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Land and Environment Court of NSW Judicial Newsletter

Legislation

Statutes

Planning Appeals Legislation Amendment Act 2010 No 120 — published 4 February 2011, provided for 7 February 2011 to be the commencement date for Schedule 2 of the Act. The amending Act introduces amendments to the *Land and Environment Court Act* 1979 requiring certain Class 1 proceedings in the Land and Environment Court to be dealt with by conciliation or arbitration [full explanatory notes].

The Court has provided substantial information on residential development appeals on its website. The Department of Planning has also released a planning circular (PS 11-003) outlining the changes.

Planning Appeals Legislation Amendment Act 2010 No 120 — appointed 28 February 2011 as the commencement date for Schedules 1 and 3 of that Act. The schedules contain amendments to the *Environmental Planning and Assessment Act* 1979, the *Environmental Planning and Assessment Amendment Act* 2008 and the *Independent Commission Against Corruption Act* 1988. For further information see the Department of Planning's planning circular PS 11-009.

Environmental Planning and Assessment Amendment (Planning Appeals) Regulation 2011 — published 18 February 2011, amends the *Environmental Planning and Assessment Regulation* 2000 with respect to the following:

(a) the rejection of development applications;

(b) the time in which development applications are to be forwarded to concurrence authorities and approval bodies;

(c) the giving of notices of determination;

(d) the effect of a failure to determine an application for the modification of a development consent within 40 days;

(e) the review of decisions to reject development applications;

(f) the review of decisions with respect to applications for modification of development consents;

(g) the fees payable in respect of certain applications;

(h) the exemption of temporary structures from certain requirements relating to construction certificates and occupation certificates; and

(i) the removal of provisions relating to planning arbitrators.

Environmental Planning and Assessment Amendment (Part 4A Certificates and DCPs) Regulation 2011 — published 17 February 2011, amends the *Environmental Planning and Assessment Regulation* 2000 as follows:

(a) inserts a definition of *planning agreement*;

(b) simplifies requirements for the making of certain amendments to or revocation of DCPs that are done at the direction of the Minister for Planning, including by removing requirements for councils to publicly exhibit or notify the amendment or revocation of such development control plans before they are amended or revoked;

(c) provides that an explanatory note for a voluntary planning agreement, or an agreement that amends or revokes a voluntary planning agreement, must state whether the agreement specifies that certain requirements must be complied with before a construction, occupation or subdivision certificate is issued;

(d) provides that a certifying authority must not issue a construction certificate unless the authority is satisfied that all requirements of a voluntary planning agreement that are, under that agreement, required to be met before the construction certificate is issued are complied with;

(e) enables a certifying authority to require applicants for construction, occupation or subdivision certificates to provide additional information relating to voluntary planning agreements, if it is essential to the authority's proper consideration of the application;

(f) makes it clear that a planning authority that is a party to a voluntary planning agreement may, for the purposes of any such requirement to supply information, certify that specified requirements of the agreement have been met;

(g) enables a certifying authority to require applicants for occupation certificates to provide additional information relating to the building concerned, if it is essential to the authority's proper consideration of the application; and

(h) inserts transitional provisions consequent on the amendments.

Statute Law (Miscellaneous Provisions) Act 2009 No 56 — published 17 February 2011, commenced amendments to the *Environmental Planning and Assessment Act* 1979 relating to prerequisites for the issue of subdivision and occupation certificates as set out in sch 1.13 [9] of the Act.

Nation Building and Jobs Plan (State Infrastructure Delivery) Amendment (Planning Legislation) Regulation 2011 — published 3 March 2011, amended the *Environmental Planning and Assessment Act* 1979 by restoring the operation of that Act in relation to certain infrastructure projects carried out under the *Nation Building and Jobs Plan (State Infrastructure Delivery) Act* 2009. The amendments:

(a) deem authorisations given for infrastructure projects under the *Nation Building and Jobs Plan (State Infrastructure Delivery) Act* 2009, and certified for that purpose, to be development consents, subject to the conditions specified in those authorisations;

(b) deem infrastructure projects under the *Nation Building and Jobs Plan (State Infrastructure Delivery) Act* 2009, for which an authorisation was not required, to be exempt development; and

(c) provide for the application of provisions of the *Environmental Planning and Assessment Act* 1979 to those infrastructure projects, in particular provisions for the modification of development consents and relating to the erection and use of buildings.

Local Government Amendment (Environmental Upgrade Agreements) Act 2010 No 110 — commenced 18 February 2011, amended the *Local Government Act* 1993 to make provision for environmental upgrade

agreements between the council and an owners corporation to improve the environmental efficiency or sustainability of a building [full expanatory notes].

Local Government Amendment (Environmental Upgrade Agreements) Regulation 2011 — published 18 February 2011, made further provision in respect of environmental upgrade agreements and charges in order to facilitate the commencement of the *Local Government Amendment (Environmental Upgrade Agreements) Act* 2010. This Regulation:

(a) specifies the types of works that are considered to be environmental upgrade works and, accordingly, that can be made the subject of an environmental upgrade agreement;

(b) modifies the application of the charge provisions of the *Local Government Act* 1993 to environmental upgrade charges, in particular, to facilitate the levying of the charge in respect of strata buildings and buildings owned by the Crown;

(c) requires a certificate issued by a council in respect of land affected by an environmental upgrade agreement to include a statement of environmental upgrade charges;

(d) modifies the *Retail Leases Act* 1994 in connection with the payment of contributions by lessees to environmental upgrade charges;

(e) specifies the mandatory requirements of the Ministerial guidelines relating to entry into environmental upgrade agreements; and

(f) provides for other matters relating to the recovery of environmental upgrade charges.

Local Government (General) Amendment (Minimum Rates) Regulation 2011 — published 3 March 2011, increases the minimum amount that may be specified by a council when levying an ordinary rate from $430 to $442.

Coastal Protection Regulation 2011 — published 3 March 2011, made provision for certain matters under the *Coastal Protection Act* 1979. The Regulation remade (with only minor changes in substance) certain provisions of the *Coastal Protection Regulation* 2004 which was repealed on 1 September 2010 by s 10 (2) of the *Subordinate Legislation Act* 1989. Specifically, the Regulation:

(a) prohibits the carrying out of certain development on any part of the coastal zone below the mean high water mark (excluding any estuary, lake or artificial harbour), except with the concurrence of the Minister for Climate Change and the Environment;

(b) provides that requirements specified in a Code of Practice published by the Department of Environment, Climate Change and Water in March 2011 must be complied with in relation to:

  (i) the placement, maintenance and removal of emergency coastal protection works, and

  (ii) orders to remove material, structures and emergency coastal protection works on beaches; and

  (iii) the restoration of land after the removal of material, structures and emergency coastal protection works;

(c) provides for a scheme of categorisation of land within the coastal zone into risk categories according to the level of the risk that particular land will be adversely affected by, including providing for the following:

  (i) the determination by the Minister, by certification of a council's coastal zone management plan, of the risk category to which particular land is to be allocated; and

  (ii) the inclusion in planning certificates issued under s 149 of the *Environmental Planning and Assessment Act* 1979 of information regarding such determinations;

(d) authorises persons to whom a Coastal Authority may delegate the exercise of its functions;

(e) prescribes certain offences under the *Coastal Protection Act* 1979 as penalty notice offences and prescribes penalty notice amounts for those offences; and

(f) provides for transitional arrangements for draft coastal zone management plans submitted to the Minister for approval before the commencement of the *Coastal Protection and Other Legislation Amendment Act* 2010.

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

Crown Lands (General Reserves) Amendment (Sustainable Burials) By-law 2011 – published 3 March 2011, amends the *Crown Lands (General Reserves) By-law* 2006:

(a) to allow, after consultation with the community and with the approval of the Minister for Lands, reserve trusts that manage cemeteries to revoke burial licences to facilitate cemetery renewal schemes;

(b) to limit the granting of burial licences to no more than 2 burial places per person;

(c) to reduce the period required before reserve trusts may revoke burial licences from 60 years to 50 years;

(d) to extend the application of the provisions of the By-law to all cemeteries for which a reserve trust has been established; and

(e) to update the language of the By-law to clarify its intent and reflect terminology used in the industry.

Native Vegetation Amendment (Assessment Methodology) Regulation 2011 — published 3 March 2011, gives effect to a revised Assessment Methodology for the purposes of the *Native Vegetation Regulation* 2005. The Assessment Methodology is a methodology adopted by that Regulation for assessing and determining whether proposed clearing improves or maintains environmental outcomes in relation to an application for development consent for broadscale clearing, or for approval of a property vegetation plan that proposes broadscale clearing.

Swimming Pools Amendment Regulation 2011 — published 3 March 2011, amends the *Swimming Pools Regulation* 2008 so as to require:

(a) child-resistant barriers surrounding new outdoor swimming pools to be designed, constructed, installed and maintained in accordance with the standards set out in the Building Code of Australia from 1 May 2011;

(b) the means of access to new indoor swimming pools to be restricted in accordance with those standards, from 1 May 2011; and

(c) the Division of Local Government, within the Department of Premier and Cabinet, and each local authority, to make the Building Code of Australia available for public inspection.

Marine Parks (Zoning Plans) Amendment (Solitary Islands and Jervis Bay Marine Parks) Regulation 2011 — published 27 January 2011, repeals and remakes the *Solitary Islands Marine Park Zoning Plan* and the *Jervis Bay Marine Park Zoning Plan*. The revised zoning plans include within them matters that are in Div 2–4 of Pt 1 of the *Marine Parks (Zoning Plans) Regulation* 1999. This is done so that all provisions that relate to each of the two marine parks are located in one place. This Regulation also amends the table of offences that can be dealt with by penalty notice, to take into account the re-arrangement of provisions in the zoning plans.

Waste Recycling and Processing Corporation (Authorised Transaction) Act 2010 No 8 — commenced 3 March 2011. The Act:

(a) repeals the *Waste Recycling and Processing Corporation Act* 2001; and

(b) removes any reference to the Waste Recycling and Processing Corporation from the *State Owned Corporations Act* 1989.

