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Land and Environment Court of NSW Judicial Newsletter

Legislation

- **Statutes and Regulations**

Planning:

Environmental Planning and Assessment Amendment (North West Rail Link) Regulation 2012, published 13 March 2012, amends the *Environmental Planning and Assessment Act* 1979 to make additional savings and transitional provisions relating to the North West Rail Link development, consequent on the declaration of that development as State significant infrastructure. The amendment enables existing and new requests for modifications to the deemed approval for the staged infrastructure application relating to that project to be made and dealt with.

Water:

Water Management (General) Amendment (Exemptions) Regulation 2012, published 28 March 2012, exempts a person from the requirement under the *Water Management Act* 2000 to hold certain licences or approvals (to take or use water from a water source, carry out a controlled activity in on or under waterfront land, or construct or use a water supply work), if the person carries out the activity concerned only for the purposes of complying with a direction given under the *State Emergency Service Act* 1989 or the *State Emergency and Rescue Management Act* 1989 in an emergency and the person's compliance with the direction is in accordance with the Act under which the direction is given.

Water Management (General) Amendment (Lower Murray Shallow Water Sharing Plan) Regulation 2012, published 30 March 2012, makes provision with respect to certain entitlements under the *Water Act* 1912 to take water from the Lower Murray Shallow Groundwater Source, being entitlements that are to become access licences to which Part 2 of Chapter 3 of the *Water Management Act* 2000 applies.

The Water Sharing Plan for the Lower Murray Shallow Groundwater Source 2012, commenced 30 March 2012. The Water Management (Application of Act to Lower Murray Shallow Groundwater Source) Proclamation 2012 declared that Part 2 and 3 of Chapter 3 of the *Water Management Act* 2000 apply to the Plan from 1 April 2012.

Water Sharing Plan for the New South Wales Murray and Lower Darling Regulated Rivers Water Sources Amendment Order 2012, published 15 February 2012, amends the Water Sharing Plan for the New South Wales Murray and Lower Darling Regulated Rivers Water Sources 2003, to establish planned environmental water rules relating to the management of the NSW Barmah-Millewa Environmental Water Allowance.

Mining:

The Mining Legislation Amendment (Uranium Exploration) Act was assented to on 4 April 2012. It will amend the *Mining Act* 1992, the *Uranium Mining and Nuclear Facilities (Prohibitions) Act* 1986 and other Acts and instruments to:

(a) remove the general prohibition on prospecting for uranium in NSW;
(b) enable exploration licences and associated permits (but no other licences or authorities) to be granted under the *Mining Act 1992* to prospect for uranium;
(c) apply to uranium prospecting the State environmental planning policy applicable to other mineral exploration;
(d) vest all uranium in New South Wales in the Crown and to exclude compensation for that vesting; and
(e) make other consequential amendments.

Environmental Planning and Assessment Amendment (Existing Mining Leases) Regulation 2012, published 30 March 2012, extended to 31 July 2012 a transitional provision relating to certain existing mining leases.

Pollution:

Protection of the Environment Legislation Amendment Act 2011, commenced 29 February 2012, apart from Schedule 2 [1], [20], [21] and [23] which commenced 31 March 2012. The Act amends environment protection legislation to create the office of Chairperson of the Environment Protection Authority and to make further provision with respect to the notification and management of pollution incidents, and for other purposes. The additional information required for pollution incident response management plans is set out in the Protection of the Environment Operations (General) Amendment (Pollution Incident Response Management Plans) Regulation 2012, published 24 February 2012.

Miscellaneous:

The Local Government Amendment Act 2012 was assented to and mostly commenced on 4 April 2012. The Act amends the *Local Government Act* 1993 with respect to the voting system for the election of councillors, community land, the pecuniary interests of councillors and staff affected by amalgamations; and for other purposes. [full explanatory notes]

Local Government (General) Amendment (Election Procedures) Regulation 2012, published 24 February 2012, made amendments to the Local Government (General) Regulation 2005 relating to the conduct of local council elections for councillors and mayor. The amendments include the requirements for paid electoral advertisements published on the internet.

The *Centennial Park and Moore Park Trust Amendment Act* 2012, commenced 11 April 2012. The Act amends the *Centennial Park and Moore Park Trust Act* 1983 by:

(a) extending the maximum term of a lease over Trust lands into which the Centennial Park and Moore Park Trust may enter from 20 years to 50 years, or 99 years with the approval of the Minister; and

(b) facilitating the management of the Trust by extending the power of the Trust to delegate its functions to authorised persons and by allowing the Trust to conduct its business without the necessity for a formal meeting.

The Real Property Amendment (Public Lands) Act 2012, commenced 14 March 2012, amended the Real Property Act 1900 to enable public lands to be brought under the provisions of the *Real Property Act* 1900.

The *Heritage Amendment Act* 2011, apart from Schedule 1 [11]-[12], commenced on 1 March 2012. The Act amends the *Heritage Act* 1977 in relation to the Heritage Council and the listing of items on the State Heritage Register and for other purposes.

Brigalow and Nandewar Community Conservation Area Amendment Proclamation 2012 commenced 24 February 2012, added certain land to Zones 1 and 3 of the Community Conservation Area established by the *Brigalow and Nandewar Community Conservation Area Act* 2005.

Oaths Amendment (Confirmation of Identity) Regulation 2012, published 13 April 2012:

(a) allows an authorised witness to confirm the identity of a person making a statutory declaration or affidavit based on an identification document even if the witness knows the person; and

(b) prescribes additional documents that may be used by an authorised witness to confirm the identity of an inmate (within the meaning of the *Crimes (Administration of Sentences) Act* 1999), a patient (within the meaning of the *Mental Health Act* 2007) or a forensic patient (within the meaning of the *Mental Health (Forensic Provisions) Act* 1990) who is making a statutory declaration or affidavit.

The *Fines Amendment (Work and Development Orders) Act* 2011, commenced 12 March 2012, amended the *Fines Act* 1996 to make further provision with respect to work and development orders. To assist with their implementation, the Department has issued Work and Development Order Guidelines 2012.

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

SEPP Amendment (Gwandalan) 2012, published 13 April 2012, amended the Wyong Local Environmental Plan 1991 to specify provisions relating to the Gwandalan site.

SEPP Amendment (Middle Camp) 2012 and SEPP Amendment (Nords Wharf) 2012, published 13 April 2012, amended the Lake Macquarie Local Environmental Plan 2004 in respect of land in the Middle Camp and Nords Wharf sites respectively.

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

- SEPP (Major Development) Amendment (Sydney Olympic Park) 2012, published 23 March 2012, updated the maps for Sydney Olympic Park site.

- SEPP (Major Development) Amendment (Redfern–Waterloo Authority Sites) 2012, published 16 March 2012, updated, inter alia, the maps for the sites.

SEPP Amendment (Penrith Lakes Scheme) 2012, published 24 February 2012, changes the SREP No 11 – Penrith Lakes Scheme to the SEPP (Penrith Lakes Scheme) 1989, and other housekeeping updates.

SEPP (Infrastructure) Amendment (Educational Establishments) 2012, published 17 February 2012, amended the SEPP (Infrastructure) 2007 to allow 'any person' to apply for development consent for an educational institution.

SEPP (Sydney Region Growth Centres) Amendment (Schofields Precinct) 2012, published 11 May 2012, amended the SEPP (Sydney Region Growth Centres) 2006 by amending or replacing specified maps; inserting cl 18A(2) to require notification to the Department of Planning and Infrastructure before development comprising the clearing of native vegetation is carried out by a public authority or a person acting on behalf of a public authority; and making the Schofields Precinct Plan 2012.

- **Bills**

Primary Industries Legislation Amendment (Biosecurity) Bill 2012 seeks to amend the *Animal Diseases (Emergency Outbreaks) Act* 1991, the *Fisheries Management Act* 1994, the *Noxious Weeds Act* 1993 and the *Plant Diseases Act* 1924 including:

(a) to provide for mechanisms to deal with emergency outbreaks of animal pests, such as the declaration of infested places, restricted areas and control areas and accompanying restrictions on movement, and orders relating to control and eradication of animal pests;

(b) to prohibit interim court orders that might prevent or delay emergency measures in circumstances where there is an emergency outbreak of notifiable weeds or plant diseases or pests;

(c) to provide for the use of quarantine areas to control the spread of noxious fish and noxious marine vegetation and to make other provision with respect to noxious fish and noxious marine vegetation; and

(d) to enable various orders relating to fish and marine vegetation quarantine areas, noxious weeds and plant diseases and pests to be published urgently in newspapers or on a government website; (e) to require the appropriate authorities to be notified by persons who, while acting in a professional capacity, become aware of the presence of an emergency animal disease or pest or a notifiable weed or a notifiable plant disease or pest.

National Parks and Wildlife Amendment (Adjustment of Areas) Bill 2012 seeks to amend the *National Parks and Wildlife Act* 1974:

(a) to change the reservation of part of the Berowra Valley Regional Park to a national park to be known as Berowra Valley National Park;

(b) to revoke the reservation of parts of Broadwater National Park, Kooraban National Park, Yaegl Nature Reserve, Cooperabung Creek Nature Reserve and Bogandyera Nature Reserve and to vest that land in the Minister for the purposes of Part 11 of the Act; and

(c) (c) to provide that the Minister must not transfer that land (other than certain land in Bogandyera Nature Reserve) under Part 11 of the Act unless satisfied that appropriate compensation has been provided.

- **Miscellaneous**

The Minister for Local Government (The Hon Don Page) has established an Independent Review Local Government Review Panel that will investigate governance models, structural arrangements and boundary changes for local government in NSW. The panel will consider the:

(a) ability to support the current and future needs of local communities;
(b) ability to deliver services and infrastructure efficiently, effectively, and in a timely manner;
(c) financial stability of each LGA;
(d) ability for local representation and decision making; and
(e) barriers and incentives to encourage voluntary boundary changers.

The NSW Law Reform Commission has released its report on Penalty Notices. [full report] [summary]

The NSW Parliamentary Library Services has released a briefing paper on Noxious Weeds [full paper] [summary]

Court Practice and Procedure

- **Civil Procedure Amendments**

Uniform Civil Procedure Rules (Amendment No 50) 2011, published 9 December 2011, amended rule 33.10 of the Uniform Civil Procedure Rules 2005. Following the approval of Forms 26A and 27A for subpoenas, the notice and declaration that an issuing party was previously required to attach to a subpoena for use by an addressee now form part of the approved form for a subpoena. The amendment recognises that the notice and declaration are no longer required to be attached to a subpoena because they form part of the subpoena.

- **Criminal Procedure Amendments**

The *Criminal Procedure Amendment (Summary Proceedings Case Management) Act* 2012 commenced operation on 30 April 2012.

The object of the Act is to amend the *Criminal Procedure Act* 1986 to make provision for case management procedures to reduce delays in trial and sentencing proceedings before the Supreme Court and the Land and Environment Court in their summary jurisdiction. Amongst the measures the courts may make are orders requiring that certain disclosures be made by the prosecution and the defence before a trial or sentencing hearing. The Act includes provision for preliminary hearings and preliminary conferences. Section 247V enables the court to make such orders, determinations or findings, or give such directions or rulings, as it thinks appropriate for the efficient management and conduct of the trial or sentencing hearing.

The Land and Environment Court will shortly release a Practice Note for Class 5 matters to reflect the provisions of the Act.

Judgments

- **NSW Court of Appeal and NSW Court of Criminal Appeal**

Valuer-General of New South Wales v In Adam Pty Limited [2012] NSWCA 20 (Allsop P, Handley and Tobias AJJA)

(related decision: *In Adam Pty Ltd v Valuer-General* [2011] NSWLEC 55 Biscoe J)

Facts: the owner of land occupied by a heritage restricted building appealed against land values determined by the Valuer-General for 2006, 2007 and 2008. Section 14G(1)(b1) of the *Valuation of Land Act 1916* required the land value of land with heritage restricted buildings to be determined on the assumption that all improvements on the land were new without any deduction for their actual condition. Two commissioners of the Court upheld objections to the valuations, finding that a newly built copy of the heritage restricted building would cost $1,666,203 more than a new, non-heritage building, with the same net lettable area. Biscoe J on an appeal under s 56A of the *Land and Environment Court Act 1979* held that the additional cost reduced the land values. The Valuer-General sought leave to appeal claiming that Biscoe J had erred in allowing the deduction.

Issue:

(1) whether the increased cost of constructing a new “heritage” building compared with the cost of constructing a new “non-heritage” building with the same net lettable area should be deducted in arriving at the value of the property.

Held: dismissing the application for leave to appeal:

(1) section 14G(1) operated in conjunction with s 6A(1) which defined "land value" and both had to be applied in the valuation exercise: at [22];

(2) the assumptions required by s 14G(1) had to be included in the matters which the parties to the hypothetical sale assumed by s 6A(1) were perfectly acquainted with, "the land, and cognizant of all circumstances which might affect its value": at [23];

(3) most of the assumptions in s 14G(1) modified the basic, but artificial, assumption in s 6A(1) that the improvements other than land improvements had not been made. While those assumptions introduced facts from the real world, s 14G(1)(b1) was different because it introduced a fiction that bore no relationship to the real world: at [24];

(4) the imaginary new heritage restricted building which had to be treated as real had as one of its inevitable corollaries an imaginary cost of construction. There being no relevant prohibition, one of the consequences which the Court had to treat as real was that the hypothetical willing and informed purchaser would take its cost of construction into account in negotiating for the purchase of the land: at [26].

Darley Australia Pty Ltd v Walfertan Processors Pty Ltd [2012] NSWCA 48 (McColl, Macfarlan and Whealy JJA)

(related decisions: *Walfertan Processors Pty Ltd v Upper Hunter Shire Council (No 4)* [2010] NSWLEC 108 Pain J; *Walfertan Processors Pty Ltd v Upper Hunter Shire Council* [2009] NSWLEC 1260 Moore SC and Taylor C)

Facts: Walfertan Processors Pty Ltd ("Walfertan") owns and has operated a tannery at Aberdeen since about 1990. The tannery was established in 1973. In 1992 the Upper Hunter Shire Council ("the council") consented to the upgrading of effluent treatment facilities for effluent discharged as part of the tanning process. In 2008 Walfertan applied for development consent to treat tannery effluent both on the tannery land and on other land previously used for an abattoir. Walfertan appealed under s97 of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act") against the deemed refusal of consent for that application. The owners of land adjacent to Walfertan's property ("Darley") were joined to the appeal. One of the issues raised in the Class 1 appeal was whether Walfertan was required to prepare and submit an environmental impact statement ("EIS") before the council could consider the merits of the development application. Walfertan accepted that the development application related to designated development, but contended that because the development proposed was for the improved environmental performance of an existing operation being the treatment and disposal of effluent, it did not significantly increase the environmental impacts of the total development within the meaning of cl 35 of Part 2, Schedule 3 to the *Environmental Planning and Assessment Regulation* 2000 ("the Regulation") which provided that development would be designated development if it "substantially increase[d] the environmental impacts of the total development (that is the development together with the additions or alterations) compared with the existing or approved development". Darley argued that an EIS was required because the development application related to the use of the land as a tannery, that there was no evidence of consent to the lawful commencement or operation of the tannery, and that absent a limit on the volume of effluent Walfertan could treat under the 1992 consent, the comparative exercise for which cl 35 called could not be undertaken. The evidence before the Commissioners included a list of development consents and building approvals granted by Scone Shire Council in 1983, 1989, and 1990 for the tannery. The Commissioners held that no EIS was required, and granted development consent. Darley appealed under s56A of the *Land and Environment Court Act* 1979. That appeal was dismissed, and leave was sought to appeal from that decision.

Issue:

(1) whether the primary judge erred in failing to find that the Commissioners had erred in applying cl 35 of the Regulation.

Held: granting leave to appeal and dismissing the appeal:

(1) the development described in the development application framed the cl 35 inquiry, and the Commissioners had not erred in identifying the use of the tannery land for the treatment and/or disposal of waste water from the tannery's operations as the relevant development: at [83], [84];

(2) the purpose of cl 35 was to identify situations where an EIS would not be required to accompany a development application in respect of designated development. An EIS would be appropriate if the effect of alterations or additions would be to increase significantly the environmental impacts of an existing development: at [88];

(3) the Commissioners did not err in law in concluding that they could undertake the cl 35 comparison: at [89]. Each step in their process of reasoning was an available finding of fact, none of which could be challenged on the appeal. The Commissioners did not err in law in concluding that the development application was not in respect of designated development: at [89]-[92];

(4) an applicant for development consent seeking to rely on cl 35 to establish that a development was not a designated development, had to demonstrate the elements of that clause to the relevant decision-maker: at [101];

(5) if the question whether the tannery was an "existing or approved" development was material, then it was necessary for the Commissioners to reach a conclusion of fact on that issue by reference to the materials before them: at [107]; and

(6) the primary judge did not err in concluding that the tannery could have been considered as an "existing or approved development", and this was an appropriate case for application of the presumption of regularity: at [119]-[120].

Martin v State of New South Wales (No 14) [2012] NSWCA 46 (Basten and Meagher JJA, Handley AJA)

(related decisions: *Martin v State of New South Wales and Central West Scientific Pty Ltd* [2011] NSWLEC 50 Preston CJ; *Martin v State of New South Wales & Anor* [2011] NSWLEC 20 Pain J; *Martin v New South Wales Minister for Mineral and Forest Resources* [2010] NSWLEC 131 Biscoe J; *Martin v State of New South Wales* [2011] NSWLEC 126 Sheahan J)

Facts: Mr Martin ("the appellant") had challenged in a number of proceedings in the Land and Environment Court, against a number of respondents, grants under the *Mining Act* 1992 ("the Act") of a number of mining tenements. The appellant appealed as of right against the judgment of Preston CJ dismissing an application for judicial review of the decision of the Minister for Mineral Resources to grant an exploration licence (EL 7547) to Central West Scientific Pty Ltd ("Central West"); and against the judgment of Pain J striking out Mr Martin's points of claim in relation to the grant of an exploration licence (EL 7613) to Highlake Resources Pty Ltd ("Highlake") and staying proceedings and ordering security for costs. On 15 August 2011 the appellant filed a notice of motion seeking orders in 10 separate proceedings naming seven respondents: The parties were heard in relation to claims for stay of an order for costs against the appellant; a claim for various respondents and their lawyers to show cause why they should not be charged with contempt; and a claim for exemplary damages against various respondents and their solicitors.

Issues:

(1) whether Preston CJ had made an error of law in dismissing the challenge to the validity of EL 7547;

(2) whether the appellant should be entitled to his costs in the Court of Appeal against Highlake in relation to the appeal from the orders of Pain J; and

(3) whether any of the orders sought in the notice of motion filed 15 August 2011 should be granted.

Held:

(1) dismissing the appeal from the judgment of Preston CJ:

(a) the appellant had failed to demonstrate any error of law in the judgment of Preston CJ on the grounds of appeal relating to disclosure of confidential information, failure to consider relevant matters, deficiencies in the application for the exploration licence, execution of the licence, application of departmental policy, absence of information relating to the lapsing of the

appellant's exploration licence, and alleged preferential treatment of Central West: at [13], [20], [44], [46], [50], [53]-[56];

(b) two of the grounds for challenge to the validity of the delegation to grant EL 7547 and execute it had already been determined by Biscoe J. The State was always the proper defendant in those proceedings and it had been substituted as respondent on appeal to the Court of Appeal. Although the cases related to different mining titles and decisions at different dates they involved the same delegation, the same delegate, the same arguments and the same parties, and the decision of Biscoe J created issue estoppels which bound Mr Martin in these proceedings: at [26]-[28];

(c) the decision-maker's discretion under s 22(1) of the Act to grant or refuse an application for a licence allowed him or her to decide whether the information provided was sufficient for the Department's purposes, and any deficiencies in information provided did not invalidate the application or the licence: at [40], [42];

(2) in relation to the appeal from the orders of Pain J:

(a) orders 2, 3, 4 and 5 should be set aside and order 6 varied to permit Mr Martin to file amended points of claim: at [62];

(b) the appeal having been conceded Mr Martin should have his costs in the Court of Appeal against Highlake, as a self represented litigant: at [63]; and

(3) dismissing the notice of motion:

(a) the application for a stay of proceedings in which Sheahan J had ordered summary dismissal of Mr Martin's claim and in which appeals had been dismissed as incompetent was dismissed with costs on the ground that there were no proceedings in the Court of Appeal which could be stayed: at [70], [72];

(b) while private litigants such as Mr Martin had standing to bring proceedings relating to contempt, the charges had to be laid with some precision and supported by affidavit evidence in accordance with Pt 55 of the *Supreme Court Rules* 1970: at [74]; and

(c) the claim for exemplary damages was incompetent in appellate proceedings where the claim had not been tried at first instance: at [75].

Bobolas v Waverley Council [2012] NSWCA 126 (McColl and Macfarlan JJA, Tobias AJA)

(related decision: Waverley Council v Bobolas (No 2) [2009] NSWLEC 211 Pain J)

Facts: Elena, Liana and Mary Bobolas appealed against orders made by Pain J under s 678(10) of the *Local Government Act* 1993 ("the Act") in relation to three orders issued by the respondent council in purported reliance on s 124 of the Act ("the s 124 order"). The s 124 order required removal and disposition of waste on residential premises owned by Mary Bobolas at Bondi; at the relevant times Elena Bobolas and Liana Bobolas, the daughters of Mary Bobolas, were occupants of the premises. The heading to the part of the s 124 order referring to the removal of rubbish was expressed to be "Terms of Proposed Order"; the words "The order will be given" appeared in that part of the document headed "Reasons for the order"; and that part of the document identifying the "Period for compliance" contained the words "…the order will require that you comply…". On 11 December 2009 Pain J made orders enabling the council or their agents to enter the appellants' properties at specified times to remove the rubbish; no costs order was made. The primary judge's orders were executed over the period 15, 17 and 18 December 2010. At the time of the proceedings in the Land and Environment Court and at the hearing of the appeal Mary Bobolas' estate was subject to the control of a manager appointed on 4 December 2009 under the *NSW Trustee and Guardian Act* 2009. On 9 December 2009 the NSW Trustee and Guardian had filed a submitting appearance on Mary Bobolas' behalf in the proceedings before the primary judge. No such appearance was filed in the appeal. In a letter dated 13 December 2011 the NSW Trustee and Guardian confirmed that the NSW Trustee and Guardian managed the finances of Mary Bobolas, had not consented to Ms Bobolas commencing the proceedings in the Court of Appeal, and had not consented to act as tutor in the

proceedings. The appellants appeared in person before the primary judge before the intervention of pro bono counsel, Mr J Doyle, and on appeal.

Issues:

(1) whether the s 124 order was valid;

(2) whether Mary Bobolas needed a tutor in the proceedings under Uniform Civil Procedure Rules r 7.14; and

(3) whether costs should be ordered.

Held: allowing the appeal and setting aside the orders made on 11 December 2009:

(1) the s 124 order was invalid. Section 124 of the Act spoke in present terms, and an order issued pursuant to its terms had to convey clearly to the recipient that that person was being ordered at that time to do or refrain from undertaking the identified action by reason of the receipt of the order. The terms of the s 124 order did not convey any requirement for immediate implementation or compliance, rather they were expressed in terms of futurity. The recipient of the s 124 order could not be certain as to whether it required present compliance or, rather, whether it was some sort of warning notice in anticipation of an order requiring removal of rubbish being issued at a later date: at [47]-[50];

(2) the Court should in the circumstances and for more abundant caution, in exercise of its parens patriae jurisdiction, appoint Elena Bobolas to be Mary Bobolas' tutor for the purposes of the appeal: at [62];

(3) the appellants should have their costs of the written submissions prepared by Mr Doyle on the question of the validity of the s 124 order, out of pocket expenses and "deferred filing fees" in the event that the condition on which those fees were deferred fall in. Save as to costs orders of 29 April 2010 and 17 June 2010 which the council agreed should be set aside, no other costs order should be made: at [72], [73]; and

(4) the costs of the primary proceedings should be remitted to Pain J for determination: at [74].

Joly Pty Ltd v Director-General, Department of Environment, Climate Change and Water [2012] NSWCA 133 (Bathurst CJ, Whealy JA, and McClellan CJ at CL)

(related decision: Joly Pty Ltd v Director-General of the Department of Environment, Climate Change and Water [2009] NSWLEC 217 Pain J)

Facts: Joly Pty Ltd ("Joly") appealed against a remediation order made pursuant to s 38 of the *Native Vegetation Act* 2003 ("the NV Act") in relation to clearing of part of a property "Yarrol" in the Moree Plains by a director of Joly, Mr John Ross Hudson. On appeal to the Land and Environment Court under s 39 of the NV Act, the primary judge made minor changes to the remediation direction. On appeal, the appellant sought to adduce additional evidence.

Issues:

(1) whether the remediation direction effectively prohibited the appellant's reasonable use of its land, such prohibition on the proper interpretation of the statute being beyond the power of the Court or the Minister; and

(2) whether the clearing was authorised by the *Moree Plains Local Environmental Plan* 1995 ("the LEP") to permit the clearing as part of normal agricultural activities such that the clearing was not in breach of s 12 of the NV Act.

Held: dismissing the appeal with costs:

(1) each direction was expressed in mandatory terms and on its face complied with the limitation on the power to make remediation directions. The fact that compliance with the direction might incidentally prevent the land being used for the period of the remedial order did not lead to the conclusion that the direction was invalid. A direction to keep cattle, pigs and vehicles off the remediated area and maintain the fencing were positive steps and ones which could constitute steps to allow the land to regenerate: at [22], [23];

(2) the proceedings in the Land and Environment Court were Class 1 proceedings and any appeal was limited to an appeal on a question of law. It followed that even if the direction was disproportionate to the damage caused, no appeal would lie: at [24];

(3) the submission that what occurred was an acquisition of property did not assist the appellant: the appellant abandoned its constitutional argument; even if the requirement to take the steps set out in some way constituted an acquisition, it would not lead to the conclusion that the direction was invalid if the work fell within s 38(2), which it did; and there was no evidence of acquisition: at [25];

(4) the fact that the LEP permitted agricultural use of the land without development consent did not override the need for specific consent under the NV Act prior to clearing native vegetation: at [27]-[30]; and

(5) the remediation order should not be redetermined, and the additional evidence had no relevance to the appeal and leave to adduce it should not be granted. It would be open to the appellant to seek a variation of the direction under s38(3) of the NV Act: at [37].

Wood v R [2012] NSWCCA 21 (McClellan CJ at CL, Latham and Rothman JJ)

(related decision*: R v Wood* [2008] NSWSC 1273 Barr J)

Facts: on 8 June 1995, the body of Ms Caroline Byrne was recovered from the rocks at the Gap at Watsons Bay. On 3 May 2006, Mr Gordon Wood was charged with Ms Byrne's murder. Mr Wood had been living with Ms Byrne at the time of her death. At trial, it was accepted that, unless the prosecution could exclude the reasonable possibility that Ms Byrne had committed suicide, a prosecution for murder would not be sustained. The expert evidence of Prof Cross, a physicist, proved instrumental in establishing the prosecution case. This included evidence, based on experimental data, that it was possible that Mr Wood had "spear thrown" Ms Byrne into the Gap. Mr Wood was convicted of murder and subsequently applied to appeal the verdict. After the trial and while the appeal was pending, Prof Cross published a book titled *Evidence for Murder: How Physics Convicted a Killer* ("the book") detailing his involvement in the case.

Issues: several grounds of appeal were considered, including (relevantly):

(1) whether on the evidence the verdict of guilty could be upheld (Ground 1):

(2) whether the expert evidence and opinions of Prof Cross caused the trial to miscarry (Ground 3);

(3) whether there had been a miscarriage of justice on account of fresh evidence and evidence undisclosed at the trial (Ground 9); and/or

(4) whether there had otherwise been any miscarriage of justice (Grounds 2 and 4 – 8).

Held: the appeal was upheld, the conviction was quashed and an order of acquittal was entered:

(1) the evidence was insufficient to establish Mr Wood's guilt beyond reasonable doubt;

(2) in collating and presenting his evidence, Prof Cross breached several of the obligations owed by him to the Court as an expert witness. This should have resulted in much of that evidence either being given limited weight or being declared inadmissible under ss 135 or 137 of the *Evidence Act* 1995: at [729];

(3) the obligations of an expert witness were identified in *National Justice Cia Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer)* [1993] 2 Lloyd's Rep 68 at 81-82 (reproduced at [719]) and are contained in the Expert Code of Conduct found in Sch 7 to the *Uniform Civil Procedure Rules* 2005. Prof Cross acted in breach of these obligations when he:

   (a) failed to make it clear when certain issues fell outside his field of specialised knowledge. Significant and important aspects of his evidence were concerned with biomechanics, yet Prof Cross was qualified as a physicist with primary expertise in plasma physics: at [466] – [468]. This

evidence should not have been admitted (*Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588): at [726];

(b) failed to provide independent assistance to the Court by way of objective unbiased opinion. Instead, he took upon himself the role of investigator and became an active participant in attempting to prove that Mr Wood was guilty: at [758]; and

(c) failed to identify the controversial nature of many of the facts and assumptions upon which his evidence was based, such as the extent of vegetation present on the cliff top, and the fact that his experiments required several "refinements" before he was satisfied that his assumptions could be proved: at [476] and [490]; and

(4) the book constituted fresh evidence that, if it had been available at trial, would have significantly diminished Prof Cross' credibility and caused much of his evidence to be given little if any weight. Further, the contents of the book revealed the existence of evidence that had not been disclosed at the trial: at [717] and [748].

