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# Land and Environment Court of NSW Judicial Newsletter



# Legislation

- **Statutes**

Aboriginal Land Rights Amendment (Miscellaneous) Regulation 2010 — published 10 September 2010, makes miscellaneous amendments to the Aboriginal Land Rights Regulation 2002. The amendments reflect changes made to the *Aboriginal Land Rights Act* 1983 to transfer responsibility for compiling and updating Local Aboriginal Land Council membership rolls from those Councils to the Registrar under that Act.

Aboriginal Land Rights Amendment (References to Renamed Region) Regulation 2010 — published 10 September 2010, states that a reference in any document to the Central Coast Region as being a Region under the Act is to be read as a reference to the Mid North Coast Region.

Aboriginal Land Rights Amendment (Regions) Order 2010 — published 10 September 2010, amends Schedule 5 to the *Aboriginal Land Rights Act* 1983 (which specifies the regions for Local Aboriginal Land Councils ("LALCs")) to change the name of a region so that it more accurately reflects the geographical area to which it relates and to update the name of a LALC. The "Ngunnawal" LALC on the South Coast Region is now the "Ngambri" LALC.

A number of regulations were repealed on 1 September 2010 and have been remade with minor amendments. The current remade regulations include:

(a) Conveyancing (Sale of Land) Regulation 2010 — published 27 August 2010;

(b) Crimes (Sentencing Procedure) Regulation 2010 – published 6 August 2010

(c) Crimes Regulation 2010 – published 20 August 2010;

(d) Criminal Procedure Regulation 2010 — published 27 August 2010;

(e) Fines Regulation 2010 — published 6 August 2010;

(f) Fisheries Management (General) Regulation 2010 — published 27 August 2010;

(g) Protection of the Environment Operations (Clean Air) Regulation 2010 — published 13 August 2010;

(h) Rural Lands Protection Regulation 2010 (2010-489) — published 27 August 2010; and

(i) Threatened Species Conservation Regulation 2010 — published 27 August 2010.

Subordinate Legislation (Postponement of Repeal) Order 2010 commenced on 31 August 2010. It postpones the repeal of the Regulations listed in Schedule 1, from 1 September 2010 to 1 September 2011. Schedule 1 includes the following:

(a) Aboriginal Land Rights Regulation 2002;

(b) Civil Procedure Regulation 2005;

(c) Environmental Planning and Assessment Regulation 2000;

(d) Heritage Regulation 2005;

(e) Local Government (General) Regulation 2005;

(f) Local Government (Manufactured Home Estates, and Moveable Dwellings) Regulation 2005;

(g) Lord Howe Island Regulation 2004;

(h) Mining Regulation 2003;

(i) Protection of the Environment Operations (Waste) Regulation 2005;

(j) Water Management (General) Regulation 2004; and

(k) Western Lands Regulation 2004.

Environmental Planning and Assessment Amendment Regulation 2010 — published 3 September 2010, amends the Environmental Planning and Assessment Regulation 2000:

(a) to extend the operation of transitional arrangements with respect to the modification of certain development consents that are taken to be approvals under Part 3A of the *Environmental Planning and Assessment Act 1979* (*the Act*);

(b) to clarify the requirements for a critical stage inspection in relation to certain buildings and swimming pools;

(c) to clarify that fees payable in respect of a request for a modification of an approval under Part 3A of the Act apply in respect of a request for a modification of a development consent that is taken to be an approval under that Part;

(d) to require a consent authority to forward to the Director-General of the Department of Planning a report on the number of development applications lodged and to forward an amount in respect of those development applications;

(e) to require the keeping of records in relation to complaints made to principal certifying authorities about development; and

(f) to require the giving of notice of the intention to make certain orders.

Environmental Planning and Assessment (Cessnock City Council Planning Panel) Order 2010 — published 23 August 2010, establishes the Cessnock City Planning Panel as a planning assessment panel and confers on the panel certain functions of the Council relating to environmental planning instruments and development applications.

Fisheries Management Amendment (Threatened Species Conservation) Order (No 1) 2010 — published 3 September 2010, gives effect to the final determinations of the Fisheries Scientific

Committee to:

(a) list certain populations of the seagrass, Posidonia australis as endangered populations; and

(b) list human-caused climate change as a key threatening process.

Crimes (Sentencing Procedures) Amendment (Intensive Correction Orders) Regulation 2010 – published 6 August 2010, amends the Crimes (Sentencing Procedure) Regulation 2010 by making provision with respect to sentencing procedures for intensive correction orders, which are established as a community-based sentencing option by the *Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Act 2010.* The Regulation also repeals provisions relating to periodic detention, which is abolished by that Act. The Regulation and Act commenced 1 October 2010.

On 28 September 2010 the *Evidence Amendment Act* 2010 was assented to. The Act will amend the *Evidence Act 1995* to make further provision with respect to the privilege against self-incrimination and the unavailability of witnesses; and for other purposes. [full explanatory notes]

Further provisions of the *National Parks and Wildlife Amendment Act* 2010 commenced on 1 October 2010. The Department of Environment, Climate Change and Water has released five fact sheets on the changes:

- Fact sheet 1 - New Aboriginal heritage provisions
- Fact sheet 2 - Providing certainty for the protection of Aboriginal heritage through due diligence
- Fact sheet 3 - Better law enforcement for the protection of Aboriginal heritage, national parks and threatened species in New South Wales
- Fact sheet 4 - New procedures for boards of management for Aboriginal - owned parks
- Fact sheet 5 - Summary of miscellaneous provisions

A new Part 15 has been introduced into the *National Parks and Wildlife Act* 1974 which brings together provisions relating to criminal and other proceedings into one section for ease of use by the reader.

The *Privacy and Government Information Legislation Amendment Act* 2010 was assented to on 28 September 2010. The Act will amend the *Privacy and Personal Information Protection Act* 1998, the *Government Information (Information Commissioner) Act* 2009, the *Government Information (Public Access) Act 2009* and other Acts to establish the Information and Privacy Commission by merging the Office of the Information Commissioner and Privacy NSW. [full explanatory notes]

- **Consultation Drafts**

The *Bail Act* 1978 is being reviewed. The Bail Bill 2010 consultation draft was released on 11 October 2010. DJAG's Criminal Law Review Division conducted a review of the *Bali Act* 1978 and the report is available through this link.

The Department of Planning has placed a Draft Environmental Planning and Assessment Regulation 2010 on public exhibition. The Department has released the Regulatory Impact Statement and a series of fact sheets on the draft regulation:

- Overview of the Draft Environmental Planning and Assessment Regulation 2010;

- Development assessment changes proposed in the draft 2010 Regulation; and
- Planning certificate changes proposed in the draft regulation.

Class Action Reforms: the Civil Procedure Amendment (Supreme Court Representative Proceedings) Bill 2010 Consultation draft and discussion paper was released on 12 October 2010. For further information see the Lawlink website, Legislation and Policy Division.

- **State Environmental Planning Policy [SEPP) Amendments**

SEPP (Kurnell Peninsula) Amendment (Zoning) 2010 — published 27 August 2010, replaces the Sydney Regional Plan No 17 – Kurnell Peninsula (1989)

SEPP (Major Development) 2005 has been amended by the following:

- SEPP (Major Development) Amendment (Channel 7) 2010 — published 6 August 2010, by inserting some definitions into Schedule 3;
- Environmental Planning and Assessment Amendment (SEPP (Major Development) 2005) Order 2010 — published 10 September 2010, lists additional permitted uses of land, with development consent, in the Warner Industrial Park;
- SEPP (Major Development) Amendment (Kings Forest) 2010 — published 10 September 2010, makes changes to definitions applying to the Kings Forest Site; and
- SEPP (Major Development) Amendment (Channel 7 and UTS Ku-ring-gai Campus) 2010 — published 22 September 2010, updates the maps for these State Significant Sites

- **Bills**

The National Parks and Wildlife Amendment (Adjustment of Areas) Bill 2010, passed Parliament on 19 October 2010. It seeks to amend the *National Parks and Wildlife Act* 1974 to revoke the reservation of certain land currently reserved as part of Beni State Conservation Area and Gwydir River State Conservation Area [full explanatory notes].

Plantations and Reafforestation Amendment Bill 2010 sets out to amend the *Plantations and Reafforestation Act 1999* as follows:

- to clarify the authorisation and ownership provisions with respect to plantations; and
- to expand the powers of entry and inspection and the power to obtain information with respect to plantations. [full explanatory notes]

The *Constitution Amendment (Recognition of Aboriginal People) Act* 2010 passed Parliament on 19 October 2010. The object of the Bill is to amend the *Constitution Act* 1902 (NSW) to declare that the Parliament, on behalf of the people of NSW, acknowledges and honours the Aboriginal people as the state's first people and nations, and recognises that Aboriginal people as the traditional custodians and occupants of the land in NSW:

(a) have a spiritual, social, cultural and economic relationship with their traditional lands and waters; and

(b) have made and continue to make a unique and lasting contribution to the identity of the state. [full explanatory notes]

The Community Justice Centres Amendment Bill 2010, seeks to amend the *Community Justice Centres Act* 1983 to provide that the:

(a) parties to a mediation session may agree that an agreement reached at, or drawn up pursuant to, the session may be enforceable in a court, tribunal or other body;

(b) privilege given with respect to evidence given at, or documents prepared for, a mediation session does not extend to evidence in relation to agreements that the parties have agreed will be enforceable; and

(c) secrecy requirements that apply to a person exercising functions under the principal Act do not prevent the person from giving evidence in relation to agreements that the parties have agreed will be enforceable.

Coastal Protection and Other Legislation Amendment Bill 2010 (No 2) passed Parliament on 21 October 2010. The Bill amends the *Coastal Protection Act* 1979 and other legislation to deal with coastal erosion and projected sea level rise, including amendments relating to the following:

(a) the improvement of the operation and enforcement of the Principal Act;

(b) enabling landowners to place certain emergency coastal protection works (such as sandbags) on beaches and sand dunes to mitigate erosion in specified circumstances without obtaining development consent or other specified permissions; and

(c) enabling local councils to make and levy an annual charge for the provision of coastal protection services (such as services to maintain coastal protection works or to manage the impacts of such works) on rateable land that benefits from such services.

Further information is available on the Department of Environment, Climate Change and Water's website.

- **Miscellaneous**

Recent Briefing Papers published by the NSW Parliamentary Libaray Research Service include:

(a) NSW National Parks and Reserves;

(b) Waste: Comparative Data and Management Frameworks – full briefing paper and summary.

The Department of Planning has released:

(a) A fact sheet which further advises councils, industry and the public of changes relating to local development contributions;

(b) NSW Coastal Planning Guideline: Adapting to Sea Level Rise; and

(c) State Environmental Planning Policy (World Heritage) Discussion Paper.

# New Developments

The Court's 2009 Annual Review was published on 24 August 2010.

The Court has published a new section on the LEC's website on Heritage and the Law.

The Court has revised the Trees webpages to reflect the changes to the Trees Act that came into effect on 2 August 2010 for high hedges.

On 1 September 2010, the Court celebrated its 30th Anniversary. The Attorney General of New South Wales, The Hon John Hatzistergos MLC, spoke about the Court in his speech opening the Australasian Conference of Planning and Environment Courts and Tribunals (ACPECT) Conference 2010 and issued a press release.

Pursuant to section 77A(1) of the *Land and Environment Court Act* 1979, the Chief Judge has issued a new approval of forms to be used in the Land and Environment Court. The forms are listed in Schedule A of the approval, and include the new tree dispute application forms. The approval also extends the approval of forms in Classes 1-4 to proceedings in Class 8.

Justice Terry Sheahan has been appointed to the Council of the Southern Cross University for 4 years, effective 3 September 2010.

# Judgments

## Overseas

***Bocardo SA v Star Energy UK Onshore Ltd*** [2010] UKSC 35 (Lord Hope DP, Lord Walker, Lord Brown, Lord Collins and Lord Clarke SCJJ)

Facts: under UK legislation minerals were vested in the Crown and licences granted to operators. Minerals operators had the right to make an application to the court to compulsorily acquire the right to work minerals and 'ancillary rights' to enable the operator to work minerals when those rights could not be agreed with others who had the ability to grant the relevant right. The compensation was required to be fair and reasonable between a willing grantor and a willing grantee, having regard to the conditions subject to which the right was to be granted and an additional allowance of not less than ten per cent was to be made on account of the acquisition of the right being compulsory acquired. Star Energy UK Onshore Ltd ("Star Energy") held a petroleum production licence permitting them to search, bore and extract petroleum in a strata that lay partly beneath Bocardo SA's ("Bocardo") land. Star Energy had laid three pipes through the strata and had been extracting petroleum since 1990. In 2006 the claimant became aware of the extraction of the petroleum from beneath its land and brought an action against the defendants for damages and trespass. At first instance the judge found that no actual damage had occurred but that Star Energy had trespassed. He awarded damages for the period between 2000 to 2007 on the basis of 9 per cent of the value of the oil

extracted and 9% for the continuing trespass. The Court of Appeal affirmed this decision and found that the terms "fair and reasonable" used in the legislation were required to be construed consistent with the principles for compensation for compulsory acquisition. They assessed the compensation for past and continuing trespass at £1000. The claimant appealed. The defendant cross appealed.

Issues:

(1) whether the rights of the surface owner extended to the depth at which the operations had been carried out;

(2) whether possession, not ownership was essential for bringing a claim in trespass;

(3) whether the right to drill and use the pipes to extract petroleum from beneath the claimant's land gave them a defence to the claim in trespass; and

(4) whether the principle that compensation for compulsorily acquired land could not include an increase in value which was entirely due to the scheme underlying the acquisition (the "no-scheme rule") applied to the construction of "fair and reasonable".

Held: affirming the decision of the Court of Appeal and dismissing the cross appeal:

(1) the owner of the surface was the owner of the strata beneath it. This would cease to be the case at the point at which pressure and temperature was such that no work could be done: at [27]-[28], [46], [94] and [116];

(2) the claimant had a prima facie right of possession of the strata so as to be deemed to be in factual possession even though it had not acted on the right: at [30]-[31], [46], [94], [116];

(3) there was no common law defence to the trespass as the land owner was not a party to the licence nor did the statute remove the claimant's proprietary rights: at [32], [35];

(4) the construction of what was "fair and reasonable" was to be in accordance with the construction of statutory provisions dealing with compensation for compulsory land acquisition: at [48], [71]-[72], [106];

(5) "fair and reasonable" was to be approached on the basis of what the grantor was losing, not on what the grantee was gaining: at [48], [74]; and

(6) Parliament had created a scheme in which only the Crown and its licencees had any interest in accessing the oilfield and in which they had been empowered to do so compulsorily and thus the no-scheme rule approach to compensation applied: at [55], [77], [82]-[83], [90]-[94] and [103].

## High Court of Australia

***Cadia Holdings Pty Ltd v State of New South Wales*** [2010] HCA 27 (French CJ, Gummow, Hayne, Heydon, Crennan JJ)

(related decision: *Cadia Holdings Pty Ltd v State of New South Wales* [2008] NSWSC 528 and *State of New South Wales v Cadia Holdings Pty Ltd* [2009] NSWCA 174)

Facts: Cadia Holdings Pty Ltd ("Cadia") was the holder of mining leases granted under the *Mining Act* 1992 with respect to land near Orange. The mine was operated to extract both gold and copper (which was intermingled) and it was not in dispute that it was neither possible nor financially viable to mine for one without the other. The mining of minerals was subject to the payment of a royalty to the Minister for Mineral Resources ("the Minister"). If the mineral was a "publicly owned mineral" the Minister retained the entire royalty. If the mineral was a "privately owned mineral" the Minister was required to reimburse the owner seven eighths of the royalty paid. The Crown held the prerogative right to gold. The Minister contended that the presence of gold intermingled with the copper made the copper a "publicly owned mineral". There was no express reservation of minerals in the land grants made between 1852 and 1881 which covered the lands the subject of the proceedings. Accordingly, the case proceeded on the basis that the royal prerogative at

common law and any relevant effect *the Royal Mines Acts* of 1688 and 1693 had upon that prerogative governed the dispute.

Issue:

(1) whether the Minister was entitled to $8.7 million dollars for royalties for the copper mined as a "publicly owned mineral" within the meaning of the *Mining Act*.

Held: allowing the appeal:

(1) the 1688 *Royal Mines Act* had the effect that the right to copper was conveyed by the Crown grant of the land . The liability to pay royalties for the copper mined from the land was therefore to be assessed on the basis that it was a "privately owned mineral" within the meaning the *Mining Act*: at [5], [59] and [107]; and

(2) a mine may be characterised for the operation of s 3 of the 1688 *Royal Mines Act* as a "mine of copper" as well as a "mine of gold". Each of the Cadia mines should have been classed as a "mine of copper", therefore giving rise to an entitlement to be reimbursed seven eighths of the royalties: at [103].