Water Management Amendment Act 2008 No 73 — commenced 1 April 2011, amended the *Water Management Act* 2000 to provide for the Minister to authorise the taking of water pursuant to supplementary water access licences within a specified water management area or water source.

Water Management Amendment Act 2010 No 133 — commenced 4 April 2011, amended the *Water Management Act* 2000 in respect of access licences, approvals, environmental water, offences relating to the taking of water and to access licences and approvals and other minor matters.

Water Management (General) Amendment (Metering Equipment) Regulation 2011— published 3 March 2011, amended the Water Management (General) Regulation 2004 as follows:

(a) to make the Water Administration Ministerial Corporation the owner of metering equipment installed or replaced by it on or after 4 March 2011;

(b) to confer on it the function of modifying metering equipment; and

(c) to confer on it exclusively the functions of maintaining, repairing, modifying, replacing and operating metering equipment installed, modified or replaced by the Corporation after 4 March 2011, or as part of the Hawkesbury Nepean River Recovery Project.

Water Management (Water Bores for Domestic Consumption and Stock Watering) Proclamation 2011 — as from 28 February 2011, Pt 3 of Ch 3 of the *Water Management Act* 2000 applies to each water source in the State in relation to which a water supply work approval authorises the construction of a water bore to be used to take water from a water source for the purposes of the exercise of domestic and stock rights, but only for that purpose.

The following Water Sharing Plans commenced 1 April 2011:

- Greater Metropolitan Region Groundwater Sources 2011;
- Greater Metropolitan Region Unregulated River Water Sources 2011; and
- Bega and Brogo Rivers Area Regulated, Unregulated and Alluvial Water Sources 2011.

Water Management (General) Amendment (Greater Metropolitan Region Water Sharing Plans) Regulation 2011 and Water Management (General) Amendment (Bega and Brogo Rivers Water Sharing Plan) Regulation 2011 — published 3 March 2011 seek:

(a) to make provision with respect to entitlements under the *Water Act* 1912 that authorise the taking of water from certain water sources, being entitlements that are to become access licences to which Pt 2 of Ch 3 of the *Water Management Act 2000* applies; and

(b) to provide for the creation of new access licences that authorise the taking of tidal pool water from tidal pool water sources (for which no entitlement has previously been required under the *Water Act* 1912); and

- The Water Sharing Plan for the Coopers Creek Water Source 2003 was amended by the Water Sharing Plan for the Coopers Creek Water Source Amendment Order 2011 — published 2 March 2011.

The Water Management (General) Amendment (Poon Boon Water Trust) Regulation 2011 — published 18 February 2011, provided for the winding up of the Poon Boon Water Trust, a private water trust constituted under provisions of the *Water Act* 1912 that are now repealed. The Regulation provides for the transfer of the Trust's assets, rights and liabilities to the Water Administration Ministerial Corporation and for the pro rata distribution of money held by the Trust to its ratepayers.

Information on water management is available on the Department of Climate Change and Water's website.

Central Coast Water Corporation Act 2006 No 105 — commenced on 25 February 2011, provide for all of the provisions of the *Central Coast Water Corporation Act* 2006 (except for amendments to the *Water Management Act* 2000) relating to the constitution of the Corporation as a water supply authority for Gosford City Council and Wyong Shire Council.

Central Coast Water Corporation Amendment Act 2010 No 89 — commenced 25 February 2011, amended the *Central Coast Water Corporation Act* 2006 to facilitate the establishment of the Central Coast Water Corporation as a water supply authority to, amend the *Energy and Utilities Administration Act* 1987 to provide for the Corporation to be made a contributor to the Climate Change Fund and for other purposes.

Central Coast Water Corporation Regulation 2011 — published 25 February 2011, applies certain provisions in relation to the staff of the Central Coast Water Corporation that are based on provisions in the *Local Government Act* 1993, as required by s 15 (3) (b) of the *Central Coast Water Corporation Act* 2006.

Protection of the Environment Operations (Waste) Amendment (Australian Packaging Covenant) Regulation 2011 — published 3 March 2011, amends the Protection of the Environment Operations (Waste) Regulation 2005 as a consequence of the replacement of the National Packaging Covenant with the Australian Packaging Covenant and consequent variations to the National Environment Protection (Used Packaging Materials) Measure of the Commonwealth. The amendments:

(a) update a definition and certain references, criteria and record-keeping requirements;

(b) require the EPA to set targets for the review of packaging design by brand owners and certain retailers and create an offence for failure to comply with such targets (with a maximum penalty of $11,000 for an individual and $22,000 for a corporation and, for a continuing offence, a maximum penalty of half those amounts for each day the offence continues);

(c) require brand owners and certain retailers to prepare waste action plans within one month of being notified in writing by the EPA;

(d) require waste action plans to set out how a brand owner or relevant retailer will ensure a continuous reduction in the number of packaging items in the litter stream and compliance with EPA targets for the review of packaging design;

(e) enable the EPA to direct waste action plans to be amended to set out the information referred to in paragraph (d), and extend an existing offence of failure to comply with directions of the EPA (with a maximum penalty the same as that referred to in paragraph (b)) so that it applies in relation to such directions; and

(f) save the operation of existing waste action plans

Crimes (Sentencing Procedure) Amendment Act 2010 No 136 — commenced 14 March 2011:

(a) amends the *Crimes (Administration of Sentences) Act* 1999 in relation to the matters considered by the parole authority in making parole orders; and

(b) makes miscellaneous amendments to the *Crimes (Sentencing Procedure) Act* 1999, including amendments relating to aggregate sentencing [full explanatory notes].

Civil Procedure Amendments

Courts and Crimes Legislation Further Amendment Act 2010 No 135 — commenced 4 March 2011, applies certain amendments made to the *Civil Procedure Act* 2005 by the Act providing a statutory regime for the conduct of proceedings of a representative nature in certain actions in the Supreme Court.

Courts and Crimes Legislation Further Amendment Act 2010 No 135 — commenced 1 April 2011, amends the *Civil Procedure Act* 2005 made by the *Act* that facilitate the taking of pre-litigation steps in certain civil disputes to resolve or narrow the issues in dispute before the commencement of certain court proceedings.

Civil Procedure Amendment (Excluded Proceedings) Regulation 2011 — published 3 March 2011, amends the *Civil Procedure Regulation* 2005 to exclude civil proceedings in the Supreme Court from the operation of Pt 2A (steps to be taken before the commencement of proceedings) of the *Civil Procedure Act* 2005 pending the enactment by the Commonwealth Parliament of comparable provisions in relation to the commencement of civil proceedings in Federal courts.

Environmental Planning Instrument Amendments

SEPP Amendment (Site Compatibility Certificates) 2011 — published 2 March 2011, prevents a consent authority from imposing more stringent conditions for some types of development than is outlined in the site compatibility statement.

SEPP (Sydney Harbour Catchment) Amendment (Subdivision) 2011 — published 3 March 2011, amends the Amendment of Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 and allows for subdivision of land/waterways. Land/waterways to which this clause applies may be subdivided, with development consent, if the purpose of the subdivision is to enable the creation of a lot that is, or is to be, used only for the following:

(a) development the subject of an existing development consent or a project approval under Pt 3A of the *Environment Planning Assessment Act* 1975 or that is an existing use;

(b) exempt development, or development or an activity that may be carried out without development consent; or

(c) any other development that is authorised under an Act of the Commonwealth.

Before granting consent to subdivision under this clause the consent authority must consider whether, and to what extent, the subdivision is likely to result in any reduction in public access to the foreshore or waterways. For further information see the Department of Planning's planning circular PS 11-013.

Environmental Planning and Assessment Amendment (Marrickville Local Environmental Plan 2001) Order 2011 — published 4 March 2011, amends the Marrickville LEP 2001 by rezoning land to allow for a bulky goods outlet at Tempe.

Environmental Planning and Assessment Amendment (State Environmental Planning Policy No 55—Remediation of Land) Order 2011 — published 2 March 2011, modified SEPP No 55 – Remediation of Land to change the remediation of land requirements procedures for parts of the Bangaroo site.

Environmental Planning and Assessment Amendment (Tweed Local Environmental Plan 2000) Order 2011 — published 3 March 2011, rezones land at Cobaki Lakes to allow for subdivision of such land under the following condition: development consent may be granted for the subdivision of land for the erection of a dwelling house if the area of each lot created is at least 120 m².

Environmental Planning and Assessment (Ku-ring-gai Planning Panel Repeal) Order 2011 — published 7 April 2011. The Order:

(a) repeals the *Environmental Planning and Assessment (Ku-ring-gai Planning Panel) Order* 2008*,* abolishing the Ku-ring-gai Planning Panel established pursuant to that Order; and

(b) provides for consequential savings and transitional matters.

State Environmental Planning Policy Amendment (Zone B8 Metropolitan Centre) 2011 — published 23 February 2011, inserted Zone B8 into SEPP (Exempt and Complying Development Codes) 2008 and SEPP 62 – Sustainable Acquaculture.

Standard Instrument (Local Environmental Plans) Amendment (Zone B8 Metropolitan Centre) Order 2011 — published 23 February 2011, inserted Zone B8 into the instrument. This Zone may only be used in the City of Sydney and North Sydney.

The following must be included as either “Permitted without consent” or “Permitted with consent” for this Zone: Roads

The Order seeks to:

(a) recognise and provide for the pre-eminent role of business, office, retail, entertainment and tourist premises in Australia’s participation in the global economy;

(b) provide opportunities for an intensity of land uses commensurate with Sydney’s global status; and

(c) permit a diversity of compatible land uses characteristic of Sydney’s global status and that serve the workforce, visitors and wider community.

Standard Instrument (Local Environmental Plans) Amendment Order 2011 — published 25 February 2011, amended the Standard Instrument (Local Environmental Plans) Amendment Order 2006 by:

(a) redefining the Zone RU4 Rural Small Holdings to include a reference to Zone RU4 Primary Production Small Lots;

(b) updating clauses in line with recent changes to legislation; and

(c) clarifying land use terms to remove overlap.