Hudson v Director-General, Department of Environment Climate Change and Water [2012] NSWCCA 92 (Bathurst CJ, Whealy JA, and McClellan CJ at CL)

(related decision: *Director-General of the Department of Environment and Climate Change v Hudson* [2009] NSWLEC 4 Lloyd J)

Facts: the appellant was convicted of an offence under s 12 of the *Native Vegetation Act* 2003 ("the NV Act") in that he authorised the carrying out of clearing of native vegetation other than in accordance with a development consent or a property vegetation plan, and an offence under s 36(4) of the NV Act in that he failed to comply with a notice seeking provision of information issued under s 36(2) of the NV Act. He was fined $400,000 for the offence against s 12 and $8,000 in respect of the offence against s 36(4) and ordered to pay the prosecutor's costs. In the proceedings in the Land and Environment Court he was represented by a Mr Walters who was not a qualified lawyer. The appellant appealed against conviction and sentence.

Issues:

(1) whether Mr Walters as a non-qualified agent was entitled to appear in Class 5 proceedings in the Land and Environment Court; and

(2) whether what occurred at the trial resulted in a miscarriage of justice.

Held: dismissing the appeal against conviction, setting aside the penalties imposed and remitting the question of sentence:

(1) section 63(1) of the *Land and Environment Court Act* 1979 in terms entitled a litigant as of right to appear by authorised agent in proceedings in the Court except in proceedings in Classes 5, 6 or 7; it did not in terms prohibit the Court granting leave for an agent to appear in proceedings in those Classes. That section did not by necessary implication prohibit the Court from giving leave to a person being represented by an unqualified person in Class 5 proceedings. The insertion of s 63(2) requiring leave of the Court for an unqualified person to represent a litigant in Class 8 proceedings did not lead to the conclusion that it was otherwise the intention of the legislature to remove the power of the Court in proceedings in Classes 5, 6 or 7 to permit unqualified persons to appear with leave: at [63]-[66];

(2) even if this were not correct it would not follow that the proceedings were a nullity: at [67];

(3) the primary judge did not err as a matter of discretion in permitting Mr Walters to appear: at [68];

(4) it was not seriously contested that the conduct of the case by Mr Walters was incompetent. However, at least so far as the conviction was concerned, to the extent it was alleged that Mr Walters failed to contend that a permit authorising clearing was in existence or that he failed to adduce evidence or make submissions going to the defence of honest and reasonable mistake of fact, there was not a miscarriage of justice: at [69]-[78]; and

(5) the submissions on sentence were plainly inept and should have confirmed that Mr Walters was incapable of representing the appellant. The primary judge in those circumstances was obliged to take steps to ensure that the sentencing procedure was conducted fairly. Whether or not he should have revoked Mr Walters' leave to appear at that stage, he should at least have ensured that the appellant knew that he was exposed to significant pecuniary penalties, and of his right to make submissions and to adduce evidence in mitigation of the penalty: at [94], [95].

- **NSW Supreme Court**

Australian Leisure and Hospitality Group Pty Ltd & Anor v Dr Judith Stubbs & Anor [2012] NSWSC 215 (Nicholas J)

Facts: Martin Morris & Jones Pty Ltd ("MMJ") was retained by Australian Leisure and Hospitality Group Pty Ltd ("ALH") to provide town-planning advice and a development application for the proposed development of a Dan Murphy's liquor store in Nowra on the same site as an existing BWS store. In 2009 MMJ requested Dr Judith Stubbs to prepare a social impact assessment to support the proposed development application. During May and June 2009 MMJ provided information to Dr Stubbs regarding the operation of the proposed development and the nature of the businesses conducted by Dan Murphy's and BWS and in relation to co-located businesses conducted by ALH at two locations in Queensland and Victoria. Dr Stubbs prepared a draft report and was subsequently informed that the report would not be used for the development application and no further work was required of her. MMJ lodged the development application, which was refused by Shoalhaven Council ("the council"). In November 2011 MMJ appealed to the Court under s 97 of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act). In December 2011 Dr Stubbs was retained by the council to act as an expert witness in the appeal and to report on questions concerning the social impact of the proposed development. ALH sought an injunction to restrain Dr Stubbs from disclosing confidential information to the council and restraining her from assisting the council as an expert witness.

Issues:

(1) whether information was communicated in confidence; and

(2) whether there was a real and sensible possibility of the misuse of the information if Dr Stubbs was retained as the council's expert witness.

Held: granting the injunctions sought and restraining Dr Stubbs from any pre-trial involvement with the council or its representatives as an expert witness or otherwise:

(1) ALH had provided information orally and in correspondence relating to the operations of its co-located BWS and Dan Murphy's stores in Queensland and Victoria, including confidential sales trading figures, turnover, and retail strategies, and confidential budget and forecast figures for the proposed store: at [35];

(2) the information was imparted in circumstances of confidentiality, was identified with the requisite precision, and retained its confidentiality: at [36];

(3) ALH had not waived any claim that the information was confidential: at [37];

(4) it was possible that Dr Stubbs could inadvertently or subconsciously take into account the information concerning the operation of the co-located stores. Furthermore, she had already drawn on it for the purposes of her 2009 report to ALH as being relevant to the social impact issue, which raised the possibility of subconscious or inadvertent disclosure in her evidence in the appeal or that she would be influenced at least to some extent by the information in the formulation of her opinion to the advantage of the council: at [39];

(5) it was realistic to recognise, without casting doubt on her bona fides or honesty, that Dr Stubbs might have some practical difficulty in compartmentalising in her mind the various parcels of information, including the confidential information: at [40]; and

(6) an undertaking not to use or disclose the confidential information would not be a sufficient safeguard against the risk of inadvertent or subconscious breach by Dr Stubbs of her duty: at [41].

363 Military Road Mosman Pty Ltd v The Owners Strata Plan 72814 [2012] NSWSC 263 (Ward J)

Facts: the plaintiff company, the owners of 363 Military Road, Mosman ("the company"), applied for an order pursuant to s 149B(2) of the *Civil Procedure Act* 2005 ("the CPA") for the transfer of proceedings from the Supreme Court ("SC") to the Land and Environment Court ("LEC"). The dispute in the SC related to the refusal by the defendant ("the Strata Owners") to allow the removal or relocation of an intercom, which provided access to a security car park on their land. The intercom was located on a right of way registered in favour of the company. The company was required under condition 1(b) of a of a deferred development consent ("the consent") issued by Mosman Council ("the council") to remove or relocate the intercom, the council being concerned as to the impact of the intercom on traffic flows. Following commencement of the SC proceedings, the company applied to the council for modification of the consent in order to remove condition 1(b) and, following the council's deemed refusal, commenced Class 1 proceedings in the LEC against the council.

Issues: whether the SC proceedings should be transferred to the LEC. Specifically:

(1) whether there were "related proceedings" already commenced in the LEC, those being proceedings so closely associated as to form part of the same controversy; and

(2) whether the LEC was a "more appropriate" forum to hear both sets of proceedings together (s 149B(2) of the CPA).

Held: the application for the transfer of proceedings to the LEC was not granted. Instead, the SC proceedings were stayed until the determination of proceedings in the LEC:

(1) it was doubtful that the LEC proceedings were "so closely associated" to the SC proceedings so as to form part of the one controversy: at [23];

(2) even if the matters were sufficiently related, it would not be appropriate or expedient for them to be heard together in the LEC because:

(a) each matter concerned separate legal issues and would require different evidence. In particular, the LEC proceedings related to public planning issues while the SC proceedings concerned private rights in relation to an easement: at [22];

(b) it was possible that the outcome of LEC proceedings would obviate the utility of the SC proceedings. Namely, if the LEC proceedings resulted in condition 1(b) being removed, the presence of the intercom would cease to be an issue for the purpose of the SC proceedings: at [16] and [27]; and

(c) the Strata Owners should not be forced to incur the costs of participation in the dispute over the consent condition where they were not a necessary party: at [32].

- **Land Court of Queensland**

Xstrata Coal Queensland Pty Ltd v Friends of the Earth –Brisbane Co-Op Ltd and Department of Environment and Resource Management [2012] QLC 013 (MacDonald CAC)

Facts: Xstrata Coal Queensland Pty Ltd, ICRA Wandoan Pty Ltd and Sumisho Coal Australia Pty Ltd ("Xstrata") applied for three mining leases and an associated environmental authority ("EA"), under the *Mineral Resources Act* 1989 (Qld) ("the MRA") and the *Environmental Protection Act* 1994 (Qld) ("the EPA") respectively, in relation to a proposed open cut coal mine in the Surat Basin ("the project"). In 2007 the project was declared to be a significant project for which an Environmental Impact Statement ("EIS") was required pursuant to the *State Development and Public Works Organisation Act* 1971 (Qld) ("the

SDA"). In 2008 aspects of the project were determined to be a "controlled action" by the Minister administering the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth). Xstrata submitted an EIS on 6 December 2008 and, at the request of the Coordinator-General ("the C-G") a supplementary EIS ("SEIS") was submitted in November 2009.

On 14 October 2010, the Mining Registrar granted certificates of application for the three mining leases under the MRA. One month later, the C-G produced a report that recommended the project proceed, subject to a number of conditions, including conditions for the EA and for approvals under the *Water Act* 2000 (Qld). On 10 December 2010 a draft EA was issued under the EPA that incorporated conditions from the C-G's report.

Objections were lodged to the mining lease applications ("MLAs") under the MRA and also to the application for the EA, the draft EA and conditions included in the draft EA, under the EPA by two groups: landowners and Friends of the Earth ("FOE"). The landowners' objections were based on their concerns as to the size of the proposed mine and its impact on the productive use of their land, while FOE's objections were made on climate change grounds.

Issues:

(1) whether the Land Court could make recommendations for conditions in relation to applications made under the MRA and the EPA that were inconsistent with the C-G's conditions;

(2) whether the area and shape of the land over which the MLAs were granted was appropriate;

(3) whether Xstrata had properly investigated the potential impacts of proposed mining activities on groundwater resources and whether Xstrata should be made to enter into any make-good agreement with the landowners in relation to these impacts;

(4) whether the potential impacts of dust or noise warranted refusal of the MLAs or EA application, or the imposition of additional conditions; and

(5) whether the project should be refused on the basis that greenhouse gas ("GHG") emissions were expected to result from mining activities, including the activities of transporting and using the coal, and that GHG emissions would contribute to anthropogenic climate change.

Held: the Court recommended that the MLAs should be granted in part, and that the EA be issued subject to additional conditions regarding groundwater monitoring and make-good arrangements:

(1) the Court had power under the EPA to recommend conditions for the draft EA dealing with the same subject matter as conditions imposed by the C-G, provided that the Court's conditions did not contradict or were unharmonious with the C-G's conditions: at [47];

(2) the Court accepted Xstrata's submissions that additional space within the MLA areas was required to accommodate infrastructure associated with the mining activities, such as access roads and drains, and to protect persons and property from the potential impacts of blast vibration and fly-rock: at [102]. The lease was, however, limited over the Wolobee South and Glen Haven Pit areas to infrastructure (rather than coal mining) purposes: at [131]. In addition, certain areas of land identified as "restricted land" under the MRA were excised from the MLAs: at [155];

(3) the Court did not have jurisdiction to make recommendations relating to activities involving water diversions or extractions: at [206], [210] and [276];

(4) in relation to groundwater monitoring, the Court recommended that additional conditions should be included in the EA to establish a comprehensive monitoring regime relating to the deep aquifers: at [261]. No corresponding regime could be recommended in relation to shallow aquifers as this would be inconsistent with a condition made by the C-G and therefore contrary to the EPA: at [265]. The Court recommended that, as a prerequisite to the grant of the EA, Xstrata were required to reach mutually suitable make-good agreements with landowners potentially affected by adverse impacts on the availability and quality of groundwater as a result of mining operations: at [286];

(5) having regard to dust and noise controls already imposed under the draft EA, the Court did not make any further recommendations concerning noise or dust: at [350], [424] and [429]; and

(6) the potential GHG impacts did not justify refusal of the project: at [558]. Under the EPA, the Court only had jurisdiction to consider activities the subject of the EA, those being the onsite mining activities and not the activities of transporting and using the coal. Further, in accordance with the objects of the EPA, the Court was only concerned with activities that would affect Queensland's environment and not the global impacts of the project: at [599]-[600].

- **Land and Environment Court of NSW**

Judicial Review

SOCARES Support Group Inc v Cessnock City Council [2012] NSWLEC 23 (Pain J)

Facts: SOCARES Support Group Inc ("the applicant") challenged a decision of Cessnock City Council ("the council") not to engage in a competitive tendering process as required by s 55(1) of the *Local Government Act* 1993 ("the LG Act") before entering into an agreement in July 2011 with the Royal Society of the Prevention of Cruelty to Animals ("RSPCA") for the provision of pound services. The responsibilities of the council in issue arose under the *Impounding Act* 1993, the *Companion Animals Act* 1998 and the *Prevention of Cruelty to Animals Act* 1979. The Department of Local Government highlighted in 2009 and 2010 that the council's animal management operations required attention. On 8 December 2010 the council passed a resolution that the General Manager confirm the council's interest in entering into a formal arrangement for the RSPCA to manage impounded animals. There were two briefings to councillors by council officers on 9 February 2011 and 8 June 2011. On 18 May 2011 the council deferred its decision. On 11 June 2011 two councillors visited the Akuna Care Pet Hotel, a boarding kennel operator for cats and dogs. On 15 June 2011 the council passed a resolution that it would enter into a contract with the RSPCA relying on s 55(3)(i) of the LG Act which states that the requirement in s 55(1) does not apply to a "contract where, because of extenuating circumstances, … or the unavailability of competitive or reliable tenderers, a council decides by resolution (which states the reasons for the decision) that a satisfactory result would not be achieved by inviting tenders".

Issues:

(1) whether the council bore the onus of proof in the proceedings;

(2) what was the test of council satisfaction in relation to s 55(3);

(3) whether s 55(3)(i) requires a two step approach;

(4) whether there were extenuating circumstances (ground 6a);

(5) whether the council had not properly determined that there were competitive or reliable alternative tenderers (ground 6b);

(6) whether there was a failure to take into account:

  (a) that there were competitive and reliable alternatives to the RSPCA (ground 7a(i));

  (b) that the council was aware of the availability of competitive or reliable alternatives including Akuna Care Pet Hotel (ground 7a(iii); and

  (c) that there were no extenuating circumstances (ground 7a(iv));

(7) whether the council failed to give proper, genuine and realistic consideration to competitive and reliable alternatives to the RSPCA including Akuna Care Pet Hotel (ground 7a(ii));

(8) whether the council took into account irrelevant considerations (grounds 7b(i)-(iv)); and

(9) whether the December 2010 resolution demonstrated that the council had already made up its mind to grant the contract to the RSPCA without calling for tenders (ground 9).

Held: summons dismissed:

(1) there was nothing in s 55(3)(i) suggesting that the usual onus of proof in judicial review proceedings, that the applicant bears the onus of establishing its case, did not apply: at [8]-[10];

(2) the relevant test of council satisfaction was whether the council was reasonably satisfied of the two exceptions relied on in s 55(3)(i) (extenuating circumstances and unavailability of competitive and reliable tenderers) on the material before it: at [11], [54]. The exception in s 55(3)(i) must be satisfied at any time before entry into the contract and practically in this case it was at the time of the decision to enter into a contract on 15 June 2011. The council only had to be satisfied of one of the specified circumstances for the exception to operate: at [51];

(3) s 55(3)(i) did not involve a two step approach requiring that the council identify separately from its reasons in its resolution that it was satisfied that a satisfactory result would not be achieved by inviting tenders. The resolution mirrored the words of the subsection; it stated that a satisfactory result could not be achieved and identified four reasons purporting to relate to extenuating circumstances and unavailability of competitive tenderers: at [53];

(4) much of the applicant's case amounted to a challenge to the merits of the council's decision in the June 2011 resolution which was not a matter able to be considered in judicial review proceedings: at [52]. Ground 6a stating that there were no extenuating circumstances was an attack on the council's view that extenuating circumstances existed and could not be maintained: at [54]. In any case one of the four stated reasons suggested an extenuating circumstance to which the council had regard. There was evidence that the council had an immediate and critical need to address operational requirements and occupational health and safety concerns. Ground 7a(iv) similarly failed: at [56], [64]. Ground 6b was also framed as a merits review ground and failed: at [57];

(5) in relation to ground 7a(i), s 55(3) did not require the council to identify the availability of alternative competitive or reliable tenderers to the RSPCA. It was required to be satisfied of the unavailability of competitive or reliable tenderers, a materially different emphasis in obligation imposed on the council: at [60]. In any event there was evidence in the council file that council officers undertook a process to determine the availability of tenderers who could undertake all the services required in light of the council's legislative responsibilities for impounded animals: at [61];

(6) ground 7a(iii) was not maintainable on the evidence. The history of briefings provided by council officers, consideration at council meetings in February 2011, May 2011 and June 2011 and attendance at the Akuna Care Pet Hotel site by two councillors in June 2011 gave rise to the clear inference that the councillors were aware of other interested parties including Akuna Care Pet Hotel at the time of the June 2011 resolution: at [62];

(7) when applying the ground of proper, genuine, and realistic consideration, the court must be mindful not to trespass on the merits. Ground 7a(ii) was not made out on the evidence for the reasons identified in relation to ground 7a(i) and (iii): at [66];

(8) with regard to the ground of taking into account irrelevant considerations (grounds 7b(i)-(iv)), as the LG Act conferred an unconfined discretion and did not state expressly or by implication that a matter was to be ignored, the applicant did not satisfy the high hurdle required to succeed. The applicant's grounds were essentially assertions that the four reasons in the June 2011 resolution were irrelevant without proper bases in law or on the evidence: at [67]-[69];

(9) no authority was cited to support ground 9 and it failed on the evidence. The council's documents subsequent to the December 2010 resolution disclosed a lengthy period of investigation of options in relation to the continued operation or closure of its pound utilising another service provider: at [70]; and

(10) it was important to review the whole of the council's investigatory and decision-making processes as disclosed in the council's file rather than scrutinising single documents without regard to that wider context. By way of general answer to the applicant's case the council's evidence showed a lengthy process of consideration by the council from 2003 of the best way to deal with its statutory animal welfare obligations. The councillors were well informed of the issues relevant to the decision made in June 2011 and there could be no suggestion that the councillors had closed their minds at a point in time before the June 2011 resolution: at [71]-[73].

Shellharbour City Council v Minister for Planning [2012] NSWLEC 29 (Craig J)

Facts: Shellharbour City Council ("the council") challenged the Minister for Planning's approval of a concept plan under s 75O of the *Environmental Planning and Assessment Act* 1979 for the urban development of a site in the Calderwood Valley ("the Site"). The challenge was made on the single ground that the Minister's power was constrained by cl 8N(1) of the Environmental Planning and Assessment Regulation 2000 ("the Regulation"). The council argued that this constraint was to be imposed by reference made to the State Environmental Planning Policy (Major Projects) 2005 ("the Major Projects SEPP") under cl 8N(3) of the Regulation. Under the definition section of of the Major Projects SEPP, cl 3(1)(e) provides that "land identified in an environmental planning instrument as being of … high biodiversity significance" is an "environmentally sensitive area of State significance". The council argued that land identified as an "area of high conservation value" under cl 36 of the Shellharbour Rural Local Environmental Plan 2004 ("the LEP"), satisfied this definition and the Minister was therefore prohibited from approving an urban development such as that in the Calderwood Valley.

Issue:

(1) whether or not cl 8N(1) of the Regulation denied the Minister power to give approval to the concept plan because the site was within an "environmentally sensitive area of State significance" as defined in the Major Projects SEPP.

Held: summons dismissed:

(1) the Court rejected the council's approach to interpretation of cl 8N(1) of the Regulation as it:

   (a) did not directly apply the language of the provision: at [33], [34]-[38];

   (b) did not accord with the statutory and regulatory context: at [33], [39]-[42]; and

   (c) did not give effect to a purposive construction of the provision: at [33], [43]-[47];

(2) there was no basis upon which the language of cl 36 could be construed to mean "high biodiversity significance": at [48]-[56]. Therefore, the Court did not accept the council's submission that an "area of high conservation value" under cl 36 of the LEP satisfied the definition of an "environmentally sensitive area of State significance" under cl 3(1)(e) of the Major Projects SEPP: at [56]; and

(3) the council's reliance on a nature conservation study in support of its submissions went beyond the limited evidentiary purpose for which the study was admitted: at [31], [60]-[62]. While reference to the study was made in the LEP for the limited purpose of completing expressions defined therein, the text of the study could provide no basis for aiding the interpretation process: at [62].

Hoxton Park Residents Action Group Inc v Liverpool City Council (No 3) [2012] NSWLEC 43 (Biscoe J)

(related decisions: *Hoxton Park Residents Action Group Inc v Liverpool City Council* [2010] NSWLEC 242 Biscoe J; *Hoxton Park Residents Action Group Inc v Liverpool City Council (No 2)* [2010] NSWLEC 259 Biscoe J; *Hoxton Park Residents Action Group Inc v Liverpool City Council* [2011] NSWCA 349 Giles, Basten and Macfarlan JJA; *Hoxton Park Residents Action Group Inc v Liverpool City Council (No 2)* [2011] NSWCA 363 Allsop P, Beazley and Basten JJA; *Hoxton Park Residents Action Group v Liverpool City Council (No 4)* [2012] NSWLEC 67 Biscoe J)

Facts: in 2009, the first respondent council granted development consent to Malek Fahd Islamic School, the third respondent, for the erection of a school and road on land owned by the Australian Federation of Islamic Councils, the second respondent. The applicant challenged the consent on the grounds that the council had failed to consider the environmental impact on an endangered ecological community ("EEC") of the proposed construction of a bridge over a creek which ran across the land. The council filed submitting appearances save as to costs in all proceedings. At first instance ([2010] NSWLEC 242), the Court held that the consent was invalid because the council had failed to consider a matter mandated to be considered by s 79C(1)(b) of the *Environmental Planning and Assessment Act* 1979 ("EPA Act"), but that the proceedings were time barred under s 101 of the EPA Act. On appeal ([2011] NSWCA 349), the Court of Appeal found that the proceedings were not time barred because the s 101 EPA Act notice had not

strictly complied with the regulations. The matter was remitted for determination of the appropriate relief and costs. It was common ground that the respondents had to pay the applicant's costs.

Issues:

(1) whether the Court should exercise its general discretion under s 124 of the EPA Act and make no final orders in the form of relief;

(2) alternatively, whether the Court should make orders pursuant to s 25B of the *Land and Environment Court Act* 1979 ("LEC Act") suspending the operation of the consent in part and specifying terms compliance with which would validate the consent; and

(3) whether the second and third respondents should indemnify the council in respect of the council's liability for the applicant's costs insofar as those costs were attributable to defences unsuccessfully raised by them.

Held: declaration that the consent was invalid; and injunctions against further work on the land and use of the land as a school (this latter injunction was suspended for one year); the respondents were to pay the applicant's costs; and the second and third respondents were to indemnify the council:

(1) the Court declined to exercise its discretion to refuse relief (at [29]) because:

(a) there was environmental utility in granting relief which had the effect of requiring the council to consider the likely impact of the proposed bridge upon the EEC when determining a new development application as it was conceivable that the council may determine to grant access to the school in an alternative location, thus avoiding the need for a bridge through the EEC. Refusal of relief would effectively mean that the council would never consider a mandatory matter in the development assessment context: at [19]–[20], and

(b) even though such relief may impose financial hardship on the second and third respondents (due to the amount of money expended and costs incurred from delays in completing contracts), and difficulties and disruption to the school's future operation, these were collectively outweighed by the following factors:

i. there was no evidence of these outstanding contracts and as to whether they provided relief from financial obligations if the consent was declared to be invalid,

ii. the second and third respondents were aware of, and were a party to, proceedings challenging their consent well before any work was commenced. They undertook work subsequently and entered into contracts in full knowledge of the risks. They took a commercial risk at each stage they expended money on the development,

iii. the expenditure would not have been wasted and the claimed hardship would be substantially avoided if the council granted consent in the future,

iv. the Court ought not to sanction or encourage the development of a practice whereby respondents escalate works during the course of litigation in order to gain a forensic advantage and secure an exercise of discretion in their favour,

v. this was not a case where works were substantially commenced before a potential challenge was raised and prejudice had resulted from an incorrect reliance on a consent,

vi. evidence indicated that there had been a breach of s 109M of the EPA Act as the school had been operated for a time without the required interim occupation certificate, and

vii. a fair balance would be struck with a suspension of the injunction to enable the children to continue their schooling during 2012 and provide a reasonable opportunity to apply for a new consent, whilst preventing any further work or use of the school until a further consent was granted: at [21] and [25]–[26];

(2) in the s 25B LEC Act context, there was a distinction between a discrete technical breach and a breach of a mandatory consideration requirement in s 79C EPA Act requiring reconsideration of the whole development application. Generally, a s 25B order should not be appropriate in the latter case because balancing and weighing the s 79C matter against all other matters relevant to the consent authority's

consideration would necessitate a re-opening of the whole process. It was difficult to see a large difference between the consequences of making a s 25B order in a s 79C case and of declaring a consent to be invalid resulting in the submission and consideration of a new development application which may be substantially similar to that which was invalidated. Furthermore, the framing of a s 25B order in a s 79C case was challenging, and difficult obstacles could arise if the s 25C LEC Act application was subsequently made: at [37], [40], [42] and [51]; and

(3) although the council's error caused the litigation, the second and third respondents chose to defend the proceedings, and the council had complied with the 'Oshlack principle' - that a consent authority should file a submitting appearance and not defend a challenge to the validity of its decision other than in exceptional cases (generally limited to its power and procedures). Costs are compensatory and not a form of punishment of the council for its errors. Thus, the indemnity sought by the council should be granted: at [59]–[62].

Bardsley-Smith v Penrith City Council [2012] NSWLEC 79 (Sheahan J)

Facts: the applicants, who were involved in the retail pharmacy industry, challenged the validity of a development consent and the lawfulness of the current use of certain premises as a pharmacy business known and registered as "Chemist Warehouse Distribution Centre Penrith" ("CWDCP"). The consent allowed the use of the premises for retail activities ancillary and incidental to warehousing and distribution activities operating from the premises. The regulatory requirements under the *National Health Act* 1953 (Cth) included a requirement for public access. Under the relevant planning instruments retail sales of any sort were prohibited, regardless of whether in aid of permitted purposes such as warehousing or distribution.

The CWDCP conducted various interrelated activities, and its premises could be regarded as physically divided into four main areas: (1) a warehouse area, physically presenting as a retail pharmacy, displaying over-the-counter items for sale and distribution; (2) a traditional pharmaceutical counter/dispensary area, where "*pharmacists only*" products were stored; (3) a table of computer screens for ePharmacy purposes, and for recording distribution of restricted products to other stores, and a parcel packing area; and (4) a large warehousing area. The only area accessible to the general public was area (1).

Issues:

(1) whether the consent was beyond the council's jurisdiction, because the subject use, being a "shop", was prohibited by the then applicable local environmental plan ("the 1996 LEP");

(2) whether the actual use as a "shop" was prohibited by s 76B of the *Environmental Planning and Assessment Act* 1979 ("EPA Act") by virtue of the current local environmental plan ("the 2010 LEP");

(3) whether the actual use of the premises was in breach of condition 4 of the consent, which required any retail sales to be no more than ancillary to the primary use of the premises as a distribution centre; and

(4) whether condition 4 was valid, and, if it was not, whether it was severable from the consent, or rendered the whole consent invalid.

Held: all of the applicants' challenges failed and the summons was dismissed. The consent was valid and the current use of the premises with ancillary retail activities was not prohibited under the relevant planning instruments:

(1) the *National Health Act* requirement for "public access" was mandatory, and required some elements of "shop" to be incorporated in the proposed warehouse/distribution project. However, the mere presence of some retail elements did not make the proposal, as a whole, one for a "shop". The consent was, therefore, valid, being for a multi-faceted single use, of which such "shop" aspects were both minor and genuinely ancillary, on the one hand, and required by the *National Health Act,* on the other, as well as being inextricably bound to the overall use of the premises: at [270]-[280];

(2) the CWDCP business was actually used for the purpose of six co-mingled activities, four of which concerned distribution activities, and two the retail sale of products, with the evidence suggesting an overlap in use of space for each of the elements. As the consent was valid, and the evidence

suggested that the use was being carried out in accordance with that consent, there was no breach of the law or of the conditions of consent: at [295]-[299]; and

(3) condition 4 was fundamental to the consent and the development, going to the root of the planning permission granted by council. However, it met the test for validity being for a planning purpose, reasonably and fairly relating to the development, and being a reasonable condition to impose in the circumstances. It was also not severable in any event: at [311]-[312].