***Spencer v Commonwealth of Australia*** [2010] HCA 28 (French CJ, Gummow, Hayne, Crennan, Kiefel, Heydon and Bell JJ)

Facts: the applicant commenced proceedings against the Commonwealth in the Federal Court. He claimed that New South Wales legislation, said to be enacted in accordance with an informal arrangement with the Commonwealth, effected an acquisition of his property other than on just terms contrary to s 51(xxxi) of the Constitution. At first instance, the proceedings were summarily dismissed on the basis that the applicant had no reasonable prospect of successfully prosecuting the proceedings pursuant s 31A(2) of the *Federal Court of Australia Act* 1976 (Cth) ("the Act"). Section 31A was introduced into the Act by the *Migration Litigation Reform Act* 2004 (Cth) and was intended to strengthen the power of the courts to deal with unmeritorious matters. The applicant then appealed to the Full Court of the Federal Court which dismissed the appeal.

Issues:

(1) whether after *ICM Agriculture Pty Ltd v The Commonwealth* [2009] HCA 51; (2009) 240 CLR 140 the applicant had no reasonable prospects of success warranting his claim's summary dismissal.

Held: granting the applicant special leave to appeal and upholding the appeal:

(1) the decision of *ICM*, delivered after the Federal Court's decision, meant that it could not longer be said that the applicant had no reasonable prospects of success because three members of the majority in *ICM* reserved for future consideration the question of whether the impugned legislation was a scheme or device designed to avoid the restrictions on the exercise of legislative power under s 51(xxxi) of the Constitution: at [34], [40], [45], [47] and [49];

(2) the relevant enquiry under s 31A was whether there is a "reasonable" prospect of prosecuting the proceedings, not whether a certain and concluded determination could be made that the proceeding would necessarily fail: at [52];

(3) this was a radical departure from the basis upon which earlier forms of the provision had been understood and administered: at [53] (see, for example, *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62; *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125);

(4) it was dangerous to elucidate the meaning of the statutory expression "no reasonable prospect" by referring to earlier cases, or to United Kingdom or United States cases: at [57]. Full weight must be given to the expression as a whole. It should be given content through a succession of decided cases rather than through judicial paraphrase: at [58] and [60]; and

(5) the rule will apply to a number of cases, including where the pleadings disclose no reasonable cause of action and their deficiency is incurable, where there is unanswerable or unanswered evidence of a fact fatal to the pleaded case, and to cases which are "frivolous or vexatious or an abuse of process". The

section requires a practical judgment by the Federal Court as to whether the applicant has more than "fanciful" prospects of success: at [22] and [25].

***Kostas v HIA Insurance Services Pty Limited*** [2010] HCA 32 (French CJ, Hayne, Heydon, Crennan and Kiefel JJ)

Facts: the Kostas terminated a contract with a builder and HIA Insurance Services Pty Limited on the basis that the builder had failed to meet its contractual obligations.

Issues:

(1) whether the Supreme Court of New South Wales had the power pursuant to s 75A(6) of the *Supreme Court Act* 1970 to make an order that the Fair Trading Tribunal (now the Consumer, Trader and Tenancy Tribunal) ("the Tribunal") ought to have made at first instance.

Held: allowing the appeal:

(1) under s 67(3)(a) of the *Consumer, Trader, and Tenancy Tribunal Act* 2001, the Supreme Court, where an appeal is successful, may make such orders as the Tribunal ought to have made at first instance. That power is properly exercised where the Court's decision on a question of law leaves only one possible outcome having regard to undisputed facts or facts found by the Tribunal. Invocation of the ancillary jurisdiction of the Supreme Court enabled the Court to draw inferences from facts found by the Tribunal or to find facts on material before the Tribunal which were not in dispute. This was appropriate to avoid the need for a remitter to the Tribunal: at [30]; and

(2) the High Court affirmed the statement of Spigelman CJ in *ThainaTown (On Goulburn) Pty Ltd v City of Sydney Council* [2007] NSWCA 300 that, "where no new findings of primary fact are required to be made, this Court should exercise a power conferred upon it in wide terms so as to ensure that the cost of legal disputation is minimised and thereby apply the guiding principle in s 56 of the *Civil Procedure Act* 2005 to the exercise of powers conferred by an Act other than that Act or by Rules of Court, so as to facilitate the just, quick and cheap resolution of the issues in dispute in civil proceedings": at [31].

## NSW Court of Appeal

***Laurie v New South Wales Aboriginal Land Council*** [2010] NSWCA 199 (McColl, Basten JJA and Handley AJA)

(related decision: *Laurie v New South Wales Aboriginal Land Council (No 5)* [2010] NSWLEC 13; *Laurie v New South Wales Aboriginal Land Council* [2009] NSWLEC 58; *Laurie v New South Wales Aboriginal Land Council (No 4)* [2009] NSWLEC 161 (Pain J))

Facts: Ms Laurie was convicted of driving whilst disqualified. Section 132(1)(c) of the *Aboriginal Land Rights Act* 1983 ("the Land Rights Act") rendered the conviction a ground of disqualification from holding office as a councillor of the New South Wales Aboriginal Land Council ("the State Land Council"). Upon nomination for the office of councillor Ms Laurie made a statutory declaration that she was not disqualified from holding office. Ms Laurie was elected as a councillor. Later, the State Land Council formed the view that Ms Laurie was disqualified from holding office and withdrew the benefits attached to the office including her salary. Ms Laurie filed an application in the Land and Environment Court seeking a declaration that she held the office of councillor. Pain J held that Ms Laurie was validly elected but that she was disqualified from holding office and the office of councillor may have been vacant: [2009] NSWLEC 58. Final orders were made declaring there was a casual vacancy in respect of the office. Ms Laurie appealed seeking orders that although she had been disqualified prior to her election, because her election had not been validly challenged and she had not lost office as a result of a disqualification arising after her election, she remained in office as a councillor. The

State Land Council cross-appealed on the basis that she was disqualified from holding office and had not been validly elected.

Issues:

(1) whether Ms Laurie's qualification to stand for election could only be considered by the Land and Environment Court sitting as the Court of Disputed Returns pursuant to s 125 of the Land Rights Act;

(2) whether the grounds of disqualification from holding office contained in s 132 of the Land Rights Act constituted grounds of disqualification from standing for election; and

(3) whether there was a mechanism for resolving the ineffective election of a disqualified person.

Held: dismissing the appeal and upholding the cross-appeal:

(1) s 125 of the Land Rights Act intended that the Land and Environment Court, as the Court of Disputed Returns, deal with questions arising out of disputed elections held under that enactment. This mechanism did not demonstrate an intention to exclude other mechanisms to agitate questions of disqualification: at [32];

(2) superior courts have an inherent or common law jurisdiction to review elections to bodies such as the State Land Council and the status of their office holders: at [105]-[109];

(3) by identifying persons who were disqualified from holding office, s 132(1) was also identifying persons who were unable to stand for election: at [41];

(4) the election of a disqualified candidate could be challenged under s 125(1). A continuing disqualification could be enforced pursuant to s 132(1) although the election could no longer be challenged: at [111];

(5) Ms Laurie's continuing disqualification did not create a casual vacancy because the vacancy created by the election was never filled: at [113]; and

(6) the Aboriginal Land Rights Regulation 2002 provides for optional preferential voting. The ineligibility of Ms Laurie meant that voters' preference could not be ascertained. Thus the election failed and a new election had to be held to fill the vacancy: at [126].

***Calardu Penrith Pty Ltd v Penrith City Council*** [2010] NSWCA 189; 174 LGERA 446 *(*Hodgson, Tobias and McColl JJA*)*

(related decision: *Calardu Penrith Pty Ltd v Penrith City Council* [2010] NSWLEC 50 (Biscoe J))

Facts: in 2008, under delegated authority, the Council granted consent to Pipven Pty Ltd ("Pipven") for the alterations and additions to the Penrith SupaCentre. Building works, including pouring a reinforced concrete slab, had commenced when Calardu Penrith Pty Ltd ("Calardu") commenced proceedings challenging the validity of the 2008 consent. The proceedings were adjourned so that Pipven could lodge a new development application. A condition of the ajournment was that Pipven would surrender the 2008 consent if the Council approved the new application, which it did ("2009 consent").

Calardu then challenged the validity of the 2009 consent. The proceedings were dismissed and Calardu appealed on two grounds. The essential issues centre on whether the 2009 development application had a capital investment value ("CIV") of over $10 million. If so cl 13F(1)(a) of the of the State Environment Planning Policy (Major Development) 2005 ("the SEPP"), provided that the application was to be assessed by a Joint Regional Planning Panel and not the Council. CIV is defined in cl 3 of the SEPP at the time.

For Calardu to succeed it was necessary for it to establish that both the estimated tenancy fit-out costs of the extension and the costs of the works performed under the 2008 consent were included in the CIV.

Issues:

(1) whether Mr Mee's tenancy fit-out costs were costs of the development and therefore within the definition of "capital investment value";

(2) whether the tenancy fit-out costs were of a capital nature;

(3) whether the capital investment value of the development was confined to costs incurred by the proponent of the development;

(4) whether the costs incurred pursuant to the 2008 development consent were costs captured by the definition of "*capital investment value*"; and

(5) whether the 2009 application was a "staged development application" within the meaning of s 83B of the *Environmental Planning and Assessment Act* 1979.

Held: dismissing the appeal:

(1) it was critical that the "development" be capable of accurate identification so that the CIV could be determined. In this case it was clear that the development application did not include any particular bulky goods retail use of any part of the extension. The fit-out of individual tenancies were to be the subject of individual development applications which would include the estimated costs of the fit-out for the tenancy. While those fit-out costs may have been necessary to "*establish and operate*" the particular use the subject of a development application, it was not a cost necessary to "*establish and operate*" the development per se. Where used in the definition of CIV, the word "*operate*" in the present case referred to the extension being in a condition to be available to be occupied by the bulky goods retail tenants: at [51], [54]-[57] and [59];

(2) while it was decided at first instance that tenancy fit-out costs were of a capital nature, Pipven submitted that as a tenancies were temporary they were not of a capital nature and did not fall within the definition of CIV. This question was not decided but it was noted that a reference to "costs" in CIV was not confined to costs of a capital nature: at [60]-[62];

(3) Pipven contested that CIV included costs incurred by those other than the proponent of the development. The Court held that the definition was directed to determining all the costs necessary to establish and operate the development and it was neutral as to who was to incur those costs: at [63];

(4) it was clear that there was an intimate connection between the development proposed and the completed works. This was not a case where a development dependent upon existing works was too remote to be excluded as a cost of establishing the development under consideration: at [68]-[69]; and

(5) s 83B(1) provided that a staged development application was one that "sets out concept proposals for the development of a site". The 2009 application was a concrete proposal to erect a particular building. To suggest that a note in the Statement of Environmental Effects that specific uses of the tenancies would be subject to separate development applications and a condition imposed by the Council requiring such applications constituted a request that the 2009 application be treated as a staged development was without merit: at [75]-[76].

***Phoenix Commercial Enterprises Pty Limited v City of Canada Bay Council*** [2010] NSWCA 205
(Beazley, Macfarlan JJA and Handley AJA)

(related decision: *Phoenix Commercial Enterprises Pty Ltd v City of Canada Bay Council* [2010] NSWCA 64
(Spigelman CJ, Campbell JA and Handley AJA))

Facts: a contractual dispute arose between the City of Canada Bay Council ("the council") and Phoenix Commercial Enterprises Pty Limited ("Phoenix") as to whether or not there had been a breach of a lease. The terms of the lease stated:

> Should the Lessor [the council] in its capacity as consent authority approve the erection of a general advertising structure on other land within the Lessor's Local Government Area or control then within one (1) month of such approval the Lessor will pay the Lessee [Phoenix] an amount equivalent to 25% of the Rental corresponding to the amount of time remaining within the Term.

Phoenix alleged that the council had breached this term of the lease by approving, as the consent authority, the erection of other advertising structures within its area without any payment. The council subsequently

served on Phoenix a Notice of Termination on the basis that it had not paid the rent due. Phoenix contended that it was not required to pay the amount specified by reason of the breach of lease described above and that it could "set off" this amount against the amount owed to it by reason of the council's breach. At first instance it was held that there had been no breach of the lease based on its proper construction, which left open the possibility that approval could be given by the council other than in its capacity as a consent authority based on the term "consent authority" as referred to in the *Environmental Planning and Assessment Act* 1979 and because the *Roads Act* 1993 did not confer the statutory power of a consent authority on the council, but conferred power on the council as the owner of the road.

Phoenix sought to set aside the orders. The application was refused by Young JA. Phoenix then brought a notice of motion seeking a review of the decision of Young JA on the basis that the advertising structures were "over" a public road and thus the council was the consent authority pursuant the *Local Government Act* 1993 and the *Environmental Planning and Assessment Act*.

Issues:

(1) whether the advertising structures erected on bus shelters were "in or on" or "over" a public road; and

(2) whether the council was the consent authority.

Held: dismissing the notice of motion:

(1) the advertising structures were "in or on" the public roads and not "over" public roads. To be "over" a road pursuant to the *Roads Act*, the structure would need to extend from one side of the road to the other: at [16]; and

(2) consequently, the approvals were granted by the council under the powers conferred on it by the *Roads Act* and not as the "consent authority" under the *Environmental Planning and Assessment Act*: at [17] and [20]-[22].

***Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd*** [2010] NSWCA 214 (Tobias and McColl JJA, Handley AJA in dissent)

(related decision: *Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd (No 2)* [2009] NSWSC 1157 (Smart AJ))

Facts: the appellant was the registered proprietor of Lot 1 DP 302605. The first respondent was, until June 2010, the registered proprietor of Lots 102 and 103 in DP834629. The second respondent operated a private hospital on Lot 101 DP834629 which adjoins Lot 103. On 28 June 2010, the third respondent acquired Lots 102 and 103, and was subsequently joined as a party. On the registration of DP834629 in 1993 there was created pursuant to s 88B(3) of the *Conveyancing Act* 1919 a restriction on use upon Lots 102 and 103 which benefited, amongst other lots, the appellant's land. The terms of the restriction provided that no part of Lots 102 and 103 was to be used for the purposes of a hospital ("the covenant"). The Ku-ring-gai Planning Scheme Ordinance ("KPSO") applies to the land, and by virtue of the *Miscellaneous Acts (Planning) Repeal and Amendment Act* 1979 is an "environmental planning instrument" for the purposes of the *Environmental Planning and Assessment Act* 1979. Subsections 28(2) and (3) of the EPAA provide:

> (2) For the purpose of enabling development to be carried out in accordance with an environmental planning instrument or in accordance with a consent granted under this Act, an environmental planning instrument may provide that, to the extent necessary to serve that purpose, a regulatory instrument specified in that environmental planning instrument shall not apply to any such development or shall apply subject to the modifications specified in that environmental planning instrument.
>
> (3) A provision referred to in subsection (2) shall have effect according to its tenor, but only if the Governor has, before the making of the environmental planning instrument, approved of the provision.

Prior to 2004 Lot 103 was zoned 2(b) under which hospitals were a permissible use with consent. In 2004 Warringah Local Environmental Plan No 194 (LEP 194) was gazetted under which Lot 103 was rezoned to zone 2(d3) in which hospitals were permissible with consent. Clause 68(2) of the KPSO provided:

(2) In respect of any land which is comprised within any zone, other than within Zone No 2(a), 2(b), 2(c), 2(d), 2(e), 2(f) or 2(g) the operation of any covenant agreement or instrument imposing restrictions as to the erection or use of buildings for certain purposes or as to the use of land for certain purposes is hereby suspended to the extent to which any such covenant, agreement or instrument is inconsistent with any provision of this Ordinance or with any consent given thereunder.

In 2008 Ku-ring-gai Municipal Council granted a deferred commencement development consent to an application by the second respondent to demolish the existing house on Lot 103 and another lot to construct an extension of the hospital erected on Lot 101. The appellant brought proceedings in the Supreme Court seeking an order that the first and second respondents be restrained from using or permitting to be used the land in Lots 102 and 103 as a hospital in breach of the covenant. The appellant was unsuccessful at first instance and appealed to the Court of Appeal.

Issue:

(1) whether the effect of LEP 194 was to apply cl 68(2) to Lot 103 in circumstances where it had previously been exempt from its provisions when zoned 2(b), in contravention of s 28(3) of the EPAA in that the Governor had not, prior to the making of LEP194, approved of its provisions.

Held: appeal dismissed:

(1) a "provision" referred to in s 28(3) is one which, for the purposes of s 28(2), provides that, to the extent necessary to serve the relevant purpose, the regulatory instrument specified in a particular environmental planning instrument shall not apply to any such development: at [34];

(2) the particular provisions of LEP 194 which had the effect of amending the KPSO and rezoning the land were not provisions of the nature referred to in s 28(2): at [38]; and

(3) absent a provision in LEP 194 which provided that a regulatory instrument specified therein was not to apply to any development permissible under that LEP, it followed that s 28(3) was not engaged and the Governor's approval of the relevant clauses in LEP 194 was not required: at [44].