The Order does not have effect in relation to any LEP that was in force immediately before the commencement of the amending Order until 25 June 2011. Further information is available on the Department of Planning's website.

State Environmental Planning Policy (Exempt and Complying Development Codes) Amendment (Miscellaneous) 2011 — published 25 February 2011, made minor changes to development standards. See the Department of Planning's planning circular PS 11-010.

SEPP (Major Development) Amendment (Channel 7 Site) 2011 — published 25 February 2011, amended the SEPP (Major Development) 2005, by increasing the number of allowable dwellings to 800, up from 650.

State Environmental Planning Policy (Standard Instrument References) Amendment 2011 — published 25 February 2011 amended a number of LEPs and SEPPs in respect to the Standard Instrument (Local Environmental Plans) Amendment Order 2011.

Miscellaneous

The NSW Parliamentary Library Research Service has released the following research papers:

- history of development contributions under the NSW planning system – e-brief 03/2011;
- offshore petroleum exploration and mining - briefing paper 01/2011: summary, full briefing paper
- a Statistical Portrait of the Environment in NSW – statistical indicators 01/2011
- agriculture in the Sydney region: historical and current perspectives – e-brief 02/2011.

Planning circulars released by the Department of Planning:

- Special Infrastructure Contribution – Western Sydney Growth Areas (PS 11-004);
- Implementation of the Metropolitan Plan for Sydney 2036 – Ministerial Direction (PS 11-005);
- Section 117 Direction – Shooting Ranges (PS 11-006);
- Voluntary Planning Agreements and Development Control Plans (PS 11-007);
- Planning and Assessment Guidelines for Hazardous Industry (PS 11-008);
- Codes SEPP 2008 – Amendment Miscellaneous 2011 (PS 11-010);
- Section 94E Direction – Development contributions (PS 11-012)

Judgments

United Kingdom

R (on the application of Copeland) v Tower Hamlets London Borough Council [2010] EWHC 1845 (Admin) (Cranston J)

Facts: the applicant brought proceedings for judicial review of a decision by the Tower Hamlets London Borough Council ("the Council") to grant permission for the change of use of premises to enable a fast food take-away outlet to operate at the premises. In determining planning applications the Council was bound to "have regard to the provisions of the development plan, so far as material to the application and to any other material considerations" (*Town & County Planning Act* 1990, s 70(2)). The applicant submitted that in approving the change of use, the Council did not take into account the proximity of the premises to a local secondary school and its potential impact on the school's attempts to encourage healthy eating by pupils. The officer's report to the Council's Development Planning Committee had stated that the issue was not a material planning consideration that could have weight in determining the application.

Issues:

(1) whether the effect of a take-away outlet on students' healthy eating at a nearby school was capable of being a material consideration;

(2) whether the Council's Planning Committee considered that the issue was not, in law, capable of being a material consideration; and

(3) whether the decision might have been different if the Council had regarded it as a material consideration.

Held: application allowed and planning permission quashed:

(1) the proximity of a fast food take-away outlet to the school was capable of being a material consideration. It was thus for the Planning Committee to decide whether it was material, and, if so, what weight should be attached to it: at [25];

(2) when the application for planning permission came before the members of the Planning Committee, councillors were specifically advised that such matters could not be a material planning consideration, because it was not a matter going to the character of the use of the land. However, members within the Council were in fact concerned about the issue and might, if directed it was open for them to do so, have given it weight in the planning decision: at [30]–[34]; and

(3) the Council did not persuade the Court that if it had considered the proximity to the school as a material consideration the result would inevitably have been the same. If the Committee had been properly directed they may have reached a different decision: at [36]–[37].

High Court of Australia

Hili v R; Jones v R [2010] HCA 45 (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ)

Facts: the applicants, Mr Hili and Mr Jones, formed a company to perform painting and contract work for the New South Wales Department of Housing. Each applicant participated in a scheme for evading tax. Mr Hili pleaded guilty to one charge of obtaining a financial advantage by deception from a Commonwealth entity (the Commissioner of Taxation) contrary to s 134.2(1) of the *Criminal Code Act* 1995 (Cth) ("the Code"). Mr Jones pleaded guilty to three charges: one of defrauding the Commonwealth contrary to s 29D of the *Crimes Act* 1914 (Cth) ("the Crimes Act"), one of obtaining a financial advantage by deception from the

Commissioner of Taxation contrary to s 134.2(1) of the Code, and one of money laundering contrary to s 400.4(1) of the Code. The prosecution successfully appealed the sentences from the District Court for being manifestly inadequate. The applicants sought special leave to appeal the sentences imposed by the Court of Criminal Appeal.

Issues:

(1) was there, or should there be, a norm or starting point, expressed as a percentage for the period of imprisonment that a federal offender should actually serve in prison before release on a recognizance release order;

(2) should consistency in sentencing be presented in table form; and

(3) to what extent are courts bound by earlier sentencing decisions.

Held: dismissing the appeal:

(1) there neither is, nor should be, a judicially determined norm or starting point (whether expressed as a percentage of the head sentence, or otherwise) for the period of imprisonment that a federal offender should actually serve in prison before release on a recognizance release order. Particularly, it should not be accepted, as was stated by the Court of Criminal Appeal, that the "norm" for a period of mandatory imprisonment under the Commonwealth legislation is between 60 and 66%, which figure will be affected by special circumstances applicable to a particular offender. It is wrong to begin from some assumed starting point and then seek to identify "special circumstances": at [36] and [44];

(2) consistency is not demonstrated by, and does not require, numerical equivalence. Presentation of the sentences that have been passed on federal offenders in numerical tables, bar charts or graphs is not useful to a sentencing judge. It is not useful because referring only to the lengths of sentences passed says nothing about why sentences were fixed as they were. The consistency that is sought is consistency in the application of the relevant legal principles. When it is said that the search is for "reasonable consistency", what is sought is the treatment of like cases alike, and different cases differently. Consistency of that kind is not capable of mathematical expression. It is not capable of expression in tabular form: at [48]–[49];

(3) in seeking consistency, sentencing judges must have regard to what has been done in other cases. Care must be taken, however, in using what has been done in other cases. A history of sentencing can establish a range of sentences that have in fact been imposed. Yet, that history does not establish that the range is the correct range, or that the upper or lower limits to the range are the correct upper and lower limits. Past sentences "are no more than historical statements of what has happened in the past. They can, and should, provide guidance to sentencing judges, and to appellate courts, and *"stand as a yardstick against which to examine a proposed sentence*" (emphasis added). When considering past sentences, "it is only by examination of the whole of the circumstances that have given rise to the sentence that 'unifying principles' may be discerned": at [53]–[54]; and

(4) sentences must be reasonably consistent, but it cannot be said that any particular disparate sentence is necessarily wrong merely because it is disparate. Two courts may arrive at difference sentences because the later court considers the first to have erred, not in relation to the identification of legal principles, but in relation to factual reasoning or in relation to the exercise of discretionary judgement. The later court's liberty to differ in sentence exists even where it does not think the earlier court's conclusion to be "wrong", but just disagrees with it. The primary duty of a sentencing court is to be true to its own perception of what degree of severity or leniency is appropriate. For a "sentence itself gives rise to no binding precedent": [77]–[79].

British American Tobacco Australia Services Ltd v Laurie [2011] HCA 2 (French CJ, Gummow, Heydon, Kiefel and Bell JJ)

Facts: the respondent was the plaintiff in proceedings in the Dust Diseases Tribunal of New South Wales against the appellant ("BATAS") in her own right and continuing proceedings commenced by her late

husband, Mr Laurie, alleging that BATAS was negligent in the manufacture, sale and supply of tobacco products smoked by him. Mrs Laurie alleged that BATAS had a policy of destroying documents in its possession which might have evidenced its negligence. The pre-trial management and the trial of the action were allocated to Curtis DCJ. Curtis DCJ had made interlocutory orders against BATAS in other unrelated proceedings commenced by the widow of Mr Mowbray against Brambles Australia Ltd ("Brambles"). In those proceedings Mrs Mowbray alleged that her husband had contracted lung cancer as a result of exposure to asbestos while working for Brambles. Brambles cross-claimed against BATAS for contribution on the basis of Mr Mowbray's use of BATAS' tobacco products. An application made in those proceedings in 2006 by Brambles for an order for discovery was supported by testimony from the former Company Secretary and in-house solicitor to BATAS concerning the BATAS Document Retention Policy. Curtis DCJ made findings based on this and other evidence then before him that the policy had been adopted for the purpose of a fraud within the meaning of s 125 of the *Evidence Act* 1995 and that legal professional privilege claimed by BATAS for certain communications had been lost. His Honour ordered discovery. BATAS sought an order that Curtis DCJ disqualify himself from further hearing or determining the Laurie proceedings. Curtis DCJ dismissed the motion, and BATAS sought leave to appeal from that decision and prohibition under s 69 of the Supreme Court Act 1970. The Court of Appeal by majority (Tobias and Basten JJA, Allsop P dissenting) dismissed both summonses. BATAS appealed.

Issues:

(1) whether a fair minded lay observer might reasonably apprehend that Curtis DCJ might not bring an impartial mind to the resolution of the question he was required to decide; and

(2) whether any of the exceptions to the apprehension of bias rule applied.

Held: by majority (French CJ and Gummow J dissenting) the High Court allowed the appeal, set aside the decision of the Court of Appeal, and granted an order under s 69 of the Supreme Court Act prohibiting Curtis DCJ from further hearing or determining the proceedings:

(1) whenever a judge is asked to try an issue which he or she has previously determined whether in the same proceedings or in different proceedings and whether between the same or different parties, the judge will be aware that different evidence may be led at the later trial. Curtis DCJ's express acknowledgement of that circumstance did not remove the impression created by reading the judgment that the clear views there stated might influence his determination of the same issue in the Laurie proceedings: at [145];

(2) in addition to the possibility of the evidentiary position changing, a reasonable observer would note that the trial judge's finding of fraud was otherwise expressed without qualification or doubt, that it was based on actual persuasion of the correctness of that conclusion, that while the judge did not use violent language, he did express himself in terms indicating extreme scepticism about BATAS's denials and strong doubt about the possibility of different materials explaining the difficulties experienced by the judge, and that the nature of the fraud about which the judge had been persuaded was extremely serious. A reasonable observer might possibly apprehend that at the trial the court might not move its mind from the position reached on one set of materials even if different materials were presented at trial: at [145];

(3) while the fact of the delay in bringing the recusal application was noted in submissions, it was not submitted that delay was a circumstance that would justify the refusal of relief in the event that the apprehension of bias rule was engaged: at [151]; and

(4) the appeal did not raise for consideration what special circumstances might amount to an exception to the apprehended bias rule. In circumstances where evidence of Mr Laurie taken by Curtis DCJ at his bedside had been transcribed and video-recorded, such a contention would have been forlorn: at [152].