Oshlack v Rous Water (No 2) [2012] NSWLEC 111 (Pepper J)

(related decision: *Oshlack v Rous Water* [2011] NSWLEC 73; (2011) 184 LGERA 365 Biscoe J)

Facts: by summons filed 23 July 2010, Mr Al Oshlack challenged two decisions: first, a decision made by the first respondent, Rous Water ("Rous Water" being the business name of Rous County Council), to approve the construction and operation of four fluoridation facilities within its local government area ("the Rous Water decision"); and second, the decision of the second respondent, Ballina Shire Council ("Ballina Council"), to approve the construction of a fluoride dosing plant at Marom Creek ("the Marom Creek decision").

In 2007 Rous Water was directed by the Director-General of the Department of Health to increase the level of fluoride in the public water supply of Richmond Valley Council, in accordance with the *Fluoridation of Public Water Supplies Act* 1957 ("the Fluoridation Act"). The Director-General also issued approvals to Rous Water under that Act in 2007 and 2009, permitting Rous Water to increase the level of fluoride in the public water supplies of Lismore City Council and Ballina Council respectively, by 1mg/L. Ballina Council was granted a similar approval in relation to the area situated downstream of the proposed Marom Creek fluoridation plant in December 2009. Attached to each of the approvals and the direction was a condition that specified a commencement date for the addition of fluoride.

Prior to making the Rous Water decision, Rous Water prepared a draft Review of Environmental Factors ("REF"). Advice was provided to Rous Water to the effect that failure to comply with a condition of an approval or direction issued under the Fluoridation Act constituted an offence under that Act. However, based on a recommendation contained in a separate Determining Authorities Report, Rous Water resolved to defer preparation of a final REF in order to seek further assurance from the Department of Health as to the environmental effects of fluoridation, and to seek legal advice on its options. It obtained legal advice from solicitors of Blake Dawson and Lindsay Taylor Lawyers, both of whom advised that Rous Water had sufficient material before it to satisfy s 111 of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act") and that the council should proceed to determine the REF.

Issues:

(1) whether either Rous Water or Ballina Council failed to comply with s 111 of the EPA Act and cl 228(2) of the *Environmental Planning and Assessment Regulation* 2000 by not examining and taking into account "to the fullest extent possible all matters affecting or likely to affect the environment" by reason of their decisions;

(2) whether Rous Water took into account an irrelevant consideration, namely, "erroneous" legal advice;

(3) whether Rous Water made an error of law pursuant to s 111 of the EPA Act by acting on the belief that it had no power to exercise its discretion under that provision other than to make the Rous Water decision; and

(4) whether, in making their respective decisions, either council constructively failed to exercise its jurisdiction.

Held: the summons was dismissed:

(1) applying *Guthega Developments Pty Ltd v Minister Administering the National Parks and Wildlife Act 1974 (NSW)* (1986) 7 NSWLR 353, the duty upon the councils under s 111 of the EPAA was, upon that provision's proper construction, qualified by the word "reasonably". That is, the councils' duty was to examine and take into account the matters referred to in that section to the fullest extent reasonably possible: at [65]. In light of the material before the councils in making their respective decisions, each

council adequately discharged its duty. Provided this duty was discharged, the subjective views of the councils in relation to the adequacy of material before them were irrelevant: at [78];

(2) it was not demonstrated that the legal advice provided was erroneous and, in any event, s 111 of the EPA Act did not prohibit Rous Water from considering arguably incorrect legal advice: at [106];

(3) the evidence indicated that Rous Water made the Rous Water decision in a cautious and thorough manner, and was not in any way compelled to make it: at [91] and [92]; and

(4) no evidence was led to demonstrate any misapprehension on the part of either council in exercising its power under s 111 of the EPAA, and therefore, neither constructively failed to exercise its discretion: at [109] and [111].

Objector Appeals

Hunter Environment Lobby Inc v Minister for Planning (No 2) [2012] NSWLEC 40 (Pain J)

(related decision: *Hunter Environment Lobby Inc v Minister for Planning* [2011] NSWLEC 221 Pain J)

Facts: in *Hunter Environment Lobby Inc v Minister for Planning* [2011] NSWLEC 221 the Court stated it would grant approval to Ulan Coal Mines Ltd's ("Ulan") major project application under the now repealed Pt 3A of the *Environmental Planning and Assessment Act* 1979 for the expansion of its coal mine near Mudgee, subject to further consideration of conditions including a requirement to offset scope 1 greenhouse gas ("GHG") emissions. After judgment was delivered the parties alerted the Court that the Commonwealth Government passed its GHG legislation package including the *Clean Energy Act* 2011 (Cth) ("the CE Act") which comes into force on 1 July 2012. The respondents raised the issue of whether imposition of the conditions proposed by Hunter Environment Lobby Inc ("the applicant") could be legally imposed under a State planning Act because of conflict with the Commonwealth scheme and therefore with s 109 of the Australian Constitution. Rather than proceeding with a notification process under *Judiciary Act* 1903 (Cth) to the State and Commonwealth Attorneys-General on a constitutional law question, the Court asked the parties to consider the practical impacts of the Commonwealth scheme and make submissions on whether the Court should impose the applicant's proposed GHG conditions. Further expert evidence was filed on behalf of the applicant and Ulan on the potential application of the Commonwealth scheme to Ulan's coal mine.

Issue:

(1) whether the Court should impose the applicant's proposed GHG conditions.

Held: declining to impose the applicant's proposed GHG conditions:

(1) Ulan's emission of GHG at the mine near Mudgee contributes to a global problem which is now addressed in Australia through a national scheme passed by the Commonwealth Government which covers individual large emitters of GHG. The parties' evidence identified the scope and purpose of the Commonwealth scheme and confirmed that Ulan will be subject to this scheme for most of its activities which result in scope 1 GHG emissions: at [15]; and

(2) the Court was satisfied that the scheme as represented in the CE Act and related legislation met, at a practical level, the purpose of imposing a condition requiring offset of scope 1 GHG emissions: at [16]. The evidence was that the Commonwealth scheme would not cover those emissions to a de minimus level only: at [17]. Consequently, the Court considered that the applicant's proposed GHG conditions were not warranted and that the Minister's conditions were appropriate: at [17], [21]. It was therefore unnecessary to resolve whether there was a Constitutional conflict between a State planning Act and the CE Act: at [19].

Compulsory Acquisition

Reysson Pty Ltd v Roads and Maritime Services [2012] NSWLEC 17 (Biscoe J)

(related decisions: *Reysson v Roads and Traffic Authority* [2011] NSWLEC 153 Craig J; *Reysson Pty Ltd v Roads and Traffic Authority of New South Wales (No 2)* [2011] NSWLEC 168 Pepper J)

Facts: in 2010, the respondent compulsorily acquired land owned by the applicant, who objected to the compensation offered. In 1993, the applicant had been granted a development consent for a staged 34 lot residential subdivision on a substantial part of the acquired land. At the date of acquisition, that land was undeveloped. A preliminary question was ordered as to whether the consent had lapsed. Relevant consent conditions included:

(a) condition 9 - "Under no circumstances shall engineering works commence prior to approval of the complete set of engineering drawings"; and

(b) condition 37 - a proposed roundabout had to be constructed according to plans approved by the Director of Development Services.

The applicant relied on three categories of work as being engineering work performed before the lapsing date and before the complete set of engineering drawings was approved:

(a) survey work;

(b) council's construction of the roundabout on land which was not part of the approved subdivision to plans approved by the council, but not the Director; and

(c) bulk earthworks.

Issues: whether the 1993 development consent had, by 1998, lapsed under the former s 99 of the *Environmental Planning and Assessment Act* 1979, specifically:

(a) whether the survey work was engineering work within the meaning of condition 9, and was therefore in breach of it;

(b) whether, pursuant to s 99(4), the roundabout work:

(i) "related" to the subdivision, and

(ii) was constructed "on the land to which the consent applies";

(c) whether the roundabout work offended conditions 9 and 37; and

(d) whether the earthworks were performed in breach of condition 9.

Held: the development consent had not lapsed:

(1) the words of a development consent have the legal meaning that the consent authority is objectively taken to have intended them to have, which will ordinarily correspond to the grammatical meaning, but not always. The context of the words, the consequences of a literal construction, the purpose of the consent or the canons of construction may require the words to be read in a way that does not correspond to the literal meaning: at [28];

(2) the survey work was not performed in breach of condition 9 and prevented the lapsing of the consent, the survey work carried out was necessary to produce engineering drawings. Therefore, even though survey work is engineering work within the composite phrase "building, engineering or construction work" in s 99(4), it was not "engineering works" within the meaning of condition 9. Otherwise, a Catch 22 situation would arise: at [39]. Further, s 99(4) and condition 9 had different purposes and contexts: at [44]. The preferred construction of condition 9 was that the council intended to authorise work necessary for compliance with that condition: at [46];

(3) the construction of the roundabout also prevented lapsing:

(a) even though the roundabout was not the subject of the consent, it "related" to the approved development, as required by s 99(4), since it provided the approach to the access road to the subdivision and condition 37 required its construction: at [58], and

(b) because of condition 37, the roundabout was constructed on the land to which the consent applied even though it was outside the land on which the approved development was to be constructed: at [60];

(4) the "engineering works" referred to in condition 9 were the engineering works for the approved development, which was the subdivision. The roundabout work, though engineering work, was external to the subdivision, and condition 9 was inapplicable to it: at [62]. Condition 37 was not breached because the source of the Director's authority to approve was the council, and the greater included the lesser: at [65]; and

(5) the earthworks were in breach of condition 9 and were unlawful. They did not constitute commencement of the development within the meaning of s 99(4): at [74].

Goluzd v Minister Administering the Environmental Planning and Assessment Act 1979 [2012] NSWLEC 25 (Biscoe J)

Facts: the respondent compulsorily acquired the rear half of the applicant's residential land for the purposes of a foreshore reservation and park. The subject land was partly on top of a headland and partly on the beach below. The applicant objected to the statutory offer of compensation, arguing that the lost subdivision potential of the subject land should be taken into account and the respondent had ignored most of the injurious affection to the retained land. According to the deposited plan, the rear southern boundary of the subject land was the "high water mark", with that word struck through, and the eastern and western boundaries of the lot were described by reference to "H.W.M.". In a survey performed for the applicant, measurements to the mean high water mark resulted in the areas of the parent land and the acquired land being greater than that indicated approximately on the title. The actual foreshore building line had to be disregarded pursuant to s 56(1)(a) of the *Land Acquisition (Just Terms Compensation) Act* 1991 ("the Act") because it was part of the public purpose of creating a foreshore reservation and park, and a notional foreshore building line had to be adopted for the purposes of valuation. Although the dimensions of the subject land would have satisfied the requirements for subdivision under the applicable local environmental plan ("the LEP"), it failed to meet certain controls under the applicable development control plan ("the DCP") for subdivision approval. It was agreed that market value should be determined by the before and after method, and that valuation should be by directly comparable sales evidence. However the applicant's expert valued the land against comparable sales on a rate per square metre basis, whilst the respondent's valuer adopted a per lot basis.

Issues:

(1) whether "high water mark" and "H.W.M." in the deposited plan were references to the mean high water mark;

(2) whether the areas of the subject land and acquired land should be according to survey or title;

(3) where the notional foreshore building line should be located;

(4) whether the subject land had subdivision potential;

(5) whether comparable sales should be applied to the subject land on a per lot basis or a rate per square metre basis;

(6) whether the possibility of public access to the acquired land at some unknown time in the future was an injurious affection to the retained land in the after scenario; and

(7) whether the retained land would suffer other injurious affection.

Held: compensation determined in the sum of $572,000:

(1) pursuant to the *Surveying and Spatial Information Regulation* 2006 and the expert evidence of the applicant's surveyor as to surveying practices, references to "high water mark" and "H.W.M." in the deposited plan were meant to refer to the mean high water mark: at [31]-[38];

(2) the southern boundary of the land had always been the mean high water mark, whose location was only marked approximately on the deposited plan. The applicant's surveyor determined its precise location. Thus, the area according to survey, rather than that indicated approximately on the title, should be adopted because the Act requires compensation to be awarded for the loss of the actual area of the compulsorily acquired land: at [41]-[45];

(3) the notional foreshore building line should accord with the prescribed DCP outcomes of an uncluttered setback which enhances the legibility of the foreshore and reduces the visual impact of development when viewed from the waterway. The actual foreshore building line of the neighbouring lands situated closer to the beach was 22-23m measured from the mean high water mark, which was the dominant topographical feature for those properties. Therefore, the notional foreshore building line should be 22m measured from the dominant topographical feature of the subject land, which was the cliff line: at [54]-[56];

(4) it was unnecessary to form an opinion on the inconsistency between the DCP and LEP because, given the risks and difficult circumstances of the potential subdivision caused by the non-compliance with the DCP, the market at the acquisition date would not have regarded the subject land as having any significant subdivision potential: at [60]-[74];

(5) applying comparable sales on a per lot basis was adopted, and the rate per square metre basis was rejected because, on the uncontradicted expert evidence of the respondent's valuer, it was inappropriate and not the practice of valuers, nor the previous practice of the applicant's valuer, to apply a rate per square metre valuation to a single residential allotment: at [77]-[80];

(6) loss of privacy and peacefulness due to public access to the acquired land at some uncertain time in the future constituted an injurious affection to the retained land. Neighbouring land had already been acquired for the same public purpose, and only two further acquisitions were required before the public would have access to a large part of the headland including the acquired land. Even though the timing was unclear, this was the dispossessed owner's only opportunity to claim compensation for the consequential loss of amenity: at [81(b)];

(7) other injurious affection to the residue land included loss of absolute ocean frontage and a natural connection to the cliff and ocean, a sense of enclosure caused by a council policy requiring the boundary between the retained and acquired lands to be fenced, loss of sweeping views from the retained land, and a significant reduction in development rights due to a diminution in area: at [81]; and

(8) adjustments from comparable sales in the before and after scenarios were expressed as percentages in a table because there were only four comparables, they appeared to be closely comparable, and relatively few adjustments were required. In many other cases, detailed percentage adjustments can tend to obscure rather than illuminate valuation reasoning: at [92]-[93].

Contempt

Sydney City Council v Sydney Tool Supplies Pty Ltd & Daniel Bek (No 3) [2012] NSWLEC 27 (Sheahan J)

(related decisions: *Daniel Bek v Sydney City Council; Sydney City Council v Sydney Tool Supplies Pty Ltd & Daniel Bek* [2008] NSWLEC 262 Sheahan J; *Sydney City Council v Sydney Tool Supplies Pty Ltd & Daniel Bek (No. 2)* [2011] NSWLEC 196 Sheahan J)

Facts: a hearing was held to determine the penalty to be imposed on the second defendant, Mr Bek ("the defendant"), for breach of court orders that operations of a café carwash cease. The substantive proceedings were a Class 4 matter in which the council successfully established that the carwash and café

did not enjoy consent. Related Class 1 proceedings in respect of the council's refusal of a development application concerning operation of the carwash and cafe were later discontinued by consent, following the council's success in the Class 4 matter.

When operations did not cease, the contempt charges were laid on 30 October 2008 against both the first and second defendants, however, as the defendant company was deregistered and/or dissolved on 3 April 2009, and the second defendant was the guiding mind of the company, the prosecution continued against him in his own right.

The defendant entered a plea of guilty in March 2009 (after entering an earlier plea of not guilty in 2008). In October 2009 the question of the defendant's fitness to plead or stand trial was raised. When the defendant refused to cooperate with the Court or the council in advancing his case on the question of fitness, the Court ordered that he be arrested and brought before it to ensure his participation in the process of assessing his fitness. It was not until November 2011 that the question was finally resolved. Once he was found fit, his sentence hearing, part heard from May 2009, was fixed to be completed.

In an agreed Statement of Facts tendered at the resumed sentence hearing, the defendant admitted responsibility for the illegal use of the site from 16 September 2008 until approximately October 2010.

Issues:

(1) whether the defendant ought be convicted of contempt of Court, and whether his contempt was considered wilful or contumacious; and

(2) what penalty should be imposed upon the defendant as a result of his persistent disobedience of court orders.

Held: the defendant was convicted of the charge of contempt of court, given a suspended prison sentence, fined $30,000 and ordered to pay costs. The court found that:

(1) although environmental harm caused to the neighbourhood was virtually eliminated by compliance, the defendant's conduct caused lasting harm to the integrity of the justice system, and the objective circumstances of the defendant's contumacious contempt were very serious: at [100];

(2) the subjective circumstances of the defendant included:

  (a) a history of violence, dishonesty, breach of court-imposed conditions as well as a range of driving offences and poor compliance with alternative sentencing options: at [103]-[104];

  (b) serious eye problems, stress related to financial issues, difficulties with cognitive functioning, depression and anxiety: at [105]-[108];

  (c) his eventual guilty plea, but refusal to accept his culpability: at [110];

  (d) his failure to cooperate with the council or the Court until arrested: at [112];

  (e) some level of late contrition and remorse, which included a long letter of apology: at [113];

  (f) the making of admissions having serious implications for himself and his family: at [113]; and

  (g) strong support from his mother and wife: at [114];

(3) in view of the defendant's assessment, on two occasions, as unsuitable for community service (at [119]), a sentence of imprisonment of one year and nine months, suspended for the term of that sentence, in accordance with s 12 of the *Crimes (Sentencing Procedure) Act* 1999 should be imposed. The sentence was suspended on the condition that the defendant appear before the Court if called to do so at any time, be of good behaviour, and advise the Registrar of the Court of any change of residential address: at [126]; and

(4) a costs order should be imposed. The defendant was ordered to pay the prosecuting council's legal costs and investigation expenses for the substantive proceedings on a party-party basis, plus all costs and investigation expenses incurred by the prosecutor from 16 September 2008, except those incurred specifically in respect of the inquiry into the defendant's fitness to plead, on an indemnity basis: at [126.

Criminal

Ku-ring-gai Council v Abroon (No 3) [2012] NSWLEC 12 (Pepper J)

(related decisions: *Ku-ring-gai Council v Abroon* [2010] NSWLEC 176 Craig J; *Ku-ring-gai Council v Abroon* [2011] NSWLEC 1 Pepper J)

Facts: in June 2005, Mr Abroon, the principal of Abby's Real Estate Pty Ltd, lodged eight development applications for the purpose of redeveloping 23-25 Stanley St, St Ives. Specifically, Mr Abroon sought to demolish the two existing dwellings and construct five new dual-occupancy townhouses. In early 2006, Ku-ring-gai Council ("the council") granted approval for the developments under a staged development scheme. Deferred commencement conditions were attached to the consent approvals, requiring the Lots to be systematically subdivided and registered before the subsequent stage of construction could commence. Mr Abroon began constructing dwellings C and E before the relevant deferred commencement conditions had been fulfilled, and thus without operative consents. By summonses issued 14 December 2009, the council charged Mr Abroon, as owner-builder of the development, with two breaches of s 125 of the *Environmental Planning and Assessment Act* 1979 for undertaking development without an operative consent.

Mr Abroon pleaded guilty to both charges and, as such, the case concerned the appropriate sentence to be determined for the two offences. Mr Abroon argued that he did not commit the offences intentionally because he had relied on the advice of his Principal Certifying Authority ("PCA"), Mr Tsiontsis, who had assured him that the dwellings could be constructed out of sequence and construction certificates issued retrospectively. Mr Abroon testified that he believed Mr Tsiontsis could, in giving this assurance, amend the terms of the consents. Mr Tsiontsis denied this, asserting that he only acted as the PCA for two of the five dwellings, namely, A and B.

The sentence proceeding was initially set down for two days. In fact the hearing lasted six days, due largely to the conduct of Mr Abroon who, in effect, conducted the proceedings as if liability were in issue resulting in an excessively protracted hearing.

Issues:

(1) whether Mr Abroon committed the offences intentionally or inadvertently. Specifically:

  (a) whether he knew that he was acting in a manner contrary to the consents; and

  (b) whether he believed that Mr Tsiontsis, as the PCA, had the power to alter the terms of the consents.

(2) whether any harm to the environment was occasioned by Mr Abroon's conduct;

(3) whether the commission of the offences was commercially motivated; and

(4) to what extent the conduct of an offender during a sentence hearing can be taken into account in determining an appropriate sentence.

Held: Mr Abroon was convicted of both offences. He was fined $22,500 for the first offence and, upon application of the totality principle, $11,250 for the second offence. He was also ordered to pay the council's legal and investigation costs:

(1) Mr Abroon committed the offences intentionally. The evidence revealed that Mr Abroon was, in fact, an experienced developer who had had previous experience with staged developments in the St Ives area. He knew both that he was acting in breach of the consent conditions and that his PCA could not amend the terms of the consents: at [98] and [103]-[105];

(2) there was no actual harm caused to the environment, although Mr Abroon's actions had the effect of undermining the planning system. The offences were of low to moderate objective gravity: at [85], [88]-[90] and [118];

(3) the offences were committed for commercial gain. Mr Abroon's reason for constructing dwellings C and E out of sequence was to avoid logistical issues in order to reduce the construction cost of the development: at [111]-[112]; and

(4) Mr Abroon pleaded guilty at an early stage and expressed remorse for his actions. These factors operated to mitigate the penalty imposed. However, Mr Abroon's conduct during the hearing was also taken into account, insofar as it reduced the utilitarian value of the early guilty pleas and demonstrated that Mr Abroon did not accept full responsibility for his actions: at [124]-[125] and [126]-[128].

EPA v Pipeline Drillers Group Pty Ltd [2012] NSWLEC 18 (Craig J)

Facts: Pipeline Drillers Group Pty Ltd ("Pipeline") was charged with and pleaded guilty to two offences against s 120(1) of the *Protection of the Environment Operations Act* 1997 ("the POEO Act"). Each offence involved the discharge, known as a "frac out", of a bentonite slurry into a wetland area. Each frac out occurred while the defendant was undertaking horizontal directional drilling beneath the wetland for the purpose of installing a wastewater pipeline for a residential development nearby. The wetland provided habitat for a variety of wildlife and vegetation, including the Wallum Froglet, a vulnerable species listed in Sch 2 to the *Threatened Species Conservation Act* 1995. The horizontal directional drilling method was considered to be the most appropriate method for installing a pipeline in an environmentally sensitive area.

Issues: consideration of sentencing principles, including:

(1) matters under s 241 of the POEO Act:

(a) level of environmental harm caused to the wetland ecology and to the Wallum Froglet;

(b) practical measures taken by the defendant to reduce harm;

(c) reasonable foreseeability of harm;

(2) subjective factors under s 21A of the *Crimes (Sentencing Procedure) Act* 1999; and

(3) appropriate sentence to be imposed.

Held: Pipeline was convicted of both offences and was fined $30,000 plus costs:

(1) (a) although the actual harm caused by the two frac outs was significant, because of the short duration of each offence and apparent absence of long-term impact, the level of overall harm was low: at [72]. It was accepted that there was likely short-term harm to both the wetland ecology and the Wallum Froglet, however there was no evidence to indicate that any actual harm had been done: at [70]-[71]. It was observed that two separate works undertaken by the council in the area had confounded the assessment of harm: at [48]-[49];

(b) further practical measures could have been taken and if such measures had been taken the harm that occurred may have been prevented: at [85]. While the horizontal directional drilling method used by the defendant was in accordance with industry best practice, there were aspects of the drilling system that allowed for human error, which reflected an inherent problem with the system: at [83]-[84];

(c) the risk of a frac out was a recognised risk of horizontal directional drilling: at [86]. The sensitivity of the area in which drilling was being undertaken was recognised: at [88]. Harm to that area was therefore reasonably foreseeable, although it was accepted that the frac out incidents that were the subject of charges were not, themselves, foreseeable: at [88];

(2) subjectively, there were no aggravating circumstances. There were several mitigating factors: it was acknowledged that the defendant had no prior offences: at [99]; made an early plea of guilty: at [100]-[101]; expressed contrition and remorse: at [102]-[104]; and provided assistance to the authorities: at [105]-[106]; and

(3) the defendant was fined a total of $30,000 ($18,000 for the first offence and $12,000 for the second offence) taking into account a discount of 25 per cent for an early plea of guilty and other subjective factors: at [113]. Those fines were fixed taking account of the prosecutor's legal and investigation costs totalling $44,000: at [113]. A publication order was also made against the defendant under s 250(1)(a) of the POEO Act: at [117].

Lee v Office of Environment and Heritage [2012] NSWLEC 9 (Craig J)

Facts: Mr Lee was convicted in the Maclean Local Court of two offences against s 98(2)(a) of the *National Parks and Wildlife Act* 1974 ("the NPW Act"). Each of the offences involved the shooting and killing of six Little Black Cormorants. He was sentenced to three months imprisonment for each offence, such sentences to be served concurrently. Mr Lee appealed against those sentences pursuant to s 31 of the *Crimes (Appeal and Review) Act* 2001. He submitted that the penalty by way of imprisonment was "too severe" having regard to the circumstances relevant to be considered in respect of an offender for commission of those offences. At the time of the offence Mr Lee had already served a six month prison sentence for an "environmental regulatory offence" against s 67(3) of the *Quarantine Act* 1908 (Cth) and was subject to a good behaviour bond for the offence. All offences were committed while employed as the manager of a prawn farm.

Issues: whether the Magistrate:

(1) overstated the objective seriousness of the offence in attributing financial gain to Mr Lee through the commission of the offences;

(2) gave sufficient consideration to the subjective circumstances of the appellant; and

(3) should have considered the principles of parity and totality.

Held: appeal upheld with the sentences of imprisonment set aside:

(1) the assessment of objective gravity was lower than the Magistrate perceived it to be: at [41]. There was no evidence to suggest that Mr Lee would derive any financial benefit from the commission of the offences: at [37] – [38];

(2) the learned Magistrate did not give sufficient weight to the subjective circumstances. Weight was correctly given to Mr Lee's early plea of guilty, but consideration should also been given to:

    (a) his expression of remorse: at [45];

    (b) the rehabilitative benefits of his sentence for the offence of the same genre under the *Quarantine Act* 1908 (Cth): at [46]. It was noted that Mr Lee's only two transgressions of the law occurred while he was employed as manager of his employer's prawn farm: at [56];

    (c) there was no suggestion that Mr Lee had not otherwise been a man of good character and this should have been taken into account: at [43]. Cessation of employment as the manager of the prawn farm and pursuit of a career as an accountant, living and working in an urban environment, reduced the need for specific deterrence: at [56];

(3) the principle of parity should have been considered: at [63]. In terms of mitigating factors to be taken into account when sentencing, this case was factually comparable to *Garrett on behalf of the Director-General of the Department of Conservation and Environment v House* [2006] NSWLEC 492 in which a pecuniary penalty of $9,000 plus costs had been imposed: at [59]. Further, JIRS data showed that eight of 13 cases determined under s 98(2)(a) of the NPW Act in the Local Court had imposed a fine only, while the other five imposed a bond of some kind: at [61]. This indicated that a fine was more appropriate than a jail sentence: at [62]; and

(4) the principle of totality should have been considered: at [67]. The maximum fine for each of the present offences was $17,600. The totality principle apart, the appropriate penalty was a fine of $9,600 for each offence. However, given that the offences involved exactly the same actions and were undertaken on consecutive days, it was appropriate to regard those actions as comprising a single course of conduct. Taking into account a discount of 25 per cent for an early plea of guilty, the total penalty was $12,200, ($7,200 for the first offence and $5,000 for the second offence): at [68].

The Hills Shire Council v Kinnarney Civil & Earthworks Pty Ltd and Kinnarney [2012] NSWLEC 30 (Biscoe J)

(related decision: *The Hills Shire Council v Kinnarney Civil & Earthworks Pty Ltd and Kinnarney* [2012] NSWLEC 45 Biscoe J)

Facts: the corporate defendant was charged with an offence under s 143(1) of the *Protection of the Environment Operations Act* 1997 ("the POEO Act") for transporting waste to a place that cannot lawfully be used as a waste facility for that waste from June 2009 to July 2010. Pursuant to s 169(1) of the POEO Act, the individual defendant, as a director of the corporate defendant, was charged with the same offence under s 143(1). It was alleged that, pursuant to an agreement with the owner of a residential semi-rural property, the defendants transported and deposited a large quantity of fill to that property, which was not authorised to receive such material. The prosecutor granted the owner of the land on which the waste was deposited, the prosecution's main witness, an indemnity against prosecution in exchange for his testimony against the defendants. This witness had repeatedly lied in information he had provided to the prosecutor's investigating officers and subsequently in affidavits. On the first day of trial, the defendants flagged the defence of honest and reasonable mistake of fact. At the close of the prosecution's case, the defendants submitted that there was no case to answer. There was unchallenged evidence of all the elements of the offences charged, and the defendants had conceded that they transported waste as alleged. The defendants did not contest that there was a prima facie case, but submitted that this prima facie case had been negated because the prosecution's case was tainted.