***Delta Electricity v Blue Mountains Conservation Society Inc*** [2010] NSWCA 263 (Basten and Macfarlan JJA, Beazley JA in dissent)

(related decision: *Blue Mountains Conservation Society Inc v Delta Electricity* [2009] NSWLEC 150 (Pain J))

Facts: the Blue Mountains Conservation Society commenced proceedings in the Land and Environment Court seeking a declaration that Delta Electricity had polluted the waters of the Cox's River near Lithgow in contravention of s 120 of the *Protection of the Environment Operations Act* 1997 ("the POEO Act"). The Blue Mountains Conservation Society contended that the proceedings were brought in the public interest.

At an early stage in the proceedings, the Blue Mountains Conservation Society filed a notice of motion seeking an order pursuant to r 42.4 of the Uniform Civil Procedure Rules 2005 limiting the maximum costs recoverable by the parties to the proceedings to $10,000, or an amount specified by the Court; the Blue Mountains Conservation Society having resolved that it was only able to proceed with the litigation if an order limiting costs was made. The application was opposed by Delta Electricity, who adduced evidence that the costs that it would likely incur in defending the substantive proceedings would be between $232,000 and $266,000. The Blue Mountains Conservation Society did not contest the reasonableness of Delta Electricity's cost estimate. Pain J ordered that the maximum costs that may be recovered by a party to the proceedings was the sum of $20,000.

Issues:

(1) whether her Honour erred in making an order to protect the Blue Mountains Conservation Society's assets to the exclusion of other relevant considerations, including the usual rule that costs follow the event and that costs are compensatory in nature;

(2) and whether the underlying purpose of r 42.4 was to ensure the proportionality of costs to the complexity of proceedings; and

(3) whether it was reasonably possible to categorise the proceedings as public interest litigation at the outset.

Held: dismissing the appeal:

(1) where a broad discretion is conferred on a court it is important that the full range of permissible considerations are identified and that limitations which do not find reflection in the language of the rule not be imposed: at [186];

(2) notwithstanding the early stage of the proceedings, the litigation could be characterised as being in "the public interest": at [209];

(3) the public interest nature of the proceedings was directly relevant to the propriety of a maximum costs order. The proceedings being in the public interest, r 4.2 operated to qualify Delta Electricity's expectation that it would recover its costs if successful: at [203];

(4) the principle that any person may bring proceedings to prevent a breach or threatened breach of environmental protection laws would be seriously undermined if some protection against large costs bills was not available: at [218];

(5) Delta Electricity had not established that there was any error in the approach taken by the primary judge or that the order made was unreasonable in amount: at [220]; and

(6) in dissent, Beazley J held that in accordance with the dictates of justice, Australian courts should have regard to the proportionality of any proposed maximum costs to the costs likely to be incurred by the parties: at [164]. The trial judge had, according to Beazley J, failed to take into account a relevant consideration, namely, the disproportionality between the order made and the reasonable estimate of Delta Electricity's costs: at [166]. Given the disproportionality, the order fell outside the reasonable exercise of the discretion conferred by r 42.4: at [166].

***Rich v Lennox Palms Estate Pty Ltd*** [2010] NSWCA 242 (McColl, Young JJA, Lindgren AJA)

(related decision: *Rich v Lennox Palms Estate* [2009] NSWLEC 167 (Pain J))

Facts: the appellants and the first respondent owned adjoining parcels of land. In 1982 the first respondent obtained development consent from Ballina Shire Council (the second respondent) to subdivide its land into 65 lots; lot 65 was the residue of the land after the other blocks had been split off. The plan submitted with the development application showed that there would be a road dedicated to the public over lot 65, which would give access to part of the appellant's land. The development consent was subject to condition 6 which provided that "the submitted plan shall be amended to provide public access over lot 65". In 1983, 1993 and 1996 plans of subdivision were lodged with and approved by the Council for subdivision in stages. At the end of stage 3 what was to be lot 65 remained undeveloped, with some extension of the road to end in a cul de sac about 5m to the west of the appellants' land. The appellants sought declarations and orders that the first respondent was bound to submit a plan to the Council for the extension of the road over lot 65 so as to give access to the appellants' land. Pain J dismissed the application on the basis that the three stage release of subdivided land was in accordance with the development consent, that lot 65 had not been created in one or other of the plans of subdivision, and that accordingly the obligation to create the road over lot 65 had not yet come to fruition.

Issue:

(1) whether the first respondent was in breach of the development consent; and

(2) whether there was utility in making the declaration sought by the appellants.

Held: appeal dismissed:

(1) the time for fulfilling condition 6 had not arrived: at [43]; and

(2) there was no utility in making the declaration sought by the appellants: at [45].

***Those Best Placed Pty Ltd v Tweed Shire Council*** [2010] NSWCA 261 (McColl JA)

(related decision*: Those Best Placed Pty Ltd v Tweed Shire Council* [2010] NSWLEC 83 (Biscoe J))

Facts: Those Best Placed Pty Ltd ("TBP"), a start up business that had never traded, made a development application to erect a shed with a bathroom on land in Upper Crystal Creek. Tweed Shire Council ("the council") required that TBP provide a report demonstrating that sufficient land area and site conditions existed to cope with the additional use to which a septic tank might be subject as a result of the construction. TBP refused to supply the report and the development consent was refused. Biscoe J dismissed the application which sought, amongst other things, a review of the council's refusal of the development application, on the basis that it disclosed no real cause of action and ordered that TBP pay the council's costs. The council notified TBP that it would seek to recover $53,000 in costs but it took no steps to have those costs assessed.

Issues:

(1) whether the costs order should be stayed; and

(2) whether the council should be ordered to answer interrogatories.

Held: dismissing the appeal:

(1) continuing the proceedings would only result in the incurring of further costs at the council's expense. This was because TBP was not in any position to meet the council's costs and the financial position of those behind TBP was marginal, if not precarious. Biscoe J correctly dismissed the proceeding in the interest of all parties before the associated costs became unmanageable. This was a subtle warning, which appears not to have found a home in the "heart" of TBP: at [13];

(2) there were little prospects of TBP providing anything by way of security of costs that would preserve the status quo: at [15]; and

(3) it was not appropriate to make orders for interrogatories to be answered when there were no current proceedings: at [17].

***Chase Oyster Bar v Hamo Industries*** [2010] NSWCA 190 (Spigelman CJ, Basten JA and McDougall J)

Facts: Chase Oyster Bar ("Chase") contracted Hamo Industries ("Hamo") to carry out a restaurant fitout. Hamo served on the plaintiff a payment claim. Chase did not provide a payment schedule in response to the payment claim. Chase became liable, pursuant to s 14(4) of the *Building and Construction Industry Security of Payment Act* 1999 ("the Act"), to pay the claimed amount to Hamo by the due date, but did not do so. Hamo made an adjudication application.

Section 17 of the Act relevantly provided:

(1) A claimant may apply for adjudication of a payment claim (an "adjudication application") if:

…
(b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.

(2) An adjudication application to which subsection (1) (b) applies cannot be made unless:

(a) the claimant has notified the respondent, within the period of 20 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim, and
(b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 5 business days after receiving the claimant's notice.

Hamo did not give notice until after the period for notice had lapsed pursuant to s 17(2)(a), but nonetheless made an adjudication application. An adjudicator was appointed. The adjudicator made a determination that

Hamo was entitled to payment of the claimed amount plus interest. Although there was no payment schedule, the adjudicator nonetheless considered whether Hamo's notice pursuant to s 17(2)(a) of the Act had been given within the time required, and concluded that it had. Chase raised before the trial judge that compliance with s 17(2)(a) of the Act was essential if the adjudicator were to have jurisdiction, and that the adjudicator's finding amounted to jurisdictional error.

Issues:

(1) whether the determination of the adjudicator that he could hear and determine Hamo's adjudication application pursuant to the Act should be set aside or quashed for jurisdictional error in circumstances where the adjudicator incorrectly concluded that the notice required by s 17(2)(a) of the Act had been served on Chase in the time required by the Act;

(2) whether the Supreme Court of New South Wales was required to consider and determine the existence of jurisdictional error by an adjudicator in reaching a determination under the Act;

(3) whether an order in the nature of certiorari was available to quash or set aside a decision of an adjudicator under the Act;

(4) whether the Act expressly or impliedly limited the Supreme Court of New South Wales's power to consider and quash a determination for jurisdictional error by an adjudicator in reaching a determination under the Act; and

(5) whether the limits the Act places on the power of the Supreme Court of New South Wales to review an adjudicator's determination for jurisdictional error, is inconsistent with the requirement of the Constitution that there be a State Supreme Court with jurisdiction to grant relief in the nature of certiorari.

Held: upholding the appeal and quashing the determination:

(1) determinations by adjudicators are in principle amenable to orders in the nature of certiorari for jurisdictional error: at [127];

(2) the Supreme Court, in exercise of its supervisory jurisdiction had the power to determine that an adjudication application had not been made in compliance with s 17(2)(a) of the Act : at [2], [108] and [285]. In so determining, the Court of Appeal discussed the principles for identifying jurisdictional error and jurisdictional facts: at [33]-[47] and [163]-[183];

(3) the supervisory jurisdiction of the Supreme Court granted the power to decide if the determination of the adjudicator made in the absence of a valid adjudication application was invalid: at [56], [108] and [285];

(4) the Supreme Court was empowered to grant relief in the nature of certiorari and to set the determination aside: at [2], [108] and [267]; and

(5) applying *Kirk v Industrial Relations Commission* [2010] HCA 1, it was not permissible for a State legislature to enact a privative clause which prevented the exercise by the Supreme Court of its supervisory jurisdiction with respect to jurisdictional error: at [58] and [160].

***Wilson v State Rail Authority*** [2010] NSWCA 198 (Allsop P, Giles, Hodgson, Tobias and Macfarlan JJA)

Facts: this case was heard by a five judge bench which overruled a previous decision of the New South Wales Court of Appeal on the interpretation of provisions of the NSW workers' compensation legislation.

Issues:

(1) whether the provisions of the *Workers Compensation Act* 1987 applied to the appellant's claim for workers compensation arising out of a sexual assault by another employee; and

(2) whether the earlier Court of Appeal decision in *Attileh v State Rail Authority of New South Wales* [2005] NSWCA 64; 62 NSWLR 439 should be departed from.

Held: in the course of allowing the appeal Allsop P stated the following principles in relation to statutory construction:

(1) the President said (at [12]-[13], footnotes omitted):

> I am mindful that any initial engagement with enactment history and context might be misunderstood as part of any enquiry as to the subjective intent of legislators or policy advisers so that such divined intent can be transferred to the words used by Parliament. Such an enquiry would be misdirected. It is the language of Parliament that must be interpreted and construed: *Harrison v Melhem* [2008] NSWCA 67; 72 NSWLR 380 at 384-385 [12]-[16] (Spigelman CJ), 398-403 [158]-[185] (Mason P), 403 [191] (Beazley JA) and 403 [192] (Giles JA). However, as is now beyond dispute, in construing an Act, a court is permitted to have regard to the words used by Parliament in their legal and historical context. Context is to be considered in the first instance, not merely when some ambiguity is discerned. Context is to be understood in its widest sense to include such things as the existing state of the law and the mischief or object to which the statute was directed. These are legitimate means of understanding the purpose of the Act and of the relevant provisions, against which the terms and structure of the provisions and the Act, and a whole, are to be understood. Fundamental to the task, of course, is the giving of close attention to the text and structure of the Act, as the words used by Parliament to effect its legislative purpose. Nevertheless, general words, informed by an understanding of the context, and of the mischief to which the Act is directed, may be constrained in their effect

(2) the primary object of statutory construction was to construe the relevant provision so that it was consistent with the language and purpose of all the provisions of the statute: at [13];

(3) in *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397, Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that was being construed: at [13];

(4) a legislative instrument must be construed on the *prima facie* basis that its provisions are intended to give effect to harmonious goals (*Ross v The Queen* (1979) 141 CLR 432 at 440 per Gibbs J: at [13];

(5) where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve the result which will best give effect to the purpose and language of those provisions while maintaining the unity of the statutory provisions: at [13];

(6) only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme: at [13];

(7) a court construing a statutory provision must strive to give meaning to every word of the provision: at [13]; and

(8) the modern approach to interpretation insists that the context be considered in the first instance, especially in the case of general words, not merely at some later stage when ambiguity might be thought to arise: at [14].

***Jeray v Blue Mountains City Council*** [2010] NSWCA 281 (Handley and Sackville AJJA)

(related decision: *Jeray v Blue Mountains City Council* [2010] NSWCA 153 (Handley JA and Sackville AJA))

Facts: Mr Jeray, a litigant in person, sought to vary orders made by the Court of Appeal that granted limited leave to appeal from a decision of Lloyd J which dismissed an application seeking declarations that certain development consents granted by the council were "null and void". The variation sought to enlarge the grounds of appeal available to include those that the Court of Appeal had previously rejected.

The Court of Appeal found Mr Jeray had an arguable case that he was denied procedural fairness by the manner in which the proceedings had been dismissed, but did not grant leave in respect of the grounds of appeal relating to bias.

Issues:

(1) whether the Court should grant leave to enlarge the grounds of appeal available to Mr Jeray by including many of those which were previously disallowed by the Court of Appeal.

Held: dismissing the notice of motion:

(1) because no application for disqualification was made to Lloyd J and Mr Jeray had refused more that once to make an application for bias, Lloyd J did not decide that question and made no relevant order. Because there was neither a decision nor an order, there was no basis for an appeal on the bias ground: at [8]-[9]; and

(2) although the Court had the power to re-visit and reconsider its interlocutory orders the principle of finality of litigation was relevant and applicable. The Court's power of reconsideration could only be exercised on proper grounds. It was not available simply for the purpose of advancing for a second time arguments about fact or law which the Court had rejected the first time: at [13].

***Roads & Traffic Authority of New South Wales v McDonald*** [2010] NSWCA 236 (Giles, Tobias and Macfarlan JJA)

(related decision: *McDonald v Roads & Traffic Authority of New South Wales* [2009] NSWLEC 105 (Biscoe J))

Facts: on 31 August 2007 the Roads & Traffic Authority of New South Wales ("the RTA"), pursuant to provisions of the *Land Acquisition (Just Terms Compensation) Act* 1991 ("the Just Terms Act"), compulsorily acquired part of the respondent's land ("the acquired land") located at Kew in north New South Wales for the purpose of upgrading the Pacific Highway. Pursuant to the Just Terms Act, the respondent was entitled to claim compensation for the acquisition of her land.

On 8 July 2009, Biscoe J in the Land and Environment Court determined the compensation payable by the RTA to the respondent as follows:

> Market value of the acquired land
> (Just Terms Act, s 55(a)): $490,000
> Disturbance (Just Terms Act, s 59(c) or (f)): $269,846
> Solatium (Just Terms Act s 55(e)): $21,823
> Total $781,669

The RTA challenged Biscoe J's assessment of the compensation for disturbance.

Issues:

(1) whether the primary judge made errors of valuation principle when determining the respondent's claim for disturbance and if so, whether they were errors of law that vitiated his decision;

(2) alternatively, if his Honour made no errors of valuation principle when determining the respondent's claim for disturbance, whether his assessment of the amount of compensation for disturbance was incorrect as it increased the market value of the respondent's land remaining after acquisition (the residue land); and

(3) whether the respondent was entitled to be compensated for rent that was paid while residential premised were constructed on the residual land.

Held: dismissing the appeal and upholding the cross appeal:

(1) s 61(b) of the Just Terms Act only applied to the determination of the market value of the acquired land as part of the parent land only if the realisation of the potential of that land upon subdivided into residential allotments required the cessation of the use of the land;

(2) whether such termination or cessation was necessary in order to realise the relevant potential of the parent land was a question of fact. That fact, having been determined by the primary judge could not be turned into a question of law: at [90];

(3) the disturbance costs claimed by the respondent related to the relocation of the uses from the acquired land to the residue land but added no value to that land when valued in the "after" scenario, with the consequence that that potential use could not be realised without those uses ceasing: at [103];

(4) the primary judge accepted that allowance had been made in the "before" valuation of the parent land for the services which, as a consequence of the compulsory acquisition, had to be reinstated upon the residue land to enable the respondent to relocate. Because the primary judge had correctly reduced the disturbance costs by the relevant amount there was no error of law: at [109];

(5) in s 59(c) and (f) of the Just Terms Act, the word "reasonably" governed the word "incurred", and not the expression "financial costs". The issue that arose under each subsection was whether the relevant costs were "reasonably incurred". This was not a question as to whether or not those costs were reasonable in themselves, nor did the Just Terms Act contemplate some overarching test of reasonableness in respect of compensation otherwise properly assessed having regard to "all relevant matters" in Pt 3: at [143];

(6) the respondent had no option but to rent premises pending the construction of her new residence upon the residue land, the only relevant question was whether the incurring of the financial costs in the form of rent was itself reasonable: at [143];

(7) the primary judge applied a general test of reasonableness that did not accord with either the plain text of s 59(c) or (f), or the statutory objective of ensuring just compensation for the separate head of loss attributable to disturbance: at [143]; and

(8) the decision in *Horton v Wyong Shire Council (No 2)* [2005] NSWLEC 45 overruled in part: at [135]-[139].