NSW Court of Appeal

MM & SW Enterprises Pty Limited v Strathfield Municipal Council [2011] NSWCA 14 (per Macfarlan JA, with Handley and Sackville AJJA agreeing)

(related decision: *MM & SW Enterprises Pty Limited v Strathfield Municipal Council* [2010] NSWLEC 8; (2010) 172 LGERA 125 Pepper J)

Facts: the applicant, MM & SW Enterprises Pty Limited, conducted a brothel at rental premises located at 131A Parramatta Road, Homebush, which were purchased by the current owner (David Lahood Pty Ltd), in or about August 2003. The premises had consent for use as "commercial offices" since 12 August 1980. There was evidence that the premises had been used as a brothel intermittently from the mid 1980's. On the 6 November 2008, Strathfield Council served MM & SW with a Brothel Closure Order pursuant to s 121B of the *Environmental Planning and Assessment Act* 1979 ("EPAA"). *The Strathfield Planning Scheme Ordinance 1969* had been amended by Strathfield Local Environmental Plan 82 ("the Plan"), gazetted on 21 November 1997. The Plan zoned the premises Special Use 3(b) zone, which prohibited use of the premises as a brothel. At first instance, the applicant sought, and was subsequently declined, a declaration that the premises had the benefit of "existing use" rights for the purpose of use as a brothel, within the meaning of ss 106 and 107 of the EPAA. The applicant appealed.

Issues:

(1) whether a development consent granted in 1980 permitting use of premises as "commercial offices" permitted use of the premises as a brothel; and

(2) whether there were existing use rights, within the meaning of ss 106 and 107 of the EPAA that protected the use of the premises as a brothel.

Held: dismissing the appeal with costs:

(1) the primary judge correctly described the issue for determination, namely, that the applicant must demonstrate that the ordinary meaning of "commercial offices" could be characterised to include a brothel, as without this construction, the usage could not be considered to be a lawful purpose, in accordance with the consent and the usage, because a brothel could not take the benefit of existing use rights: at [5];

(2) further, the primary judge's conclusion that to construe the use of rooms for provision of sexual services for reward as "commercial offices" would be to strain the ordinary meaning given to that term far in excess of what is "a fair but liberal reading of the rights it confers" and far in excess of "common sense" was correct: at [7];

(3) in the present context, the concept of "commercial premises" was a broader one than "commercial offices", as was made clear in the relevant Ordinance. The use of premises contains two limbs: first, use as "an office" and, second, use "for other business or commercial purpose." Use as a brothel, may well have fallen within the latter expression, but would not fall within the former, for which the development consent was granted. The term "office" was associated with clerical or administrative work, rather than business in the wider sense of a commercial transaction: at [8]; and

(4) the provision of sexual services for reward could not be described as "clerical or administrative work": at [8].

Meriton Apartments Pty Ltd v Council of the City of Sydney [2011] NSWCA 17 (per Tobias JA, with Campbell and Macfarlan JJA agreeing)

(related decisions: *Meriton Apartments Pty Ltd v Council of the City of Sydney* [2009] NSWLEC 1336 Moore SC and *Meriton Apartments Pty Ltd v Council of the City of Sydney* [2010] NSWLEC 64 Pain J)

Facts: Meriton Apartments Pty Ltd (*"Meriton"*) successfully appealed against the amount of a s 94 *Environmental Planning and Assessment Act* 1979 ("the *EPAA*") contribution levied by the Council under the City of Sydney Development Contributions Plan 2006 ("the Contribution Plan") by imposing a condition ("Condition 5") upon the development consent. The Contribution Plan allowed a particular type of "discount" on contributions owed on the basis of an existing workforce (a workforce demonstrating an existing demand), but limited the calculation to a particular census date. However, in allowing the appeal, the Senior Commissioner took into account that the land was in government ownership for a considerable period of time and thus not rateable, and reduced Meriton's claim for a reduction from $467,462.28 by $186,984.91. Meriton commenced, under s 56A(1) of the *Land and Environment Court Act* 1979 ("the *Court Act*"), an appeal against the Senior Commissioner's decision, alleging an error of law in that he took into account an irrelevant consideration. Pain J dismissed the appeal. Meriton sought leave to appeal that decision.

Issues:

(1) in determining whether or not a condition requiring the payment of a monetary contribution pursuant to s 94(1) of the *EPAA* was reasonable, did the subject matter, scope and purpose of the relevant provisions of the *EPAA* permit a reference to whether the land in question was rateable or unrateable; and

(2) did the Senior Commissioner err in law in taking into account the past rateability of the land in question.

Held: granting leave to appeal and allowing the appeal:

(1) the primary judge's reasoning supporting the conclusion that the Senior Commissioner did not err was unpersuasive for two reasons. First, it was simply an assertion that there was no such error rather than a reasoned consideration of why that was so. Second, her Honour did not, at least directly, address the real issue, namely, whether the fact that the site was non-rateable for a period of time was a relevant consideration as a matter of construction of s 94(3) taking into account the subject matter, scope and purpose of the provisions of the *EPAA* relating to the imposition of a condition under s 94(1) for the payment of a monetary contribution: at [45];

(2) a consideration of the subject matter, scope and purpose of the relevant provisions of the *EPAA* (ss 94 and 94B), did not provide any basis, whether express or implied, which was capable of linking the rateability of the relevant land to the net demand for public amenities and public services generated by the development under consideration. Neither did the Contribution Plan or the publication of the Department of Infrastructure, Planning and Natural Resources entitled "*Development contributions, Practice Notes* ": at [56]–[57];

(3) the present provisions of the statute neither expressly nor impliedly related to the manner in which a council provided public amenities and services to meet the needs of past populations. Rather, it was only concerned with ensuring that the present developer was not required to meet the needs that were not generated by the development in respect of which consent was being sought. Therefore, by taking into account the past rateability of the relevant land, the Senior Comissioner took into account an irrelevant consideration and erred in law: at [61]; and

(4) no purpose would have been served by remitting the matter for further consideration by the Land and Environment Court in light of this Court's finding on the sole basis upon which the Senior Commissioner discounted the credit. The orders of Pain J and Moore SC were set aside, and the development consent was modified by inserting at the end of Condition 5 a credit of $467,462.28 for past workforce contributions: at [69]–[70].

***Kelly v* Jowett** [2009] NSWCA 278 (Beazley and McColl JJA, Barrett J)

(related decision: *Jowett v Kelly* NSWSC, 29 May 2008, unreported, McLaughlin AsJ)

Facts: Leanne Kelly and Terrence McLennan ("the executors") were appealing orders made by McLaughlin AsJ in proceedings under the *Family Provision Act* 1982 ("the substantive appeal"), in which Mr Kenneth Jowett claimed maintenance and advancement in life out of the estate or notional estate of his late mother ("the Equity Proceedings"). Mr Jason Dimmock filed a notice of appearance on behalf of the executors in the

Equity Proceedings, and was noted as the "solicitor on the record". Mr Dimmock was employed by Brydens Compensation Lawyers. Mr Robert Bryden and Mr Bandeli Hagipantelis ("the Principals") were the principals of Brydens Compensation Lawyers and Brydens Law Office. Before the commencement of the Equity Proceedings, the executors in the Equity Proceedings failed to comply with court directions in relation to the filing and service of affidavits and at the hearing did not lead evidence or undertake cross-examination. The trial judge granted Mr Jowett a legacy in the estate, ordered the executors to pay the costs of Mr Jowett on an indemnity basis, and ordered Mr Dimmock to pay the costs of the executors on an indemnity basis, incurred as a result of his failure to comply with orders regarding the filing and service of affidavits.

Prior to the substantive appeal, a stay was granted on the basis that the executors were not kept apprised, by Mr Dimmock, of the conduct of the matter and were unaware of the non-compliance with court orders. In the substantive appeal, orders by consent were made setting aside the legacy of Mr Jowett and remitting the claim to the Equity Division to be reheard. The appeal against the costs order proceeded. Mr Jowett sought an order that the Principals pay the costs of the substantive appeal and the costs ordered by the trial judge.

Issues:

(1) whether a retainer was with the principals of the employer firm, notwithstanding that an employed solicitor was on the record in the notice of appearance; and

(2) whether the Court had the power to make a costs order against the principals of the employer firm irrespective of whether they had personal knowledge of the neglect of the proceedings.

Held: allowing the appeal:

(1) the Court's power to make costs orders in respect of a legal practitioner has always been exercised to ensure legal practitioners observe their duty to the Court and, in turn, to the administration of justice, to ensure among other obligations the expeditious and efficient conduct of litigation. The purpose of an order is for payment of costs thrown away or lost because of the conduct complained of and is frequently exercised in order to compensate the opposite party in the action: [57] and [58];

(2) where a solicitor is employed by another, the retainer is with the employer. The executors were the clients of the Principals. In addition, where a solicitor is allowed to carry on practice indiscriminately using the business name of the principals, the solicitor is held out as acting on the principals' behalf and for the clients retaining them: [70] and [71];

(3) it was the Principals' responsibility to ensure that the Court's orders and rules were complied with in relation to matters conducted by their law firms. The minimum discharge of the Principals' duty was to ensure that the affidavits were filed in time to enable Mr Jowett's legal representatives to complete their preparation for the hearing and for the hearing to proceed: [77] and [79];

(4) the Principals were responsible for the persistent failures to comply with court directions irrespective of when they had notice of them. In short, the Principals in this instance were responsible for the neglectful manner in the way their firm conducted the Equity Proceedings, which resulted in the substantive appeal: [72], [79] and [88];

(5) solicitors in sole practice or in partnership should not allow an employed solicitor to be the solicitor on the record, even if the employed solicitor holds an unrestricted practising certificate: [96]; and

(6) it was appropriate to order that the Principals pay Mr Jowett's costs on an indemnity basis of the Equity Proceedings, the stay application and the substantive appeal: [94].