Issues:

(1) whether the prosecution's case was tainted by the indemnity and the admissions of its main witness that he had repeatedly lied; and

(2) whether the prosecution's case was tainted by its failure to displace the defence of honest and reasonable mistake of fact at the close of its case.

Held: there was a case to answer because on the evidence as it stood, the defendants could lawfully be convicted:

(1) the indemnity against prosecution and the lies told by the prosecution's main witness did not taint the prosecution's case such as to negate what would otherwise be a prima facie case. The indemnity was not significant on this no case to answer submission: at [5]; and

(2) the prosecution did not have an obligation at the close of its case to displace a defence of honest and reasonable mistake of fact, and its failure to do so did not taint its case. Before the prosecution has the onus of proving beyond reasonable doubt that the defendants did not honestly believe on reasonable grounds in the existence of a state of facts which if true would take their act outside the operation of the enactment, the defendants first have the evidential burden of establishing the defence. At the close of the prosecution's case, it was difficult to see how the defendants' evidential burden had been satisfied on the evidence to date: at [6]-[8].

The Hills Shire Council v Kinnarney Civil & Earthworks Pty Ltd and Kinnarney [2012] NSWLEC 45 (Biscoe J)

(related decision: *The Hills Shire Council v Kinnarney Civil & Earthworks Pty Ltd and Kinnarney* [2012] NSWLEC 30 Biscoe J)

Facts: the corporate defendant was charged with an offence under s 143(1) of the *Protection of the Environment Operations Act* 1997 ("the POEO Act") for transporting waste to a place that cannot lawfully be used as a waste facility for that waste from June 2009 to July 2010. Pursuant to s 169(1) of the POEO Act, the individual defendant, Mr Kinnarney, as a director of the corporate defendant, was charged with the same offence under s 143(1). Under an agreement with the owner of a residential semi-rural property, Mr Clark, the defendants transported and deposited a large quantity of fill to that property, which was not authorised to receive such material. The fill was deposited onto two fill bodies for the purpose of constructing a firebreak. There was objective evidence of the amount the defendants paid to Mr Clark to deposit the fill, and from this it was possible to estimate the amount of fill transported. The fill bodies were contaminated. The defendants claimed to have only transported clean soil. The only defence raised was the common law defence of honest and reasonable mistake of fact. Mr Kinnarney claimed he was led by Mr Clark to mistakenly believe that, during the charge period, there was a development consent for the property which authorised the depositing of the fill for the construction of a firebreak on the property. There was no such consent.

Issues:

(1) what are the elements of an offence under s 143(1) of the Act;

(2) whether the fill transported, if clean, still constituted "waste";

(3) whether the property could have lawfully been used as a waste facility for that fill;

(4) whether Mr Kinnarney actually held the alleged mistaken belief;

(5) if so, whether his mistaken belief constituted a mistake of fact; and

(6) if so, whether this particular mistake would be sufficient to exculpate.

Held: the defendants were convicted of the offences as charged under s 143(1) of the POEO Act:

(1) there are only three elements in a s 143(1) offence:

(a) the defendant transported a substance to a place,

(b) that substance was "waste" within the meaning of that word in the Act, and

(c) the place to which the waste was transported could not lawfully be used as a "waste facility", within the meaning of that expression in the POEO Act, for that waste.

There was no additional requirement that the place to which the waste was transported was previously being used as a waste facility. The burden of proof required the prosecutor to first prove that the substance transported was waste and lawful authority was required to use the place as a waste facility. Section 143(2) of the POEO Act then put the burden on the defendants to prove that, at the time the waste was transported, it was lawful to use the place as a waste facility for that waste: at [24]-[28];

(2) the fill transported by the defendants was contaminated, but even if it was clean, it was still "waste" as defined in the Dictionary of the POEO Act because it was:

(a) deposited in such a volume and manner as to cause an alteration in the environment,

(b) an unwanted or surplus substance, and

(c) an otherwise discarded, rejected, unwanted, surplus substance intended for recycling or processing by a separate operation from that which produced the substance.

The fact that the owner of the property had a purpose of using the fill for a firebreak or for covering existing fill did not prevent it being "waste". The fill was not stockpile material because at the time it was delivered to the property, it was plainly unwanted or surplus material: at [9] and [146]-[152];

(3) the property could not have been lawfully used as a waste facility for the fill because a place cannot lawfully be used for a particular purpose if it does not have such lawful authority as is required in the circumstances for that use by any statute. Lawful authority for depositing the fill was required under both the *Environmental Planning and Assessment Act* 1979, in the form of a development consent, and the POEO Act, in the form of an environment protection licence. Under the *Baulkham Hills Local Environmental Plan* 2005, use of the property as a waste facility was prohibited, and therefore no development consent could have been granted. No consent was in fact granted. Furthermore, the disposal of waste by application to land was a premises-based scheduled activity which required an environment protection licence. There was no such licence: at [153]-[170];

(4) Mr Kinnarney had not discharged his evidential burden of proving that he held the alleged mistaken belief at all. He did not give evidence, and there was no direct evidence as to his state of mind in a context where his state of mind was critical. Sufficient evidence may be elicited in the prosecution's case by way of cross-examination or otherwise to provide the necessary evidentiary foundation, but this had not occurred: at [185]-[186] and [188]-[190];

(5) even if Mr Kinnarney held the mistaken belief, it was not a mistake of fact. It may be characterised as a pure mistake of law or one of mixed fact and law, but in either case the outcome was the same. If he mistakenly believed that a consent authorised the transportation and depositing of the fill, without more, it was a mistaken belief that an activity was authorised by the consent, and this was a mistaken

belief as to a matter of law rather than to a matter of fact. If, alternatively, he believed that there *existed* a development consent which *authorised* the same, this was a single mistake of mixed fact and law. Mixed mistakes will not ordinarily constitute mistakes of fact, and if one of the components vital to the total belief is a belief on a question of law, then such mistakes will be treated as mistakes of law. Either way, his mistake was one of law, and a mistake of law is not a ground of exculpation: at [174]-[183]; and

(6) in any event, the claimed belief in a relevant development consent would not have taken the corporate defendant's conduct outside the operation of s 143(1) of the POEO Act because, in addition to a consent, lawful authority was also required by way of an environment protection licence. Therefore, even if the defendants had established that Mr Kinnarney held the mistaken belief and that it was a mistake of fact, it would not have exculpated because he did not have a similar mistaken belief in relation to an environment protection licence: at [184].

Chief Executive*, *Office of Environment and Heritage v Kyluk Pty Limited (No 3) [2012] NSWLEC 56 (Pain J)

(related decisions: *Chief Executive, Office of Environment and Heritage v Kyluk Pty Limited* [2012] NSWLEC 22 Pain J; *Chief Executive, Office of Environment and Heritage v Kyluk Pty Limited* (No 2) [2012] NSWLEC 24 Pain J)

Facts: Kyluk Pty Limited ("the defendant") pleaded guilty on 14 February 2012 to the offence that between about 11 June 2009 and 11 August 2009 contrary to s 118A(2) of the *National Parks and Wildlife Act* 1974 ("the NPW Act"), it picked plants that were part of an endangered ecological community ("EEC") on a property in Gilead being "Shale/Sandstone Transition Forest in the Sydney Basin Region" ("SSTF") as described in the Scientific Committee's Final Determination. At the time of the offence SSTF was listed as an EEC in Sch 1 Pt 3 of the *Threatened Species Conservation Act* 1995 ("the TSC Act"). In pleading guilty the defendant admitted that it caused and/or permitted the picking of SSTF plants and that it owned the property. The area of SSTF cleared was not particularised in the charge and was not admitted by the defendant. In *Chief Executive, Office of Environment and Heritage v Kyluk Pty Limited* [2012] NSWLEC 22 the Court determined on a voir dire that the reports of Mr Tulau, soil scientist, and Ms James, botanist/ecologist, would be admitted into evidence. The defendant challenged Ms James' evidence of the area cleared by focussing on her interpretation of the Final Determination. The defendant challenged Mr Tulau's expert report stating it should be given no probative weight as it was too qualified in the language used and his oral evidence was too vague to satisfy the burden of proof (of beyond reasonable doubt). The Court was required to sentence the defendant. The defendant submitted that s 21A(2) of the *Crimes (Sentencing Procedure) Act* 1999 ("the CSP Act") did not apply to offences under the NPW Act; that environmental harm did not include potential harm; that a restoration order was not required given SSTF's ability to regenerate; that the Court could not impose a restoration order under s 200(1)(a) of the NPW Act to prevent, control, abate or mitigate any harm caused by the offence because that provision operated prospectively; and that the Court did not have power to impose an order for restoration which required improvement in the quality of SSTF cleared to regenerated.

Held: the defendant was convicted of the offence and ordered to pay $127,500 to a specified environmental project, to carry out restoration works, to publicise the offence and to pay the prosecutor's costs of the proceedings:

(1) in relation to the area of SSTF cleared (at [87]-[96]):

(b) the Final Determination should not be read with the precision expected of a document drafted by Parliamentary counsel and must be considered in light of its subject matter, namely ecological communities which do not have precise boundaries;

(c) Mr Tulau's report and oral evidence had probative weight. Mr Tulau's use of language was consistent with the language of the Final Determination and his oral evidence confirmed the views expressed in his report;

(d) proof of the existence of SSTF in a criminal matter was likely to be through the application of expert opinion. There was no uncertainty about whether a particular area of flora was caught by

the definition in view of the Court's conclusion about the application of the Final Determination. Through the evidence of Ms James and Mr Tulau, the prosecutor established the area of SSTF cleared by the defendant beyond reasonable doubt, described as approximately 12.54 ha, reflecting the difficulty of having precisely defined boundaries;

(2) factors under s 194 of the NPW Act and those under s 21A(2) of the CSP Act were both relevant to determining the seriousness of the offence. The latter were additional to any other matters that were required to be taken into account. Having considered the s 194 factors on sentencing, the Court would consider if there were additional matters under s 21A(2) it should consider. If there were any overlapping factors in s 194 of the NPW Act s 194 and s 21A of the CSP Act, the Court had to be aware of the risk of double counting through giving effect to the same factors as aggravating (or mitigating) the seriousness of the offence: at [109]-[116];

(3) in determining that the offence was of moderate to severe objective seriousness, the Court took into account under s 194(1) of the NPW Act that the offence caused substantial actual and potential harm: at [100]; the extent of harm was substantial aggravated the seriousness of the offence: at [117]; the EEC was found to be significant generally, in the Sydney basin and in the locality: at [101]-[102]; the extent of the harm caused was foreseeable: at [104]-[105]; the defendant, as owner of the land, had control of the activities on the property which gave rise to the offence: at [106]; and the offence was committed for commercial gain, which aggravated the seriousness of the offence: at [107]-[108], [118];

(4) mitigating factors taken into consideration included that the defendant pleaded guilty, but only at a late stage, warranting a discount of 15 per cent: at [124]-[135]; the offence was not a planned activity: at [136]; and the defendant had no prior convictions: at [137]; and

(5) the defendant's challenge to the need for a restoration order was rejected as that approach would not achieve the objects of the TSC and NPW Acts which are aimed at the preservation of EEC: at [148]. Ms James' evidence confirmed the essentiality of positive restorative action to achieve some measure of regeneration: at [149]. The scope of s 200(1)(a) was not confined in the way the defendant submitted: at [147]. A restoration order was justified in the circumstances: at [148]-[152]. Given that Ms James' evidence confirmed the lack of precise boundaries of SSTF cleared and the need for connectivity of SSTF on the property and adjoining lands, some latitude in the area requiring restoration was warranted: at [153].

Environment Protection Authority v Wyong Council [2012] NSWLEC 36 (Craig J)

Facts: the defendant pleaded guilty to two offences against s 144(1) of the *Protection of the Environment Operations Act* 1997 ("the POEO Act"). Each offence involved the use of land as a waste facility without a licence. The first offence involved a site at Toukley, which the defendant had long been using for recycling and storing material from its operations. The defendant mistakenly believed that it was permitted to use the site for the disposal, storage and recycling of road construction waste. The second offence concerned a site at Mardi that had previously been used as a landfill but was being rehabilitated. An internal access road required for remediation investigation was constructed from crushed concrete taken from the Toukley site. The defendant did not know that a license was required for this activity or that the crushed concrete was contaminated with asbestos. Insufficient cross-departmental communication and inadequate staff training contributed to the commission of the offences.

Issues: consideration of sentencing principles, including:

(1) objective gravity of the offence;

(2) subjective factors; and

(3) the appropriate sentence to be imposed.

Held: the defendant was convicted of both offences and fined $62,000 plus costs:

(1) the offences were at the low end of medium objective seriousness: at [101]. The environmental harm caused was low: at [74]. While the deposition of waste caused "harm", there was no evidence of "pollution" at either site: at [70]. The potential for harm was low in the circumstances and the potential was never transformed into actuality: at [73]. There was no evidence that the breach was intentional:

at [89]. The defendant held a reasonable, albeit misinformed, belief that it had existing use rights to conduct the waste processing and recycling facility at the Toukley site: at [90]. The offence at the Mardi site was motivated by an environmentally beneficial aim: at [91]. The objective seriousness was decreased by reason of these circumstances: at [92];

(2) there were a number of mitigating factors: it was acknowledged that the defendant had no prior offences: at [104]; made an early plea of guilty: at [105]; was genuinely remorseful: at [114]; and provided assistance to the authorities: at [115]; and

(3) the defendant was required to pay a total of $62,000. In lieu of a fine, the Court made an order subject to s 250(1)(e) of the POEO Act: [137] – [140], [142]. Further orders against the defendant included payment of the prosecutor's legal and investigation costs totalling to $73,830: at [142] and a publication order under s 250(1)(a) of the POEO Act: at [141].

Environment Protection Authority v BMG Environmental Group Pty Ltd and Barnes [2012] NSWLEC 69 (Biscoe J)

(related decision: *Environment Protection Authority v BMG Environmental Group Pty Ltd and Barnes* [2012] NSWLEC 48 Biscoe J)

Facts: the corporate defendant was charged with an offence under s 115(1) of the *Protection of the Environment Operations Act* 1997 ("the POEO Act") for negligently disposing of untreated sewage, septic tank waste and untreated grease trap waste in a manner that harmed or was likely to harm the environment at a farm called 'Greenbank' near Bathurst from January to September 2009. Pursuant to s 169(1) of the POEO Act, the individual defendant, Mr Barnes, as a director of the corporate defendant, was charged with the same offence under s 115(1). Both defendants pleaded guilty to the charges less than a week before the trial was due to start, and were before the Court for sentencing, though the corporate defendant was unrepresented. Mr Barnes gave evidence that, at the time of the offences, he mistakenly believed that the defendants were entitled to engage in such conduct because it fell within certain general exemptions to licensing requirements under the Act. The prosecution and Mr Barnes agreed on an amount for the prosecution's costs (including investigation costs) and that a costs order should be made against Mr Barnes. The prosecution submitted that no costs order should be made against the corporate defendant. Mr Barnes submitted that the liability for costs should be shared equally with the corporate defendant, and that any costs liability should be deducted against any fines that the defendants would otherwise be ordered to pay.

Issues:

(1) considering the objective circumstances of the offences and the subjective circumstances of the defendants, what was the appropriate sentence;

(2) whether any costs liability should be deducted from any fine that each defendant would otherwise be ordered to pay;

(3) whether a community service order should be made against Mr Barnes; and

(4) whether liability for the prosecution's costs should be equally divided between the defendants.

Held: each defendant was fined $100,000, and was jointly and severally liable with the other for the prosecution's costs to the intent that the prosecution could not recover more than $143,631 legal costs for both matters and $31,369 investigation costs for both matters from both defendants:

(1) traditionally, a defendant's state of mind and reasons for committing an offence, though matters personal to the defendant, have been regarded as affecting the objective seriousness of the offence because of their direct causal connection with the commission of the offence (*R v Way* [2004 NSWCCA 131). However, in *Muldrock v The Queen* [2011] HCA 39, the High Court cast doubt on this view when it said that the objective seriousness of an offence is to be assessed without reference to matters personal to a particular offender or class of offenders. Nevertheless, since the Court of Criminal Appeal has not held that *Muldrock* has overturned the principle in *R v Way*, and since there were no submissions on this issue, the traditional view was adhered to: at [92]–[98];

(2) the offences were of moderate objective seriousness: at [99]–[111]. A number of subjective factors operated in favour of the defendants: at [113]-[119]. There should be parity of punishment between the defendants because Mr Barnes' conduct should be equated with that of the corporate defendant, and both defendants presented with approximately comparable objective and subjective features. The appropriate sentence for each was a fine of $200,000 discounted by 15 per cent for late guilty pleas, resulting in a fine of $170,000 each: at [120]–[121] and [142];

(3) costs could be taken into account as part of the consideration of the amount of a fine. However, taking costs into consideration did not necessarily equate to an equivalent deduction from the fine that would otherwise be imposed. After taking into account the agreed amount of costs, each defendant was fined $100,000: at [137]–[139] and [142];

(4) there are restrictions on the Court's power to make a community service order and a statutory procedure must be followed. In particular, the Court must have before it an assessment report, usually prepared by a probation and parole officer, as to the suitability of the offender for such an order. The prosecution did not submit that a community service order should be made. Mr Barnes' submission that one should not be made was accepted: [128]–[135]; and

(5) the defendants should be jointly and severally liable for the prosecution's total costs (including investigation costs) as the case and evidence against both were virtually identical. There was some evidence suggesting that the corporate defendant was at risk of insolvency as a result of the proceedings, and dividing the costs liability equally would mean that the prosecution bore the risk of being unable to recover costs to the extent that either defendant became insolvent: at [139].

EPA v Moolarben Coal Operations Pty Ltd [2012] NSWLEC 65 (Craig J)

Facts: the defendant pleaded guilty to a charge against s 120(1) of the *Protection of the Environment Operations Act* 1997 ("the POEO Act") for multiple discharges of sediment-laden waters into a creek. The defendant had been granted conditional approval for coal mining under Pt 3A of the *Environmental Planning and Assessment Act* 1979 and was required to implement a water management plan that included an erosion and sediment control plan before any land clearing commenced. The majority of erosion and sediment control measures were not in place when substantial clearing commenced.

Issues: consideration of sentencing principles, including:

(1) objective gravity of the offence;

(2) subjective factors; and

(3) appropriate sentence to be imposed.

Held: the defendant was convicted of the offence and fined $105,000 plus costs:

(1) the offence was of medium objective seriousness: at [70]. While the offence gave rise to the potential for serious environmental harm, the actual harm caused was low: at [58]. The availability of practical measures to mitigate the harm and the reasonable forseeability of harm weighed heavily on the objective seriousness, as both factors were well known to the defendant: at [59], [63]. The defendant's failure to implement obligatory erosion and sediment control measures prior to extensive earthworks measures was the primary cause of water pollution: at [60]. The undertaking of those earthworks was entirely within the defendant's control: at [67];

(2) subjectively, there were no aggravating circumstances. There were several mitigating factors: it was acknowledged that the defendant had no prior offences: at [74]-[81]; made an early plea of guilty: at [82]; expressed contrition and remorse: at [83]-[89]; and provided assistance to the authorities: at [90]-[91]; and

(3) the defendant was fined a total of $105,000 taking into account a discount of 30 per cent for mitigating factors: at [105]. Those fines were fixed taking account of the prosecutor's legal and investigation costs totalling $61,632: at [107]. A publication order was also made against the defendant under s 250(1)(a) of the Act: at [106].

EPA v Moolarben Coal Operations Pty Ltd (No 2) [2012] NSWLEC 80 (Craig J)

Facts: the defendant pleaded guilty to a charge against s 120(1) of the *Protection of the Environment Operations Act* 1997 ("the POEO Act"). The offence occurred when the defendant released sediment-laden water into a creek by unblocking a culvert beneath an embankment retaining that water. The defendant had been granted conditional approval for coal mining under Pt 3A of the *Environmental Planning and Assessment Act* 1979. About 53ha of land had been cleared in preparation for coal mining. No adequate erosion and sediment control measures had been implemented prior to this clearing being undertaken. The embankment had retained sediment laden waden from upstream run-off. Inadequate provision had been made to pump this water into holding dams. The release of water was made to avoid the collapse of the embankment.

Issues: consideration of sentencing principles, including:

(1) objective gravity of the offence;

(2) subjective factors; and

(3) appropriate sentence to be imposed.

Held: the defendant was convicted of the offence and fined $112,500 plus costs:

(1) the offence was of moderate objective seriousness: at [85]. The environmental harm caused was low to moderate: at [68]. The practical measures available and the reasonable foreseeability of harm were significant in assessing the objective seriousness of the offence: at [69]. The defendant had control over the causes of the offence: at [78]. While it was accepted that the discharge was not deliberate in the sense that it was pre-planned, the defendant took a number of risks in conducting its activities that were not reasonably justified: at [82], [84];

(2) subjectively, there were no aggravating circumstances, although the defendant had been convicted of a prior offence against s 120: at [87]-[89]. Mitigating factors included an early plea of guilty: at [82]; expression of contrition and remorse: at [96]-[101]; and assistance to the authorities: at [102]-[104]; and

(3) the defendant was fined a total of $112,500 taking into account a discount of 25 per cent for an early plea of guilty: at [133]. The fine was fixed taking account of the prosecutor's legal and investigation costs totalling $63,314: at [133], [139]. A publication order was also made against the defendant under s 250(1)(a) of the POEO Act: at [136], [139].

Corbyn v Walker Corporation Pty Ltd [2012] NSWLEC 75 (Preston CJ)

(related decision: *Director-General of the Department of Environment, Climate Change and Water v Walker Corporation Pty Ltd (No 2)* [2011] NSWLEC 229 Preston CJ)

Facts: on 30 November 2011, Walker Corporation Pty Ltd ("Walker") was found guilty of committing an offence against s 12 of the *Native Vegetation Act* 2003 ("NV Act") in that between April and October 2006 it engaged a clearing contractor which cleared native vegetation on three allotments of land in Appin, otherwise than in accordance with a development consent granted under the NV Act or a property vegetation plan. In the principal judgment, the Court ordered that the summons be amended to substitute the proper name of the prosecutor, Lisa Corbyn, for the no longer correct description of the office held by the prosecutor, Director-General of the Department of Environment, Climate Change and Water ("DECCW"). However, nearly two months after delivery of the penal liability judgment, Ms Corbyn resigned as the Chief Executive of the Office of Environment and Heritage ("OEH"). At the sentence hearing, Walker challenged the retainer of the barrister and solicitor engaged for the prosecutor. Walker sought for the proceedings to be stayed on the ground of want of proof of retainer. Walker submitted that as Ms Corbyn was no longer employed by OEH, she could no longer be the prosecutor or providing instructions to the solicitors and counsel to prosecute the proceedings. Accordingly, Walker submitted, the solicitors and counsel who appeared on behalf of the prosecutor were no longer properly retained to do so.

Issues:

(1) whether the solicitors and counsel who appeared on behalf of OEH were properly retained; and

(2) if the solicitors and counsel were validly retained, the appropriate sentence for the offence.

Held: convicting the defendant and ordering it to pay a fine of $80,000 and the prosecutor's costs:

(1) Ms Corbyn's consent and authority to prosecute did not abate after Ms Corbyn resigned from office as a public officer of the OEH. The OEH could continue to provide instructions to the solicitors and counsel with regard to the continued prosecution of the proceedings: at [11];

(2) the sentence of the Court needed to publicly denounce the conduct of Walker, make Walker accountable for its actions and ensure Walker was adequately punished for the offence committed. The sentence needed to recognise the harm done to the environment and the community for which the environment holds value and deter others from committing similar offences: at [14] and [15];

(3) the objective circumstances of the offence that were taken into account in the sentence were: the commission of the offence hindered the attainment of the objects of the NV Act; the maximum penalty for the offence of 10,000 penalty units; the moderate environmental harm caused by the clearing; the lack of proof beyond reasonable doubt that the offence was committed intentionally or recklessly; the foreseeable risk of environmental harm including the removal of larger trees, most of the shrub layer, and the groundcover, with adverse consequences for fauna, but not including foreseeing that the vegetation was part of endangered ecological communities; Walker's failure to seek advice on what vegetation could lawfully be cleared; Walker's lack of control and direction over the contractor in undertaking the actual clearing of native vegetation on the land; and the continuation of the offence over an extended period of time: at [18], [19], [25], [26], [32], [36], [39] and [42];

(4) the subjective circumstances of the offence that were taken into account in the sentence were Walker's lack of a significant record of previous convictions for environmental offences; Walker's actions after the commission of the offence which indicated it was unlikely to reoffend; the lack of remorse shown by Walker; that the offence committed by Walker was not part of a planned or organised criminal activity; and the company's pre-trial disclosure and assistance to the relevant regulatory agency: at [44], [46], [51] and [54]-[56]; and

(5) a comparative analysis of the offence in this case with certain other cases concerning offences against s 12 of the NV Act indicated that the subject offence was of a lower objective seriousness than the offences in those cases: at [61].

EPA v Tea Garden Farms Pty Ltd [2012] NSWLEC 89 (Craig J)

Facts: the defendant pleaded guilty to an offence against s 120(1) of the *Protection of the Environment Operations Act* 1997 ("the POEO Act"). The offence occurred when an employee of the defendant was excavating the base of a rural dam wall to repair a damaged drainage pipe. The excavation led to the partial collapse of the dam wall which resulted in an unknown quantity of sediment-laden water being discharged from the dam into the waters of a marine park.

Issues: consideration of sentencing principles, including objective and subjective factors and the appropriate penalty to be imposed.

Held: the defendant was convicted of the offence and ordered to pay $77,000 plus costs:

(1) the objective seriousness of the offence was in the low to moderate range: at [118]. While there was potential for harm to an oyster lease in the marine park, the actual environmental harm was in the relatively low range: at [84]-[85]. It was acknowledged that there were practical measures open to the defendant that would have reduced the harm caused. Significantly, the defendant should have engaged a suitably qualified person to undertake the dam repairs: at [86]-[88]. The offence was reasonably foreseeable in the circumstances due to a number of factors, including a need to exercise particular precaution in undertaking any works as the dam area had been identified as being vulnerable to discharge of sediment-laden waters: at [89]-[94]. The defendant had control over the causes of the offence: at [95]. The prosecutor's submissions that the defendant's conduct was reckless: at [100]-[104], and not an uncharacteristic aberration, were not accepted: at [105]-[116];

(2) subjectively, there were no aggravating factors applicable to the circumstances: at [120]. There were a number of mitigating factors in favour of the defendant including: the environmental harm was not substantial: at [121]; the offence occurred while the defendant was trying to prevent environmental harm: at [122]; no prior convictions: at [123]; expression of remorse and contrition, which included the expenditure of $454,694.52 in adressing site problems: at [126]-[131]; an early plea of guilty: at [132]; and assistance to authorities: at [133]-[135]; and

(3) the defendant was required to pay a total of $198,464 including the prosecutor's legal and investigation costs: at [154]. In lieu of a fine, the Court made an order subject to s 250(1)(e): at [148], [154]. The Court also made a publication order under s 250(1)(a) of the POEO Act: at [153].

Civil Enforcement

CTI Joint Venture Company Pty Ltd v CRI Chatswood Pty Ltd (In Liq) (Receivers and Managers Appointed) (No 3) [2012] NSWLEC 3 (Craig J)

Facts:

Principal proceedings: as part of the Chatswood Transport Interchange Project, the First Respondent obtained, pursuant to the provisions of Pt 4 of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act"), a single development consent for development on the site of retail premises beneath a podium, three residential towers on the podium and a stratum subdivision of the site to accommodate these uses. A condition of consent required that the subdivision be in accordance with a plan identified in the condition. A further condition required that before the subdivision certificate was issued, easements were to be created which were necessary to accommodate the erection and use of the residential towers. CTI Joint Venture Company Pty Ltd ("JVCo"), acquired the stratum lots intended to accommodate the residential towers. After acquisition it was discovered that two of the three residential towers could not be constructed on the stratum lots intended for them as the boundaries of the stratum subdivision plan as registered ("the DP") did not accord with the boundaries shown in the plan that was the subject of the development consent and the necessary easements had not been created. The Applicant claimed that this led to a breach of s 76A(1) of the EPA Act and sought remedies under ss 123 and 124.