## Supreme Court of New South Wales

***Hutchins Pastoral Co Pty Ltd v Minister for Water and Energy (NSW)*** [2010] NSWSC 1102 *(*McCallum J)

Facts: the proceedings involve two claims by the Hutchins companies related to their water entitlements under the *Water Management Act* 2000 against the Minister and the State of NSW. The defendants applied for a stay of proceedings until proceedings in the Land and Environment Court ("LEC") challenging the validity of the Water Sharing Plan was decided. Concurrent proceedings, which were commenced prior to these proceedings, in the Supreme Court had been stayed generally pending the finalisation of proceedings in the LEC and the present proceedings. The parties to these proceedings are also parties in the other two proceedings.

Issues:

(1) whether the proceedings should be stayed pending the outcome of the invalidity case;

(2) whether the proceedings should be stayed until the defendants' costs of proceedings in the LEC (as ordered in the LEC on 6 November 2009) have been paid; and

(3) whether the proceedings should be stayed until the stay in the concurrent Supreme Court proceedings has been lifted.

Held: granting a temporary stay:

(1) it was noted that the LEC proceedings were commenced first in time and were significantly further advanced than the present proceedings. The plaintiffs filed a notice of discontinuance in the LEC proceedings. As neither party to these proceedings impugned the validity of the legislation and as the Court was required to facilitate the just, quick and cheap resolution of the real issues in the proceedings, a stay on this ground was refused: at [42]-[44];

(2) the defendants noted it may be an abuse of process if a plaintiff brings second proceedings against the same defendant "in the same cause" without having paid costs of the first proceedings. Such an abuse of proceedings would ordinarily found a stay of the second proceedings until the outstanding costs had been

paid. The LEC orders expressly contemplated that the defendants' costs payable would abide the determination of the wasted costs application. Additionally, the orders contemplated the commencement of these proceedings: at [47]-[49]; and

(3) as the plaintiff's intention to abandon some claims pleaded in the concurrent proceedings was only disclosed during this hearing, a temporary stay was granted until the plaintiffs had served a proposed amended statement of claim in the concurrent proceedings: at [52]-[53].

## Land and Environment Court of NSW

### Judicial decisions

- **Jurisdiction**

***Farriss v Minister Administering the Crown Lands Act*** [2010] NSWLEC 206 (Pain J)

Facts: the applicant appealed against a decision of the Minister administering the Crown Lands Act dismissing her objection to the redetermination of rent payable under a domestic waterfront licence granted under the *Crown Lands Act* 1989 ("the CL Act") s 34. In 2004 the Independent Pricing and Regulatory Tribunal of New South Wales ("IPART") reviewed the rent that the NSW Government should charge for use of Crown land below the mean high water mark in harbours and estuaries. IPART produced a report on its findings including a recommended formula for determining rents which specified the rate of return to be applied. It also stated in one part of the recommendation that the rate of return would need to be regularly reviewed. The CL Act was amended in 2005 stating that the Minister could apply a recommendation made by IPART in redetermining the rent of any lease or licence. The applicant's rent redetermination was calculated by the Minister (through the Land and Property Management Authority) using the formula recommended by IPART which had a rate of return of 3.05 per cent. The applicant wished to dispute the rent redetermination based on the rate of return of 3.05 per cent used in the recommended rent formula.

Issues:

(1) whether in applying the IPART recommendation the rate of return of 3.05 per cent in the IPART rent formula recommendation used by the Minister can be varied by the Court on appeal.

Held: dismissing the applicant's application, her Honour found that:

(1) the Court's power in this appeal is limited by s 143(3) of the CL Act to applying the IPART recommendation: at [68] and [72]; and

(2) the phrase "will need to be regularly reviewed" in the IPART recommendation was general and essentially advisory. It did not provide a basis for statutory power residing in the Minister, and hence the Court on appeal, to apply the IPART recommendation by undertaking a review of the rate of return in the rent formula: at [65].

- **Judicial Review**

***Hill Top Residents Action Group Inc v Minister for Planning (No 3); Strang v Minister for Planning*** [2010] NSWLEC 155 (Preston CJ)

(related decision: *Hill Top Residents Action Group Inc v Minister for Planning* [2009] NSWLEC 185; (2009) 171 LGERA 247 (Biscoe J)

Facts: in March 2010, the Minister for Planning approved, under Part 3A of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act"), the redevelopment of the Hill Top Rifle Range as part of the development of the Southern Highlands Regional Shooting Complex ("the Project"). The applicants challenged the validity of the approval on the ground that, by reason of s 75J(3) of the EPA Act and cl 8O(1)(b) of the Environmental Planning and Assessment Regulation 2000, the Minister was precluded from giving approval to the carrying out of the Project.

The Project site was zoned 1(a) Rural A under the Wingecarribee Local Environmental Plan 1989 ('the WLEP'). Shooting ranges were listed as prohibited development in the 1(a) Rural A zone. In 2008, Part 33 of Schedule 3, titled "Southern Highlands Regional Shooting Complex Site", was inserted into the State Environmental Planning Policy (Major Developments) 2005 ('the Major Development SEPP'), zoning land in the Southern Highlands Regional Shooting Site as either Zone SP1 Special Activities or Zone E2 Environmental Conservation. Clause 5 of Part 33 of Schedule 3 of the Major Development SEPP explicitly provided that the only environmental planning instrument ("EPI") that applied to the Southern Highlands Regional Shooting Complex Site was the Major Development SEPP and all other SEPPs except SEPP No 1 – Development Standards.

When the Major Development SEPP was originally made, development for the purpose of shooting ranges was permissible in Zone SP1, but not in Zone E2. In *Hill Top Residents Action Group Inc v Minister for Planning* [2009] NSWLEC 185, the Court held that part of the Project to be carried out for the purpose of shooting ranges was to be on land zoned E2 but that such development was prohibited in that zone. Subsequently, the Major Development SEPP was amended to permit development on the land zone E2 for the purpose of shooting ranges.

Issues:

(1) whether the Minister was precluded from giving approval to the project; and

(2) whether the public interest nature of the litigation justified a departure from the usual costs rule.

Held: dismissing the applicants' claim:

(1) in order for approval of the Project to be precluded, the applicants need to identify an EPI which, first, prohibits the Project and secondly, would not apply to the Project if approved because of s 75R of the EPA Act: at [5];

(2) Div 2 of Pt 33 of Schedule 3 of the Major Development SEPP zoned the land and specified the permissible and prohibited purposes of development and the development controls in terms that were directly inconsistent with the WLEP's zoning and permissible and prohibited development and development controls for the land. Part 33 of Schedule 3 of the Major Development SEPP effectively superseded the WLEP in relation to the land and any development or project to be carried out on the land: at [29];

(3) from its commencement, Pt 33 of Schedule 3 of the Major Development SEPP caused the WLEP not to apply to the land and hence any prohibition that the WLEP might have otherwise imposed on carrying out of the Project on the land also ceased to apply: at [31];

(4) once it was recognised that the WLEP did not apply to the land and any project on it, then the WLEP could not answer the description in s 75R(3) of being an EPI that did not apply to or in respect of the Project on the land, or the description in s 75J(3) and cl 8O(1)(b) of being an EPI that would not (because of 75R of the EPA Act) apply to the Project if approved: at [33];

(5) as a consequence, s75J(3) and cl 8O(1)(b) did not preclude the Minister giving approval to the project: at [33]; and

(6) the proceedings were brought in the public interest. The proceedings were brought to uphold and enforce public law obligations and to ensure that the Minister's exercise of power under Part 3A of the EPA Act was lawful. The nature, extent and other features of the public interest involved in the litigation are significant and the litigation has contributed, in a material way, to the proper understanding and

administration of Part 3A of the EPA Act: at [40]-[41]. Each party was therefore to pay their own costs of each proceeding: at [36].

***Kennedy v NSW Minister for Planning*** [2010] NSWLEC 129 (Biscoe J)

Facts: the applicant challenged the validity of a major project approval for development at Sandon Point. The approval was granted by the NSW Minister for Planning to Stockland Developments Pty Ltd ("Stockland").

Issues:

(1) whether the Minister's determination was *ultra vires* as Stockland had made political donations to the Australian Labor Party and, in those circumstances, the Minister had delegated her determination power to the Planning Assessment Commission;

(2) whether the Minister failed to consider several mandatory relevant considerations, namely:

  (a) that there had been no consultation with Aboriginal community groups as required by the Director-General's Environmental Assessment Requirements;

  (b) that an Aboriginal Keeping Place had not been established as required by the Concept Plan Approval; and

  (c) increased flood risk due to climate change;

(3) whether the Minister erred by:

  (a) making a determination before the completion of archaeological test excavations; and

  (b) reaching a conclusion that the project was generally consistent with the recommendations of a report on Aboriginal Cultural Heritage when this was not the case; and

(4) whether the Minister's decision was manifestly unreasonable because:

  (a) the Minister approved development over land that was likely to be subject to extreme flooding events; and

  (b) the Minister approved development on a site containing significant Aboriginal cultural heritage in circumstances where the proponent had failed to comply with previous commitments relating to Aboriginal heritage.

Held: dismissing the appeal:

(1) the decision was not *ultra vires* because s 147 of the *Environmental Planning and Assessment Act* 1979, which related to reportable political donations, did not apply because the application predated the coming into force of that section: at [49];

(2) the Minister did not fail to consider Aboriginal consultation. The Director-General's Report informed the Minister of the Environmental Assessment Requirements for consultation and the amount of consultation that in fact occurred. It was apparent from the report that there was notification to Aboriginal community groups through the public exhibition process and a number of submissions were made: at [70];

(3) the Minister knew that Stockland had failed to provide an Aboriginal Keeping Place. The Director-General's Report noted that the Concept Plan approval for the site included a commitment to establish a Keeping Place and stated that this commitment was yet to be implemented: at [82];

(4) given the numerous documents before the Minister dealing with climate change and flooding impacts the applicant did not discharge the onus of proving that the Minister failed to take these matters into account: at [91];

(5) it was within the Minister's power to impose a condition relating to archaeological test excavations. The timing of such excavations had no bearing on the validity of the determination. The statute did not require test excavations to be completed before the project was approved: at [96];

(6) if the Minister did mistakenly conclude that the proposed development was consistent with a report on Aboriginal Cultural Heritage when this was not the case, this was not something that can be remedied by the Court: at [100];

(7) the Minister had numerous documents before her stating that flood risk had been considered and addressed in the design of the project. In these circumstances it was not manifestly unreasonable for the Minister to approve the project: at [103]; and

(8) there had been no agreement between Aboriginal community groups as to the form of the Keeping Place. It was unfortunate that the commitment to establish a Keeping Place had yet to be honoured, however, this did not make the decision manifestly unreasonable: at [107].

***Williams v NSW Minister for Planning (No 3)*** [2010] NSWLEC 204 (Biscoe J)

Facts: the applicant challenged the validity of two decisions of the NSW Minister for Planning's delegate to modify a development consent for the Cowal Gold Mine pursuant to s 96(1A) of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act"). The gold mine used cyanide as a leaching agent for extracting gold. Due to its toxicity, cyanide had to be carefully managed through cyanide destruction techniques. One of the proposed modifications involved changing the method of cyanide destruction from the Caro's Acid method to the INCO process.

Issues:

(1) the main issue was whether the Minister failed to consider the likely impact on the environment of the proposed new INCO method of cyanide destruction.

Held: upholding the appeal on this ground:

(1) by virtue of s 79C(1)(b) of the EPA Act the Minister was required to have regard to the likely environmental impact of the proposed INCO method of cyanide destruction: at [74(a)];

(2) a 1998 Environmental Impact Statement ("EIS"), which outlined the disadvantages of the INCO method, was in the possession of the Department of Planning. In these circumstances it should be treated as being in the possession of the Minister and could not be ignored if it had a direct bearing on the justice of the matter: at [74(d)];

(3) the EIS had a direct bearing on the Minister's consideration of the likely environmental impacts of the INCO method. It indicated that the method was likely to have environmental impacts (being toxic to fauna, especially fish and birds at certain levels) unless the by-products which it produced were subject to additional processing before being released into the environment: at [74(e)];

(4) the Department's reports failed to bring that disadvantageous environmental impact to the attention of the Minister's delegate; at [74(f)]; and

(5) that impact was of such importance that, as it was not considered by the Minister's delegate, it could not be said that the likely environmental impact of the INCO method had been properly considered: at [74(g)].

***Williams v NSW Minister for Planning (No 4)*** [2010] NSWLEC 222 (Biscoe J)

(related decision: *Williams v NSW Minister for Planning (No 3)* [2010] NSWLEC 204 (Biscoe J))

Facts: in earlier proceedings the applicant challenged the validity of two decisions of the NSW Minister for Planning's delegate to modify a development consent for the Cowal Gold Mine. The proposed modifications (Modifications 7 and 8) sought a number of changes to the mine. The Court made a declaration that Modification 8 was invalid on the basis that the Minister's delegate failed to consider the environmental impact of changing the mine's method of cyanide destruction. The second respondent sought to vary the declaration so that the modification was invalid only insofar as it purported to approve a change in cyanide destruction methods, but not in relation to the other proposed changes.

Issues:

(1) whether the declaration should be varied so that Modification 8 is invalid only to the extent that it purported to approve the introduction and use of a new method of cyanide destruction.

Held: in modifying the declaration as proposed:

(1) s 124(1) of the *Environmental Planning and Assessment Act* 1979 provided that "where the court is satisfied that a breach of this Act has been committed…it may make such order as it thinks fit to remedy or restrain the breach". This empowered the Court to mould the manner of its intervention in such a way as will best meet the practicabilities as well as the justice of the situation: at [8]-[9];

(2) where a development consent had discrete components and the challenge to validity succeeds in relation to only one component, it may be proportionate and reasonable to make a declaration of invalidity only in relation to that component: at [11]; and

(3) the proposed new method of cyanide destruction was a discrete and severable aspect of Modification 8. Modification 8 was a bundle of modifications of which the proposed new method of cyanide destruction was only one. The challenge to validity succeeded only in relation to that aspect. The proposed variation was a proportionate and reasonable remedial response to the breach found: at [13].

- **Development Application**

***Norlex Holdings Pty Ltd v Wingecarribee Shire Council*** [2010] NSWLEC 149 (Pepper J)

Facts: Wingecarribee Shire Council ("the council") granted conditional development consent to Norlex Holdings Pty Ltd ("Norlex") on 30 August 1995. The consent authorised the use of the land for the collection and extraction of spring water from it. After granting the consent Norlex took samples of extracted water from the bore and had them analysed at a laboratory for quality and fitness for drinking, made repairs to the fences and gates on the property and had an acoustic engineer make an assessment of the noise emissions of the pump used to extract the water. The conditions of the consent governing haulage of the extracted water, however, meant that it was unlikely that the development would be economically viable. As a consequence, Norlex made and withdrew, first, a modification application, and second, a new development application. In 2006 Norlex made an application to the council for a construction certificate to enable the extraction of spring water from the property. The council refused that application on the basis that the consent had lapsed.

Issues:

(1) whether the consent had lapsed;

(2) whether the work on the property constituted "engineering" "work" for the purpose of s 95(4) of the *Environmental Planning and Assessment Act* 1979;

(3) whether the engineering work was physically commenced on the land to which the consent applied; and

(4) whether the engineering work related to the consent granted, or whether it related to the modification or new development application.

Held: the consent had not lapsed:

(1) the fence and gate repair were not building, engineering or construction work because it was ongoing and had commenced prior to the granting of the consent: at [85];

(2) in order to achieve compliance with the consent spring water had to be extracted and analysed, and therefore, was "engineering" "work" which was commenced on the property: at [89];

(3) the work undertaken by the acoustic engineer was "engineering" "work" commenced on the property: at [96-100];

(4) the consent was for "a work", and therefore, there was a sufficient nexus between the so-called "operational" steps taken by Norlex and the subject matter of the consent: at [102]; and

(5) the pumping, testing and analysis of the spring water and the acoustic work performed was work that related to the subject of the consent. It occurred prior to the lodging and contemplation of either the modification application or the new development application: at [106].

***SJ Connelly CPP Pty Ltd v Ballina Shire Council*** [2010] NSWLEC 128 (Craig J)

Facts: the applicant made a development application to use a site to stockpile 100,000 $m^3$ of soil and rock for a period of two years. The RTA had been pre-loading parts of the Ballina Bypass with fill (soil and rock) on a length of road adjoining the site as part of major road construction. The preloading reached the stage where excess fill was required to be removed. It was this fill which the applicant wished to stockpile, intending its eventual use to fill its site prior to development for a highway service centre. The development application was not accompanied by an environmental impact statement. The applicant sought declaratory relief as to the validity of its application.

Issues:

(1) whether the development application was an application in respect of designated development within the meaning of the *Environmental Planning and Assessment Act* 1979 on the basis that it was an "extractive industry";

(2) whether the development could be categorised as an "industry" within the meaning of cl 19(1) of Sch 3 of the Environmental Planning and Assessment Regulation 2000; and

(3) whether the proposed development was development ancillary to the construction of the Ballina Bypass and therefore engaged cl 37A of Sch 3 of the Regulation.