D'Anastasi v Environment Protection Authority [2011] NSWCA 1 (Allsop P)

(related decision: *D'Anastasi v Environment Protection Authority* [2010] NSWLEC 260 Pain J)

Facts: the Environment Protection Authority and Mr Gregory Abood ("the respondents") successfully sought to have an injunction, obtained before Craig J on 26 November 2010, lifted in proceedings before Pain J on 16 December 2010. The injunction restrained the respondents from seeking to enforce a notice and a variation of notice issued under s 193 of the *Protection of the Environment Operations Act* 1997 ("the POEA")

against Mr Charles D'Anastasi to produce certain information and records. In the proceedings before Pain J, her Honour had dismissed a summons challenging the validity of the notices under s 193 of the POEA, made an order that the Mr D'Anastasi answer the statutory notice within 10 business days of the publication of the Court's reasons and reserved the question of costs. Mr D'Anastasi appealed her Honour's decision and applied to have the orders stayed.

Issues:

(1) whether there was a proper foundation for considering that there were reasonable prospects of success in the appeal so as to warrant interference with an investigation under the POEA.

Held: dismissing the stay application and declining to interfere with the orders of Pain J:

(1) whilst s 193 of the POEA had (other than because of the reasons stated by her Honour) not been the subject of consideration by a superior court, this was not a ground to stay any order made under it until the Court of Appeal or the High Court had finally opined on its scope. The precise extent and reach of s 193 of the POEA in its search for information (as opposed to records) was not entirely clear. It was a broad provision and its precise reach would be the subject of careful argument and consideration in the substantive appeal: at [5];

(2) the invalidity of the notices would be considered in the context of both the admissibility of the evidence in any prosecution, as well as whether a prosecution should proceed to the extent that the evidence was critical. These matters were not taken to mean that the utility of the appeal against Pain J's orders would be denied if the stay was not granted: at [6]; and

(3) no foundation was shown for the interference with the investigation under the POEA: at [7].

Land and Environment Court of NSW

Judicial Decisions

- **Development Appeals**

The Owners Strata Plan No 855 v Gosford City Council [2011] NSWLEC 9 (Craig J)

Facts: the applicants sought development consent to demolish an existing residential flat building and redevelop the site by the erection of a new residential flat building. The application was refused by the Respondent Council. The applicant appealed pursuant to s 97 of the *Environmental Planning and Assessment Act* 1979 ("EP&A Act"). One issue in the appeal was whether the present use of the land was an "existing use" as defined in s 106 of the EP&A Act. The land was zoned Residential 2(a) under the Gosford Planning Scheme Ordinance which prohibited development for the purpose of residential flat building. Despite varying its position on this issue over the course of the hearing, the Council ultimately conceded, on the fourth day of hearing when final submissions were due to commence, that the present use of the land was an "existing use" for the entire lot and therefore residential flat building was permissible with consent.

The existing building was constructed in 1955. The proposed new residential flat building was to be three levels of 'stepped' design containing six residential units.

Issues:

(1) whether the character of the proposed development was appropriate when regard was had to the character of existing and likely future development in the vicinity of the site;

(2) whether the bulk and scale of the proposed development was appropriate;

(3) whether the proposed development would unreasonably impose upon amenity within neighbouring residential properties; and

(4) costs.

Held: appeal allowed:

(1) the character of the proposed development was found to be appropriate when considering the existing character and likely future development in the vicinity of the site. The "desired character" of the area was described in the Council's Development Control Plan 159 (Character) Amendment One ("DCP 159") at Schedule 2 and was characterised as "medium density residential hillsides." While the proposed development was different in design and size to other buildings in the area, differentiation did not equate to inimical or incompatible development: at [46];

(2) the bulk and scale of the proposed development was found to be appropriate. The size and design of the building was criticised for its "horizontal continuity of form." However, the proposal clearly incorporated the elements necessary for compliance with DCP 159 which allowed for that continuity to be broken by diverse architectural layout and variations along the façade of the building: at [55];

(3) the proposed development would not unreasonably impose upon amenity within neighbouring residential properties. It was found that the use of the two lap pools attached to the upper level apartments would be of minimal impact as they were surrounded by walls on all sides and separated by significant distances from neighbouring residences: at [57]–[58]; and

(4) in the context of the Council's changing position on existing use before and during the hearing, it was fair and reasonable in the circumstances that the respondents pay a proportion of the costs incurred by the applicant in the appeal. A fair and reasonable proportion of costs was held to be 15%: at [79]–[81].

- **Judicial Review**

Australians for Sustainable Development Inc v Minister for Planning [2011] NSWLEC 33 (Biscoe J)

Facts: the first respondent, the Minister, granted approvals for the carrying out of two projects at Barangaroo. The applicant brought proceedings challenging the validity of these two approvals and sought to enjoin the second and third respondents from carrying out these projects. After the conclusion of the trial, but before judgment was delivered, the Minister made an order amending the State Environmental Planning Policy No 55 – Remediation of Land ("SEPP 55") such that the two contested projects were removed from the ambit of cl 17. Clause 17(1)(c) of SEPP 55 mandated that all remediation work must be carried out in accordance with "in the case of a category 1 remediation work – a plan of remediation, as approved by the consent authority, prepared in accordance with the contaminated land planning guidelines".

Issues:

(1) but for the Minister's amendment to SEPP 55:
   (a) whether cl 17(1)(c) of the SEPP applied to the carrying out of projects approved under Pt 3A of the *Environmental Planning and Assessment Act* (1979) ("the EPAA"); and
   (b) whether remedial actions plans failed to comply with cl 17(1)(c) of SEPP 55.

(2) whether cl 7 SEPP 55 applies to Pt 3A projects at the approval stage;

(3) whether respondents failed to comply with cl 7 of SEPP 55;

(4) whether the Minister failed to consider principles of ecologically sustainable development ("ESD") as part of the public interest;

(5) whether the Minister failed to make requisite inquiries or constructively failed to exercise jurisdiction;

(6) whether extraction of sandstone was for an impermissible purpose, and thus whether the development was consequently prohibited; and

(7) whether, in light of the Minister's amendment to SEPP 55, the Minister should be ordered to pay costs and if so, on what basis?

Held: dismissing the application, but ordering the Minister to pay costs:

(1) but for the Minister's amendment to SEPP 55, the applicants would have succeeded on the cl 17(1)(c) issue: at [10] and [183]–[194];

(2) the Minister's power to grant project approval was subject to the implied limitation not to grant approval for the carrying out of unlawful development: at [214];

(3) cl 7 of SEPP 55 did not apply to projects at the approval stage: at [215];

(4) the applicant did not prove that the Minister failed to consider the substance of ESD principles when approving the two projects: at [249]–[250];

(5) constructive failure to exercise jurisdiction requires the administrative decision-maker to fail to make an obvious finding about a critical fact, the existence of which is easily ascertained. Mere failure to investigate an issue on which the administrative decision-maker could have obtained more information is not sufficient to constitute constructive failure to exercise jurisdiction: at [257]–[259];

(6) the extraction of the sandstone was for a permissible purpose, even if it was for an anticipated project which had not yet been approved: at [296]; and

(7) a preliminary determination was made that the Minister's amendment to SEPP 55 constituted special and unusual circumstances, which warranted an order that the Minister pay costs on an indemnity basis, subject to any later application filed by the Minister: at [307].

Shellharbour City Council v Minister for Planning [2011] NSWLEC 59 (Biscoe J)

Facts: the applicant challenged the validity of the Minister's concept plan approval under Pt 3A of the *Environmental Planning and Assessment Act* 1979. The applicant sought directions that the Minister provide relevant documents and a statement of reasons relating to the decision.

Issues:

(1) whether the Court should direct the Minister to provide written reasons for the approval under r 4.3 of the Land and Environment Court Rules ("LECR") or para 14 of the Court's Class 4 Practice Note;

(2) whether the Minister was a "public authority" for the purposes of r 4.3, having regard to the definition in r 1.3 of the LECR;

(3) whether the Minister was a "public official" for the purposes of para 14 of the Court's Class 4 Practice Note;

(4) whether the Court should direct the Minister to make available to the applicant documents in respect of the concept plan application; and

(5) whether, due to the change in personality of the Minister (due to a change in government), the new Minister should only be ordered to provide reasons to the "best of their knowledge, information and belief".

Held:

(1) the Minister did not constitute a "public authority" for the purposes of r 4.3 having regard to the definition in r 1.3 of the LECR: at [7];

(2) the Minister was a "public official" within the meaning of para 14 of the Class 4 Practice Note: at [8];

(3) directions to provide reasons and to make available documents under the para 14 of the Class 4 Practice Note may be made before points of claim are filed: at [11]–[13];

(4) as the Minister was no longer the person who gave the approval (due to a change in government), the Minister was directed to provide reasons to the best of the Minister's knowledge, information and belief: at [16]; and

(5) the Minister was directed to make available documents that were "relevant" to (rather than "in relation to") the concept plan application: at [17].

Meriton Apartments Pty Limited v Council of the City of Sydney (No 3) [2011] NSWLEC 65 (Pepper J)

Facts: Meriton Apartments Pty Limited ("Meriton") challenged the lawfulness of Work Zones fees imposed by the Council of the City of Sydney ("the council") for the establishment of Work Zones on the roads outside of three construction sites pursuant to the *Local Government Act* 1993 ("the LGA"). Meriton had applied for the Work Zones permits in order to be able to unload and load material on the roads outside the construction sites. The fees imposed by the council depended on three variables: whether the Work Zone in question was in a Core or Non Core Area; whether the Work Zone operated for more than 12 hours per day; and whether the Work Zone operated for more than 12 months.