Related proceedings: If JVCo was successful in the principal proceedings, then an issue would arise as to whether the Second Respondent was bound to take title to one of the stratum subdivision lots, which, if the plan was amended in the manner sought in the principal proceedings, it would have reduced dimensions and area from that which was originally contracted to be purchased.

Issues:

(1) whether the First, Third or Fourth Respondent caused or brought about the registration of the plan of stratum subdivision;

(2) if so, did all or any of the First, Third or Fourth Respondents do so in breach of the conditions of the development consent that permitted the subdivision, therefore acting in breach of the EPA Act in that:
   (a) the location of the common boundary between the lots did not accord with that shown on the plan of stratum subdivision identified in the conditions of the development consent; and/or
   (b) the s 88B instrument under the *Conveyancing Act* 1919 ("the Conveyancing Act") that came to be registered with the DP did not record easements required by the conditions of the development consent;

(3) whether s 195J of the Conveyancing Act operated as a bar to the claims made by JVCo;

(4) if the challenge by JVCo was not barred, and any of all of the First, Third or Fourth Respondents had breached the EPA Act, whether the Court should grant relief, particularly with regard to the contractual arrangements into which JVCo entered; and

(5) if relief was to be granted, the form of the orders that should be made.

Held: directing the parties to bring in short minutes of orders reflecting the amendment required to the common boundary between two lots as indicated in the DP, and the creation of additional easements:

(1) the breach in relation to the stratum subdivision and failure to create easements was attributed to the First, Third and Fourth Respondents by reason of the part they played in securing registration of the plan, making them susceptible to an order pursuant to s 124 of the EPA Act: at [73]-[74];

(2) (a) the registered plan was not prepared in accordance with the development consent. This constituted a breach of s 76A(1)(b) of the EPA Act: at [106];

(b) a number of easements required by the conditions of the development consent had not been created prior to or upon registration: at [114];

(3) section 195J of the Conveyancing Act did not operate as a bar to the claim made by JVCo, as it sought enforcement of the EPA Act and its action was *in personam*: at [177], [190]-[194];

(4) the terms of the contracts under which the stratum lots were acquired by JVCo did not deny its claim either as a matter of contract or in exercise of the Court's discretion. The need to ensure that the conditions of the development consent were observed weighed heavily upon the exercise of discretion to grant relief: at [249]; and

(5) orders made requiring amendment of the registered plan of stratum subdivision by the Respondents pursuant to s 195H of the Conveyancing Act: at [250]-[253], [310].

Ryde City Council v Chen [2012] NSWLEC 63 (Preston CJ)

Facts: Mr Chen, the first respondent, was the owner of a business called "JC Sapphire Massage" which he operated from premises at unit 1A, 21-25 Rowe Street, Eastwood. He purchased the business in January 2011 and leased the premises from Ms Kim, the second respondent and owner of the premises. There was a development consent for the premises for a remedial massage clinic. In May 2011, Ryde City Council ("the council") issued a brothel closure order to Mr Chen and to Ms Kim requiring cessation of use of the premises as a brothel. Ms Kim served termination notices on Mr Chen on 15 February 2011 and 8 July 2011, however Mr Chen did not surrender possession of the premises. The council sought declarations that Mr Chen had breached s 76B of the *Environmental Planning and Assessment Act* 1979 ("EPA Act") by carrying out prohibited development for the purposes of sex services premises, and that Mr Chen and Ms Kim had breached the EPA Act by failing to comply with a brothel closure order under s 121B of the EPA Act. The council sought an order that Mr Chen and Ms Kim be restrained from using or permitting the use of the premises for sex services premises and related sex uses. The council also sought a utilities order under s 121ZS of the EPA Act directing the providers of electricity to the premises to cease providing that service. Ms Kim opposed the making of a utilities order, submitting that a utilities order could impede her intended action to evict Mr Chen and remove and store the contents of the premises, being Mr Chen's chattels and equipment.

Issues:

(1) whether Mr Chen had breached the EPA Act;

(2) whether Ms Kim had breached the EPA Act; and

(3) if such breach were identified, what orders should be made to remedy the breaches.

Held: finding both Mr Chen and Ms Kim had breached the EPA Act:

(1) Mr Chen used the premises as a brothel (as defined in s 4 of the EPA Act) and sex services premises (as defined in the *Ryde Local Environmental Plan* 2010 ("Ryde LEP")) from 15 January 2011, being the commencement date of the lease of the premises to Mr Chen, to at least 19 January 2012: at [4], [22] and [79];

(2) Mr Chen's use of the premises as a brothel and sex services premises was in breach of the zoning controls of the Ryde LEP which prohibits such development, and s 76B of the EPA Act: [4], [15], [19] and [80];

(3) Mr Chen failed to comply with the brothel closure order issued to him on 4 May 2011: at [4], [51] and [79];

(4) Ms Kim failed to comply with the brothel closure order issued to her on 4 May 2011: at [4], [51] and [79];

(5) Mr Chen and Ms Kim's failure to comply with the respective brothel closure orders was a breach of the EPA Act: [4] and [80];

(6) it was appropriate to make declarations that Mr Chen had breached the EPA Act by carrying out the prohibited development of sex services premises and that Mr Chen and Ms Kim had each breached the EPA Act by failing to comply with the brothel closure orders issued to them on 4 May 2011: at [84]; and

(7) it was also appropriate to grant a prohibitory injunction restraining Mr Chen from using, and Ms Kim from permitting the use of, the premises for the purposes of sex services premises: at [85]; and Ms Kim was to prepare, file and serve an affidavit deposing to the action taken to repossess the premises. The matter could then be listed for further hearing to determine the appropriateness of making a utilities order in light of the action taken: at [96].

Ryde City Council v Chen (No 2) [2012] NSWLEC 64 (Preston CJ)

(related decision: *Ryde City Council v Chen* [2012] NSWLEC 63 Preston CJ)

Facts: on 22 February 2012, the Court found that the first respondent, Mr Chen, and the second respondent, Ms Kim, had breached the *Environmental Planning and Assessment Act* 1979 ("EPA Act") by carrying out development for the prohibited purpose of sex services premises and by failing to comply with an order under s 121B of the EPA Act to cease using the premises at unit 1A, 21-25 Rowe Street, Eastwood as a brothel. Declarations to that effect were made and an injunction was made restraining Mr Chen, the lessee of the premises, and Ms Kim, the owner of the premises, from using or permitting the use of the premises for sex services premises and related sex uses. These proceedings were in the Court's Class 4 jurisdiction. Ryde City Council ("the council") had also sought a utilities order under s 121ZS of the EPA Act in the Court's Class 1 jurisdiction that the electricity provider cease providing electricity to the premises for three months. Ms Kim had said she intended to evict the tenant, Mr Chen, who operated the illegal brothel on the premises and sought an adjournment for a week and a half of the further hearing of the question of whether a utilities order should be granted to allow her to take this action. The Court had adjourned the further hearing and directed Ms Kim to file and serve an affidavit describing the actions she had taken to re-enter the premises and evict Mr Chen by 29 February 2012. Ms Kim deposed that on 23 February 2012, she had re-entered the premises and caused the removal of the contents of Mr Chen, including all furniture, beds and possessions, and the storage of the contents in a self-storage warehouse at Strathfield. On 24 February 2012, Ms Kim arranged for a locksmith to change the lock for the premises and for the premises to be cleaned by professional cleaners and painted. Officers of the council inspected the premises on 1 March 2012 and verified that Ms Kim had taken the actions she had described. At the time of the hearing, Ms Kim was advertising the premises for lease to a new tenant.

Issues:

(1) whether a utilities order should be made; and

(2) the parties' liability for costs.

Held: dismissing the Class 1 proceedings and ordering the second respondent to pay the amount of $10,000 towards the applicant's costs of the proceedings:

(1) a utilities order did not need to be made. By reason of the actions taken by the owner of the premises, Ms Kim, to evict the tenant, Mr Chen, who was using the premises as a brothel, the use of the premises as a brothel had ceased. The intended result of the brothel closure order, of cessation of use of the premises as a brothel, had been achieved. A utilities order was therefore not required to enforce the brothel closure order: at [14], [15];

(2) in the Class 4 proceedings, the council, having been successful, was prima facie entitled to an order that both Mr Chen and Ms Kim should pay the council's costs: at [18];

(3) ordinarily, the liability for costs of unsuccessful parties is joint and several. However, the successful applicant, the council, had agreed with one unsuccessful respondent, Ms Kim, to several liability in an agreed sum of $10,000. This would leave the other unsuccessful respondent, Mr Chen, liable to pay the balance. In this circumstance, it was appropriate to depart from the conventional order and specifiy contributions of the respondents: at [22]–[24];

(4) the apportionment of costs liability of 20 percent for Ms Kim and 80 percent for Mr Chen was appropriate having regard to their roles as owner of the premises, and tenant and operator of the brothel, respectively: at [25]; and

(5) in the Class 1 proceedings, the fact that, due to the events that had occurred, a utilities order would not be made as had originally been sought by the council, was not a sufficient reason to depart from the general rule that there should be no order as to costs. The central reason why a utilities order had not been made was Ms Kim's actions taken after the proceedings commenced to evict Mr Chen from the premises and thereby bring about a cessation of use of the premises as a brothel. The council was successful because by bringing the proceedings it brought about the event sought of the cessation of use of the premises as a brothel: at [19].

Maitland City Council v Khalil [2012] NSWLEC 58 (Preston CJ)

Facts: in the decade prior to the proceedings, Maitland City Council ("the council") had repeatedly requested and directed Mr Khalil, the owner of a dilapidated and vacant building on the main street of Maitland, to repair the building. Two statutory orders were given to Mr Khalil on 12 October 2010, which orders were the subject of these proceedings. These were an order No 4 under s 121B of the *Environmental Planning and Assessment Act* 1979 ("EPA Act") requiring Mr Khalil to repair or make structural alterations to the building and an order No 22 under s 124 of the *Local Government Act* 1993 ("LG Act") requiring Mr Khalil to remove from the building and dispose of the waste specified in the order. Mr Khalil denied that he was personally served the orders in October 2010. The council sought declarations that Mr Khalil had not complied with the orders. Instead of orders compelling Mr Khalil to do the work required by the statutory orders, the council sought for the Court to make an order that the Council exercise its functions to carry out the work required by the two orders. Mr Khalil defended the claim on four grounds. These were that: first, he was not personally served the orders; secondly, the vandalism of the building was the result of a wider social problem which he was powerless as an individual to solve; thirdly, the statutory orders were an abuse of power by the council because, amongst other matters, it had taken legal action against him in the Local Court prior to the subject proceedings to recover unpaid rates; and fourthly, Mr Khalil's limited financial means prevented him from complying with the orders. In relation to orders for the doing of the works, Mr Khalil submitted that he, not the council, should carry out the work. He asked the Court to extend the time for compliance with the statutory orders.

Issues:

(1) whether Mr Khalil was personally served the orders in October 2010;

(2) whether Mr Khalil breached the EPA Act and LG Act; and

(3) if there were breaches, what remedial orders should be made.

Held: declaring that Mr Khalil had breached the EPA Act and LG Act, and ordering the council to carry out the works required in the statutory orders:

(1) Mr Khalil's defences were ineffectual against the council's claims that he had failed to comply with the statutory orders under s 121B of the EPA Act and s 124 of the LG Act and had thereby breached ss 122(a)(i) and (b)(v) of the EPA Act and ss 672(a)(i) and (b)(ii) of the LG Act: at [11], [21] and [28];

(2) the evidence of Ms Iannitti that she personally served the orders on Mr Khalil was accepted: at [16];

(3) the responsibility to secure privately owned buildings and put and maintain such buildings in a proper state of repair and cleanliness rests on the building owner: at [21];

(4) there was no abuse of power by the council in bringing the proceedings. The council had the power to issue the statutory orders and it had no responsibility to put Mr Khalil's building in a state of good repair

and maintain it, solve the problem of vandalism in Maitland or spend the money on that action instead of bringing proceedings to enforce compliance by Mr Khalil with the statutory orders. The subject proceedings and those in the Local Court were unrelated. The issuing of the statutory orders was a response to continued inaction by Mr Khalil to repair and clean up the building: at [22], [24] at and [25];

(5) neither the EPA Act nor the LG Act obliged the council to refrain from exercising the powers to issue statutory orders to require the repair and clean up of a building because the building owner is of limited financial means or is experiencing financial difficulties: at [23]; and

(6) there was no real likelihood that Mr Khalil would carry out all of the works required by the orders in any reasonable period of time. It was appropriate to make the orders sought by the council for it to carry out the works required in the orders: at [32], [37] and [41]; and Mr Khalil should pay the council's costs of the proceedings: at [42].

Woollahra Municipal Council v Sahade [2012] NSWLEC 76 (Preston CJ)

Facts: the respondent's residence, known as 86 Wolseley Road, Point Piper, was one of three in a strata subdivision. Above the residence to the east was a two-storey, residential flat building containing another two residences, known as Apartments 1 and 2, 84 Wolseley Road. Further east from the residential flat building was a forecourt for the garages for the three residences. Without seeking development consent, the respondent arranged for tradesmen to cut down a row of pencil pines which shielded Apartment 2 and to build over the cut stumps a flight of timber stairs to link the garage forecourt, which was on a higher elevation, with an existing pathway and stairs lower in elevation, which led to the front door of the respondent's residence. The pencil pine screen was planted pursuant to a condition of development consent. Woollahra Municipal Council ("the council") brought proceedings seeking a declaration that the construction of the stairway was a breach of the *Woollahra Local Environmental Plan* 1995 ("LEP") and the *Environmental Planning and Assessment Act* 1979 ("EPA Act"), and an injunction ordering Mrs Sahade to remove the stairway in order to remedy the breach. Mrs Sahade defended the proceedings on the basis that the stairway was exempt development under s 76(2) of the EPA Act, which stated that an environmental planning instrument may provide that development of a specified description that is of minimal environmental impact is exempt development, and the *State Environmental Planning Policy (Exempt and Complying Development Codes)* 2008 ("SEPP"), which provided that development specified in an exempt development code that met the standards specified for that development and that complied with certain requirements of the SEPP was exempt development. The respondent submitted that the stairway met the description of an exempt development for a pathway associated with a terrace or verandah. The council submitted that the stairway did not meet the description of a pathway and that the stairway was not "associated with" the front verandah or the terrace. The council also submitted that the stairway did not comply with the requirement in cl 1.16(3)(b) of the SEPP that the development not involve the removal or pruning of a tree without, or otherwise than in accordance with, a development consent.

Issues:

(1) whether the development was exempt development; and

(2) if the development was not exempt development, what orders should be made to remedy and restrain the breach.

Held: declaring that the timber stairway and associated works were constructed in contravention of the LEP and s 76A of the EPA Act and ordering that the development be demolished:

(1) the stairway was a pathway within the meaning of the SEPP. In the context of the SEPP, a pathway was a way or route which provided access to the specified types of associated development. A stairway could be of minimal environmental impact: at [33], [34] and [36];

(2) a pathway need not be subordinate to the associated development: at [35];

(3) the stairway was associated with the front verandah and the terrace. The stairway provided direct access between the garage forecourt, the pool terrace and the front verandah of the residence of 86 Wolseley Road: at [42] and [45];

(4) the location of both the original stairway and the modified stairway overlapped with the location of the pencil pine screen that was originally planted in the location specified by the development consent. Neither the original stairway nor the modified stairway could have been constructed without cutting down the pencil pine screen. Accordingly, the new stairway did not comply with cl 1.16(3)(b) of the SEPP because it involved the removal or pruning of the original pencil pine screen, which required development consent: at [51] and [59];

(5) because the stairway did not comply with a requirement of the SEPP for exempt development, the stairway was not exempt for the purposes of the SEPP or s 76(2) of the EPA Act. The stairway was not, therefore, exempt from the requirement under the LEP and s 76A(1)(a) of the EPA Act for development consent, and, since the respondent did not obtain development consent, the development breached s 76A(1) of the EPA Act: at [60] and [61]; and

(6) an injunction ordering the removal of the stairway was appropriate to remedy the breach of the LEP and the EPA Act by putting the respondent back in the position she should have been in of having to make a development application seeking development consent to construct the stairway: at [72].

Parramatta City Council v M E & B D Pty Limited (No 2) [2012] NSWLEC 74 (Preston CJ)
(related decision: *Parramatta City Council v M E & B D Pty Limited* [2012] NSWLEC 47 Preston CJ)

Facts: on 17 February 2012, the Court found that the respondent company had breached the *Environmental Planning and Assessment Act* 1979 ("EPA Act") by first, failing to comply with an order under s 121B of the EPA Act requiring the removal of an illegally erected metal awning and secondly, erecting and using the awning without development consent. At the time of the decision on 17 February 2012, receivers and managers had been appointed to the company. The Court deferred determining the appropriate orders to be made to remedy and restrain the breaches to allow an opportunity for the receivers and managers who had been appointed to the company and Mr Dagher, the sole director of the company, to be heard as to the relief that should be granted. Mr Dagher submitted that the reason he did not comply with the s 121B order was that the company had been in financial difficulties, which were compounded once the signage at the premises advertising the business had been removed in compliance with the s 121B order. Furthermore, once receivers and managers were appointed to the company, Mr Dagher was effectively locked out of the premises and was unable to remove the awning. By the time of the adjourned hearing, the receivers and managers had retired from acting and did not wish to be heard as to the relief that should be granted to remedy and restrain the company's breaches of the EPA Act. Mr Dagher advised the council and the Court that he would be prepared to remove the awning once he was able to re-enter the premises. The former receivers and managers had advised Mr Dagher that they would provide him with keys to enable him to re-enter the premises. Mr Dagher said that once he was able to re-enter the premises, he would be able to remove his personal plant and equipment from underneath the awning and store it at a friend's rural property until he was able to recommence his business elsewhere. Mr Dagher said he would then arrange for the awning to be demolished.

Issues:

(1) whether an order should be made that the company remove the unauthorised awning; and

(2) the parties' liability for costs of the proceedings.

Held: ordering that the respondent company remove the unauthorised awning and pay the applicant's costs of the proceedings:

(1) it was appropriate for the Court to make an order that the company remove the unauthorised awning. There were no discretionary grounds for refusing such relief: at [7];

(2) the council's delay in seeking orders for the removal of the awning was not a sufficient reason to decline relief. Although the awning had been in place for at least 10 years, there was no evidence that the awning was structurally safe. The awning did not comply with a number of Deemed-to-Satisfy provisions of the Building Code of Australia ("BCA") concerned with fire resistance and the council was not satisfied that the awning complied with the BCA requirements concerning structural safety. Failure to satisfy these standards could have resulted in failure of the structure leading to damage to property and harm to persons: at [8]-[11];

(3) a period of six weeks from the date of the order was sufficient to allow Mr Dagher to re-enter the premises, remove his plant and equipment and arrange for the removal of the awning: at [13];

(4) the usual costs order in Class 4 of the Court's jurisdiction was that the unsuccessful party pay the successful party's costs. In this case, the council ordinarily should be entitled to its costs: at [14]; and

(5) Mr Khalil's impecuniosity and his being locked out of the premises explained why the company had not complied with the s 121B order but these explanations did not provide sufficient grounds for departing from the usual order as to costs. The quantum of the costs could be negotiated and possibly agreed with the council, having regard to the company's financial position. The appropriate order was that the company pay the council's costs as agreed, or failing agreement, as assessed: at [16]-[18].

Director-General, Department of Environment, Climate Change and Water v Venn (No 3) [2012] NSWLEC 31 (Preston CJ)

(related decisions: *Director-General, Department of Environment, Climate Change and Water v Venn* [2011] NSWLEC 118 Preston CJ; *Director-General of the Department of Environment, Climate Change and Water v Venn (No 2)* [2011] NSWLEC 232 Preston CJ)

Facts: on 8 July 2011, Mr Venn had been found by the Court to have breached the *National Parks and Wildlife Act* 1974 ("the NPW Act") by directing the clearing and filling of land on which there were two endangered ecological communities. He had been restrained from continuing the breach. Amongst other materials, a piece of asbestos sheeting had been discovered in the fill. A parties' single expert in restoration ecology, Ms Elizabeth Ashby, was appointed to provide, and did provide, an expert report in relation to remedying the harm caused to the endangered ecological communities by Mr Venn's clearing and filling activities. The applicant had contended that all fill should be removed and disposed of at a waste facility. The applicant also sought variations to Ms Ashby's recommended measures.The applicant had pressed for the court orders to identify the bushland restoration consultant who would undertake the work. Ms Ashby had identified one suitable person, whose indicative quotation was 50 per cent higher than the indicative costings Ms Ashby had provided in her report. Another bushland regenerator provided a quotation that was 250 per cent higher than Ms Ashby's indicative costings.

Issues:

(1) which bushland regenerator should be appointed to carry out the restoration works;

(2) whether all the fill should be removed from the site and disposed of at a waste facility;

(3) whether the remedial orders should extend beyond the disturbed area to adjacent bushland; and

(4) the parties' liability for costs of the proceedings after 11 November 2011.

Held:

(1) Ms Ashby should be appointed as the restoration consultant who would cause the measures recommended in her expert report to be performed and provide compliance reports to the applicant not less than every three months: at [11], [19];

(2) disposal of the fill at a waste facility (at a significantly greater cost to Mr Venn) was not necessary. Mr Venn would be under an existing duty at law not to place the fill on his property in such a location or manner as would cause a nuisance or harm to the neighbouring property. The risk of further asbestos being in the fill was not sufficient to warrant removal and disposal of all of the fill, although Mr Venn was required to comply with a protocol upon discovering any material suspected to be, or to contain, asbestos: at [13], [15], [29];

(3) there was a weed infestation in the nature reserve which needed to be addressed by the National Parks and Wildlife Service but the evidence did not establish that Mr Venn's breach of the NPW Act was responsible for the infestation. Thus, the remedial order was not extended beyond the disturbed area: at [16]-[17]; and

(4) the appropriate order in the circumstances was for the parties to pay their own costs of the proceedings after 11 November 2011, up to and including the hearing on further orders. In large part,

the applicant was not successful in obtaining the variations it had sought to Ms Ashby's report. It was not fair and reasonable to order Mr Venn to pay the respondent's costs in relation to these matters: at [28].

Injunctions

Hoxton Park Residents Action Group v Liverpool City Council (No 4) [2012] NSWLEC 67 (Biscoe J)

(related decisions: *Hoxton Park Residents Action Group Inc v Liverpool City Council* [2010] NSWLEC 242 Biscoe J; *Hoxton Park Residents Action Group Inc v Liverpool City Council (No 2)* [2010] NSWLEC 259 Biscoe J; *Hoxton Park Residents Action Group Inc v Liverpool City Council* [2011] NSWCA 349 Giles, Basten and Macfarlan JJA; *Hoxton Park Residents Action Group Inc v Liverpool City Council (No 2)* [2011] NSWCA 363 Allsop P, Beazley and Basten JJA; *Hoxton Park Residents Action Group Inc v Liverpool City Council (No 3)* [2012] NSWLEC 43 Biscoe J)

Facts: immediately after judgment was delivered in [2012] NSWLEC 43, the second and third respondents applied for a stay of the injunction against further work to allow the building to be made watertight, to secure the building site against trespass and to ensure the building was structurally secure. The applicant opposed the application on all three grounds. The parties agreed to a court-appointed expert (an experienced civil and structural engineer) to report to the Court on an urgent basis. Both sides subsequently sought an order that the other pay the costs of the stay application.

Issues:

(1) whether waterproofing works were necessary;

(2) whether works were required to make the building secure against unauthorised entry;

(3) whether works were necessary to make the building structurally secure; and

(4) whether a costs order should be made.

Held: temporary stay of the injunction against further work to allow certain works to be carried out, and the second and third respondents were to pay the applicant's costs of the stay application:

(1) the expert concluded that the building did not need to be made waterproof or watertight if work was suspended for up to 12 months. However, work was required to protect the insulation blanket beneath the roof sheeting and the plasterboard wrapped around the steel columns from the weather: at [5];

(2) further works were not necessary to secure the building against unauthorised entry because there was a range of adequate security measures already in place, and, in the expert's opinion, the building elements were robust so as not to be easily damaged without some force. However, the air-conditioning fans on the ground floor should be removed to prevent theft: at [8]-[9];

(3) the expert concluded that the building was structurally secure in its present state and further wall bracing to the upper floor was unnecessary. However, the wall bracing should be permitted because the expert conceded that such bracing would eliminate any risk of collapse, it was open to a structural engineer to reasonably hold a different view as to the extent of the risk of structural collapse absent such bracing and he had not undertaken the usual manual checks of the building due to the urgency of the matter, and a structural collapse would pose a serious risk to public safety and would be extremely costly to fix: at [10]-[11]; and

(4) the second and third respondents' stay application sought an indulgence, it was not made until after judgment had been delivered, and the stay to be granted was more limited than was sought. Thus, they should pay the applicant's costs of the stay application: at [12].

Bankstown City Council v Bennett [2012] NSWLEC 38 (Pepper J)

Facts: Bankstown City Council ("the council") sought a declaration that a complying development certificate issued in 2010 ("the certificate") by Mr Bennett (the first respondent) to Al Noori Muslim School Ltd (the second respondent) ("the school") under the *State Environmental Planning Policy (Infrastructure) 2007* ("the SEPP") was invalid. The council also sought a consequential order restraining the school from undertaking any development pursuant to the certificate.

The school initially operated a small educational facility on land at 75 Greenacre Rd, Greenacre. In 2008, it was granted consent to use a residential building on 93 Greenacre Rd, Greenacre as a school. The school acquired five additional adjacent blocks of land, which it consolidated with 93 Greenacre Rd to form a single lot ("Lot 893"). In 2009, the school was granted development consent to construct a "replacement educational facility" on Lot 893 pursuant to funding provided under the Commonwealth's Building the Education Revolution Programme ("the 2009 consent"). In 2010, Lot 893 was consolidated with two additional lots to form Lot 894. The certificate, issued in September 2010, purportedly authorised the erection of a school on Lot 894.

Issues:

(1) whether there was an "existing school" as required by cl 31A(1) of the SEPP in order to enliven the power to grant the certificate;

(2) whether the certificate authorised development on land that was not "within the boundaries of the existing school" contrary to cl 31A(1) of the SEPP;

(3) whether the certificate authorised the construction of a new school rather than building works comprising alterations or additions to an existing school, and whether this was permitted under cl 31A(1);

(4) if the certificate was invalid, whether consent was required for the development pursuant to cl 28(2) of the SEPP; and

(5) whether there were discretionary considerations that would prevent injunctive relief being granted.

Held: a declaration was made that the certificate was invalid, but no injunctive relief was granted:

(1) although a school existed on the land in the sense that it was present and operational, the term "existing school" in cl 31A(1) of the SEPP meant, having regard to the term's statutory context and purpose, an existing school that had the benefit of a development consent to be operating as a school on the land upon which it was located: at [77]-[80] and [89]-[90];

(2) no consent had been granted to approve development beyond the geographical boundary of either 93 Greenacre Rd, Greenacre or Lot 893 to include the additional land forming Lot 894. Thus, any "existing school" could only be said to be operating within the boundary of either 93 Greenacre Rd or Lot 893. The certificate, purporting to approve development over the whole of Lot 894, was issued in breach of cl 31A(1) because it related to an area of land greater than that contained "within the boundaries of an existing school": at [96]-[98];

(3) clause 31A(1)(a) permitted either the expansion of an existing school via "alterations or additions" or the construction of an entirely new school: at [99]-[101];

(4) because there was no "existing school" pursuant to cl 31A(1) of the SEPP, the certificate was invalid and development consent was required pursuant to cl 28(2) of the SEPP, but none had been granted: at [102]; and

(5) no injunctive relief was granted because: at [109]:

   (a) the council did nothing to stop the unlawful use, apart from putting the school on notice that it believed the certificate was invalid, and had waited five months before commencing proceedings;

   (b) the school was acting in the public interest and not for private commercial gain;

   (c) the unlawful use caused no damage to the environment other than harm to the planning regime;

   (d) the school acted reasonably in relying on the certificate issued by Mr Bennett;

(e) the detrimental effect to the school and its students caused by the granting of an injunction would be severe; and

(f) avenues existed for the regularising of the unlawful building works.

Aboriginal Land Rights

Deerubbin Local Aboriginal Land Council v Minister Administering the Crown Lands Act [2012] NSWLEC 68 (Pain J)

Facts: Deerubbin Local Aboriginal Land Council ("the applicant") appealed pursuant to s 36(6) of the *Aboriginal Land Rights Act* 1983 ("the ALR Act") against the Minister's refusal of its Aboriginal Land Claim ("ALC") on 8 December 2009. The ALC was lodged on 15 August 1989 and related to land along O'Haras Creek at Kenthurst. The claimed land was reserved in 1963 under the now repealed *Crown Lands Consolidation Act* 1913 for future public requirements. The Minister conceded at the hearing that as at the date of the claim, part of the claimed land was claimable Crown land ("Area A") but that the remainder ("Area B") was needed or likely to be needed for one or more of the essential public purposes ("EPPs") of open space and/or urban fringe park, nature conservation and public recreation. The parties sought to rely on large numbers of post-claim documents.