Held: granting the relief sought:

(1) the proposed development was not designated development: at [61];

(2) the proposed development was not "extractive industry". "Extractive industry" required some form of process directed to "extractive material". This involved the intervention of machinery or equipment as a necessary element in the conduct of the activities. The term "extractive industry" as it appeared in the Regulation was intended to encapsulate activities that by their nature were likely to have a significant impact upon the environment. The mere stockpiling of material did not have this effect: at [54]-[55];

(3) the word "industry" when used in cl 19(1) of Sch 3 of the Regulation identified "commercial activities carried on through industrial processes" when used in the plural in cl 19(1): at [55]; and

(4) cl 37A of Sch 3 was not engaged because the proposed development was not ancillary to another development and could be carried out independently of the adjoining road construction: at [58]-{60].

***S J Connelly Pty Ltd v Ballina Shire Council*** [2010] NSWLEC 151 (Pepper J)

Facts: S J Connelly Pty Ltd ("SJ") lodged a development application ("the DA") to subdivide a series of existing lots. From the DA it was clear that SJ intended that some of the lots would be used for future community title development. This intention was brought to the attention of Ballina Shire Council ("the council"). The Ballina Local Environmental Plan did not prohibit community title development upon the land. Community title subdivision and multiple dwellings per lot were, however, inconsistent with the Development Control Plan No 1 – Urban Land ("the DCP"), which was applicable to the proposed development. On 24 June 2004, the council granted development consent with a deferred commencement condition that required the submission to the satisfaction of the council of additional information regarding the use of specific lots for multiple dwellings and future community title subdivision. SJ provided the additional information. Although SJ always intended to submit a future development application for the community title subdivision, it assumed that compliance with the deferred commencement conditions would result in later

approval. However, on 24 February 2005 the council resolved, "that the applicant be advised subject to the amendments as outlined in the report, the deferred commencement conditions of DA2004/605 have been adequately addressed, however Council advises it does not accept that consented to Lots 4, 8, 19 are suitable for development with multiple dwellings thereon". This included any future community title subdivision.

Issues:

(1) whether the council was constrained by the terms of the deferred commencement consent in the passing of the subsequent resolution or in the future determination of any development application for community title subdivision in respect of the proposed development; and

(2) whether the development was a staged development.

Held: dismissing the application:

(1) the consent imposed no conditions circumscribing the determination of any future development application in relation to the use of the lots for multiple dwellings and community title subdivision: at [66]. The deferred commencement condition did not state that once the additional information had been submitted to the satisfaction of the council regarding the proposed use of the lots for multiple dwellings or community title subdivision, that a positive determination would be made in respect of the proposed future use of those lots. All that it stated was that the information was required in order for the consent to become operative and the consent did not grant approval for community title subdivision: at [68];

(2) no 'in principle' planning permission was granted to SJ by the consent in respect of the community title subdivision of the lots: at [81];

(3) the council was unfettered in the subsequent exercise of its power on 24 February 2005: at [82]; and

(4) the consent was not a staged consent because none of the conditions were imposed pursuant to s 80(5) of the *Environmental Planning and Assessment Act* 1979: at [106].

***Olsson v Goulburn Mulwaree Council & the Minister Administering The Crown Land Act 1989, Olsson v The Minister Administering The Crown Land Act 1989*** [2010] NSWLEC 169 (Craig J)

Facts: the applicants were lessees from the Crown of vacant rural land. They wished to erect a number of 'rural dwelling-houses' on the land. Consent was refused by the Council on the basis that the development proposed was prohibited by cl 20 of the Mulwaree Local Environmental Plan 1995 which controlled the erection of "additional dwellings" on rural land;

Issues:

(1) whether the elements of the definition of "rural worker's dwelling" were satisfied;

(2) whether cl 20 required a principal dwelling-house to be standing on land before consent could be given to rural workers dwellings; and

(3) whether, when determining a "staged development application" under Div 2A of Pt 4 of the *Environmental Planning and Assessment Act* 1979, all components of the development sought must be permissible at the time of determination.

Held: upholding the Council's contention:

(1) clause 20 was permissive of an additional dwelling-house on land within the rural (1)(a) zone. However, it also imposed constraints upon the power of a consent authority to consent to the erection of an additional dwelling-house on land in that zone. The additional dwelling house had to be a "rural worker's dwelling house" and had therefore to be an "additional dwelling" located on land on which a "principal dwelling house stands." Consequently, consent could only be given to a second or further dwelling-house if there was a primary dwelling house already erected upon the land at the time of consent and the second or further dwelling otherwise met the constraints of occupation identified in the definition of a "rural worker's dwelling": at [15]-[16],[25];

(2) all elements of the development had to be permissible at the time of granting consent: at [26];

(3) conditional consent was not available to secure compliance with the requirement for the principal dwelling to be erected first: at [26]; and

(4) for similar reasons, a "staged development consent" was not available: at [37]-[38].

***Presrod Pty Ltd v Wollongong City Council*** [2010] NSWLEC 192 (Craig J)

Facts: final orders granting development consent to the applicant's proposed development were made following agreement reached at a conference conducted pursuant to s 34 *Land and Environment Court Act* 1979. The agreement was signed by the solicitors for both parties. The council applied to set aside the orders on the ground that they were made "irregularly" or "illegally" within the meaning of r 36.15 of the Uniform Civil Procedure Rules 2005 ("UCPR"). It founded the application upon its own conduct described by it as "administrative oversight". The council's employees' actions in giving instructions for the solicitor were not in accordance with the functions delegated to them which required that objectors to the development be notified of the proceedings before exercising those functions. A number of persons had objected to the development prior to its refusal by the council.

Issues:

(1) whether orders made by the Council were made irregularly or illegally;

(2) whether legal practitioners acting for the parties had authority to compromise the proceedings; and

(3) whether sufficient cause was shown so as to warrant the orders being set aside in the exercise of the Court's discretion.

Held: application dismissed:

(1) conciliation conferences play an integral role in the process of resolving proceedings brought in Class 1 of this Court's jurisdiction: at [30];

(2) a Commissioner requested to make an order by agreement reached at or following a section 34 conference is not required by s 34(3) to enquire as to the capacity of signatories to an agreement to bind the parties or the capacity of representatives at the hearing to bind the parties to an agreement that has been announced: at [61];

(3) the council was bound by the agreement signed by its solicitor. It was within the solicitor's implied authority to sign such an agreement. The applicant was entitled to act on the basis that the council's solicitor had ostensible authority to sign that agreement: at [84];

(4) the orders were not made "irregularly" or "illegally" within the meaning of r 36.15 of the UCPR. The significance of finality in litigation as a foundation of public confidence in the administration of justice reflects the circumstances in which the exceptional provisions of r 36.15 of the UCPR are to be considered: at [57], [85]; and

(5) although not strictly necessary to be determined, "sufficient cause" had not, in the particular circumstances of the case, been shown to justify the setting aside of the Court orders: at [98].

***Warriewood Properties Pty Ltd v Pittwater Council*** [2010] NSWLEC 215 (Sheahan J and Brown C)

Facts: the applicant appealed against the council's refusal of a development application to subdivide land into two lots and to construct a retail facility on one of them. The proposed retail facility was to include a 2,222 $m^2$ supermarket, 142 $m^2$ of specialty shops, a café, and other ancillary items such as carparking.

The subject site was within "Zone 2(f) (Urban Purposes – Mixed Residential)" and under the Pittwater Local Environmental Plan 1993 ("the LEP"), where the only permissible development was "residential buildings; associated community and urban infrastructure". However, the LEP specifically identified the subject site for "development for certain additional purposes", including a "neighbourhood shop".

"Neighbourhood shop" was defined in the LEP as "retail premises used for the purposes of **selling small daily convenience goods** such as foodstuffs, personal care products, newspapers and the like **to provide for the day-to-day needs of people who live or work in the local area,** and may include ancillary services such as a post office, bank or dry cleaning, but does not include restricted premises".

Issues:

(1) whether a supermarket could be characterised as "associated community and urban infrastructure"; and

(2) alternatively, whether a supermarket of 2,222 $m^2$ could be characterised as a "neighbourhood shop".

Held: appeal dismissed and consent refused

(1) the 2(f) zoning did not identify specific uses and the intent would be further planned, therefore, the term "associated community and urban infrastructure" should not be read broadly to include specific land uses that allow development which may prove inconsistent with future uses: at [68];

(2) a supermarket was a "retail" use rather than a type of "associated community and urban infrastructure": at [69];

(3) the proposed supermarket of 2,222 $m^2$ was a "major" supermarket and would provide items beyond "small daily convenience goods": at [86];

(4) a supermarket's available floor space was an indicator for characterisation purposes, as a larger store would have a higher tendency to stock goods that were not "small daily convenience goods": at [87];

(5) the proposed supermarket would meet "day-to-day needs" of shoppers, but would also attract a proportionally higher number of "weekly shopping trips": at [88];

(6) a limit on floor space was a more practical method of ensuring compliance with the definition of "neighbourhood shop" than the imposition of conditions of consent limiting the types of goods for sale: at [88]; and

(7) the proposed supermarket would also attract shoppers beyond "people who live or work in the local area": at [89].

***City of Botany Bay v New South Wales Land and Housing Corporation*** [2010] NSWLEC 160
(Sheahan J)

Facts: the respondent ("Housing NSW") granted itself approval, under Part 5 of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act"), for a project to redevelop a site within the council's local government area, by replacing an existing 1980s cottage with a development, containing seven dwellings in four blocks, being affordable housing for low income earning tenants.

The subject land was zoned 2(a) residential under the Botany Local Environmental Plan 1995, in which the objectives of the zone provide for detached and semi-detached dwellings. The development relied upon the provisions of the State Environmental Planning Policy (Affordable Rental Housing) 2009 ("AHSEPP"), which prevails over other planning policies within the 2(a) zoning – provided the development was for "dual occupancies, multi dwelling housing or residential flat buildings".

The project was funded by the Commonwealth government's "stimulus package" of February 2009, which provided time limits for applying the funding. In June 2009, the Director-General of Human Services began making the relevant delegations to officers within Housing NSW.

On 8 October 2009, council officers met with Housing NSW officers to discuss a social housing project for the subject site. It was made clear to the council, at that meeting, that Housing NSW proposed a seven dwelling development on the subject site. The council then urged Housing NSW to conduct an acoustic assessment of the project as the subject site was "heavily affected by aircraft noise". On 13 October, an acoustic report was provided for the site, and that report was externally reviewed on 23 October.

In late October 2009, design plans were drawn up, and on or about 18 November 2009, SMEC Australia Pty Ltd was engaged to review any environmental impacts. On 26 November, Housing NSW completed a checklist to ensure compliance with the Part 5 requirement for an Environmental Impact Assessment ("EIA").

On 11 January 2010, a report by SMEC was provided and was accompanied by a 'Statement of Compliance with Part 5'. This report was independently reviewed, and that review was completed on 11 February 2010.

The project approval, including conditions and plans, was signed off by Catherine Hicks, Housing NSW's Manager Portfolio Strategy and Planning, on 17 February 2010. Housing NSW notified the council on 19 February 2010 of the determination, and demolition work commenced around this time.

On 18 March 2010, council wrote to Housing NSW protesting about the approval and threatening proceedings. This letter was received on the same day but was not given attention by officers of Housing NSW, and on 19 March 2010, Boronia Estates Pty Ltd was engaged to carry out the project.

The council commenced the proceedings on 23 March 2010, around the same time as construction commenced. The council did not seek any interlocutory relief, nor expedition of the proceedings, despite general public knowledge that the project was required to be completed within strict time limits.

The council alleged (1) that the approval was invalid as the approval was not signed off by the Director-General; (2) that the approved development was not a development to which the AHSEPP applied; (3) that the respondent failed to examine and take into account the fullest extent possible all matters affecting or likely to affect the environment by reason of that activity, under s 111 of the EPA Act; and (4) that the respondent failed to undertake an Environmental Impact Statement under s 112 of the EPA Act, despite the fact the development was likely to significantly affect the environment.

During and at the conclusion of the hearing, the council asked the Court to issue orders stopping work on the development pending the court's decision, without giving any undertaking as to damages. This was despite the respondent's evidence that the project was largely constructed and expected to be completed within a month of the hearing.

Issues:

(1) whether the approval given by Ms Hicks lacked authority;

(2) whether the development was of the type to which the AHSEPP applied;

(3) whether the assessment process was inadequate as it failed to examine and take into account the fullest extent possible all matters affecting or likely to affect the environment;

(4) whether the assessment process was invalid as it was carried out by an external organisation;

(5) whether the development was "likely to significantly affect the environment" and therefore required an Environmental Impact Statement; and

(6) whether the proceedings were of any utility as the development was near completion.

Held: summons dismissed:

(1) Ms Hicks enjoyed the necessary delegated authority to act for Housing NSW: at [85];

(2) there was nothing to forbid or preclude a consent authority from appointing external advisors, such as SMEC, to prepare material for its consideration, or to conduct reviews of that material: at [86];

(3) there was no evidence that Ms Hicks failed to give close attention, "to the fullest possible extent possible", to the environmental impacts: at [87];

(4) assessments of environmental impacts were appropriately carried out (under s111) and those impacts were considered not to be as "significant" as to trigger the need for an Environmental Impact Statement (under s112): at [90]; and

(5) the development, properly characterised, was a "multi dwelling housing" for the purposes of the AHSEPP: at [91].

- **Injunctions**

***Parks and Playgrounds Movement Inc v Newcastle City Council*** [2010] NSWLEC 173 (Biscoe J)

Facts: the applicant sought an urgent interlocutory injunction to prevent Newcastle City Council from removing 14 fig trees planted along the sides of Laman Street in Newcastle. The Council's purported power to remove the trees came from s 88 of the *Roads Act* 1993 or alternatively from s 98(2) of State Environmental Planning Policy (Infrastructure) 2007.

Issues:

(1) whether there was a serious question to be tried in relation to:

  (a) whether the council's decision was invalid as the council did not consider an Environmental Impact Statement (EIS); and

  (b) whether the Land and Environment Court ("LEC") had jurisdiction to hear the application; and

(2) whether the balance of convenience favoured granting an interlocutory injunction.

Held: granting the interlocutory injunction:

(1) there was a serious question whether the removal of the trees was likely to significantly affect the environment and therefore whether an EIS was required: at [17];

(2) there was a serious question whether s 112 of the *Environmental Planning and Assessment Act* 1979, which required an EIS to be considered, was an "Act or law to the contrary" for the purposes of s 88 of the *Roads Act*: at [18];

(3) there was a serious question whether the LEC had jurisdiction over the s 88 *Roads Act* issue and power to grant injunctive relief, at least in its ancillary jurisdiction: at [26]; and

(4) the balance of convenience favoured granting an injunction as the destruction of the trees was imminent: at [27].

***Kennedy v NSW Minister for Planning*** [2010] NSWLEC 177 (Biscoe J)

Facts: the applicant sought an urgent interlocutory injunction to restrain Stockland Developments Pty Ltd from carrying out clearing work on land at Sandon Point pursuant to a 2009 major project approval. The applicant argued that two subsequent modification approvals for the project were invalid as the Minister failed to take into account a mandatory relevant consideration, namely, that the site was covered in Aboriginal artefacts deposited there after the clearing of adjacent land.

Issues:

(1) whether there was a serious question to be tried as to whether the Minister failed to take into account a mandatory relevant consideration; and

(2) whether the balance of convenience favoured the granting of an interlocutory injunction.

Held: granting the interlocutory injunction:

(1) the evidence suggested that soil stockpiled on the subject land was likely to have contained numerous Aboriginal artefacts: at [27];

(2) there was a serious question as to whether the Minister was required to consider Aboriginal cultural heritage to the level of particularity for which the applicant contended: at [35]-[36]; and

(3) the balance of convenience favoured granting an interlocutory injunction in relation to the areas where Stockland accepted stockpiles from adjoining land were located. It was unlikely that there would be

significant detriment to Stockland as it could continue clearing over most of the subject land and the case would be heard expeditiously: at [39].

***Hill Top Residents Action Group Inc v Minister Administering the Sporting Venues Authorities Act 2008 (No 2)*** [2010] NSWLEC 219 (Pepper J)

(related decisions: *Hill Top Residents Action Group Inc v Minister Administering the Sporting Venues Authorities Act 2008* [2010] NSWLEC 210( Pepper J) ; *Hill Top Residents Action Group Inc v Minister Administering the Sporting Venues Authorities Act 2008 (No 3)* [2010] NSWLEC 221 (Pepper J))

Facts: Part 3A approval was granted for the construction of a shooting range. The Hill Top Residents Action Group Inc ("Hill Top") unsuccessfully brought proceedings challenging the approval in the Court. The Minister Administering the Sporting Venues Authorities Act 2008 ("the Minister") commenced clearing the site on 15 October 2010. Hill Top made an unsuccessful *ex parte* application for an interlocutory injunction on that date on the basis that the Minister had breached the approval by failing to erect fencing around the areas to be cleared for construction and because clearing was occurring during the breeding periods for the Yellow-bellied Glider. On 21 October 2010, with the Minister present, Hill Top made another application for interim injunctive relief on the basis of inadequate fencing and on the basis that unapproved clearing had taken place. The Minister informed the Court that unapproved clearing had in fact taken place but that a modification application for the development had been lodged pursuant to s 75W of the *Environmental Planning and Assessment Act* 1979. The consequence of the application would be that the unapproved clearing that had taken place would, if granted, be approved. The Minister also proffered an undertaking not to conduct any new clearing that did not fall within both the existing approval and the modified approval until the modification application was determined and to erect high visibility fencing around all cleared areas.