Issues:

(1) whether the fees charged by the council were validly imposed under the LGA or the *Roads Act* 1993;

(2) whether the fees charged were manifestly unreasonable;

(3) whether the council in determining the amount of fees to be charged took into account an irrelevant consideration;

(4) whether the council in determining the amount of fees to be charged failed to take into account a mandatory relevant consideration;

(5) whether the fees amounted to taxes;

(6) whether, if the fees were unlawfully charged, the *Recovery of Imposts Act* 1963 applied to Meriton's claim to prevent it from recovering the fees paid in 2007 because they were statute barred;

(7) whether, if the fees were unlawfully charged, Meriton could not recover the fees as it could not satisfy the Court that the fees had not been passed on; and

(8) whether, if the fees were unlawfully charged, Meriton could recover the fees while retaining the benefit received from the council for their payment.

Held: dismissing the amended applications:

(1) the fees were validly imposed both as a matter of law and as a matter of fact pursuant to either s 608 of the LGA, or s 223 of the *Roads Act* 1993. The power of the council to impose a fee under s 608 of the LGA was not qualified, as a matter of statutory construction, by a prohibition in s 610D(1) of that Act upon the fee exceeding the total direct cost to the council of supplying the service: at [43]–[52] and [103]–[104];

(2) the fees were not manifestly unreasonable. To focus only on the direct cost of parking foregone as the appropriate measure for calculation of the Work Zones fees was overly narrow and did not take into account the indirect costs to the council in establishing the Work Zones, which included the costs of disruption to businesses, to residents and to commuters: at [66] and [72]–[77];

(3) the council neither failed to take into account a mandatory consideration, namely, the direct cost of supplying the service in the form of parking revenue forgone, nor did it take into account an irrelevant consideration, namely, the desire to penalise any development that exceeded 12 months in duration. The increase in fees after 12 months was not a penalty and was no more than an incentive to complete the development as efficiently as possible: at [81]–[84] and [89]–[92];

(4) the fees did not have the character of taxes. Meriton voluntarily applied for the Work Zones, therefore, there was no compulsory extraction of fees. The Work Zones fees were fees for services: at [116]–[121];

(5) even if unlawfully imposed by the council, the *Recovery of Imposts Act* applied to preclude Meriton from recovering the fees because, first, in relation to the fees charged in 2007, their recovery was statute barred pursuant to ss 2 and 5 of that Act, and second, because Meriton could not satisfy the Court that the fees had not been, and would not be, passed on to third parties in contravention of s 4 of the *Recovery of Imposts Act*: at [139]–[147], [158], and [164]; and

(6) even if unlawfully imposed, as a matter of restitution, Meriton could not claim a refund of the fees while retaining the benefit, namely, exclusive possession of the road and kerb, that it had obtained in consideration of the fees paid: [170]–[172].

Williams v Minister for Planning (No 2) [2011] NSWLEC 62 (Pain J)

Facts: development consent for Cowal Gold Mine was granted in 1999 to the second respondent, Barrick (Cowal) Ltd ("Barrick") by the Minister for Urban Affairs and Planning ("the Minister"). Amongst other things, it allowed the construction of an open cut mine on land near Lake Cowal. The consent had been amended several times since. Some of the modifications had been the subject of separate proceedings, including the E42 Modification Request lodged in March 2008, which was challenged before approval. Subsequently, in October 2009, Barrick lodged the E42 Modification Modified Request. This was approved as Modification 6 ("Mod 6") allowing an increase in production of ore, extending the life of the mine to 2024 and altering the definition of "mining operations". Another modification request lodged in November 2010, approved as Modification 9 ("Mod 9"), reduced the life of the mine to 2019 and again altered the definition of "mining operations". Both modifications were approved under s 75W(4) of the *Environmental Planning and Assessment Act* 1979 ("the Act"), a process enabled by cl 8J(8) of the *Environmental Planning and Assessment Regulation* 2000 ("the Regulation") as in force at the relevant approval dates. Mr Williams ("the applicant") separately challenged the validity of Mod 6 and Mod 9.

Issues:

(1) in relation to Mod 6:
  (a) whether s 75W(3) of the Act raised a jurisdictional fact and, if it did, whether it was satisfied;
  (b) whether there was a failure to consider relevant matters;
  (c) whether the approval was ultra vires;
  (d) whether Mod 6 had to be substantially the same as the approved development; and

(2) in relation to Mod 9:
  (a) whether there was a jurisdictional fact requiring an evaluation to conclude that the proposal was administrative;
  (b) whether the Minister had improperly exercised his power;
  (c) whether no critical fact supported the Minister's decision;
  (d) whether there was a failure to consider ecological sustainable development ("ESD") principles;
  (d) whether the decision to approve the modification was manifestly unreasonable; and
  (f) whether the decision to approve the modification request, and the effect of the modification, were uncertain.

Held: in dismissing the proceedings:

(1) in relation to Mod 6:
  (a) the Court did not have a role in determining satisfaction with the Director General's Environmental Assessment Requirements ("DGEAR") under s 75W(3) of the Act as a jurisdictional fact. That section did not require the Director General to issue the DGEAR nor did it state that he must be satisfied of any matter. The express obligation in s 75W fell on the proponent to comply with any issued DGEAR. Section 75W did not make any reference to any statutory precondition which had to be satisfied for a project referred to the Minister for approval under s 75W(4): at [67]–[68]. The alternative argument that the Director General had to be satisfied under s 75W(3) of the Act as to whether there had been compliance with the DGEAR was not determined as there was evidence to suggest that he had formed a view: at [69]–[71];

(b) there was no failure to consider a relevant matter because, first, no mandatory considerations were specified in s 75W(4). While public interest was a mandatory consideration requiring the consideration of relevant ESD principles, these were clearly identified and considered in the documents before the Minister. The consideration of the impacts of the modification on aboriginal cultural heritage, both in relation to ESD principles and any cumulative impact, was more than cursory. The applicant's submission of a failure to consider undisturbed aboriginal objects and cultural heritage places impermissibly aimed to redraft the DGEAR: at [82]–[96]. Second, the ground of review sought to be raised by the applicant strayed close to merits review. It was not permissible in judicial review proceedings to assess whether the consideration was adequate: at [84];

(c) if any error existed in Mod 6 it was remedied by Mod 9. Consequently, there was no relief the Court could order in relation to Mod 6 as to do so would lack utility: at [72]–[75]. Additionally, the construction of the amended development consent was consistent with Barrick's application for extraction and processing until 2019, permitting other mining related activities such as rehabilitation until 2024. Alternatively, when considered with the change in the definition of mining operations in Mod 6, the consent conditions only permitted mining and processing until 2019: at [75]–[139]; and

(d) the final ground failed because it relied upon wording in s 96(1A)(b) of the Act to limit the power to modify thar was not contained in s 75W(3): at [76]–[80]. Further, the modification that was approved by the Minister was not a substantially different development than that originally approved: at [76] and [80]–[81].

(2) in relation to Mod 9:

(a) the jurisdictional fact that was said to arise in s 75W(3) or (4) in relation to Mod 9 was not clearly articulated: at [137];
(b) the first ground, namely, whether the Minister improperly exercised his power by approving Mod 9 to allow ore extraction at a higher processing rate for a further six years and eight months beyond the original development consent without environmental assessment, failed because it was not properly articulated: at [123];
(c) it was not demonstrated that the non-existence of a critical fact ground was available as a ground of review at common law: at [124]–[131];
(d) assuming that ESD principles were mandatory relevant considerations, this ground was not established as a matter of fact because the documents before the Minister's delegate referred to such principles: at [133];
(e) establishing that a decision was manifestly unreasonable was a high threshold that had been not met by the applicant: at [134]–[136]; and
(f) there was no legal uncertainty about the changes to the effect of conditions of development consent made in Mod 9: at [138].

Csillag v Woollahra Council [2011] NSWLEC 17 (Craig J)

Facts: the applicants sought a declaration that a development consent granted by the Council was invalid. The consent authorised alterations and additions to a penthouse apartment, ("apartment 15"), situated in one of three buildings on a single allotment of land at Double Bay. The address of the apartment building stated in the applicants' architectural drawings and Council's consent was 335 New South Head Road ("NSHR"). The address of apartment 15 recorded by the Council for rating purposes was 325 NSHR. The land also had frontage to Edgecliff Road and the building in which apartment 15 was located was the building closest to that road. The street number '353' was affixed to the gatepost of Edgecliff Road. That address was also recorded in the Council's own database. The applicants' claim centred upon the failure to state the Edgecliff Road address in Council's advertising and notification of the development application. Advertising and notification is required by the *Woollahra Development Control Plan for Advertising and Notification of Development Applications and Applications to Modify Development Consents* ("WDCP"). The WDCP engaged the provisions of s79A of the *Environmental Planning and Assessment Act* 1979 ("the Act").

Issues:

(1) whether the Council adequately notified and advertised the proposed development application in accordance with the WDCP as required by s 79A(2) of the Act; and

(2) who should pay the costs of the proceedings and in what amount.

Held: appeal allowed:

(1) a purposive approach must be applied to the interpretation of the WDCP in light of the objects of the Act. The purpose of s 79A(2) of the Act and the WDCP is to ensure procedural fairness for those affected or potentially affected by development decisions as well as improved decision making by consent authorities in relation to proposed development: at [33];

(2) the test to determine whether the relevant notification and advertisement were sufficient was whether those reading the advertisement or notification letter would reasonably understand where on the site the development was contemplated: at [41];

(3) notification of the development application was sufficient for the purposes of the WDCP and s 79A(2) of the Act. The second of two letters of notification, together with accompanying plans, identified the specific building in which development was to take place. This was, therefore, sufficient to attract the attention of those with a potential interest in the development: at [46];

(4) advertisement of the development application was not in accordance with the WDCP and was therefore contrary to s 79A of the Act. Advertisements published on behalf of the Council indicated an address of "335 or 325" New South Head Road. Nothing in the advertisement indicated which of the three buildings contained apartment 15 and the fact that the relevant building also had an address on Edgecliff Road was not stated: at [54];

(5) the consent was suspended under s 25B(1) of the *Land and Environment Court Act* 1979: at [59]; and

(6) only 25 % of costs were awarded to the applicants. The applicants had abandoned one of the two claims during the hearing. The reduction in the costs awarded reflected the time and resources spent by the Council addressing the abandoned claim: at [66].