Issues:

(1) whether post-claim documents could be relied on; and

(2) whether Area B was likely to be needed for the EPPs of open space and/or urban fringe park, nature conservation and public recreation.

Held: appeal upheld:

(1) given the largely preliminary level of investigation of options for the land being considered at the date of claim with no clear proposal for any one or more uses being considered at a senior departmental or Ministerial level, the documents created after mid-1990 could not be relied on: at [102]-[108];

(2) the Minister relied heavily on a local council's actions to establish that the proposed uses were EPPs and the likely need for these. However, as the Department of Lands ("Lands") had primary responsibility for Crown land at the date of the claim, the actions of local government could not be relied on to establish the view of the State government at the date of claim: at [124]-[126];

(3) given the land capability assessment requirements of Lands before any decision could be made about land use, the Minister had not established likely need for open space: at [155];

(4) in relation to nature conservation, the evidence suggested inconsistent intentions between the local council, NPWS and Lands: at [140]-[141]. The history did not establish that nature conservation was an EPP for which there was a likely need at the date of claim: at [153];

(5) there was little evidence in relation to public recreation and the references to it were not specific to the claimed land. There was no proposal for any form of public recreation under consideration. The Minister did not establish likely need for an EPP of public recreation at the date of claim at [154];

(6) there was little evidence before the date of claim in relation to urban fringe park, which was undefined and not a form of reservation provided for under the *National Parks and Wildlife Act* 1974. It was no more than a concept at the date of claim. The Minister did not establish this as an EPP for which there was likely need at the date of claim: at [156]; and

(7) that the evidence established potential for conflicting demands for the land from other State departments raised additional doubt that the land was likely to be needed for the EPPs at the date of claim: at [158]-[167].

Costs

Thomas v Randwick City Council [2012] NSWLEC 10 (Pain J)

Facts: Randwick City Council ("the council") did not have a quorum to determine the applicant's application to modify a development consent due to the number of councillors declaring pecuniary and non-pecuniary interests, as required by the *Local Government Act* 1993. The applicant commenced Class 1 proceedings against the deemed refusal of the modification application, and the council filed a submitting appearance. Subsequently, a resident objector was joined as second respondent. The applicant and the second respondent attended a conference under s 34 of the *Land and Environment Court Act* 1979 ("Court Act") and reached agreement in principle. The council did not attend the conference. It subsequently consented to the s 34 agreement and a commissioner made final orders accordingly. The hearing date was vacated. The applicant filed a notice of motion seeking costs on an indemnity basis from the council.

Issue:

(1) whether it was fair and reasonable to award costs under Pt 3 r 3.7 of the Land and Environment Court Rules 2007 due to the council's behaviour before the proceedings were commenced (r 3.7(3)(c)) and/or the council's conduct during the proceedings (r 3.7(3)(d)).

Held: application dismissed:

(1) it was important to recognise the presumptive rule in Class 1 appeals that each party pays its own costs, identified in numerous authorities: at [18];

(2) in relation to the council's behaviour before the proceedings commenced, the parties agreed that the circumstances were unusual whereby the elected councillors could not make a decision as no quorum was achieved resulting in no decision being made: at [17]. Those unusual circumstances did not alone suggest that it was fair and reasonable to order the council to pay the applicant's costs. The councillors found themselves in the position of having no quorum because of their compliance with rules regulating conflict of interests in local councils: at [20]. The councillors were not compelled to delegate the matter to the General Manager and had discretion whether to do so. While the applicant complained that the only avenue open to it was to appeal to this Court, in these unusual circumstances that did not appear an unfair or unreasonable outcome: at [21];

(3) in relation to the council's conduct during the proceedings, it was necessary to look at the circumstances overall. The council did not frustrate the conduct of the s 34 conference, agreed to holding it, and later consented to the agreement reached between the applicant and the second respondent. The council's behaviour did not result in the applicant incurring any additional or unreasonable costs. As the council's behaviour was reasonable it was not necessary to resolve whether the duty of a party to attend a s 34 conference operates regardless of a party filing an earlier submitting appearance: at [22]; and

(4) the unusual circumstances did not involve any conduct of the council suggesting any shortcomings in its behaviour justifying an award of costs on an indemnity basis: at [23].

Brown v Randwick City Council [2012] NSWLEC 28 (Preston CJ)

(related decision: Brown v Randwick City Council [2011] NSWLEC 172 Preston CJ)

Facts: the Court upheld a judicial review challenge brought by the applicant, Mr Brown, and declared invalid a development consent granted by Randwick City Council ("the council"), the first respondent, to Mr and Mrs Sandilands, the second and third respondents. The applicant's primary ground of challenge had been that the council lacked power to determine the application by granting consent because the council by its delegate had already determined the development application by refusing consent. This primary ground of challenge was disputed by Mr and Mrs Sandilands but was also met by them with a defence that such a challenge was precluded by the privative clause in s 101 of the *Environmental Planning and Assessment Act* 1979("the EPA Act"). The applicant succeeded both in rebutting the s 101 defence and in establishing its claim that the council lacked power. The applicant had made other alternative claims relating to failure to consider relevant matters, manifest unreasonableness of the council's decision and failure to properly

notify the development application. The applicant succeeded in establishing that the council failed to consider one of the relevant matters, but not other relevant matters or that the decision was manifestly unreasonable. The Court had found it could not draw an inference from all of the evidence that the notification letters were not sent.

Issues:

(1) whether there should be apportionment of the applicant's costs;

(2) which of the respondents should be liable for the applicant's costs; and

(3) whether the council should be liable for Mr and Mrs Sandilands' costs.

Held: ordering the first respondent, and the second and third respondents, to pay the applicant's costs of the proceedings, including the costs of the applications for costs of the proceedings:

(1) one circumstance where the Court may consider it appropriate to depart from the normal rule that costs follow the event is where multiple issues are involved and the successful applicant fails on one or more of the issues which are "clearly dominant or separable" or "clearly discrete" from the issues on which the applicant succeeded: at [7], [9], [11];

(2) the relevant matters and the manifestly unreasonable grounds on which the applicant did not succeed were "inseparable" from, or "at least sufficiently linked" to, the relevant matters ground on which the applicant did succeed: at [14];

(3) the saving in time that could have been achieved if not all of the relevant matters and manifest unreasonableness grounds had been run by the applicant would not have been much: at [15];

(4) the relevant matters and manifest unreasonableness grounds on which the applicant did not succeed were not without any real merit and the raising of those issues by the applicant was not so unreasonable that it would have been fair and reasonable to make an apportionment order: at [16];

(5) the notification issue was sufficiently linked to the other grounds in that it was directed to the same exercise of power to grant development consent that was challenged by the other grounds on which the applicant was successful: at [17];

(6) all of the respondents should be ordered to pay the applicant's costs with liability being equal between the council on the one part and Mr and Mrs Sandilands on the other part: at [27]; and

(7) in relation to the council's liability for the beneficiaries' costs, the costs of the applicant in preparing for and conducting the hearing, and Mr and Mrs Sandilands' costs of defending the applicant's claim before and at the hearing, were a consequence of Mr and Mrs Sandilands' choice actively to defend the proceedings. It would not be fair and just to order the council to pay the costs of Mr and Mrs Sandilands' choice actively to defend the proceedings: at [28].

Al Amanah College Inc v Minister for Education and Training (No 4) [2012] NSWLEC 26 (Biscoe J)

(related decisions: *Al Amanah College Incorporated v Minister for Education and Training* [2011] NSWLEC 189 Biscoe J; *Al Amanah College Inc v Minister for Education and Training (No 2)* [2011] NSWLEC 254 Biscoe J; and *Al Amanah College Inc v Minister for Education and Training (No 3)* [2011] NSWLEC 258 Biscoe J)

Facts: in 2010, the respondent compulsorily acquired land owned by the applicant. Judgment was given on the market value of the land, and a referee was appointed to report to the Court on the applicant's claims for disturbance loss and special value. Nineteen hours before the commencement of the referee's hearing, the applicant made a Calderbank offer to settle the disturbance loss/special value claims, leaving the offer open for approximately 21 hours. The offer expired during the course of submissions at the referee's hearing. On adopting the referee's report for disturbance loss, further judgment was delivered for compensation and the respondent was ordered to pay the applicant's costs. The applicant sought indemnity costs from the date of its unaccepted Calderbank offer.

Issues:

(1) whether the common law principles relating to Calderbank offers applied to proceedings for compensation for the compulsory acquisition of land when the *Uniform Civil Procedure Rules* 2005 specifically applied the statutory regime of Offers of Compromise to such cases; and

(2) if so, whether the applicant was entitled to the indemnity costs claimed.

Held: application for indemnity costs dismissed:

(1) it was questionable whether Calderbank principles apply in compulsory acquisition cases: at [16]-[17]; and

(2) assuming that they do, the applicant had not satisfied the Calderbank principles because the offer was not left open for a reasonable amount of time in the circumstances, and it was not unreasonable for the respondent to have not accepted it: at [24]-[29].

DEXUS Funds Management Limited v Blacktown City Council (No 4) [2012] NSWLEC 60 (Pain J)

(related decisions: *DEXUS Funds Management Ltd v Blacktown City Council* [2011] NSWLEC 156 Craig J; *DEXUS Funds Management Ltd v Blacktown City Council (No 2)* [2011] NSWLEC 247 Preston CJ; *DEXUS Funds Management Limited v Blacktown City Council (No 3)* [2011] NSWLEC 230 Pain J)

Facts: in Class 4 judicial review proceedings DEXUS Funds Management Limited ("the applicant") sought a declaration of invalidity of development consent granted by Blacktown City Council ("the council") to Plumpton Park Developments Pty Ltd ("the second respondent"). The proceedings were commenced on 27 May 2011 and Points of Claim were served on 14 July 2011 raising several issues including failure to consider contamination and impacts of traffic control signals. After the respondents filed their points of defence the applicant served a reply raising the issue that the right of way ("ROW") the development consent relied on did not benefit the whole of the land benefiting from the development consent. The defences identified this issue to the applicant for the first time. The second respondent opposed this course of raising a new issue. Subsequently on 27 October 2011 the applicant filed a notice of motion seeking leave to rely on amended Points of Claim ("APOC") and the Court granted leave on 3 November 2011. The council filed a submitting appearance. The second respondent filed a Class 1 appeal pursuant to s 97 of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act") seeking a modification of the development consent and a notice of motion in the Class 4 proceedings seeking to vacate the hearing date. That notice of motion was refused on 16 November 2011. The second respondent filed a submitting appearance on 18 November 2011 not long before the hearing on 26 November 2011. In *DEXUS Funds Management Limited v Blacktown City Council (No 3)* [2011] NSWLEC 230 the Court made a declaration of invalidity of a development consent in favour of applicant, partially based on the ROW issue. The applicant had agreed not to seek costs against the council when the council filed the submitting appearance on 3 November 2011. The applicant therefore sought its costs against the second respondent only. The council and second respondent agreed prior to the costs hearing that the council would pay 45 per cent of any costs order made against the second respondent. The second respondent accepted it should pay some costs but argued these should be limited to 50 per cent. While the usual rule is that costs follow the event according to r 42.1 of the *Uniform Civil Procedure Rules* 2005 ('the UCPR"), the Court has a wide direction to award costs as it sees fit under s 98 of the *Civil Procedure Act* 2005 and the UCPR.

Issues:

(1) whether any costs order against the second respondent should be limited to 50 per cent; and

(2) whether the applicant should receive all its costs of the proceedings.

Held: partial costs order made:

(1) costs are compensatory rather than punitive so that the successful party would generally be entitled to its costs in the absence of disentitling conduct. Where there is more than one respondent costs are generally awarded on the basis of joint and several liability. While the applicant was entitled to seek its costs from one respondent only, respondents ordinarily share costs where both are liable: at [13]. As the council agreed to pay 45 per cent of any costs order made against the second respondent, any concern the Court might have had about the second respondent being liable for an inordinate share of

costs was ameliorated. This suggested that any costs order against the second respondent should not be limited to 50 per cent as argued by the second respondent's counsel: at [16];

(2) it was unfortunate that the applicant did not identify the ROW issue at the outset given the "raw" facts theoretically before it, and that this issue also did not occur to either the council as the consent authority or the second respondent as the applicant for development. The issue was not self-evident given that there was a change of lot numbers from those referred to in the instrument creating the ROW to those the subject of the development consent. The applicant's evidence that it was alerted to the issue upon filing of the respondents' defences did not give rise to substantial disentitling delay but given the known facts when the proceedings were commenced the applicant could, and ideally would, have identified this issue earlier: at [17];

(3) the council and second respondent submitted that but for the ROW issue they would have pursued their defences to the other issues. Had the ROW issue been identified at the outset, the parties would not have incurred the substantial costs of addressing other issues raised in the proceedings in the five months leading up to the hearing: at [18];

(4) in relation to whether the second respondent's behaviour resulted in additional costs, the second respondent unsuccessfully opposed the applicant's notice of motion seeking to rely on the APOC. Further, it commenced Class 1 proceedings seeking to modify the consent and filed a notice of motion to postpone the Class 4 proceedings, which course was rejected by the Court. The second respondent also did not surrender the development consent as suggested by the applicant so that the hearing was necessary: at [19]; and

(5) weighing up all these factors the Court considered that the applicant should receive 80 per cent of its costs of the substantive hearing from the second respondent: at [20].

Prasad v Minister Administering the Environmental Planning and Assessment Act 1979 (No.2) [2012] NSWLEC 59 (Sheahan J)

(related decision: *Prasad v Minister Administering the Environmental Planning and Assessment Act 1979* [2010] NSWLEC 193 Sheahan J)

Facts: this was a hearing of competing motions regarding costs and interest following the court's determination in a Class 3 proceeding. The substantive proceedings concerned a request for acquisition made by the applicant, Mr Prasad, on the then available ground for hardship. Mr Prasad sought compensation for the acquisition in the amount of $1,350,000 by way of market value, plus disturbance costs of $2,400, but the Minister contended that compensation should be limited to $485,000. Prior to the hearing, the parties conducted various negotiations, and on 9 February 2010 the Minister made a final offer of $538,000. This was rejected by Mr Prasad who, based on valuation advice received by him indicating that the land was of much higher value, offered to accept $950,000 in full and final settlement of the dispute. Judgment was delivered in the substantive proceedings on 5 October 2010, with the court deciding on a market value of $509,922 and no award for disturbance (beyond valuation fees the Minister had paid prior to the proceedings).

Issues:

(1) what principles ought be applied when determining costs in Class 3 proceedings; and

(2) whether the Court should exercise its discretion to cancel or reduce the amount of interest payable by the respondent pursuant to s 66(4) of the *Land Acquisition (Just Terms Compensation) Act* 1991.

Held: the Minister was ordered to pay Mr Prasad's costs in the substantive proceedings and the costs hearing, on a party-party basis:

(1) costs arguments must be resolved in accordance with the principles stated by the Court of Appeal in *Dillon v Gosford City Council* [2011] NSWCA 328, that is, there is no presumption that costs follow the event in Class 3 proceedings, and a claimant for compensation, acting reasonably in terms of, for example, delay and expense, should usually be entitled to costs: at [56];

(2) it was not unreasonable conduct for either side to reject the other's settlement offers, and although the court accepted the Minister's valuation evidence, and the Minister had made no complaint about Prasad's conduct of the litigation, it was "just and equitable", and/or "fair and reasonable", that Prasad should recover his costs of the substantive proceedings on a party-party basis: at [89];

(3) given the nature of the interest discretion, the propriety and reasonableness of the applicant's conduct of the proceedings must be a factor in judicial consideration of the interest question, as well as of the costs question. Equally, despite the mathematical realities of the dollar amounts involved, the Court should exercise its discretion not to interfere with the statutory entitlement to interest: at [84] and [90]; and

(4) while it was perfectly reasonable for the Minister to argue the questions of both costs and interest, the applicant was entirely successful on both notices of motion, and should be awarded his costs of arguing them, on a party-party basis: at [91].

Noun v Sutherland Shire Council (No 2) [2012] NSWLEC 39 (Pain J)

(related decision: *Noun v Sutherland Shire Council* [2011] NSWLEC 1243 Dixon C)

Facts: in a Class 1 appeal under s 97 of the *Environmental Planning and Assessment Act* 1979 Mrs Noun ("the applicant") sought the removal of a deferred commencement condition of development consent requiring the removal of a boatshed. On 24 August 2010, the first day of hearing, the Sutherland Shire Council ("the council") raised, for the first time, the additional issue that two unlawful fender (mooring) piles should also be removed. The council's counsel indicated he would get instructions on whether it would be pressed. On 18 November 2010 the matter was adjourned to 11 - 12 January 2011 for hearing. On 8 December 2010 the council's solicitor sent a letter advising the applicant that it pressed the fender piles issue. On 23 December 2010 the applicant served its engineer's report on the fender piles issue and on 6 January 2011 the council served its engineer's report in reply. On 11 and 12 January 2011 the matter was part heard and adjourned to 7 April 2011 to hear evidence of the engineers. On 17 August 2011 the Commissioner upheld the appeal, imposed the deferred commencement condition to remove the boatshed but did not require the removal of the fender piles. The applicant sought her costs of the proceedings. The Court has discretion to award costs under r 3.7 of the *Land and Environment Court Rules* 2007 if it is fair and reasonable to do so.

Issue:

(1) whether it was fair and reasonable to award the costs of the proceedings to the applicant because the council acted unreasonably in the conduct of the proceedings.

Held: partial costs order made:

(1) the fender piles issue was a matter appropriate to be raised in the appeal so the applicant could not receive all her costs of meeting that issue: at [14]. However, as the council only confirmed it would be pressing the issue on 8 December 2010, up until that time the applicant was entitled to assume the issue was not to be pressed and not incur costs in responding: at [15]; and

(2) the council breached the Class 1 Practice Direction five times, an unsatisfactory position from the applicant's and the Court's perspective: at [14]. The failure to comply with the Class 1 Practice Direction resulted in uncertainty about the scope of the council's case as there was late notice of the issue by the council with leave granted only at the hearing to rely on it. This, together with the delay from 24 August 2010 to 8 December 2010 in confirming the issue was pressed, contributed to the delayed provision of the engineers' reports and hence the matter not finishing on 11 and 12 January 2011. It was fair and reasonable for the council to pay the applicant's costs of the extra hearing day of 7 April 2011: at [16].

Weriton Finance Pty Ltd v Wollongong City Council (No 4) [2012] NSWLEC 97 (Sheahan J)

(related decisions: *Weriton Finance v Wollongong City Council* [2011] NSWLEC 1046; *Weriton Finance Pty Ltd v Wollongong City Council (No 2)* [2010] NSWLEC 1313; *Weriton Finance Pty Ltd v Wollongong City Council* [2010] NSWLEC 1301 Moore SC and Morris C)

Facts: the respondent council sought costs against the applicant in nine Class 1 appeals which concerned the aggregation of nine allotments of land, demolition of existing buildings, re-subdivision of the land into eight lots, development of separate bed-and-breakfast ("B&B") facilities on seven of the lots, and development of the eighth lot as an apartment/spa complex. During the proceedings, as a consequence of a commercial dispute between the applicant and its expert witness, Mr Dickson, the witness was not paid and, consequently, neither finalised a joint report nor appeared to give evidence in court. The applicant had notice of the threat of his not attending court at least 36 hours before the hearing was due to resume. Before the final hearing, the Commissioners had made a preliminary determination in relation to the B&Bs, in which they agreed with the council's submissions regarding the approach to be taken to gain development approval. In their final judgment, the Commissioners upheld the appeals relating to the subdivision and development of the apartment/spa complex, but dismissed the other seven appeals relating to the development of the B&Bs.

Issues:

(1) whether it was clear, before the final days of hearing, that the seven B&B appeals had "no reasonable prospects of success"; and

(2) whether the applicant ought to have foreseen the risk that Mr Dickson would not complete the joint report and/or give oral evidence, if he was not paid according to his contract, and should therefore compensate council for the additional costs thrown away as a result of his failure to do so.

Held: the respondent council was largely successful on its NOM concerning the costs thrown away, with the Court ordering the applicant to pay its costs incurred in respect of two of its experts revising their draft individual expert reports, engaging in joint conferencing and preparing a joint report in conjunction with Mr Dickson. The applicant was also ordered to pay one-eighth of the total costs incurred in respect of the respondent's legal representatives appearing before the court over the six days of hearing. The respondent failed, however, on its NOM alleging that the B&B appeals had no reasonable prospects of success. The Court found:

(1) the applicant in the seven appeals relating to the B&Bs, although faced with the preliminary judgment, had competent legal representation and updated advice. It was, therefore, not unreasonable for the applicant to pursue its appeals: at [50]; and

(2) the applicant's specific failure to warn the court or the council's representatives once it was clear that Mr Dickson would not attend, rather than its lack of success in managing Mr Dickson and securing his attendance, was the element of unreasonable conduct upon which the Court decided to make an order in favour of the council: at [148-150].

Eather v Mosman Municipal Council [2012] NSWLEC 92 (Pepper J)

Facts: Mrs Julian Eather applied to the Land and Environment Court for judicial review of a decision made by Mosman Municipal Council ("the council") to approve a development application relating to a neighbouring dwelling owned by the second and third respondents. Mrs Eather was concerned that the positioning of an inclinator directly in front of her bedroom and the use of a translucent construction material, as approved, would impact upon her privacy and amenity. On 19 July 2011, the matter was listed for hearing on 12 and 13 October 2011.

Mrs Eather subsequently engaged in settlement negotiations with the second and third respondents. She informed the council of these negotiations on 28 July 2011 but did not approach the Court to have the hearing dates adjourned. Accordingly, the council continued to prepare for final hearing. On 28 September 2011, in principle agreement was reached between the respondents to resolve the matter by lodging a s 96 modification application that satisfactorily ameliorated the impact of the inclinator on Mrs Eather's privacy and amenity. On 7 October 2011, an application was made to vacate the hearing dates. Following approval

of the s 96 application by the council, Mrs Eather also filed a notice of motion seeking to discontinue proceedings. The council, by separate notice of motion, sought payment of its costs by Mrs Eather pursuant to the discontinuance.

Issues:

(1) who was liable for the costs of proceedings, in circumstances where proceedings were discontinued and a negotiated settlement was reached; and

(2) whether, and to what extent, the conduct of Mrs Eather during proceedings should be taken into account in making the costs order.

Held: Mrs Eather was to pay 25 percent of the council's costs of the proceedings:

(1) applying r 42.19 of the *Uniform Civil Procedure Rules* 2005, Mrs Eather, as the discontinuing party, was required to pay the council's costs unless she could demonstrate a compelling reason for the Court to exercise its discretion otherwise: at [35]. Mrs Eather submitted that the negotiated settlement constituted a supervening event which had the practical effect of removing the dispute between herself and the council: at [40]. The Court accepted this argument and held that, in circumstances where a settlement was properly negotiated and where there had been no determination of the merits of the proceedings, subject to the question of the reasonableness of the conduct of the parties during the proceedings, each party should bear their own costs: at [47]; and

(2) Mrs Eather's conduct in failing to promptly notify the council that settlement negotiations were taking place and in failing to inform the Court of this fact and seeking a suspension of the preparation of the proceedings for hearing in order to permit the settlement negations to be pursued in a manner that did not cause the parties to incur wasted costs, was sufficiently unreasonable to entitle the council to some, but not all, of its costs: at [49]-[52].

Shellharbour City Council v Minister for Planning (No 2) [2012] NSWLEC 96 (Craig J)

(related decision: *Shellharbour City Council v Minister for Planning* [2012] NSWLEC 29 Craig J)

Facts: the Council brought proceedings opposing a costs order against it following its unsuccessful challenge to the validity of a concept plan approval by the Minister for Planning.

Issues:

(1) whether the primary proceedings were brought in the "public interest" and the Court should therefore exercise its discretion under r 4.2(1) of the *Land and Environment Court Rules* 2007 ("LECR") to depart from the "usual order" under Pt 42 r 42.1 of the *Uniform Civil Procedure Rules* 2005 ("UCPR"); or

(2) alternatively, whether the costs of only one respondent should be ordered against the Council in accordance with the "Hardiman" principle.

Held: the council was required to pay the costs of each Respondent:

(1) the council did not satisfy the requisite tests for exercise of discretion under r 4.2(1) of the LECR: at [13], [24]. It was accepted that the proceedings were brought in the "public interest" in that they sought to "to uphold and enforce public law obligations" and therefore engaged r 4.2: at [12], [30]. However, this alone was insufficient to justify departure from the usual order: at [26], [30]. Application of the principle requires that "something more" be demonstrated in order to deny a successful party an order for costs: at [24], [31]. The Council did not adduce evidence of "something more". The proceedings involved only a narrow issue of interpretation; they raised no novel issue of general importance to environmental law and no evidence was adduced that the proceedings were brought to protect a component of the environment considered to be of value: at [27]; and

(2) the active participation of the Minister in the proceedings, in seeking to sustain the source of power that he invoked, was appropriate and did not contravene any applicable principle: at [36]-[37]. Given that the interests of the Minister were different from those of the Second Respondent, who held a commercial interest in sustaining the concept plan approval by the Minister, each of the Respondents was deemed a necessary party: UCPR Pt 6 r 6.24: at [41]. Further as there was minimal overlap in the submissions made by each Respondent, there was no unreasonable duplication of costs: at [42].

Hunter Environment Lobby Inc v Minister for Planning (No 3) [2012] NSWLEC 102 (Pain J)

(related decisions: *Hunter Environment Lobby Inc v Minister for Planning* [2011] NSWLEC 221 Pain J; *Hunter Environment Lobby Inc v Minister for Planning (No 2)* [2012] NSWLEC 40 Pain J)

Facts: in *Hunter Environment Lobby Inc v Minister for Planning* [2011] NSWLEC 221 ("*HEL No 1*") the Court stated it would grant approval to Ulan Coal Mines Ltd's ("Ulan's") major project application under the now repealed Pt 3A of the *Environmental Planning and Assessment Act* 1979 ("EPA Act") for the expansion of its mining operations, inter alia, subject to further consideration of conditions relating to the offset of scope 1 greenhouse gas ("GHG") emissions. In *Hunter Environment Lobby Inc v Minister for Planning (No 2)* [2012] NSWLEC 40, the Court determined not to require Ulan to purchase offsets for scope 1 GHG emissions following the passage of the *Clean Energy Act* 2011 (Cth)(the CE Act). Ulan sought its partial costs of the Class 1 proceedings in relation to GHG emissions. In the substantive proceedings Hunter Environment Lobby Inc ("the applicant") in opening submissions argued for the refusal of the project based on the extent of GHG emissions and pressed its alternative condition requiring Ulan to offset scope 1, 2 and 3 emissions. In closing submissions it no longer sought refusal of the project or an offset for scope 3 emissions.

Issue:

(1) whether it was fair and reasonable to order the applicant pay Ulan's partial costs of the proceedings because:

    (a) the applicant was unreasonable in commencing and continuing to seek an offset condition for scope 3 emissions and the refusal of the project based on the extent of GHG emissions; and

    (b) the applicant was unreasonable in pressing for an offset condition after delivery of *HEL No 1*.

Held: application for costs refused:

(1) under the EPA Act a third party objector to a Pt 3A project could bring forward any issues it considered were not sufficiently considered in the Minister's assessment, provided these were rational and supported by adequately qualified expert evidence where this was needed. A third party objector's concerns are not defined by matters considered by the Minister in approving the project: at [32]. In raising scope 1, 2 and 3 GHG emission impacts of the project, the applicant was raising a new matter in the context of a merits assessment in Class 1 proceedings: at [34]; and

(2) it was not fair and reasonable for the applicant to pay Ulan's partial costs of the proceedings ([36]-[49]):

    (a) the applicant had credible expert evidence suggesting that scope 1, 2 and 3 emissions could be offset by carbon credit schemes and supporting its claim for refusal of the project based on the extent of GHG emissions. There was an absence of policy or legislative framework on the issue. The applicant would have been successful in the imposition of an offset condition, absent the CE Act. The applicant was not bound to consider the economic impact of its proposed condition on the project. It was not unreasonable or irrational in the circumstances for the applicant to propose the offset condition and press for refusal of the project. After cross-examination of the experts at the hearing, it was not unreasonable for the applicant to no longer seek an offset of scope 3 emissions and to press for refusal of the project; and

    (b) the applicant should not have to pay costs incurred by Ulan after *HEL No 1* as whether the imposition of a condition requiring offsets of GHG under a State planning law breached s 109 of the Australian Constitution in light of the CE Act (Cth) was not self-evident and remained unresolved.