Issues:

(1) whether there was a serious question to be tried;

(2) whether the Minister breached the approval with respect to fencing; and

(3) whether the balance of convenience favoured the granting of an injunction.

Held: dismissing the application:

(1) there was no serious question to be tried. The Minister properly conceded that unapproved clearing works had occurred. The Minister could not be prevented retrospectively from carrying out an activity by an interlocutory injunction. As to the future clearing conduct, this would be governed by the undertaking: at [33];

(2) the time at which fencing was to be erected was ambiguous in the approval documents: at [47]. Provided the fencing was installed either before or immediately after clearing had occurred, the approval had not been breached: at [50]; and

(3) given the deleterious delaying effect on the development that a grant of temporary injunctive relief would have had, and in the absence of any evidence of likely or even possible harm to the environment if it were not granted, the balance of convenience did not favour the granting of an injunction: at [57].

- **Valuation / Rating**

***Trust Company Limited AFT Opera House Carpark Infrastructure Trust No 1 v Valuer-General*** [2010] NSWLEC 161 (Pain J)

Facts: the applicant challenged the reascertainment of land values of the Sydney Opera House carpark for four base dates pursuant to s 6A (assessment based on land value) of the *Valuation of Land Act* 1916 ("the VL Act"). It claimed that the valuations should be assessed under s 7B (land value of strata).

Issues:

(1) should the subject lot be valued as land or stratum?

Held: her Honour considered the subject lot should be valued as land under s 6A of the VL Act and noted that:

(1) there was no priority between valuation of the lot as land or as a stratum: at [55];

(2) while the subject lot met the definition of stratum in s 196C of the *Conveyancing Act* 1919, this was not relevant to the application of the definition of stratum in s 4 of the VL Act: at [56]; and

(3) the definition of stratum in the VL Act was not satisfied as the carpark lot was not defined or definable by reference to improvements or otherwise: at [70].

***Lend Lease GPT (Rouse Hill) Pty Ltd v The Hills Shire Council*** [2010] NSWLEC 130 (Sheahan J)

Facts: the applicant ("Lend Lease") appealed against rating notices issued by the council for various parcels of Crown lands the applicant held under an arrangement contained in a Project Delivery Agreement ("PDA") and an Occupation Licence ("OL"). The OL was granted by the Minister Administering the *Environmental Planning and Assessment Act* 1979 and Landcom to facilitate the development of a regional centre to serve the Rouse Hill development area.

The PDA set out the Minister's and the applicant's rights and obligations with respect to the development on the subject lands. In particular, the PDA provides that the applicant would procure the development of the regional centre at its sole risk and expense. The PDA also sets out how revenue from the sale of sites developed and from tenancies would be accounted to the Minister.

The applicant appealed against the notices and relied upon s 555(1) of the *Local Government Act* 1993 ("the LGA") which provided that land was exempt from rating if it was owned by the Crown not being held for a private purpose. The parties agreed that, for the purposes of the LGA, the OL was a lease.

Issues:

(1) whether the land owned by the Crown was exempt from rating under s 555(1) of the LGA;

(2) whether the building of a regional centre was the type of activity "ordinarily performed by the Crown";

(3) whether the holding of land under the OL, when construed in conjunction with the PDA, was for private purposes; and

(4) whether the private purpose predominated over or was subsidiary to the public purpose.

Held: appeal dismissed:

(1) all grants of Crown lands had a public purpose and the test was whether there existed an exemption-denying private purpose: at [97];

(2) the applicant stood to gain substantial revenue and it could be assumed that private enterprise was motivated by private commercial benefit when entering into such arrangements: at [98];

(3) the private purpose of the applicant predominated over, rather than being subsidiary to, the public purpose of the grant: at [100]; and

(4) the development of community infrastructure, such as regional centres, was not a function the Crown ordinarily performed: at [100].

- **Aboriginal Land Rights**

***Muli Muli Local Aboriginal Land Council v Minister Administering the Crown Lands Act*** [2010] NSWLEC 172 (Pain J)

Facts: appeal against a decision of the Minister administering the *Crown Lands Act* 1989 to refuse two Aboriginal land claims because the land was not claimable Crown land as at the date of the claims.

Issue:

(1) could the Minister prove the land was used and occupied lawfully for cattle grazing (pursuant to s 36(1)(b) and s 36(7) of the *Aboriginal Land Rights Act* 1983) because of the grant of a licence by tender to third parties at the date of the land claims.

Held: upholding the appeal against the Minister's refusal of the Aboriginal land rights claim her Honour determined that:

(1) there was no binding contract arising from the tender between the Minister and third parties giving rise to a licence over the claimed land at the date of the claim: at [71] and [82]; and

(2) even if there was a binding contract between the Minister and third parties allowing use of Crown land for grazing, the grant of a licence over Crown land under the Crown Lands Act was a separate unilateral action by the Minister which had not taken place at the date of the claims: at [82] and [85]. Consequently the land claimed was not lawfully used or occupied at the relevant date.

- **Section 56A Appeals**

***Walfertan Processors Pty Ltd v Upper Hunter Shire Council (No 4)*** [2010] NSWLEC 108 (Pain J)

(first instance Commissioner decision: ***Walfertan Processors Pty Limited v Upper Hunter Shire Council*** [2009] NSWLEC 1260 (Moore SC and Taylor C))

Facts: s 56A appeal of Commissioners' decision in Class 1 proceedings to grant conditional development consent.

Issues:

(1) whether the issue of existing use rights raised on appeal was raised before the Commissioners;

(2) whether Commissioners erred in considering designated development under cl 35 Sch 3 of the Environmental Planning and Assessment Regulation 2000 ("the Regulation");

(3) whether errors of fact were impermissibly raised in the appeal; and

(4) whether the Commissioners failed to give adequate reasons in their judgment.

Held: dismissing the appeal, her Honour held that:

(1) the existing use rights issue could not be raised in the appeal and was not material to the decision in any event: at [50];

(2) there was no mistake in the approach of the Commissioners in their consideration of existing development and proposed changes as required by cl 35 Sch 3 of the Regulation: at [49];

(3) the finding of facts made in the construction of existing development consents, for the purpose of determining existing development, did not give rise to an error of law and were not reviewable in the appeal: at [94]; and

(4) there was no failure to give adequate reasons when the judgment as a whole is considered: at [123].

***Gray v Ward*** [2010] NSWLEC 166 (Biscoe J)

(first instance Commissioner decision: *Gray v Ward* [2010] NSWLEC 1056 (Fakes C))

Facts: the applicants sought the removal of three trees on their neighbour's property pursuant to s 7 of the *Trees (Disputes Between Neighbours) Act* 2006 because they contended that live and dead branches falling from the trees had caused damage to their property and presented a risk of injury to persons. The Commissioner dismissed the application to remove the trees but ordered the respondents to pay for an arborist to remove all dead wood from the trees.

Issues:

(1) whether the Commissioner erred by holding that the applicants contended that only dead branches (and not live branches) falling from the trees caused and could continue to cause damage and risk of injury; and

(2) whether the Commissioner erred by holding that there was no evidence of live branches falling from the trees.

Held: upholding the appeal:

(1) the Commissioner fell into error in holding that the applicants' contentions only concerned dead branches falling and that there was no evidence of live branches falling. They were errors of law because the Commissioner misdirected herself. That is, the Commissioner defined otherwise than in accordance with law the question of fact which she had to answer. As a matter of law, the Commissioner was required to take into account the applicants' contentions, and the evidence concerning, live branches falling: at [11].

***Valuer-General v P & N Group Holdings Pty Ltd*** [2010] NSWLEC 209 (Craig J)

(first instance Commissioner decision: *P&N Group Holdings Pty Ltd v Valuer General* [2010] NSWLEC 1125 (Parker AC))

Facts: an appeal against the determination by the Valuer-General of the land value of the respondent's land was brought pursuant to s 37 of the *Valuation of Land Act* 1916 ("the VL Act") and determined by a Commissioner of the Court. The Valuer-General appealed from the decision of the Commissioner pursuant to s 56A of the *Land and Environment Court Act* 1979. The respondent admitted that the Commissioner's decision was erroneous in law.

Issues: whether the Commissioner committed a legal error in determining the land value in that he failed to allow for the value of "land improvements" as he was required to do in accordance with s 6A of the VL Act.

Held: the appeal was upheld:

(1) the error arose because the Commissioner failed to account for the fact that the excavation to provide basement car parking on the subject land was "land improvement": at [4];

(2) the value of the excavation to the land being valued was required to be added to the "raw" value deduced from the analysis of comparable improved sales: at [5];

(3) there was no issue between the parties before the Commissioner as to the value assigned by the Valuer-General to land improvements. Failure on the part of the Commissioner to apply s 6A(1) to facts that were not in contest demonstrated an error of law in the determination that the Commissioner made: at [7];

(4) the parties agreed as to the correct land value, including land improvements: at [8]; and

(5) an order was made to substitute the agreed sum for the land value determined by the Commissioner: at [8].

- **Criminal**

**liability**

***Environment Protection Authority v Shannongrove Pty Ltd*** [2010] NSWLEC 162 (Craig J)

Facts: the defendant pleaded not guilty to a charge that it transported waste to a place that could not lawfully be used as a waste facility for that waste. The defendant was contracted to transport a liquid residue from a municipal waste treatment facility. The transported liquid was taken to a farming property where it was dispersed by soil injection. It was claimed to increase soil fertility. No environmental protection licence was held for the property.

Issues:

(1) whether the liquid could be characterised as "waste" within the meaning of the *Protection of the Environment Operations Act* 1997 ("the POEO Act");

(2) whether that characterisation should be made at source or at the disposal site; and

(3) whether the farming property was a "waste facility" for which an environmental protection licence was required.

Held: finding the defendant guilty of the offence:

(1) the material should be classified as waste at the source of its creation: at [92];

(2) the liquid was an unwanted and surplus product of the treatment facility and was therefore "waste" at the time of which it was transported: at [107];

(3) the farming property was used for the disposal of that waste and was therefore being used as a "waste facility" within the meaning of the POEO Act: at [117];

(4) the liquid waste was not "sewage sludge", it was not a 'biosolid' that founded an exclusion from a "waste facility" for the purpose of Sch 1 to the POEO Act: at [127]-[132];

(5) the farming property was required to be the subject of an environmental protection licence in order to receive and dispose of the waste transported to it by the defendant: at [146]; and

(6) therefore, the property could not lawfully be used as a waste facility for the liquid waste: at [147].

***Environment Protection Authority v Unomedical Pty Limited (No 3)*** [2010] NSWLEC 198 (Pepper J)

Facts: Unomedical manufactured medical instruments at its plant which required the operation of a steriliser ("the facility"). Ethylene oxide ("EtO"), a known carcinogen, was the principal chemical used in the sterilisation process and 99% of EtO used in the manufacturing process was released directly into the atmosphere. The facility had been in operation since 1985. The facility expanded to an adjacent site in 2002. A development application for the expansion was approved by Pittwater Council ("the council") who were the consent authority and the regulatory authority under the *Protection of the Environment Operations Act* 1997 ("the POEO Act"). The council was aware that EtO was being used during the sterilisation process but was not aware that it was subsequently being vented into the air in the amount that it was.

The Environment Protection Authority alleged that Unomedical was in breach of its duty imposed by s 128(2) of the POEO Act to carry on a polluting activity on the premises "by such practicable means as may be necessary to prevent or minimise air pollution". This was so notwithstanding that no specific emission standard or rate had been prescribed by law limiting the release of EtO.

Unomedical knew that EtO was carcinogenic, that the use of a catalytic converter would reduce the EtO emissions and that if it had been operating the steriliser in Denmark (the location of its head office) or the United States, it would have been required to install a catalytic abatement system. Unomedical had the

financial capacity to install a catalytic converter during the charge period. In fact, a catalytic converter was installed by Unomedical in 2007 after two prevention notices had been issued to it.

A health expert panel subsequently concluded that it was unlikely that the emission of EtO by Unomedical from the facility resulted in any additional cases of cancer amongst the local residents.

Issues:

(1) whether Unomedical failed to implement such practicable means as may have been necessary to prevent or minimise air pollution resulting from the operation of a medical sterilisation facility;

(2) the meaning of "air pollution";

(3) the meaning of the phrase "by such practicable means as may be necessary";

(4) whether the installation of a catalytic abatement system was necessary when no actual environmental harm could be proven by the discharge of EtO;

(5) whether Unomedical could rely on the defence of honest and reasonable mistake because it believed that it was taking all necessary measures to minimise air pollution and to lawfully operate the facility; and

(6) whether Unomedical could rely on the overseas defence of officially induced error of law.

Held: Unomedical was found guilty:

(1) s 128(2) of the POEO Act made failure to comply with the general duty it imposed an offence. The words "as may be necessary to prevent or minimise pollution" deliberately left undefined the scope of this duty: at [173];

(2) the offence did not require actual harm to the environment or human safety to be demonstrated before an emission constituted "air pollution": at [182];

(3) that the nature of the risk, the cause of the risk, the state of the scientific and engineering knowledge, the learning at the relevant time and the means by which the air pollution could have been prevented or minimised, all formed part of the assessment of whether Unomedical had taken "such practicable means as may be necessary to prevent or minimise air pollution": at [209];

(4) the correct statutory construction of the words "as may be necessary" in s 128(2) is that it imposes a mandatory duty to carry out an activity or operate a plant by such practical means in circumstances where that activity or operation causes air pollution: at [217]. The only discretion created by the section was in determining which "practicable means" should be implemented: at [218];

(5) "practicable means", specifically, an abatement system, could and should have been implemented by Unomedical during the charge period in order to minimise the amount of EtO discharged into the atmosphere: at [249];

(6) Unomedical could not avail itself to the defence of honest and reasonable mistake of fact because it failed to raise any mistakes of fact capable of satisfying its evidentiary onus and even if it had, the mistakes were not reasonable: at [281]; and

(7) the defence of officially induced error of law was not a defence recognised at common law in Australia and even if it was, it was not available to Unomedical on the facts: at [309] and [313]-[334].

***Wakool Shire Council v Garrison Cattle Feeders Pty Ltd*** [2010] NSWLEC 199 (Sheahan J)

Facts: the Wakool Shire Council ("the council"), as prosecutor, charged the defendant company, by summons dated 20 July 2010, with an offence against s 144 of the *Protection of the Environment Operations Act* 1997, in that it "did use the Land or permit the use of the Land for the purpose of a waste facility without lawful authority".

Section 144(1) provided "a person who is the owner or occupier of any land and who uses the land, or causes or permits the land to be used, as a waste facility without lawful authority is guilty of an offence…". In its earlier formation the offence was created in terms of only "permit the use".

Before the Court were two notices of motion: one filed by the council seeking to amend its charge to include the words "cause or", so that it would read, and allege, that the defendant: "… did use the Land or cause or permit the use of the Land …", and another filed by the defendant which sought an order or a direction, pursuant to Part 75, r 11 of the Supreme Court Rules 1970, that the council elect under which of the three limbs of s144 it was charging the defendant.

Issues:

(1) whether the provision creates three offences, or merely stipulates three type of conduct falling under which might comprise one offence;

(2) whether the charge, as framed, creates ambiguity, uncertainty or duplicity; and

(3) whether any duplicity is an instance of "patent duplicity", or of "latent duplicity", which can be cured by the provision of particulars.

Held: notices of motion upheld to the extent that the council was granted leave to amend the summons to include the words "cause or", but was ordered to elect from the three formulations of the charge under s144(1) or charge the defendant with separate offences if it elects more than one:

(1) the section created three offences: at [57];

(2) the charge as framed, expressed the offence in the alternative and did not distinguish among the three activities created as offences: at [55];

(3) the particulars provided did not resolve the defendant's uncertainty about what was charged: at [54]; and

(4) the practice of framing charges under s 144(1) in terms of only one of the three alternatives reflected the leading authorities on duplicity: at [56]-[57].

**sentence**

***Environment Protection Authority v George Western Foods Limited*** [2010] NSWLEC 120 (Craig J)

Facts: the defendant pleaded guilty to a charge that it polluted waters contrary to s 120(1) of the *Protection of the Environment Operations Act* 1997. The offence involved the discharge of a blend of animal tallow and vegetable oil from the defendant's stock feed manufacturing plant in Tamworth into the Peel River as it ran through the centre of the City of Tamworth. The defendant reacted promptly and efficiently when notified by the prosecution's officers of the spill.

Issues:

(1) the cause of the incident giving rise to the offence; and

(2) the appropriate penalty to be imposed.