- **Civil Enforcement**

Lane Cove Council v Wu [2011] NSWLEC 43 (Sheahan J)

(related decision: *Vigor Master Pty Ltd v Lane Cove Council; Jiang v Lane Cove Council* [2010] NSWLEC 1267 Morris C)

Facts: the defendant was charged with carrying out development otherwise than in accordance with a granted consent thereby breaching s 76A(1)(a) of the *Environmental Planning and Assessment Act* 1979 ("the Act"). In breaching the Act, the defendant committed an offence pursuant to s 125, the maximum penalty for which was a fine of $1.1 million. The property on which the development took place was registered in the defendant's name and he was the licensed owner-builder. His estranged wife, who was living on the property with their two children, was the site manager, and was effectively responsible for the development on a day-to-day basis.

The development consent was granted on 8 March 2007. The construction certificate was issued on 1 August 2007. Building occurred between August 2007 and December 2008. In February 2009 a private certifier expressed concerns about aspects of the development and the defendant made contact with Council officers and admitted departures from the consent. Following the service of the summons for the Class 5 proceedings in June 2010, two related Class 1 appeals were commenced by the defendant, and interests associated with him and his wife, in an attemot to regularise the departures from the consent. The Class 1 proceedings ultimately turned on whether the development that occurred on the site was substantially the same as permitted in the consent. Morris C held that it was not.

Despite his admissions of responsibility, the defendant was only peripherally involved in the actual development on the site, visiting approximately four times between July 2007 and November 2008. The defendant became aware of departures from the consent during and after December 2007, and learned only in December 2008 that his wife had not lodged a modification application as he had requested. The defendant admitted his failure to supervise the project properly.

Issues:

(1) whether there was environmental harm as a result of the breach of the consent; and

(2) whether the defendant was responsible for the breach and consequently committed an offence under the Act.

Held: convicting the defendant of the offence and ordering him to pay a fine of $22,500, after a reduction of 25% for an early guilty plea, plus the reasonable costs of the prosecutor that were applicable to this proceeding:

(1) the defendant bore ultimate responsibility for the development of the site in his capacity as the registered proprietor and licensed owner-builder, despite the fact that his direct involvement in the development of the site was minimal: at [53];

(2) the offence may have been avoided or minimised had the defendant intervened in the development: at [55];

(3) there was minor harm done to the environment but the breach of the Act was of low to medium seriousness: at [44]–[45] and [56]; and

(4) the defendant had no previous criminal history, cooperated with council, expressed remorse and entered an early guilty plea: at [57]–[61].

- **Compulsory Acquisition**

Sydney Nationwide Realty Pty Ltd v Sydney Metro; IAE EDU NET Pty Limited v Sydney Metro [2011] NSWLEC 19 (Pain J)

Facts: Sydney Nationwide Realty Pty Ltd and IAE EDU NET Pty Limited ("the applicants") applied to Sydney Metro for compensation resulting from the withdrawal of proposed acquisition notices ("PANs"). According to s 69 of the *Land Acquisition (Just Terms Compensation) Act 1991* ("JT Act"), the owner of the land is entitled to compensation for any financial costs or damage directly resulting from the giving of the PAN and its withdrawal. The respondent rejected their claims. The applicants' solicitor failed to file an appeal to the Court under s 71(6) of the JT Act within 90 days of the decision as specified in s 67(2) of that Act. The applicants sought leave to lodge claims out of time and were required to show good cause for their failure to comply with the specified timeframe pursuant to s 67(4) of the JT Act.

Issue:

(1) whether the applicants satisfied the Court of good cause by reason of the error of their solicitor; and

(2) whether the applicants themselves had to give evidence of good cause.

Held: granting leave to lodge the compensation claims out of time:

(1) the Court must be satisfied in the circumstances of each case that good cause is demonstrated by an applicant, that is to say, a legally sufficient reason: at [22];

(2) in construing an act, the legal and historical context must be considered at the outset. One of the objects of the JT Act, as indicated in s 3(1), is to ensure compensation on just terms for the owners of land acquired by an authority of the State. An important consideration in the statutory context of s 67(4) of the JT Act was that if, after withdrawing the PAN, the State government agency did not grant an extension of

time to an applicant, it would lose a significant statutory right to have its claim for compensation determined by the Court: at [25];

(3) the nature and extent of a solicitor's retainer was relevant to assessing whether it was reasonable for the applicants to rely on their solicitor's actions on their behalf: at [32]. A solicitor whose retainer includes the conduct of litigation has the authority to do all things necessary for the conduct of litigation. Where a solicitor on the record was prepared to accept that the error or oversight resulting in the failure to file in time was his or hers, the explanation proffered through the evidence of the solicitor established good cause: at [33]. The applicants did not have to file additional evidence in order to establish good cause on this occasion, although abundant caution based on a review of various cases suggested this should generally be done: at [34]–[35]; and

(4) whether the applicants have demonstrated good cause exists for the failure to file in time was a central element in the Court's consideration, but it need not be the sole consideration. The Court's discretion under s 67(4) of the JT Act should be exercised to achieve justice between the parties. The extent of the delay and whether prejudice was caused to other parties were other relevant considerations, both of which favoured the applicants: at [41]–[43].

Parramatta CC V Transport Construction Authority [2011] NSWLEC 49 (Biscoe J)

Facts: The Council's land was compulsorily acquired by the Transport Construction Authority ("TCA"). Compensation should have been determined under the *Land Acquisition (Just Terms Compensation) Act* 1991 ("JT Act"). On the mistaken premise that the TCA was the Crown, the Valuer-General determined the amount of compensation under the *Roads Act* 1993, which did not allow recovery of market value, at a nominal $5, 000. The TCA gave the Council a compensation notice that offered compensation in that amount. Council lodged an objection, purportedly under the JT Act, with the Court claiming that it was entitled under the JT Act to the market value, which it estimated to be in excess of $10 million ("2010 JT Act Proceedings"). There was no right to lodge an objection with the Court or any other court to an amount of compensation offered under the *Roads Act*. The Council sought leave to lodge the objection out of time under s 66(3) of the JT Act. In separate proceedings the TCA claimed that the objection lodged with the Court was defeated by a general release provision in an earlier deed that settled other specified disputes between the parties for $389, 500 ("Deed Proceedings").

Issues:

(1) whether the TCA's compensation notice was a valid compensation notice under the JT Act. If so, whether the Court had jurisdiction over the 2010 JT Act Proceedings;

(2) if the Court had jurisdiction, whether it should grant leave to the Council to lodge the objection out of time ie, in terms of s 66(3) of the JT Act, whether the Court was satisfied that there was good cause for the Council's failure to lodge the objection within the prescribed period; and

(3) whether the deed barred the 2010 JT Act Proceedings.

Held: striking out the JT Act Proceedings and dismissing the Deed Proceedings:

(1) TCA's compensation notice was invalid because (a) it wrongly indicated that the Valuer-General had determined compensation under the JT Act and that the compensation notice included market value and disturbance under the JT Act; and (b) it contained only one offer in an amount that was the aggregate of the amount of compensation erroneously determined by the Valuer-General for the subject land and the amount of compensation determined by the Valuer-General for other land. Consequently, the JT Act Proceedings were outside the Courts jurisdiction. The remedy might be for the Council to seek orders in the nature of mandamus against TCA and the Valuer-General for the determination of compensation under the JT Act: at [54]–[66];

(2) if however the Court had jurisdiction, it was satisfied under s 66(3) of the JT Act that there was good cause for the Council's failure to lodge the objection within the prescribed period of the JT Act: at [90]–[93]; and

(3) on the proper construction of the deed, it did not apply to the subject land and did not bar the JT Act proceedings: at [125].

- **Valuation**

Trust Company Limited ATF Opera House Car Park Infrastructure Trust No 1 v The Valuer-General (No 2) [2011] NSWLEC 34 (Pain J)

(related decision: *Trust Company Limited ATF Opera House Car Park Infrastructure Trust No 1 v the Valuer-General* [2010] NSWLEC 161 Pain J)

Facts: the owner of the Opera House car park and trustee for Opera House Car Park Infrastructure Trust No 1, Trust Company Limited ("the applicant"), lodged four Class 3 appeals against four valuations under s 37(1) of the *Valuation of Land Act* 1916 ("VL Act"). The four valuations, which were reascertainments, were made by the Valuer-General ("the respondent") in 2008 and related to four base date years valued previously within the relevant base date years.

Issue:

(1) whether the Court had jurisdiction in a Class 3 appeal to determine whether a reascertainment of land value by the respondent was not authorised by s 14A(6) of the VL Act.

Held: the Court lacked jurisdiction:

(1) each statutory scheme that provided for Class 3 appeals must be considered individually. The important distinction between Class 3 appeals and judicial review proceedings was identified by Biscoe J in *Australian Gas Light Company v Mine Subsidence Board* [2006] NSWLEC 494 and on appeal by Tobias JA in *Mine Subsidence Board v Australian Gas Light Co* [2007] NSWCA 100. While appeals pursuant to s 37(1) of the VL Act are not described as merit appeals in the *Land and Environment Court Act* 1979 ("the Court Act") nor in case law referred to by the parties, that broad description aided in distinguishing Class 3 appeals from judicial review proceedings: at [20]–[22];

(2) that the Court exercised powers pursuant to s 39(2) of the Court Act in Class 3 appeals was an important distinguishing feature compared to the role of a judge in judicial review proceedings: at [22];

(3) that s 40(1)(a) of the VL Act empowered the Court to "confirm or revoke the decision to which the appeal relates" did not change the usual valuation function the Court exercises in a Class 3 appeal: at [23];

(4) the applicant relied on the objection in s 34(1)(a) that the values were too high. To extend that ground of objection to encompass a fundamental issue of whether a valuation was within power was a tortuous application of the language in that section: at [27];

(5) the Court did not have jurisdiction in these Class 3 appeals to determine whether the reascertainments were not authorised by s 14A(6) of the VL Act: at [32]. The Supreme Court was the appropriate court to determine the issue: at [28]. As a statutory court of limited jurisdiction, the Court must not attempt to exercise jurisdiction beyond its limits: at [30]; and

(6) if the applicant were to commence proceedings in the Supreme Court, they can be transferred to this Court under s 149B(1) of the *Civil Procedure Act* 2005, should that Court exercise its discretion to do so: at [31].