Practice and Procedure and Orders

Newcastle Muslim Association v Newcastle City Council [2012] NSWLEC 20 (Biscoe J)

(related decision: *Newcastle Muslim Association v Newcastle City Council* [2012] NSWLEC 13 Sheahan J)

Facts: the applicant lodged a Class 1 merits appeal against a refusal by a joint regional planning panel of a development application for a mosque and community facilities. After commencing the proceedings, the applicant was granted leave to amend its development application. Pursuant to orders, the parties served each other with expert reports concerning the amended development application. The respondent council filed a notice of motion seeking permission to provide copies, before the hearing, of the expert reports filed in the proceedings to objectors to the amended development application.

Issues:

(1) whether the principle established in *Harman v Secretary of State for the Home Department* [1983] 1 AC 280 and adopted by the High Court in *Hearne v Street* [2008] HCA 36, 235 CLR 125, i.e. where documents are provided to a party to legal proceedings under some compulsive process of the Court that party is taken to have impliedly undertaken to the Court not to use the documents otherwise than for the purposes of those proceedings unless the Court has granted leave to do so, applied to the disclosure of expert reports to objectors in Class 1 development appeals; and

(2) if the *Harman* principle applied, whether leave should be granted to the respondent.

Held: motion granted subject to an exception for expert evidence to which objection to admissibility was successfully taken:

(1) due to the urgency of the notice of motion, it was assumed without deciding that the implied undertaking arose in these circumstances: at [15]; and

(2) the regulatory context of providing opportunity for public involvement, participation, access to information and transparency favoured the grant of leave (at [17]):

   (a) one of the objects of the *Environmental Planning and Assessment Act* 1979 is to provide increased opportunity for public involvement and participation in environmental planning and assessment: at [18],

   (b) when a development application is before a council, anyone may inspect it and accompanying information, and make written objections (Environmental Planning and Assessment Regulation 2000 cl 91). Further, anyone has a legally enforceable right to access government information associated with development applications, including expert reports, under the *Government Information (Public Access) Act* 2009 and its concomitant regulations: at [19],

   (c) in an appeal against a council's refusal of a development consent, the Court stands in the shoes of the council: at [20],

   (d) after a document is tendered in evidence at the hearing of an appeal, it is accessible by objectors without breaching the implied undertaking: at [21],

   (e) the Court's usual directions in Class 1 development appeals (Practice Note *Class 1 Development Appeals*) provide for objectors to give evidence, and the Court's *Site Inspections Policy* requires the council to ensure that objectors have a full understanding of a development proposal so that any concerns expressed on-site are relevant: at [22]-[24], and

   (f) it is paradoxical and inefficient that objectors can see expert reports before a council determination and other expert reports after they are received in evidence at the hearing of an appeal but cannot view these other expert reports earlier in the appeal process: at [25].

Kennedy v Stockland Development Pty Ltd (No 6) [2012] NSWLEC 34 (Pepper J)

(related decisions: *Kennedy v Stockland Developments Pty Ltd (No 5)* [2012] NSWLEC 21 Pepper J, *Kennedy v Stockland Developments Pty Ltd (No 4)* [2012] NSWLEC 3 Sheahan J, *Kennedy v Stockland Developments Pty Ltd (No 3)* [2011] NSWLEC 249 Pepper J, *Kennedy v Stockland Developments Pty Ltd (No 2)* [2011] NSWLEC 186 Sheahan J, and *Kennedy v Stockland Developments Pty Ltd* [2011] NSWLEC 185 Biscoe J)

Facts: Mr Oshlack, appearing as an agent on behalf of Mr Kennedy (the applicant), applied to reopen his case in order to admit an additional document into evidence. The application was made after the evidence of both parties had closed, but before final addresses had commenced, on the fourth day of the hearing following a two-week adjournment.

The document was a deed made between BHP Refactories Ltd ("BHP") and the Council of the City of Wollongong ("the council") in 1994 that allegedly granted a licence to the council to use land known as "Wilkies Walk" as public land. Neither BHP nor the council were parties in the proceedings. BHP had sold their land to the respondent, Stockland Developments ("Stockland") in 2000. Stockland had been granted major project approval, pursuant to the now repealed Pt 3A of the *Environmental Planning and Assessment Act* 1979 ("the EPAA"), for the construction of a subdivision with associated works on land at Sandon Point, Wollongong. Wilkies Walk traversed part of this land.

During submissions on the substantive issues, Mr Kennedy claimed that Stockland had breached their approval by constructing part of a road on Wilkies Walk and that this constituted development without consent contrary to s 76A of the EPAA. Mr Kennedy also claimed that Stockland had breached s 86 of the *National Parks and Wildlife Act* 1974 by damaging Indigenous objects and an archaeological deposit that were potentially located on Wilkies Walk.

Issues:

(1) what were the applicable legal principles in respect of the Court's decision in rejecting or accepting an application to reopen a party's case; and

(2) whether the interests of justice were better served in accepting or rejecting the application in this instance.

Held: application rejected:

(1) the applicable legal principles were set out in *Wollondilly Shire Council v Foxman Environmental Development Services Pty Ltd (No 4)* [2011] NSWLEC 35 at [10]–[15]. That case held that:

   (a) the provisions under rr 2.1 and 29.5 of the *Uniform Civil Procedure Rules* 2005 and ss 56-60 of the *Civil Procedure Act* 2005 are sufficient to grant the Court a discretion to determine an application to reopen; and

   (b) the overarching guiding principle in exercising this discretion is whether the interests of justice are better served by allowing or rejecting the application: at [7]; and

(2) the interests of justice were better served in rejecting the application because:

   (a) the relevance of the evidence was not apparent to the case as pleaded: at [9];

   (b) admitting the evidence at that late stage would cause real prejudice to Stockland: at [15]; and

   (c) no reasons were given explaining the delay or why the evidence had not been sought to be admitted earlier: at [16].

Pierce v Minister Administering the Water Management Act 2000 [2012] NSWLEC 33 (Pepper J)

Facts: the Minister responsible for administering the *Water Management Act 2000* ("the WMA") had registered the second respondent as having the benefit of a Water Access Licence ("the Licence") over a land holding known as "Doma". The owner of Doma was Mrs Greenwell, who had since died. Pursuant to the WMA, in 2009 the second respondent, as an executor of the estate of the late Mrs Greenwell, was recorded on the Water Access Licence Register as the registered proprietor of the Licence for Doma. Mr

Pierce had been the licensed occupier of Doma since 1995, and had been granted a separate water access licence in his own name in 1996, which was renewed in 2003 and 2007. Mr Pierce sought declaratory relief, and to have the Water Access Licence Register altered, to name himself as the registered proprietor of the Licence. Mr Pierce argued that he was entitled to be the registered holder of the Licence either as the owner of Doma for the purposes of the WMA, by virtue of an agreement made between him and the executors to acquire the estate that was specifically enforceable in equity, or alternatively, as a successor in title.

At the commencement of the hearing of the proceedings, Mr Pierce (the applicant) made an oral application to have the matter transferred to the Supreme Court of New South Wales pursuant to s 149B of the *Civil Procedure Act* 2005 ("the CPA"). The application was not opposed.

Issues:

(1) whether the Court had jurisdiction to hear the matter; and

(2) whether the Supreme Court was a more appropriate court to determine the issues raised by the proceeding.

Held: the matter was transferred to the Supreme Court pursuant to s 149B of the CPA:

(1) the Court has limited jurisdiction under ss 335 and 336 of the WMA to hear proceedings to either grant injunctive relief or to make orders "to remedy or restrain a breach" of that Act (s 20(1)(df1) of the *Land and Environment Court Act* 1979). However, no injunctive relief was sought in the proceeding, and Mr Pierce was unable to identify a provision of the WMA that had been breached by either respondent. Thus the Court did not have jurisdiction to entertain the submissions as constituted: at [17]-[28]; and

(2) the Supreme Court was the more appropriate Court to hear and determine the matter because:

   (a) the Supreme Court clearly had jurisdiction to hear the matter: at [29];

   (b) the Court did not have the power to amend the Water Access Licence Register and the grant of declaratory relief may have been of limited utility. By contrast, the Supreme Court had the power to grant all forms of relief sought: at [30]; and

   (c) the proceedings raised issues for determination that would be more appropriately determined by the Supreme Court, including questions concerning the law of succession and the interpretation and specific performance of contractual obligations: at [34].

Pittwater Council v Brown Brothers Waste Contractors Pty Ltd; Pittwater Council v Wayne Gordon Brown; Pittwater Council v Gary Neil Brown [2012] NSWLEC 66 (Pepper J)

(related decisions*: Pittwater Council v Brown Brothers Waste Contractors Pty Ltd (No 2)* [2009] NSWLEC 210 Pepper J; *Pittwater Council v Brown Brothers Waste Contractors Pty Ltd* [2009] NSWLEC 50 Lloyd J)

Facts: the respondents ("Brown Brothers") applied to set aside two subpoenas issued by Pittwater Council ("the council") to Mr Briggs (Brown Brothers' solicitor) and Mr Hudson (their former solicitor) on grounds that the documents sought were irrelevant and of limited forensic purpose. The applications (and the subpoenas) were produced during an interlocutory proceeding whereby Brown Brothers sought to withdraw their pleas of guilty to a charge of contempt. The contempt charge related to the conduct of Brown Brothers in storing skip bins full of waste on their property, allegedly in breach of consent orders made by Lloyd J in August 2007 ("the 2007 orders") and a development consent issued in 1995 ("the 1995 consent"). Brown Brothers had been convicted of contempt on an earlier occasion (*Pittwater Council v Brown Brothers Waste Contractors Pty Ltd (No 2)* [2009] NSWLEC 210) for similar conduct, however, the brothers had been neither convicted nor sentenced in relation to the contempt charge underway at the time they applied to amend their pleas. Brown Brothers sought to withdraw the pleas of guilty on the basis that the pleas were entered based on an incorrect assumption of law, namely, that the terms of the 2007 orders and the 1995 consent were construed so as not to permit the keeping of skip bins full of waste on the premises overnight, when in fact this activity was permitted under the terms of both instruments. The subpoenas issued to Mr Briggs and Mr Hudson requested the production of records of advice relating to the entry and withdrawal of the pleas of guilty.

Issues:

(1) whether the legal advices sought by the subpoenas were relevant in the sense that they, or there was a reasonable basis beyond speculation that they, would materially assist on an identified issue in the proceedings;

(2) whether the subpoenas were issued for a legitimate forensic purpose;

(3) whether the subpoena issued to Mr Briggs was cast in unduly wide terms, given the forensic purpose for which the documents were sought; and

(4) who should bear the costs of the applications to set aside the subpoenas.

Held: the applications to set aside the subpoenas were dismissed:

(1) the legal advices sought were relevant to ascertaining an identified issue in the proceedings, namely, whether the brothers were entitled to withdraw their guilty pleas on the basis of a misapprehension of law that was engendered by erroneous or inadequate legal advice: at [56];

(2) the subpoenas were issued for a legitimate forensic purpose, namely, to elicit the production of documents that would permit the council to test the basis of the alleged misapprehension and the nexus between this misapprehension and the entry of the pleas of guilty: at [57];

(3) the terms of the subpoena issued to Mr Briggs were amended by consent between the parties during the hearing so as to narrow the scope of the documents sought to be produced. Because the subpoena would have been otherwise set aside, an order was made for the costs in relation to the application to set aside the subpoena of Mr Briggs to be the council's costs in the cause: at [66]; and

(4) the likelihood of any future claim for legal professional privilege being made in relation the subpoenaed documents was considered irrelevant at that stage to the production of material in answer to the subpoenas properly issued. Any claim for privilege was to be made after the production of the documents but before access was granted: at [63].

Fobitu Pty Ltd v Marrickville Council [2012] NSWLEC 81 (Biscoe J)

Facts: the respondent council refused development consent for the applicant's affordable rental housing development. The applicant lodged a Class 1 appeal, and the council filed a notice of motion to have two questions determined as preliminary questions: whether the proposed development would result in a building with a height of more than 8.5m for the purposes of *SEPP (Affordable Rental Housing)* 2009, and if so, whether this first SEPP was a development standard amendable to *SEPP No 1 - Development Standards*. The applicant applied for its costs of the motion.

Issues:

(1) whether the two questions should be determined as separate questions before the final hearing; and

(2) whether the applicant should have its costs of the motion.

Held: the council's notice of motion was dismissed without costs:

(1) two factors tilted the scale against the council's motion. The savings in estimated time and costs gained from a separate determination were relatively small when compared to a full hearing to determine the whole proceedings. Secondly, there was a likelihood of the applicant appealing against any decision against it on the separate questions and substantially delaying the hearing of the merits: at [22]; and

(2) it was not fair and reasonable to make a costs order against the council because its motion concerned a matter of case management, it was reasonable for the council to ventilate whether determination of the proposed preliminary questions would be efficient and preferable, and in the end the determination of the issues was finely balanced: at [24].

Rossi v Living Choice Australia Ltd t/as Living Choice [2012] NSWLEC 112 (Pepper J)

Facts: on 23 September 2010 the third respondent, the Joint Regional Planning Panel ("the JRPP") granted development approval to the first respondent, Living Choice, for the construction of a retirement village in Glenhaven on land owned by Living Choice ("the Living Choice Land"). The applicant, Mr Rossi, owned land adjacent to the Living Choice Land.

The JRPP was the authority responsible for determining the DA pursuant to s 23G of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act") and cl 13F of the *State Environmental Planning Policy (Major Development)* 2005 ("the SEPP"), while the second respondent, the Hills Shire Council ("the council") remained responsible for notifying Mr Rossi of the determination of the DA. The council issued a Notice of Determination to Mr Rossi on 12 October 2010.

In execution of the development consent, Living Choice began placing large amounts of fill onto the Living Choice Land near the boundary of Mr Rossi's land. Mr Rossi claimed that the that the placement of this fill, specifically in relation to its volume, impact on the underlying soil and method of retention, required assessment under s 79C of the EPA Act at the time the DA was determined, and that this had not occurred. He sought a declaration that the development consent was invalid, an injunction restraining Living Choice from carrying out works pursuant to the consent, and discretionary relief requiring Living Choice to remove the fill and/or to demolish any structures built thereon.

In order to prove his claim, Mr Rossi sought leave to rely on the expert evidence of Mr Hill, a town planner, Mr Betro, an engineer, and Mr Beasley, a registered surveyor.

Issues:

(1) whether the Court should grant leave pursuant to r 31.19 of the *Uniform Civil Procedure Rules* 2005 ("the UCPR") for the applicant to adduce expert evidence in the proceedings.

Held: the application seeking leave to adduce expert evidence was dismissed:

(1) r 31.19 of the UCPR applies to all civil proceedings filed in the Land and Environment Court: at [35];

(2) Mr Rossi sought judicial review of the JRPP's determination and, as such, the expert evidence sought to be adduced was unlikely to assist because it constituted information additional to that which was before the original decision-maker at the time the decision was made: at [45]. Further, the pleadings as framed alleged, in essence, failures on behalf of the original decision-maker to consider relevant mandatory considerations. These being issues of objective fact and statutory construction, the expert evidence that Mr Rossi proposed to adduce would not assist in their determination and was not reasonably required: at [48]-[58]; and

(3) it would be neither "quick, just" nor "cheap" (having regard to ss 56-60 of the *Civil Procedure Act* 2005) to put the respondents to the cost and inconvenience of adducing expert evidence at this early stage in the proceedings, especially given Mr Rossi sought to adduce expert evidence from three separate witnesses. If, however, it transpired that Mr Rossi was successful in obtaining a declaration that the development consent was invalid, and the Court was required to determine the issue of appropriate relief, the need for expert evidence could be adduced separately at this point: at [60]-[61]; and

(4) although r 31.19 requires an applicant seeking leave to adduce expert evidence to do so "promptly", a request made before the pleadings are finalised may be considered premature. Thus once the pleadings had closed and once the applicant had reviewed the material before the decision-maker, a further application could be made if, at that point, it became apparent that expert evidence was needed: at [63].

Valuation

***The Trust Company Limited v Minister Administering the Crown Lands Act* 1989** [2012] NSWLEC 73 (Pain J)

Facts: these Class 3 proceedings concerned the redetermination of rent of a long-term lease of Crown land in Port Stephens where the Anchorage resort and marina, comprising a 90 berth marina, 80 room hotel and conference centre, is located. The respondent Minister granted the lease in 1993 to Anchorage Port Stephens Pty Ltd ("APS") and in the same year extended the lease term to 75 years. APS erected improvements on the land. Prior to the commencement of the lease, the Court had granted development consent for "a marina and associated facilities, boat harbour, motel/hotel, conference centre and reclamation" and this was identified in the lease as the permitted use. The lease stated that the land could only be used for the purpose of the permitted use. It also specified improvements, acknowledged that the holder had prior to the commencement of the lease constructed the improvements, and stated that the improvements erected were those granted consent by the Court. In 1997 APS transferred the lease to the Trust Company Limited ("the appellant"). In 2010, as provided for in s 142 and 143(1) of the *Crown Lands Act* 1989 ("the CL Act"), the Minister redetermined the rent of the lease at $136,400 pa. The appellant appealed against the Minister's redetermination pursuant to s 145(2) of the CL Act. The appellant's valuer's approach resulting in a nominal rent was to assume that the improvements were to be built as new before each rent review period. Section 142(6) permits the Court to affirm the Minister's redetermination or substitute its own.

Issues:

(1) whether the Court should act as judicial valuer;

(2) whether there was an onus of proof;

(3) whether the restrictions, conditions and terms in the lease were to be taken into account in valuation in redetermining rent under s 143(1);

(4) whether any valuation had to adopt the permitted use and improvements identified in the lease as indivisible; and

(5) how the disregard of improvements under s 143(1)(b) was to occur and whether rent could be determined by the valuers' approaches.

Held: the Minister's redetermination was affirmed and the appeal dismissed:

(1) given the wide discretion under s 142(6) the Court could choose, but was not bound, to undertake the role of judicial valuer. How the Court exercised its role depended on the nature of the case before it: at [15];

(2) there was no requirement in the CL Act that the appellant demonstrate particular error in the Minister's redetermination in order to succeed in the appeal. However, it bore a practical onus of proof requiring that it identify how the Minister's valuation was wrong: at [16]. If the appellant's legal approach, which heavily informed its valuer's approach, was rejected, the appeal failed. If there was ultimately no relevant valuation evidence before the Court the appeal should be dismissed: at [18];

(3) the application of a commonsense reading to the whole of s 143(1) required that the restrictions, conditions and terms in the lease be taken into account when redetermining rent. The chapeau and subsections (a), (c) and (d) made the lease terms relevant: at [48]-[53];

(4) the lease did not oblige the leaseholder to actually use the land for the permitted purposes or erect any or all of the improvements. The leaseholder could use the premises for each or any of the activities specified in the permitted use: at [57]. The user restriction in the lease was the principal restriction on the value of the market rental for the purposes of conducting a valuation under s 143(1): at [58]; and

(5) the parties' competing approaches to how the disregard of the improvements under s 143(1)(b) was to occur were based on two different valuation approaches (at [61], [66]):

(a) the appellant's valuer's approach was artificial and produced an irrational result: at [71]-[77], [127]; and

(b) the Minister's valuer's approach more closely accorded with the usual and appropriate valuation method where the unimproved value of the land was to be valued: at [68]-[70]. The rent could be determined by a comparative method by references to sales and leases: at [78]. However the Minister's valuer's evidence was given little weight due to the absence of an explicit reasoning process, as required by the obligations on expert witnesses imposed by the expert witness code of conduct in the *Uniform Civil Procedure Rules* 2005: at [109]-[125], [127].

Development Appeals

Rothwell Boys Pty Ltd v Coffs Harbour City Council [2012] NSWLEC 19 **(Craig J)**

Facts: Rothwell Boys Pty Ltd ("Rothwell") appealed pursuant to s 97 of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act") against refusal of development consent for the construction of a collector road through land that it did not own. Rothwell had entered into a deed with Mr Barker, an adjoining landowner, for construction of the road through his land. The deed indicated Mr Barker's consent, as landowner, to the making of the development application for the road, and referred to a plan identifying the centre line of the proposed road. The deed was lodged with the development application and was accepted by the council as evidence of landowner's consent, as required by Clause 49 of the Environmental Planning and Assessment Regulation 2000 ("the Regulation"). Following the council's request that Rothwell consider an alternate road alignment within Mr Barker's land, Rothwell amended the development application to reflect the changed location of the road ("the amended DA"). Mr Barker was joined to the proceedings to argue that the deed into which he had entered did not evidence his consent to the amendment of the development application. He accepted that the deed reflected his consent, as landowner, to the development application as originally lodged.

Issue:

(1) whether Mr Barker's consent, as landowner, was required to amend the development application.

Held: the amended DA did not require Mr Barker's further consent to enable the appeal to the Court to be determined:

(1) while it was not disputed that cl 49 of the Regulation expressly required evidence of landowner's consent to the making of a development application, this was to be distinguished from any requirement under cl 55 that the applicant gain further landowner's consent when making amendments to the development application. Clause 55 imposed no such requirement: at [33]-[36];

(2) if an application lodged with landowner's consent limited the capacity of a consent authority to determine a development consent by reference to the terms of the landowner's consent, it would impose restrictions upon the exercise of the discretion neither expressed nor implied in the EPA Act and the Regulation: at [40]-[41]; and

(3) if development consent was granted, there would be no injustice to Mr Barker as the consent did not impact on proprietary rights. The holder of the consent did not, by that fact alone, acquire any right to enter and carry out work on land it did not own: at [37].

Australian Leisure & Hospitality Group Pty Ltd v Manly Council (No 5) [2012] NSWLEC 53 (Preston CJ)
(related decisions: *Australian Leisure and Hospitality Group Pty Ltd v Manly Council (No 4)* [2009] NSWLEC 226; (2009) 172 LGERA 1 Preston CJ; *Australian Leisure and Hospitality Pty Limited v Manly Council* [2005] NSWLEC 316 Bly C with Brown C)

Facts: Australian Leisure and Hospitality Group Pty Ltd ("ALH") owned and operated the New Brighton Hotel in Manly. ALH proposed to use part of the footways of the public roads of The Corso and Sydney Road adjacent to the facades of the hotel as an outdoor eating area for the hotel's restaurant. Use of the

footways as outdoor eating areas was approved as part of a development consent granted by the Court in 2005, however, because the eating area would be on public roads, approval was also required under s 125 of the *Roads Act* 1993 ("Roads Act"). The Council, as the relevant roads authority, refused a number of ALH's applications for approval under s 125 of the Roads Act. ALH then applied to the council under s 96AA(1) of the Environmental Planning and Assessment Act ("the EPA Act") to modify the 2005 development consent to substitute a new plan for the outdoor eating area. On this appeal against the council's deemed refusal of ALH's s 96AA modification application, ALH sought for the Court not only to approve ALH's amended s 96AA application to modify the development consent to change the number and location of chairs on Sydney Road and The Corso, but also, pursuant to s 39(2) of the *Land and Environment Court Act* 1979, to exercise the council's function under s 125 of the Roads Act to approve the use of all of the tables and chairs comprising the outdoor eating area on the footways of Sydney Road and The Corso.

Issues:

(1) whether the outdoor eating area on the footways of The Corso and Sydney Road would unreasonably restrict pedestrian movement; reduce pedestrian access and space for the Manly markets held on weekends in Sydney Road; restrict emergency vehicular access to The Corso and Sydney Road; or generate noise, reduce the amenity of the area, increase rubbish and food waste, and cause alcohol related crimes; and

(2) whether the proposal was contrary to relevant planning controls.

Held: upholding the appeal, granting consent to modify the development consent, and approving under the Roads Act only that part of the hotel's outdoor eating area on the footway of Sydney Road:

(1) the additional tables and chairs at the western end of the outdoor eating area would not cause conflict with pedestrians using Sydney Road, including on market days because Manly Market Place proposed to ensure a 3.1 metre-wide passageway between the hotel's outdoor eating area and the market tables. During market days, this passageway would be adequate for emergency vehicular access while on other days even more room would be available for access: at [30], [31];

(2) the incremental increase in usage of the outdoor eating area on Sydney Road would not cause any discernable increase in waste or noise or any decrease in amenity: at [38];

(3) the proposed modification was not inconsistent with the aims and objectives of the *Manly Local Environmental Plan* 1988 or the Manly Development Control Plan for the Business Zone 1989. The Manly Town Centre Urban Design Guidelines 2002 for Sydney Road provided that furniture, lighting and planting should be concentrated along the footpath alignment: at [25];

(4) the hotel's proposed modification of the development consent to change the number and location of the tables and chairs along Sydney Road and The Corso was appropriate and ought to be approved: at [45];

(5) it was appropriate to grant approval under s 125 of the Roads Act to use that part of ALH's eating area along part of Sydney Road for the purposes of a restaurant for a period of 12 months: at [62], [63]; and

(6) the Manly Town Centre Urban Design Guidelines 2002 and the Manly Development Control Plan for The Corso 2005 (Amendment 1) Master Plan required furniture, lighting and planting to be concentrated along the central axis of The Corso. The council had carried out redevelopment of The Corso consistent with its Urban Design Guidelines and the Master Plan, including in its determinations of applications under s 125 of the Roads Act for outdoor eating areas in The Corso: at [67]-[71]; and approval under s 125 of the Roads Act should not be granted to use the beneath-awning footway of The Corso adjacent to the hotel for ALH's outdoor eating area, as to do so would be inconsistent with the council's planned and implemented approach to the use of The Corso: at [74].

Eco-Villages Australia Pty Ltd v Pittwater Council [2012] NSWLEC 49 (Craig J)

Facts: the applicant appealed to the Court pursuant to s 97 of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act") on the basis of the council's deemed refusal of its development application: s 82(1) EPA Act. On the day preceding the filing of the appeal, the applicant lodged an amended

development application with the council. The council proceeded to notify the amended development application and seek general terms of approval from relevant statutory authorities, the development application being one for integrated development. The applicant applied by notice of motion to have determined the entity whose function it was to agree that the amended development application should be that which the Court was to determine in disposing the appeal.

Issues:

(1) whether the council's conduct evidenced agreement to the amendment proposed by the application as required by cl 55 *Environmental Planning and Assessment Regulation* 2000 ("the Regulation");

(2) assuming the conduct of the council did evidence agreement to the amendments sought by the applicant, whether that agreement had any legal consequence for the purpose of cl 55 of the Regulation, given that the consent authority for the purpose of determining the development application was the Joint Regional Planning Panel ("the JRPP");

(3) whether s 39(2) of the *Land and Environment Court Act* 1979 ("the Court Act") operated so that, upon commencement of the appeal pursuant to s 97 of the EPA Act, the Court was the sole respository of power to agree to the amendment of the development application for the purpose of cl 55.

Held:

(1) the council's conduct was sufficient to manifest its agreement to the amendment for the purpose of cl 55(1) of the Regulation: at [23]–[24], [57]. There was no provision of the EPA Act or the Regulation which prescribed the manner in which agreement should be evidenced: at [21], [57];

(2) clause 13F(1) of the *State Environmental Planning Policy (Major Development)* 2005 ("the State Policy") required that the JRPP be the consent authority to determine the development application: at [36]–[38], [48], [58]. However, this did not have the effect of removing the council's function as consent authority to receive and assess the development application under cl 13F(2)(d) of the State Policy: at [37] Such assessment implicitly included agreeing to an amendment of that application in accordance with cl 55(1) of the Regulation: at [38], [40]; and

(3) the council retained its role as an appropriate functionary to agree to the amendment sought notwithstanding the institution of the appeal to the Court pursuant to s 97 of the EPA Act. That function was preserved by s 82(2) of the EPA Act and was not usurped by s 39(2) of the Court Act: at [59].

Section 56A Appeals

Botany Bay City Council v Marana Developments Pty Ltd [2012] NSWLEC 15 (Pain J)

(related decision: *Marana Developments Pty Ltd v Botany Bay City Council* [2011] NSWLEC 1110 Morris C)

Facts: Botany Bay City Council ("the council") appealed under s 56A of the *Land and Environment Court Act* 1979 against the decision of a commissioner to approve a modification application lodged by Marana Developments Pty Ltd ("Marana"). The council raised seven grounds of appeal. Ground 1 raised the issue of whether the commissioner had jurisdiction to grant the modification application because no reasonable person could form the opinion that the requirements of s 96(2)(a) of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act") were satisfied on the evidence. This was submitted to be a finding of jurisdictional fact which required the Court to review the evidence before the commissioner to reach a conclusion about satisfaction of matters in s 96(2)(a). Her Honour determined that the issue of whether this ground raised a question of law, as required by s 56A, should be determined as a preliminary question per r 28.2 of the *Uniform Civil Procedure Rules* 2005.