Held: in sentencing the defendant, his Honour held that:

(1) while the prosecution did not accept the defendant's explanation for the cause of the incident, it did not advance an alternate explanation. The onus on the defendant was to prove its explanation on the balance of probabilities, which it did: at [26]-[27];

(2) the incident was occasioned through misadventure. It was caused by corrosion of a component in the tank containing the animal tallow and vegetable oil allowing that material to escape through a steam heating system: at [27];

(3) the maximum statutory penalty for the offence, namely $1 M, was of significance in demonstrating the objective gravity of the offence: at [28];

(4) the actual harm caused by the offence was exacerbated by the visual and recreational significance of the polluted part of the Peel River: at [32]-[35];

(5) the potential for harm could be best described as the potential to put further environmental pressure on a river system already under stress: at [37];

(6) there were a number of practical measures that may have been taken and which, if taken, would have controlled or mitigated the harm arising from the incident: at [46];

(7) while the incident may be characterised as an "accident", its foreseeability was heightened by a prior incident in which the same substance had escaped into the stormwater system: at [50];

(8) while the defendant did not have an unblemished record, the magnitude of its operations nationally, the spread of its facilities and the size of its overall workforce, indicated it to have a good environmental record, obviating the need for the penalty to reflect a component for specific deterrence: at [64];

(9) the defendant pleaded guilty at the earliest opportunity, entitling it to a 25% discount: at [65];

(10) the defendant cooperated with the prosecution at all times: at [66];

(11) the defendant expressed remorse and contrition: at [71]; and

(12) the appropriate penalty was $100,000, reduced to $67,000, to be paid to an environmental project in lieu of a fine. The defendant was ordered to pay the prosecutor's costs and was also subjected to a publication order: at [85] and [87-[88].

***Plath v Fish; Plath v Orogen Pty Ltd*** [2010] NSWLEC 144 (Pain J)

Facts: the defendants, Fish and Orogen Pty Ltd were each charged with an offence against s 118D(1) of the *National Parks and Wildlife Act* 1974 ("the NPW Act") that by act or omission each caused damage to the habitat, not being critical habitat, of a threatened species (koala) knowing that the land concerned was habitat of that kind. Mr Fish was charged in his capacity as a director of Orogen Pty Ltd under s 175B(1) of the NPW Act. Each entered pleas of guilty to the charges and therefore admitted the essential elements of the offence. The extent of the role of Mr Fish, and his company Orogen Pty Ltd, was providing environmental consultancy services and neither defendant contributed physically to habitat damage. The maximum penalty applicable to an offence against s 118D is 1,000 penalty units ($110,000) or imprisonment for one year or both. The purposes of sentencing under s 3A of the *Crimes (Sentencing Procedure) Act* 1999 must be considered in light of the relevant statutory scheme which has been breached. The Court was also required to give consideration to the sentencing factors provided in s 194 of the NPW Act which came into force on 2 July 2010. The prosecutor sought penalties against each defendant by way of fines, and application of the provisions under s 205 of the NPW Act (which came into force on 2 July 2010) by way of a publication order and an environmental service order.

Held: in sentencing the defendants her Honour held that:

(1) there was no evidence before the Court of any physical harm to any koalas as a result of the land clearing activity: at [52];

(2) the harm caused was foreseeable: at [59];

(3) in the contracted role of environmental consultants Mr Fish and Orogen Pty Ltd were liable for causing damage to threatened species habitat as accepted by their guilty pleas, however their physical control over the actual damage was not direct: at [64];

(4) in the circumstances of the offences where the defendants were acting in a consultative capacity the offences were not committed for financial gain in the sense identified in *Director-General of the Department of Environment and Climate Change v Rae* [2009] NSWLEC 137: at [67];

(5) the objective seriousness of the defendants' actions was at the lower end of the possible range: at [68];

(6) the defendants were not criminally negligent in the advice they provided (at [89]), and their overall culpability was low: at [94];

(7) a publication order: at [141] and an environmental service order: at [138], encompassing a targeted assessment of koala utilisation of potential koala habitat, were appropriate in the circumstances of the offences. The environmental service order project is equivalent to approximately $136,000 total cost to the defendants: at [136];

(8) the defendants were liable for the prosecutor's costs in the amount of $105,000 under s 257G of the *Criminal Procedure Act* 1986: at [142]. These legal costs were significant and were taken into account in setting the penalty; and

(9) Mr Fish was fined $5,000 and Orogen Pty Ltd was fined $10,000.

***Liverpool City Council v Leppington Pastoral Co Pty Ltd*** [2010] NSWLEC 170 (Biscoe J)

Facts: the defendant pleaded guilty to two charges of carrying out development without development consent contrary to s 76A(1)(a) of the *Environmental Planning and Assessment Act* 1979. The offences involved the demolition of two heritage items – the former Commonwealth Government Overseas Telecommunications Radio Receiving Station in Bringelly, NSW and a bolted cast iron water tank and tower which had supplied water to the station. The directors of the defendant claimed the Radio Receiving Station was demolished because it was derelict, unsafe and the roof contained asbestos and that the water tank was also removed for safety. The directors claimed they were unaware these were heritage items.

Issues:

(1) the appropriate penalty to be imposed having regard to the objective and subjective circumstances of the offence; and

(2) whether the fact that the defendant agreed to pay the prosecutor's costs should be taken into account in sentencing.

Held: in fining the defendant $30,000 and ordering the defendant to pay the prosecutor's costs:

(1) the heritage value of the structures to the community was low and they presented a safety issue: at [34];

(2) there was a need for general deterrence in a case such as this involving the carrying out of unauthorised demolition of heritage items. The penalty imposed had to be sufficient to ensure that those carrying out demolition were reminded of their responsibilities under the law: at [47]; and

(3) in the jurisdiction an order for the payment of the prosecutor's costs was routinely made. Consequently, payment of the prosecutor's costs was a constant aspect of punishment such that it was embedded in the general pattern of sentencing for all offences. Therefore, of itself, it did not generally seem to be a reason for reducing a penalty in a particular case lower than that suggested by the general pattern of sentencing for the relevant offence: at [50].

***Betland v Environment Protection Authority*** [2010] NSWLEC 183 (Pepper J)

Facts: Mr Betland ran a business called 'Birds No More'. He had been contracted to undertake bird control activities at a shopping centre. He did this through the use of seed laced with the pesticide fenthion. In addition, upon request and the payment of $200, he threw fenthion over the fence of a residential premises at which a source of food for the birds was located.

At first instance, the appellant was convicted of:

(a) two offences against s 11 of the *Pesticides Act* 1999 ("the Pesticides Act"), in that he used a pesticide in a manner which harmed non-target animals; and

(b) s 110 of the *National Parks and Wildlife Act* 1974 ("the NPW Act") , in that he used a prescribed substance, namely a poison, to attempt to harm a bird without the consent of the Director-General. The maximum penalty for an individual for a breach of s 110 of the NPW Act was $3,300, or six months imprisonment, or both.

The learned magistrate imposed the following penalties:

(1) fines of $2,500 and $5,000, court and professional costs in relation to the Pesticide Act offences; and

(2) in respect of the offence committed under the NPW Act, Mr Betland was sentenced to a period of four months in custody.

An appeal against the severity of sentence was made to the Court in relation to the NPW Act offence. Mr Betland had been the recipient of two previous penalty notices under the Pesticides Act for breaches of s 15(1)(b), for which he was convicted and satisfactorily completed a community service order.

The evidence before the learned magistrate was a statement of facts and a Community Offender Services Probation and Parole Service Court Duty Officer Report ("Probation and Parole Report"). The statement of facts revealed that there was no evidence before the learned magistrate as to whether or not fenthion was in any way harmful to humans, other than the statement that "fenthion is included on the Poison List proclaimed under the *Poisons and Therapeutic Goods Act* 1996", and that other than death, there was no evidence of the extent to which, if any, the birds killed by the fenthion suffered prior to dying. The Probation and Parole Report revealed that Mr Betland was assessed as unsuitable for a community service order on the basis of a medical condition which he had had at the time he had satisfactorily completed the earlier community service order.

Issues:

(1) whether the custodial sentence imposed by the magistrate was appropriate for the offence committed and if not, what was an appropriate sentence.

Held: allowing the appeal:

(1) there was no evidence before the lower court as to what risk to the community there was, if any, from the impermissible use of fenthion: at [26];

(2) there was no evidence before the lower court as to whether the birds suffered before they died;

(3) while a judicial officer is not obliged to spell out every single detail in their process of reasoning, it is nevertheless essential to expose his or her reasons for the purpose of resolving any future contest. Such exposure is all the more acute where that penalty will result in the deprivation of liberty of an individual: at [28];

(4) consideration of harm to the environment and the risk to human health is not a breach of the *De Simoni* principle, but is a proper factor to consider in determining an appropriate sentence: at [32];

(5) a relevant consideration in sentencing is the ascertainment of the existence of a general pattern of sentencing by the Court. The only other person in New South Wales who had been gaoled for the commission of an environmental offence was Mr Gardner: *Environment Protection Authority v Gardner* [1997] NSWLEC 169. The facts in *Gardner* were markedly far more serious than those in the present case. It was manifestly clear that in terms of evenhandedness, imprisonment was not warranted: at [59]-[63]; and

(6) the four months custodial sentence was set aside and in lieu thereof a fine of $2,500 was imposed in light of the maximum monetary penalty of $3,300: at [69] and [72].

- **Costs**

***Stanton Dahl Architects v Penrith City Council*** [2010] NSWLEC 156 (Biscoe J)

Facts: an appeal to a Class 1 development consent was upheld and development consent granted by two Commissioners of the Court. The respondent sought an order for the costs of two hearing days caused by amendments to plans which addressed the concerns of the two presiding commissioners.

Issues:

(1) whether the applicant should pay the respondent's costs of the hearing days caused by the amendment to plans in response to the commissioners' "amber light".

Held: ordering the applicant to pay the respondent's costs thrown away by reason of the amendment:

(1) s 97B of the *Environmental Planning and Assessment Act* 1979, which applied to the costs of amended development applications, did not apply in this case as the proceedings were commenced prior to the commencement of that section: at [10];

(2) r 3.7 of the Land and Environment Court Rules 2007 applied. It provided that there would be no order as to costs unless "fair and reasonable in the circumstances": at [11];

(1) the mere making of "amber light" amendments was not by itself a circumstance that always makes it fair and reasonable to make an order for costs: at [18];

(2) where "amber light" amendments lead to costs thrown away, then there may be some justification for making an order that the applicant pay costs thrown away by reason of the amendment: at [18];

(3) the making of "amber light" amendments by itself did not justify an order that the applicant pay the costs of the further hearing: at [18]; and

(4) in this case, it was not fair and reasonable in the circumstances to order the applicant to pay the costs of the further hearing. However, it was fair and reasonable to order the applicant to pay the respondent any costs thrown away by reason of the amendments: at [23].

***Edwards v The Hills Shire Council*** [2010] NSWLEC 190 (Biscoe J)

Facts: in earlier proceedings, an appeal against the council's refusal of a DA was dismissed on the council's motion that it was an abuse of process. The applicant, Mr Edwards, was ordered to pay council's costs. The costs order could not be enforced as the council was unable to locate Mr Edwards. Consequently, the council sought costs orders against a non-party, Mr Wong, who the council claimed was the real party to the litigation.

Issues:

(1) whether the costs order against Mr Edwards should be set aside as an irregularity under r 36.15 of the Uniform Civil Procedure Rule 2005 ("UCPR");

(2) whether Mr Wong should be joined as a party and ordered to pay the council's costs; and

(3) whether Mr Wong should be ordered to pay the council's costs as a non-party pursuant to s 98 of the *Civil Procedure Act* 2005 ("CPA").

Held: dismissing the appeal:

(1) if the council's "real party" contention were correct the costs order against Mr Edwards would have been made irregularly: at [43]. However, Mr Wong was not the real party, he was Mr Edward's agent: at [48];

(2) assuming the costs order was set aside, the joinder of Mr Wong for the purposes of making a costs order against him would be prohibited under r 6.26 of the UCPR unless he was a "proper party" to the proceedings: at [52];

(3) Mr Wong was not a "proper party" because, being an agent, his rights and liabilities would not be affected by the outcome of the proceedings: at [54];

(4) the power of the Court to make a costs order against a non-party is apparent from the words "the court has full power to determine by whom…costs are to be paid" in s 98(1)(b) of the CPA: at [56]-[57]. In Class 1 of the Court's jurisdiction this is subject to r 3.7(2) of the Land and Environment Court Rules 2007 which provide that no costs order is to be made unless the Court considers that it is "fair and reasonable in the circumstances": at [63]; and

(5) if the council's "real party" contention were correct it would be fair and reasonable to order costs against Mr Wong given that it was unlikely anything would be recovered from Mr Edwards and because Mr Wong had an interest in the outcome of the litigation. However, since the "real party" contention was not accepted it was not in the interests of justice to order costs against Mr Wong: at [64].

***Taylor v Port Macquarie-Hastings Council*** [2010] NSWLEC 153 (Biscoe J)

Facts: in earlier proceedings the applicants were awarded $1,733,586 compensation for the compulsory acquisition of their land. The Court then had to determine a number of issues relating to costs.

Issues:

(1) whether the applicants unaccepted 2005 offer of compromise of $1,200,000 plus costs on an indemnity basis was made in accordance with the Supreme Court Rules 1970 ("SCR");

(2) whether the respondent's 2010 unaccepted offer of compromise of $1,600,000 plus statutory interest which was open for four days was "open for such time as is reasonable in the circumstances" as required by r 20.26 of the Uniform Civil Procedure Rules;

(3) whether the respondents should be excepted from any costs relating to a 2005 subpoena to produce;

(4) whether the applicants should pay 15% of the respondent's costs associated with preparation of the case on the basis of a rural/residential subdivision, which the applicants abandoned at trial; and

(5) whether the applicants should pay 60% of the respondent's costs associated with the applicant's three comparable sales which the court did not accept.

Held:

(1) the applicant's 2005 offer of compromise was ineffective as an offer of compromise under the SCR as it required the respondent to pay the applicants costs on an indemnity basis which purported to "negative or limit the operation" of SCR r 52A.22(1): at [34];

(2) the applicants were elderly people who were likely to be reliant on their lawyers and valuers for advice. At the time of the respondent's 2010 offer of compromise the applicant's valuer was engaged in joint conference and their lawyers were engaged in final preparation for the trial and had to travel to northern NSW for the Court's view. In these circumstances the offer was not "open for such time as is reasonable in the circumstances" as required by r 20.26 of the UCPR: at [50];

(3) costs in relation to the applicant's 2005 subpoena to produce should be excepted from the costs awarded to the applicants as the subpoena led to a substantial waste of time and resources and was in the nature of a fishing expedition: at [68]; and

(4) given the special nature of compulsory acquisition cases and the fact that the court often prefers the evidence of one valuer over the other it was not reasonable to make a special costs order in regard to the applicants three comparable sales or the issue of the rural/residential subdivision highest and best use: at [82].

***S J Connelly Pty Ltd v Ballina Shire Council*** [2010] NSWLEC 167 (Biscoe J)

Facts: the applicant was given leave to amend its development application to rely on amended plans. The council sought an order that the applicant pay its costs pursuant to s 97B of the *Environmental Planning and Assessment Act* 1979.

Issues:

(1) whether the amendments were "minor" within the meaning of s 97B.

Held: ordering the applicant to pay the respondent's costs:

(1) the amendments required the council to significantly reassess parking and traffic issues and the economic impact of the proposed development: at [16]. Having regard to their overall effect, the amended plans did not constitute a minor amendment to the development application: at [17].

***Walfertan Processors Pty Ltd v Upper Hunter Shire Council (No 5)*** [2010] NSWLEC 109 (Pain J)

Facts: the matter involved a notice of motion from the applicant and the second respondent that each pay the costs of the other following Class 1 proceedings where the applicant was granted development consent subject to conditions.

Issue:

(1) whether the Court had discretion to award costs in Class 1 proceedings if it considered it fair and reasonable to do so under r 3.7(3) of the Land and Environment Court Rules 2007.

Held: her Honour dismissed each of the parties' notice of motion and held that the applicant and second respondent were to pay their own costs of the proceedings. Her Honour noted:

(1) the very late joinder of the second respondent altered the circumstances of the proceedings, particularly in relation to a number of merit matters which arose in the course of the hearing as a result of the deliberation of experts including those of the second respondent: at [37]; and

(2) there was no basis for the second respondent to argue (relying on r 3.7(3)(f)(i) of the Court Rules – commencing proceedings without reasonable prospects of success) that at the outset of the hearing the applicant had failed to provide necessary information to enable development consent to be granted: at [47].

***Vilro Pty Ltd v Roads and Traffic Authority of NSW*** [2010] NSWLEC 141 (Pepper J)

Facts: Vilro Pty Ltd ("Vilro") applied to vacate a two week hearing on the basis that one of its expert witnesses, a town planner, was unavailable to attend the hearing because of an overseas family business commitment. Initially the expert had agreed to be available for the hearing. The motion was subsequently withdrawn subject to the issue of costs because the parties took up the Court's suggestion that the matter be set down for an extra earlier day of hearing to allow the expert town planning evidence to be given.

Issues:

(1) whether the applicant should be ordered to pay the respondent's costs.

Held: ordering the applicant to pay the respondent's costs:

(1) had the application to adjourn not been withdrawn it would have been dismissed on the basis that there was insufficient evidence of real prejudice to Vilro, Vilro's conduct in handling the situation was less than satisfactory and the granting of the adjournment would have had an adverse impact on the efficient running of Court business: at [33];

(2) Vilro had failed to adequately explore alternative arrangements with the Roads and Traffic Authority of NSW ("the RTA") and to make a timely decision to terminate the expert's engagement when the expert

was indecisive as to her availability to attend the hearing: at [29], [32]. Vilro also was dilatory in seeking to engage an alternative expert town planner: at [27];

(3) maintaining the hearing dates would have resulted in prejudice to Vilro in terms of additional costs and expenditure but this could have been accommodated by Vilro and no irreparable harm would have resulted had the vacation not been granted: at [25]-[26], [33]. The RTA would have, by contrast, suffered prejudice if the adjournment was granted inasmuch as the litigation would not have been finalised until 2011: at [30]. Accordingly, to vacate the hearing dates would not have resulted in the just, quick, or cheap determination of the proceedings: at [32]; and

(4) an expert witness' paramount duty is to the Court and not to his or her client. It is expected that when an expert gives a commitment that he or she will be available to attend a hearing to give evidence the commitment will be honoured save only the most exceptional circumstances, which will generally be beyond the control of the expert: at [37].

- **Practice and Procedure**

***Council of the City of Sydney v Samadi*** [2010] NSWLEC 125 (Pepper J)

Facts: the respondent sought to adjourn Class 4 proceedings pending the resolution of a Class 1 appeal which had been granted expedition. The basis of the application was that if the Class 4 proceedings were to continue to hearing but the respondent was successful in the Class 1 proceedings, costs would be wasted. In the Class 4 proceedings the Council of the City of Sydney ("the council") sought a declaration that the respondent had failed to comply with an order to cease the use of premises for residential purposes when consent had been given for commercial use only. The Class 1 appeal was against the deemed refusal of a development application for the demolition of the premises and the construction of a mixed use development.

Issues:

(1) whether the likelihood of wasted costs was sufficient to adjourn the Class 4 proceedings when the Class 1 matter had been expedited but remained pending.

Held: dismissing the application:

(1) it was not likely that costs would be wasted in hearing the Class 4 matter because even if the Class 1 appeal was successful it nevertheless remained uncertain when, or if, construction would commence: at [52]-[54];

(2) there was no guarantee that the alleged unlawful use would cease even if the Class 1 appeal was successful, and therefore, it was not unreasonable for the council to proceed with the Class 4 matter: at [56]; and

(3) an adjournment would not have satisfied the overriding purpose of s 56 of the *Civil Procedure Act* 2005 as it would neither have facilitated the just nor quick determination of the real issues in dispute: at [57].

***Director General, NSW Department of Industry & Investment v Mato Investments Pty Ltd (No 2)*** [2010] NSWLEC 196 (Biscoe J)

Facts: three of the four defendants in criminal proceedings in Class 5 of the Court's jurisdiction applied to postpone their joint trials on the ground that they were unable to afford legal representation by the fixed trial dates due to changed financial circumstances.

Issues:

(1) whether the trial of the three defendants should be postponed;

(2) if so, whether the trial of the fourth defendant, who opposed postponement, should be postponed; and

(3) whether certain costs of the fourth defendant should be paid by the other three defendants.

Held: in determining that the trial of all four defendants should be postponed:

(1) the trial of the three defendants should be postponed as they were charged with serious crimes and were unable to obtain legal representation by the trial date: at [25];

(2) the trial of the fourth defendant should be postponed because if there were to be separate trials there was the prospect of cut-throat defences leading to verdicts that are inconsistent on the facts. There would also be a duplication of prosecution costs and inconvenience to witnesses, many of whom were from interstate and regional areas: at [31]-[33]; and

(3) the three defendant's should pay the fourth defendant's non-refundable accommodation costs for the vacated hearing dates and the costs of this notice of motion: at [37].

***Ku-ring-gai Council v Abroon*** [2010] NSWLEC 176 (Craig) J

Facts: the defendant was charged with two offences against s 125(1) of the *Environmental Planning and Assessment Act* 1979. He had obtained development consent for the erection of townhouses subject to deferred development conditions. The requirements of that condition were not met when construction commenced. The defendant's evidence was that a certifier had authorised commencement of work and had subsequently inspected building construction. Shortly prior to the sentence hearing, the prosecutor filed evidence by the certifier denying the defendant's allegations. The sentence hearing had previously been adjoined. The defendant applied to vacate the hearing date to meet the certifier's evidence. He had issued subpoenas to address the disputed facts. The subpoenas were not returnable until after the hearing date.

Issues:

(1) whether in the circumstances the hearing date should be vacated.

Held: hearing date vacated:

(1) vacating the hearing on sentence for a second time is a course not lightly to be undertaken. It is unsatisfactory in the context of the Court's proper and efficient control of proceedings before it: at [20];

(2) the defendant was substantially responsible for the difficulty in which he found himself. Had he filed his evidence in time, it was likely that there would be sufficient time to issue the necessary subpoenas: at [18]; and

(3) however, there were a number of factors in favour of vacating the hearing date, namely:

    (a) breach of s 125(1) of the *Environmental Planning and Assessment Act* 1979 is a serious offence for which a maximum penalty of $1.1M is provided: at [19];

    (b) the evidence sought to be adduced by the defendant was important in assessing penalty, as it supported his assertion that at no time did he believe that he was acting in breach of the law: at [19];

    (c) the adjournment of the first sentence hearing date was occasioned by circumstances not entirely within the defendant's control and was consented to by the prosecution: at [21];

    (d) no continuing offence was alleged: at [21]; and

    (e) the council acknowledged the importance of the issues in dispute to the proper assessment of penalty: at [21].

## Commissioner Decisions

***Pavlovski v Ku-ring-gai Council*** [2010] NSWLEC 1197 (Brown C)

Facts: the applicant appealed under s 97 of the *Environmental Planning and Assessment Act* 1979 ("the EPAA") against the deemed refusal of a development application for consent to the demolition of existing structures, which included a dwelling, and erection of a residential flat building containing 5 units. Following amendment of the plans, it was common ground that the planning contentions raised by the council were addressed, and that there was no basis for refusal of the application on planning grounds. The parties disagreed about the imposition of a condition requiring the provision of a contribution under s 94 of the EPAA. The council sought to impose a condition requiring contribution of $127,833.41 based on the Ku-ring-gai Section 94 Contributions Plan 2004-2009 (No 2); the applicant submitted that the appropriate contribution was $80,000, calculated on the basis of $20,000 for each dwelling authorised by the development consent less a credit of $20,000 for the existing dwelling on the site.

Issues:

(1) whether the direction given by the Minister for Planning on 4 June 2010 pursuant to s 94E of the EPAA that "a council as consent authority" must not impose a condition requiring payment of a monetary contribution exceeding $20,000 for each dwelling applied to the Court; and

(2) whether the proposed contribution was unreasonable in the circumstances of the case.

Held: imposing a condition requiring a total s 94 contribution of $80,000:

(1) s 39(2) of the *Land and Environment Court Act* 1979 provided that the Court had all the functions and discretions of the council in determining an appeal, and this included the obligations imposed by the Minister's direction: at [21];

(2) the Minister's direction was also a relevant matter, being a "circumstances(s) of the case", which the Court was required to have regard to by s 39(4) of the Court Act: at [21];

(3) the discretion available to the Court on appeal under s 94B(3) of the EPAA enabled the Court to disallow or amend a contribution on the basis that it was unreasonable in the particular circumstances of the case, and did not extend to a general challenge to the Minister's direction. No evidence was provided to show why the contribution was unreasonable in the particular circumstances of the development application, beyond the question of credit for an existing dwelling, and the discretion in s 94B(3) was not available: at [22]; and

(4) a credit for the existing dwelling was appropriate because the existing dwelling did not generate the demand for public amenities and public services as required by s 94, and this approach was also adopted in the council's Contributions Plan: at [23]-[24].

***Simpson v North Sydney Council*** [2010] NSWLEC 1211 (Tuor and Fakes CC)

Facts: the applicant appealed under s 97 of the *Environmental Planning and Assessment Act* 1979 ("the EPAA") against the refusal of a development application for a 6 level residential flat building with 21 apartments and associated landscaping and parking for 37 cars at Cammeray. The site is zoned part Residential C and part Public Open Space under the North Sydney Local Environmental Plan 2001 ("the LEP"). Part of the site was rezoned from Public Open Space to Residential C in 2008. The application proposed subdivision of the site into 4 lots: Lot A, (the part of the site zoned Public Open Space) to be gifted to the Council, Lot 1 being the proposed community land of the scheme, Lot 2 being the proposed apartment building car lift and a communal deck, and Lot 3 being the existing dwelling on the site, its curtilage, pool and deck. The site was not initially identified as "bush fire prone land" in accordance with s 146(2) of the EPAA, however the Rural Fire Service ("RFS") was consulted over the proposed rezoning and development application, and identified that the bushland adjoining the site posed a bushfire risk and that the site should be afforded appropriate protection measures. In 2008 the Council adopted a Bushfire Prone Land Map that

included the northern part of the site and adjoining public open space areas a Category 2 – Buffer zone of 30 m. A Vegetation Management Plan ("VMP") prepared for the site provided an asset protection zone ("APZ") generally of 10m from the habitable parts of the building to the property boundary, reduced to 6 m in the north east corner of they site and extending up to 6 m into the area of the site zoned Public Open Space. The VMP stated that the site (excluding the Riparian Zone) would be managed as an Inner Protection Area ("IPA") and included maintenance requirements relating to canopy separation of trees and shrubs, density of ground covers, dry fuel load, and spacings for planting of trees.

Issues:

(1) whether the proposal provided an acceptable level of bushfire safety, in particular whether the APZ was of sufficient width, could be reasonably maintained and would have an acceptable impact on bushland;

(2) whether the height, bulk and proximity of the proposal to bushland had an acceptable impact on the bushland and views; and

(3) whether objections under State Environmental Planning Policy No 1 – Development Standards ("SEPP 1") to building height, building height plane, and landscape area standards in the LEP were well founded.

Held: allowing the applicant to consider whether to amend the application:

(1) the rezoning in 2008 of part of the site to Residential C, under which apartment buildings were permissible with consent, was site specific, relatively recent and had involved public consultation and consideration by council, and the zoning should be given considerable weight. However, the concurrent exhibition of the development application did not provide a tacit approval for the form of apartment building proposed: at [56]-[57];

(2) the development met the requirements of s 79BA of the EPAA. The RFS had been consulted and was satisfied that the development conformed to the requirements of Planning for Bushfire Protection 2006, and the evidence did not demonstrate any fatal fault in the assumptions on which the RFS based its assessment sufficient to warrant refusal of the application: at [98]-[99];

(3) the pruning and removal of trees required for the APZ would result in filtered views of the proposal which due to its height, bulk and scale would have an unacceptable impact on the aesthetic and scenic values of the bushland. The APZ would also reduce the effectiveness of the Public Open Space zone to provide a vegetative buffer between the development and Tunks Park. The proposal should be further setback and reduced in height to limit the extent of pruning required to provide separation between the existing trees and the building: at [125];

(4) the site had characteristics that provided opportunities and constraints for development and a strict application of the numerical controls was difficult. The proposal was of height, bulk and setback that was beyond what was anticipated by the planning controls: at [190], [192] and [217]; and

(5) the applicant should have the opportunity to consider whether to amend the application to increase the building setback and reduce the height of the building, which would reduce the impact of the proposal to an acceptable level. The changes would not result in the proposal being so markedly different as to require a further development application: at [220] and [227].

***Ekermawi v Great Lakes Council*** [2010] NSWLEC 1227 (Moore SC)

Facts: the applicant appealed under s 97 of the *Environmental Planning and Assessment Act* 1979 against the refusal by the council of a development application to convert a railway carriage located on rural land into a dwelling. The applicant proposed to have the railway carriage treated as a movable home, and the council proposed a condition requiring a separate application be made to the council under s 68 of the *Local Government Act* 1993 for the use of the railway carriage for that purpose. Access to the site was by a vehicle access track between the end of a formed road across an unmade extension of that road and an undedicated Crown Road reserve.

Issues:

(1) whether upgrading of the vehicle access between the end of the formed road and the entrance to the site was required as it was not part of the development application subject of the appeal;

(2) whether the plans depicting the work proposed to be carried out were adequate;

(3) whether the measures proposed for compliance with access and asset protection provisions of Planning for Bushfire Protection 2006 were adequate; and

(4) whether the ecological information was adequate and appropriate habitat protective measures could be provided.

Held: adjourning the proceedings to enable the applicant to prepare compliant plans and for the council to prepare conditions:

(1) the bushfire experts agreed that the Rural Fire Service requirement for upgrade of the internal access track within the property to comply with Planning for Bushfire Protection 2006 ("PFBP") was appropriate. They also agreed that the access track between the property boundary and the termination of the formed portion of the road required upgrading before general safety issues were acceptable. It was therefore necessary that there be a deferred commencement condition requiring upgrading works between the formed road and the property boundary, which would require applications to the council for approval, to be undertaken before any development consent became operative: at [28]-[29];

(2) the plans did not comply with Schedule A of the Land and Environment Court Practice Note for Class 1 Development Appeals: at [39];

(3) the plans were not sufficiently accurate and detailed to be capable of providing a basis for development consent: at [52];

(4) no work would be required to upgrade the track within the site to be satisfactory in the short term for compliance with the relevant provisions of PFBP, however it would be necessary to have a condition of consent requiring the access track, passing bays and turning loop within the site be maintained in a condition permitting safe passage by a vehicle weighing 15 tonnes: at [70];

(5) if development consent were issued it would be on the basis of the minimum asset protection zone ("APZ") of 20m to the south of the railway carriage and 35 m to the north, east and west, with that APZ incorporating a turning facility for fire fighting vehicles: at [74];

(6) there were no ecological issues within the site that would preclude the granting of consent provided the various protective measures including appropriate fencing for protection of habitat of Asperula and for the Wallum Froglet, and a condition prohibiting removal of Swamp Mahogany trees, Scribbly Gum trees, and any other trees containing hollows that were potential bird or arboreal mammal habitats, were required and implemented: at [100]; and

(7) subject to the filing of properly dimensioned and scaled plans including elevations there was no basis, subject to the revision of conditions, why the applicant should not be given development consent (subject to the foreshadowed deferred commencement conditions relating to access) for the proposed works: at [104].

***King v Der*** [2010] NSWLEC 1249 (Dixon C)

Facts: the plaintiff was the registered holder of Mineral Claim 26008 granted under s 190 of the *Mining Act* 1992, located at Lightning Ridge ("King's Claim"), and the defendant is the holder of Mineral Claim 30592, which adjoins the northern boundary of King's Claim. The plaintiff alleged that the defendants had penetrated his claim from their adjoining claim in or about October 2009 and removed 148 cubic metres of opal bearing rock and earth from the King's Claim, and had destabilised the walls and roof area of the mine area. The plaintiff sought an order for damages under s 298 of the *Mining Act* 1992 for the value of the opal dirt removed, the loss of opportunity to mine a further 50-60 cubic metres due to the actions of the defendants, and for the cost of the works necessary to stabilise the walls and roof of the mine area. The defendants

admitted to entering three feet into the King's Claim and removing a small amount of dirt, however stated that they had processed that dirt and found no opal.

Issues:

(1) how much opal bearing rock and earth had been removed by the defendants;

(2) how much opal had been removed and what was its value; and

(3) whether the defendants had destabilised the mine area.

Held: ordering the defendants to pay compensation for opal removed and for the cost of the work to stabilise the mine area, and costs:

(1) the defendants had mined to extend the workings of Mineral Claim 30592 into Mineral Claim 26008 by approximately 4.5 metres and removed approximately 148 cubic metres of opal dirt and earth from an area that contained opals of value: at [72];

(2) there remained an area of approximately 50-60 cubic metres which was not safely accessible because of the unsafe mining by the defendants: at [80];

(3) the value of the opal was $372.10 per cubic metre, however not all of the 148 cubic metres of material removed would have contained opal and a simple multiplication of the area of material removed by the per cubic metre value would be a distortion of the amount of opal taken by the defendants: at [95]-[96];

(4) it was probable and just in the circumstances to assess that the defendants retrieved opal from the material taken from the King's Claim to a value of $10,000: at [99];

(5) the defendants had destabilised the mine area because they did not mine safely and prop the walls or roof and as a consequence, the walls and roof had partially collapsed and the area was unsafe to mine: at [106]-[107]; and

(6) the defendants should pay $4,120 for the cost of stabilisation works to enable the plaintiff to mine the 50-60 cubic metres which was not accessible while the area was unstable: at [109].

# Court News

## Arrivals

Russell Cowell was appointed as an Acting Commissioner on 4 August 2010 (expertise in land valuation).

Ms Joanne Gray was appointed the Registrar of the Land and Environment Court of NSW on 1 October 2010, having acted in the position since January 2009.