Issues:

(1) as a preliminary question, whether the commissioner's finding of satisfaction required by s 96(2)(a) which founds jurisdiction under s 96 to determine a modification application, was a question of law and able to be raised in this s 56A appeal;

(2) whether the commissioner failed to give sufficient reasons for her finding that "the test in s 96(2)(a) is passed" (ground 2(a));

(3) whether the commissioner erred in:

(a) making the finding referred to in (ground 2(a)) without first having found that within the meaning of cl 115A(1A)(c) of the Environmental Planning and Assessment Regulation 2000 (ground 2(b));

(b) holding that she did not have sufficient evidence that the size/quality of the units were an essential element of the approved development (ground 2(c));

(c) holding that there was no evidence that within the meaning of cl 115(1A)(c) the modification diminished or detracted from the design quality, or compromised the design intent, of the development to which the development consent was granted or diminished the design quality of the development (ground 3);

(4) whether:

(a) on a proper construction of s 96 and s 79(1)(a)(i) of the EPA Act and cl 30A(1) of *State Environmental Planning Policy No 65 – Design Quality and Residential Flat Building* ("SEPP 65") the commissioner must not refuse the modification application on the grounds in cl 30A(1)(b) of SEPP 65 (ground 6(a)) and whether the commissioner erred in her construction of the provisions (ground 6(c));

(b) on a proper construction of cl 30A(1)(b) and Part 3 of the Residential Flat Design Code there was a recommended internal area and external area and if so what those areas were (ground 6(b)) and whether the commissioner erred in her construction of the provisions (ground 6(c));

(c) the commissioner erred in holding that the areas in the development as modified would comply with the "areas included in SEPP 65" (ground 6(d));

(d) the commissioner erred in holding that control C6 in *City of Botany Bay Development Control Plan No 35 – Multi Unit Housing and Residential Flat Buildings* ("DCP") in respect of unit size was inconsistent with SEPP 65 and that therefore control C6 was not required to be taken into consideration pursuant to s 79C(1)(iii) and s 96(3) (ground 6(e));

(5) whether the commissioner failed to properly take into consideration as required by s 79C(1)(a)(iii) of the EPA Act provisions of DCP No 35 (ground 4);

(6) whether the commissioner erred in failing to give sufficient reasons as to why the modification should be approved notwithstanding the breaches of the controls referred in ground 4 (ground 5); and

(7) whether the commissioner erred in her consideration under s 96(2) and (3) and s 79C(1) of the EPA Act in determining to grant the application on the ground that the evidence did not extend to suggest that the standard of the development as proposed was such that it was so poor that it warrants refusal rather than determining the application of its merits (ground 7).

Held: appeal ground 1 remains to be determined but the other grounds should be dismissed in due course:

(1) in relation to the preliminary question (at [22]–[56]):

(a) a commissioner's finding of satisfaction in s 96(2)(a), that the development as sought to be modified is substantially the same as the development originally granted consent, is a condition precedent to engaging the Court's jurisdiction and the exercise of statutory power under that section. A court or tribunal cannot give itself jurisdiction by erroneously deciding that the fact or event exists. A finding of whether a jurisdictional act has been satisfied under a statute, which finding is necessary to establish jurisdiction, is more likely to be characterised as a question of law or at least mixed fact and law. This is distinguished from usual fact finding, errors in which are not open to appeal on a question of law; and

(b) in answer to the preliminary question, whether the commissioner had jurisdiction turning upon whether the test of satisfaction in s 96(2)(a) had been met gave rise to a question of mixed fact and law and can ground an appeal under s 56A. The matter should proceed to further hearing as

the Court had to review the evidence relevant to satisfaction that was before the commissioner in order to determine appeal ground 1;

(2) in relation to ground 2(a), decisions of commissioners should not be examined too narrowly. The content and detail of reasons vary according to the jurisdiction and nature of the matter, here a lay commissioner providing reasons in a merits review: at [61]. A fair reading of the commissioner's decision did not suggest that there was a failure to give reasons or inadequacy of reasons for her conclusions on the expert evidence: at [62];

(3) in relation to grounds 2(b), (c) and 3:

(a) the design verification statement before the commissioner answered ground 2(b). Clause 115(1A)(c) requires that the design verification statement include an opinion that the development as modified would not diminish or detract from the design quality of the development. There was no basis relying on that clause for alleging an error by the commissioner in her conclusion that "the test in s 96(2)(a) is passed". Ground 3 alleging no evidence within the meaning of cl 115(1A)(c) failed as the design verification statement was such evidence: at [68]; and

(b) grounds 2(c) and 3 were criticisms of the commissioner's findings on the merit issues before her, which grounds were not permissible in a s 56A appeal: at [69];

(4) a fair reading of the commissioner's decision demonstrated that the relevant DCP controls were the focal point of her consideration. The council did not establish there was an error in the commissioner's reasoning in ground 4: at [87]-[91];

(5) in relation to ground 5, no error in ground 4 was established by the council. The commissioner provided reasons for her conclusions in ground 4 and there was no failure to provide sufficient reasons: at [92]-[93];

(6) in relation to ground 6 (at [77]–[81]):

(a) while the SEPP was not a mandatory control under s 79C(1), s 96(3) required the commissioner to take the SEPP into account and in this case was applied as she considered appropriate. No error of law arose in those circumstances. Grounds 6(a) and (c) were not established;

(b) although the Residential Flat Design Code does not use the precise words of the SEPP, namely "recommended internal and external area for the relevant apartment type", when the document was read as a whole, it recommended internal and external areas for different apartment types as referred to in the SEPP. The two instruments were clear when read together and there was no unintelligible connection between them. Ground 6(b) was not established;

(c) ground 6(d) did not arise in the council's arguments and was not considered; and

(d) given that s 96(3) resulted in SEPP 65 being an instrument that must be taken into account by the commissioner, her conclusion that SEPP 65 should prevail was not an error of law and therefore ground 6(e) failed; and

(7) ground 7 did not appear to articulate a question of law. In any event a fair reading of the judgment as a whole and par 51 of the commissioner's judgment was required. The judgment identified the parties' contentious evidence and submissions and provided reasons for the conclusions reached. There could be no suggestion of the commissioner bringing preconceived notions to bear based on the particular phrases in the commissioner's judgment referred to by the council: at [97].

Sutherland Shire Council v Counsel [2012] NSWLEC 61 (Biscoe J)

(related decision: *Counsel v Sutherland Shire Council* [2011] NSWLEC 1306 Brown ASC)

Facts: the respondent lodged a development application for the demolition of an existing dwelling and construction of a new dwelling which would be 1.2 m forward of the foreshore building line ("FBL") established by the *Sutherland Shire Local Environmental Plan 2006* ("the LEP"). The appellant council refused consent. On appeal, the Acting Senior Commissioner granted consent subject to conditions. The council appealed against the commissioner's decision to exclude a condition requiring the new dwelling to

be relocated entirely behind the FBL, submitting that an error of law was made in construing the LEP, which was demonstrated by the irrelevant factors considered by the commissioner, and which distracted the commissioner from considering relevant matters. Clause 17(9) of the LEP permitted the erection of a dwelling forward of the FBL if, inter alia, there was "no reasonable alternative that would allow a new dwelling to be located behind the foreshore building line" (cl 17(9)(b)(iv)). It was common ground before the commissioner that the new dwelling could be located entirely behind the FBL. However, relying on five considerations, the Commissioner held that this alternative location was not reasonable.

Issues:

(1) what was the proper construction of cl 17(9)(b)(iv) of the LEP; and

(2) whether the five matters relied upon by the commissioner to find that the alternative location was unreasonable, and thus to exclude the condition, were relevant considerations, viz:

   (a) the FBL was an historic line bearing no resemblance to the foreshore and was largely irrelevant for planning purposes here given the location of the foreshore and adjoining developments,

   (b) the extent of the breaches was minor and the whole proposed development still satisfied the objectives of the FBL control (another requirement of cl 17(9)),

   (c) the new dwelling was consistent with adjoining properties which had greater FBL breaches,

   (d) the breaches of the FBL created no amenity impacts on adjoining properties, and

   (e) all other requirements of cl 17(9) were satisfied, with the exception of paragraph (b)(iv).

Held: appeal allowed and, by consent, the conditions of the development consent were varied to provide that the new dwelling be entirely behind the FBL:

(1) clause 17(9)(b)(iv) of the LEP provides that if there is an alternative location for a new dwelling entirely behind the FBL, then the decision to locate the dwelling in the alternate location must be reasonable. Thus, there were two questions:

   (a) whether a new dwelling can be located entirely behind the FBL, and

   (b) if so, whether that is a reasonable alternative: at [19(a)]-[19(b)]; and

(2) the five matters relied on by the commissioner were irrelevant to the question of whether the alternative location was reasonable:

   (a) this was a criticism of the policy behind the FBL control. That existing adjoining developments had breached the FBL said nothing about the relevance of applying the policy to this case,

   (b) the alternative location was no less reasonable because the breach of the control was minor. The reasonableness of the alternative could not be measured by the extent of the breach, and could not be answered simply because another requirement of cl 17(9) (consistency with objectives) had been satisfied,

   (c) the extent of other breaches of the FBL could not justify this breach,

   (d) this said nothing as to the reasonableness of the alternative location, and

   (e) if, in order to obtain the benefit of cl 17(9), five requirements had to be satisfied but only four were satisfied, then satisfaction with four could not be a reason for finding that the fifth was satisfied. This was to effectively delete a mandatory requirement: at [21].

Walton v Blacktown City Council [2012] NSWLEC 106 (Biscoe J)

(related decision: *Walton v Blacktown City Council* [2011] NSWLEC 1261 Brown C)

Facts: the respondent council granted a deferred commencement consent for a group home subject to conditions to the applicant, who appealed against some of those conditions, including conditions for an onsite caretaker, a plan of management, and fire extinguishers and smoke alarms. The Commissioner upheld the applicant's appeal in part but granted consent subject to some of the conditions appealed

against. The applicant argued under s 56A of the *Land and Environment Court Act* 1979 against the conditions imposed by the Commissioner.

Issues:

(1) whether the Commissioner imposed the conditions only for the reason that the development was for the purpose of a group home in breach of cl 46(1)(b) of *State Environmental Planning Policy (Affordable Rental Housing)* 2009 ("the SEPP");

(2) whether the Commissioner erred in law because he should not have admitted and had regard to the expert evidence of two experts for the council;

(3) whether the Commissioner erred in law by not revoking the conditions on the ground that they were not imposed for relevant planning purposes as delineated by the SEPP, and did not fairly and reasonably relate to the proposed development;

(5) whether the condition requiring an onsite caretaker was not one which a council properly advised might require because it was not required under the SEPP and there was no admissible evidence that a number of unrelated adults could not live together without the supervision of such a caretaker (manifest unreasonableness); and

(6) whether the Commissioner lacked the power to impose a condition for fire extinguishers and smoke alarms because he erred in classifying the development as a Class 1(b) building under the Building Code of Australia.

Held: appeal dismissed with costs:

(1) conditions requiring a caretaker and a plan of management for a group home may be imposed, not because the proposed development is a group home, but rather (for example) because of the number of unrelated people that can be accommodated within the facility. Nothing in the Commissioner's judgment established that any of the conditions were imposed "only" for the reason that the proposed development was for a group home. Thus, the SEPP was not breached: at [6]-[7];

(2) expert evidence may be rejected because of lack of impartiality, but the mere fact that an expert witness is or was an employee of the party retaining the expert is insufficient, of itself, to lead to rejection. On the material before the Commissioner, the two experts had sufficient expertise to express their opinions. There was no basis for finding that the Commissioner failed in his duty to adjudicate the related issues or that the experts failed to act impartially and acted as advocates for the council: at [9]-[10];

(3) the Commissioner was not required to confine himself to the planning purposes under the SEPP. He was obliged to have regard to the mandatory matters under s 79C of the *Environmental Planning and Assessment Act* 1979 ("the Act"). Having done so, it was open to him to decide to impose the conditions: at [11];

(4) the SEPP does not require an onsite caretaker. However, the condition was imposed having regard to the Commissioner's assessment of the impact of the development on the residential character of the area, to which he was required to have regard under s 79C(1)(b) of the Act. There was no error of law in the Commissioner deciding that the residential character of the area could be protected by, and any likely impacts of the development could be minimised through, the existence of a resident caretaker: at [12]; and

(5) on the expert evidence before the Commissioner, it was open to him to classify the development as a Class 1(b) building. Before the Commissioner, the applicant had conceded that this class of building required fire extinguishers and smoke alarms. Therefore, the alleged error of law was not established: at [13].

Commissioner Decisions

The Northern Eruv v Ku-ring-gai Council [2012] NSWLEC 1058 (Morris C)

Facts: The Northern Eruv Inc ("the Northern Eruv") sought development consent under the *Environmental Planning and Assessment Act* 1979 ("the EPA Act") for the erection of poles and wiring on eleven residential properties, and approvals under the *Roads Act* 1993 ("the Roads Act") to connect those poles using non-live wire between the poles on private land and existing street power poles, the installation of nine new poles within a number of road reserves, and the installation of non-live wire between the new poles on public land and existing Ausgrid street poles. The works were proposed to provide a continuous link around the perimeter of the St Ives Eruv, which would permit observant Jewish people to carry objects or push prams on the Sabbath. The circuit had a length of approximately 20km and each site the subject of a development application was located at various points along it. The applicant also sought approval to install plastic conduit on a total of 574 poles around the proposed circuit. During the course of a conciliation conference and the hearing the proposals were amended to reduce the number of poles proposed in the road reserve, and two development appeals were discontinued, resulting in nine development applications before the Court on appeal.

Issues:

(1) whether the proposed poles on private land had an unacceptable visual impact or impact on trees because of required pruning;

(2) whether the Court had jurisdiction to determine the applications to connect the poles within private property to the adjacent street poles;

(3) whether the Court had jurisdiction to determine the other applications for approval for works within the road reserve; and

(4) if there were jurisdiction, whether those works should be approved.

Held: approving the nine development applications and the Roads Act approvals that would permit the connection of the individual sites in those nine development applications to the adjacent street poles, but not approving the works within the road reserve that included the attachment of conduit to 574 poles, the intermittent wire connections, or the replacement of a pole:

(1) the impacts of the proposed poles within the nine private properties was acceptable and would not detrimentally affect trees on those sites or trees on the roadway immediately adjacent to the sites: at [52];

(2) the parties agreed that the connection of the poles within private property to the adjacent street poles would be integrally connected to the matter the subject of the development application and the Court had jurisdiction to determine those applications under the Roads Act: at [66];

(3) the additional wiring would be minor in terms of streetscape and would not have an unreasonable cumulative impact, and it would be appropriate to grant approval under the Roads Act: at [67];

(4) there was no relationship between the individual development applications and the work in the roads not proximate to those sites and the Court could not grant approval to the works within the roads reserve that included the attachment of conduit to 574 poles, the intermittent wire connections, or the replacement of a pole in Lynbara Avenue: at [71]-[73]; and

(5) the works would, on a merit assessment, be appropriate in terms of streetscape: at [74].

Newcastle Muslim Association v Newcastle City Council [2012] NSWLEC 1056 (Morris C)

(related decisions: *Newcastle Muslim Association v Newcastle City Council* [2012] NSWLEC 13 Sheahan J; *Newcastle Muslim Association Incorporated v Newcastle City Council* [2012] NSWLEC 20 Biscoe J)

Facts: the Newcastle Muslim Association ("the applicant") appealed under s 97 of the *Environmental Planning and Assessment Act* 1979 against the refusal by the Hunter and Central Coast Joint Regional Planning Panel of development consent for the demolition of an existing dwelling, construction of a place of

worship and associated community facilities including a dwelling house and ceremonial funeral room, and boundary adjustment, at 158A and 164 Croudace Road Elermore Vale. The total area of the site was 8,900 sqm, and existing vegetation covered a substantial part of the site comprising a total of 210 trees. A local shopping centre was located opposite the site and its exit driveway was located on the opposite side of the road approximately 15m to the north of the battle axe handle of No 158A. The proposed development included a two level decked car park and additional at grade car parking, providing 167 car parking spaces. Vehicle entry was to be via a driveway along the front portion of No 164, and vehicle egress was to be through the existing battleaxe handle that also serviced No 158. The proposal included the erection of a 2.3m high acoustic wall around the perimeter of the main development area including where it adjoined residential development. The applicant proposed a plan of management to address traffic, parking and site operations and that plan proposed to limit the attendance at the mosque to a maximum of 250 people including any staff; to limit attendances at the community centre to 100 people; to limit attendances at certain prayer sessions early morning and late evening; and included provisions to address noise, patron behaviour, prohibit the use of sound amplification equipment and containing all activities within buildings.

Issues:

(1) whether the proposed development was consistent with current and future planning controls for the site and the desired future character of the locality;

(2) whether the traffic and parking demands of the site would be satisfied;

(3) whether the development would have an unacceptable impact on the amenity of the surrounding neighbourhood particularly in relation to noise.

Held: dismissing the appeal and refusing development consent:

(1) the impacts of the traffic associated with the application were localised and related to the efficiency and effectiveness of the proposed ingress and egress driveways. Without limiting attendances to the site to 250 persons there would be traffic conflict. Within 10 years there would be a need to restrict use of the egress driveway to left out only which would require the installation of a median, which would restrict the movement of vehicles from the shopping centre and adjacent residential properties: at [95]-[97];

(2) the site would provide for the parking demands of the development under the 250 person cap provided it was managed in a way that ensured all attendees heeded the signage and directions of traffic control persons. While a plan of management could successfully be applied to manage a range of issues, the Court was not satisfied that the potential impacts of the application, particularly those relating to traffic attending the site, could be controlled to ensure there would be no adverse impacts particularly in regard to road safety along Croudace Road: at [98]-[100];

(3) the site would comply with appropriate noise standards, however the proposed acoustic wall would have a detrimental impact on the amenity of the adjoining residential dwellings. The isolation of Nos 160 and 162 between the proposed entry and exit driveways was an undesirable effect of the development particularly when combined with the high fence that would surround those properties: at [101]-[102];

(4) the need to remove the majority of the trees on the site had an unacceptable impact on the amenity of the area and the proposed planting would not compensate for the loss of that advanced vegetation: at [103]; and

(5) the objectives of the zone under the current planning controls were not met. The fact that the development would be prohibited when the draft local environmental plan was made and that the proposed development was unsatisfactory in general terms meant that the draft plan should be given some weight in determining the merits of the application: at [106], [110].

Hillsong Church Ltd v Council of the City of Sydney [2012] NSWLEC 1059 (Brown ASC)

Facts: Hillsong Church Ltd ("the Church") appealed against the refusal of development consent for the use of a factory unit at Sydney Corporate Park for a place of public worship. The site was an industrial estate with an area of 11.82ha and the present land uses included industrial, warehouse and office/retail. The proposed development involved a number of different activities at different times during the week from

8.00am to 10.30pm, and church services on Saturday and Sunday with up to 1050 persons attending per service. The proposed use was permissible with consent under the *South Sydney Local Environmental Plan* 1998 ("the LEP") which required that consideration be made of the goals and objectives of the LEP; the *Strategy for a Sustainable City of South Sydney* provided that consent must not be granted unless the proposed development is consistent with the zone objectives. Under the *Draft Sydney Local Environmental Plan* 2011 ("the draft LEP") the proposed use would be prohibited. The draft LEP had been advertised, submissions were currently undergoing consideration by the council staff, and a report was likely to be submitted to the council by the end of March 2012 to satisfy the terms of a funding agreement between the council and the Department of Planning and Infrastructure. The council was in the process of commissioning an Employment Land Study to assist in responding to submissions on the draft LEP, with expected completion in late 2012 and exhibition and adoption in early 2013. Leave was granted for the amendment of the development application on two occasions during the course of the proceedings.

Issues:

(1) the weight to be given to the draft LEP;

(2) whether the proposed development was consistent with the objectives of the zone under the LEP;

(3) the weight to be given to strategic planning documents;

(4) whether there had been an appropriate assessment of the traffic generated by the proposed development;

(5) whether sufficient car parking spaces were available;

(6) whether the proposed bus set down/pick up area was adequate;

(7) whether the proposed Plan of Management was adequate to address traffic, parking and pedestrian movements;

(8) whether the approval of the Roads and Maritime Services ("RMS") was required for the Plan of Management;

(9) whether costs should be ordered in relation to the two amendments of the application.

Held: upholding the appeal and granting development consent:

(1) the draft LEP would not be finalised until the Employment Land Study was completed and adopted by the council. The draft LEP was neither imminent nor certain and no weight could be given to it in assessing the application: at [32]-[35];

(2) the proposed development was consistent with the objectives of the zone:

  (a) objective (a) had two independent limbs, and did not require that any use had to be an industrial use or a use ancillary to an industrial use to be consistent. Whether the Church satisfied the criteria in the second limb as a land use not industrial or ancillary to an industrial use that because of its type, nature, scale, transport requirements or impacts could not reasonably be located in another zone, depended on the particular characteristics of the Church the subject of the application and not the more general question of whether a church or place or public worship was an appropriate use in an industrial zone. The Church had different characteristics to more traditional places of public worship, and was consistent with objective (a): at [49]-[54];

  (b) the proposed development did not fall within any of the categories the subject of objectives (b) and (d): at [55]; and

  (c) in considering objective (c), given the relatively isolated location of the proposed development, there was no issue as to likely impact on the amenity enjoyed by residents, and any effect on commercial centres in the vicinity would be close to zero: at [56];

(3) while the strategic planning documents referred to by the council were extremely valuable for the long term planning of the area, they should not be given significant weight in determination of the application. The documents essentially guided the planning process and the preparation of local environmental plans and development control plans: at [64]-[78];

(4) a minimum of 252 car parking spaces were required for the proposed development, and based on a common sense approach, adequate car parking spaces could be provided: at [96], [108];

(5) while the use of the driveway proposed for the designated bus pickup/collection point was not optimal, it had adequate width to accommodate the set down/pickup while still allowing vehicles to pass; there was a low level of industrial activity on Saturday afternoons and Sundays when the peak operating times of the Church would occur; the largest other occupier was due to vacate the site; and the Plan of Management could adequately deal with the traffic and pedestrian movements associated with the Church: at [112];

(6) the requirements of the Plan of Management related to the proposed use and complemented the other conditions of approval; it would not require people to act in an unlikely or unreasonable way; the source of any breaches could readily be identified; an acceptable outcome could be achieved without total compliance; it could reasonably be expected that the Church patrons would be made aware of its contents; the Plan of Management could be enforced as a condition of consent; and while it did not contain complaint management procedures or provision for updating and amendment that could be included as a condition of consent: at [117]-[126];

(7) any required approval of the RMS could be the subject of a deferred commencement condition: at [129]; and

(8) the first amendment of the development application was not minor. A significant re-assessment of the development application was also required by the second amendment, however once the original development application was amended it was no longer "the original development application" for the purposes of s 97B of the *Environmental Planning and Assessment Act* 1979 and s 97B(2) did not apply: at [157]-[159].

- **Victorian Civil and Administrative Tribunal**

Dual Gas Pty Ltd v Environment Protection Authority [2012] VCAT 308 (Dwyer DP, Potts and Sharpley)

Facts: Dual Gas Pty Ltd ("Dual Gas") sought to develop a 600 MWe power station in the Latrobe Valley to generate electricity whilst demonstrating a new power generation technology. This technology, known as IDGCC (Integrated Drying Gasification Combined Cycle Technology), could generate power with a lower greenhouse gas emissions intensity ("GEI") than would result from the conventional burning of coal. It also lent itself more readily to future carbon capture and storage ("CCS"). If successfully demonstrated, IDGCC had potential worldwide application. The project would, however, still contribute to an increase in Victoria's greenhouse gas ("GHG") emissions.

In May 2011, the Environment Protection Authority ("the EPA") issued a conditional works approval for a 300 MWe (rather than 600 MWe) power station. Six applications for review of this decision came before the Tribunal. Four were brought by objectors (Environment Victoria Inc, Locals into Victoria's Environment Inc, Doctors for the Environment Australia, and Mr Martin Shield) who sought refusal of the approval on the basis that the project was inconsistent with the State Environment Protection Policy (Air Quality Management) ("the SEPP"). A further two applications were brought by Dual Gas, who sought to have its original proposal for a 600 MWe power station approved and to have conditions on the works approval relating to SO_2 capture and noise emissions deleted or modified.

Issues:

(1) whether VCAT had jurisdiction to review the applications;

(2) whether the objectors had legal standing to bring their applications;

(3) whether the use of the power station the subject of works approval would result in emissions that would be inconsistent with the aims, principles and intent of the SEPP and/or with the requirement for "best practice"; and

(4) whether the terms of the works approval issued by the EPA should be altered in the manner requested by Dual Gas.

Held: objectors' applications for review were dismissed and Dual Gas' applications for review were upheld in part:

(1) in relation to the objectors' applications, VCAT was limited by s 33B(2) of the *Environment Protection Act* 1970 (Vic) ("the EP Act") to only two grounds of review for a works approval that had already issued: at [12]. In relation to Dual Gas' applications, the scope of VCAT's review was limited under s 33(3) of the EP Act to a consideration of only those conditions referred to in the review applications: at [13];

(2) three of the four objectors were considered to have standing (Environment Victoria Inc, Doctors for the Environment Australia, and Mr Martin Shield) under s 33B(1) of the EP Act and s 5 of the *Victorian Civil and Administrative Tribunal Act* 1998 (Vic). This conclusion was reached having regard to the context of the EP Act, the nature of the reviewable decision affecting a substantive global issue, and genuine interest of the objectors in the subject matter of the decision as opposed to a broader and more general environmental concern: at [135]. By virtue of a narrow reading of s 33B(2) of the EP Act, Mr Shield's main ground of review was struck out: at [143];

(3) the objectors failed to demonstrate that the use of the power station would result in emissions that would be inconsistent with the SEPP because:

  (a) the project complied with the requirement for "best practice" having regard to the definition of that term in the SEPP and comparable industry activity: at [176]; and

  (b) the project was not inconsistent with a holistic assessment of the aims, principles and intent of the SEPP, having regard to: existing Australian and Victorian government measures to address the enhanced greenhouse effect; the fact that the project had express support in the form of State and Federal government grants; the fact that the project would not stifle opportunities for renewable energy to play a greater role in future energy supply; and decision-making requirements under s 14 of the *Climate Change Act* 2010 (Vic): at [257] and [331]; and

(4) the EPA misapplied the principles of environmental protection under the SEPP in halving the capacity of the power station: at [309]. A works approval for a 600 MWe power station was issued, but an additional condition was imposed that effectively prevented the project from commencing until the retirement of an equivalent amount of higher GEI generation capacity in Victoria could be secured: at [341]. The conditions for SO_2 capture and noise attenuation were to remain: at [430] and [477].

Newry Street Pty Ltd & Ors v Yarra City Council [2012] VCAT 357 (Byard SM)

Facts: the Yarra City Council ("the council") issued a planning permit for a four storey residential development and car parking on a site on which there was a factory building constructed approximately 90 years earlier. The permit application contemplated the retention of some brick walls of the then existing factory building or their demolition and reconstruction as part of the contemplated new building. The walls had been demolished and the bricks retained for re-use. The council sought an enforcement order under s 114 of the *Planing and Environment Act* 1987 ("the Act") requiring reconstruction of the demolished walls to their condition as near as practicable prior to demolition. The respondent companies (Newry Street Pty Ltd and Kubic Pty Ltd) separately commenced proceedings under s 87A of the Act seeking amendment of the permit; they subsequently concluded that amendment was not necessary and sought leave to withdraw the proceeding under s 87A. Notice of intention to seek such leave was given to the other parties to the s87A proceeding which included objectors to the original Tribunal case which lead to the issue of the permit. The third proceeding was a request made by the objectors under s 87 of the Act seeking cancellation of the permit. Under s 89(3) of the Act the Tribunal could refuse to consider such a request unless it was satisfied that the request had been made as soon as practicable after they had notice of the facts relied upon. The objectors admitted that they had not made the s 87 request as soon as practicable.

Issues:

(1) whether the enforcement order should be made;

(2) whether leave should be granted to withdraw the s 87A request; and

(3) whether the objectors had a right to have the Tribunal consider their request for cancellation of the permit.

Held: finding that the land was developed in contravention of condition 1(a) of the planning permit in that the removal of the south, east and west walls was not in accordance with the plans endorsed under the permit, and ordering that the walls which the planning permit required to be retained to be reinstated to as near as practicable to the condition prior to demolition using the same bricks that formed part of the original walls:

(1) the contravention of the planning permit was admitted and the parties consented to the making of an enforcement order requiring restoration as near as practicable to the original condition of the walls: at [7];

(2) leave to withdraw the s 87 request should be granted: at [14]; and

(3) the discretion was not exercised in favour of further considering the objectors' request under s 87 of the Act: at [23].

Court News

- The Court welcomes Ms Jasmine Ward who commenced on 19 March 2012 as a Commissioner Support Officer

- The Hon. David Henry Lloyd QC has been appointed as an Acting Judge of the Court for the period commencing on 5 March 2012 until 4 May 2012 and for a further period commencing on 5 May 2012 until 12 October 2012