- **Aboriginal Land Rights**

Woods v Gandangara Local Aboriginal Land Council; Thatcher v Gandangara Local Aboriginal Land Council [2011] NSWLEC 42 (Pepper J)

Facts: Ms Ann Thatcher and Mr Jeffery Woods, the applicants, sought declaratory and injunctive relief in order to prevent the respondent, the Gandangara Local Aboriginal Land Council, from pursuing possession proceedings in the Consumer, Trade and Tenancy Tribunal ("the CTTT"), against them as tenants pursuant to residential tenancy agreements. Ms Thatcher received a notice of termination on 31 August 2009 from the respondent requiring her to give vacant possession by 3 November 2009. Mr Woods received a similar notice of termination on 2 October 2009 from the respondent that required vacant possession by 1 December 2009. Both of the applicants did not comply with the notices, which were issued pursuant to s 58 of the *Residential Tenancies Act* 1987 ("the RTA"), resulting in the respondent commencing proceedings in the CTTT. The decisions to issue the notices of termination were made by the Chief Executive Officer of the respondent to whom the power had been purportedly delegated by a resolution of the voting members of the respondent on 21 March 2007.

In accordance with s 52E(1)(a) of the *Aboriginal Land Rights Act* 1983 ("the ALRA"), certain functions of the respondent are unable to be delegated, including those concerning the " use, management, control, holding or disposal of, or otherwise dealing with, land". As a consequence, a resolution of the voting members of the respondent is required pursuant to s 52G(e) of the ALRA for "approval of dealings with land".

Issues:

(1) did the Court have jurisdiction, pursuant to the ALRA, to decide whether the respondent has validly exercised its power in deciding to terminate the residential tenancy agreements;

(2) did the giving of a notice of termination of a residential tenancy agreement constitute a "dealing with land" for the purposes of s 52E(1)(a) and s 52G(e) of the ALRA;

(3) could the issuing of a notice of termination of a residential tenancy agreement be delegated, or is a resolution of the voting members of the respondent necessary;

(4) did the applicants have a right to, and were they accorded, procedural fairness; and

(5) did the Court have the power to grant an injunction preventing the respondent from pursuing proceedings in the CTTT against the applicants.

Held: allowing the relief sought:

(1) the Court had jurisdiction to hear and dispose of proceedings to, amongst other things, enforce, review or make declarations in relation to rights, obligations, duties or exercises in respect of functions, conferred or imposed by the ALRA pursuant to s 20(2) of the *Land and Environment Court Act* 1979 ("the LECA"). The relief sought declarations in respect of functions conferred on, and exercisable by the respondent, under the ALRA. There was nothing in either the *Consumer, Trade and Tenancy Tribunal Act* 2001 or the RTA that conferred jurisdiction on the CTTT to engage in judicial review of the exercise by the respondent of the functions conferred upon it under the ALRA: at [30]–[38];

(2) there was no warrant for narrowly construing the terms "dealing with, land" and "dealings with land" in ss 52E(1)(a) and 52G(e) of the ALRA to exclude the entry into, and therefore the termination of, the residential tenancy agreements: at [46];

(3) as a consequence of the decisions to issue the notices of termination being considered "dealings with land", the respondent could not delegate those functions, as they only could be exercised by a resolution of the voting members of the respondent. To the extent that the resolution passed at an ordinary meeting of the respondent on 21 March 2007 purported to delegate "dealings with land" it was ineffective: at [78];

(4) if the notices of termination were valid, the applicants were not denied procedural fairness in not being permitted to be heard on whether or not their residential tenancy agreements should be terminated because there was nothing preventing the applicants from attending the meeting on 21 March 2007, there

was nothing in the residential tenancy agreements that gave rise to an obligation to provide procedural fairness, and the RTA provided a mechanism for the applicants to be heard in the CTTT: at [83];

(5) the Court had the power to grant the injunctive relied sought, given that the Court had the same civil jurisdiction as the Supreme Court would to hear and dispose of the proceedings listed in s 20(2) of the LECA, pursuant to s 66(1) of the *Supreme Court Act* 1970: at [86]; and

(6) there were no discretionary factors that prevented the applicants being granted the injunctive relief sought against the respondent continuing the proceedings commenced in the CTTT: at [93].

- **Criminal Jurisdiction**

Gordon Plath of the Department of Environment, Climate Change and Water v Lithgow City Council [2011] NSWLEC 8 (Sheahan J)

Facts: the defendant Council pleaded guilty to two charges under s 118A(2) of the *National Parks and Wildlife Act* 1974 regarding the "picking" in April–May 2008 of grevillea plants during routine road maintenance works. These plants are listed as endangered under the *Threatened Species Conservation Act* 1995.

The prosecutor had written to Mr Muir of the Council in 2006 after grevillea plants had been damaged in similar circumstances. Council received the letter, but it was not referred to Mr Muir and he was not aware of it until November 2008, when the Council was notified of the investigation for the 2008 incident.

The offences were committed between 22 April 2008 and 2 May 2008, during road maintenance activities in the Capertee Valley by employees of the Council. A local resident notified the prosecutor of the offences on 2 May 2008 by way of email. Senior officers of the prosecutor inspected the site on 12 May 2008. They surveyed and mapped the site, and also took plant samples.

The Council had in place a "Safe Work Method Statement" prior to the prosecutor notifying the Council of the offences, but it lacked a procedure for routine maintenance work. The Council employees who were carrying out the works had not previously received feedback and were not informed or warned about the threatened species in the area.

Following notification of the offences and the investigation by the prosecutor in November 2008, Council amended its processes to ensure that relevant employees received instruction about the use of their machinery; erected signage to warn road users of the presence of threatened species; prepared a Standard Working Procedure; and engaged an ecologist to prepare a Property Management Plan under the *Threatened Species Conservation Act*. The Council also proposed to prepare a Review of Environmental Factors in accordance with the *Environmental Planning and Assessment Act* 1979 and an Environmental Management Plan for all future maintenance works.

Issues:

(1) whether the harm was significant and the offences were objectively serious because of the way in which the road maintenance was carried out;

(2) whether the harm was foreseeable in light of the previous communication from the prosecutor to the Council on this issue;

(3) whether the harm could have been minimised by practical measures being put in place; and

(4) whether prior offences committed by the Council demonstrated that it was not taking its environmental obligations seriously and was, therefore, likely to re-offend.

Held: ordering the Council to pay a total sum of $105,000 towards an environmental rehabilitation project, after a discount of 25% for its early guilty pleas, plus costs amounting to $25,000, and the placement of a notice in the Lithgow Mercury outlining its culpability:

(1) the offences, considered on the totality principle, were objectively serious: at [112];

(2) harm to some plants was an inevitable consequence of road maintenance works, but the harm in this case was not caused by unforeseeable or unintended accidents: at [105];

(3) the Council failed to implement practical measures that would have minimised the risk of harm by the employees carrying out the maintenance work: at [106]–[110]; and

(4) the Council's prior offences indicated that it had not taken its obligations seriously in the past ([128] – [137]). A conclusion could not be drawn that the Council was not likely to re-offend: at [113]–[118].

Director-General, Department of Environment, Climate Change and Water v Walker Corporation Pty Ltd [2011] NSWLEC 27 (Pain J)

(related decision*: Director-General, Department of Environment and Climate Change v Walker Corporation Pty Ltd (No 2)* [2010] NSWLEC 73 Pepper J)

Facts: Walker Corporation Pty Ltd ("the defendant") was charged with clearing native vegetation contrary to s 12 of the *Native Vegetation Act* 2003. Pepper J previously convicted the defendant of a similar offence ("the earlier proceedings"). Once Pepper J's judgment on sentence is delivered, the defendant stated that it intends to appeal the conviction in the earlier proceedings. The defendant sought a temporary stay of these proceedings until the determination of the appeal by the Court of Criminal Appeal. The grounds of appeal the defendant proposed to rely on were submitted as issues central to these proceedings. Rule 75.11(4)(a) of the Supreme Court Rules 1970 ("SCR") and r 2.1 of the Uniform Civil Procedure Rules 2005 ("UCPR") empower a judge to dispose of proceedings in a just and efficient manner.

Issues:

(1) whether an order for a temporary stay of criminal proceedings ought be made.

Held: stay application dismissed:

(1) the Court has wide discretion under the applicable rules. The application relied on the recent emphasis in the rules on the efficient dispatch of litigation with the possibility that costs savings were a more important ingredient in the balancing of relevant considerations than had been the case in the past. There was no suggestion that the defendant could not meet the costs of the defended prosecution: at [18] and [22];

(2) applications for a permanent stay of proceedings have been granted in disciplinary and criminal proceedings where excessive delays resulted in an abuse of process. Orders for a temporary stay of proceedings have been made under s 19 of the *Criminal Procedure Act* 1986 where there was some failure on the part of the prosecution, the defendant's ability to prepare for trial was significantly impeded or issues of fairness had arisen. None of these circumstances applied: at [19]–[20];

(3) there is a public interest in having criminal trials proceed in a timely fashion. A stay order would have resulted in delay of the hearing for an undetermined period. That outcome was undesirable and to be avoided given the prejudice to both parties in evidence becoming stale. Any order resulting in delay in criminal proceedings that was not essential to the administration of justice ought not be made lightly: at [24]–[26];

(4) the prospect of success of an appeal in the Court of Criminal Appeal was a neutral factor in the consideration of a stay of these proceedings. There was no uncertainty in the law simply because an appeal was likely to be lodged in the future: at [27]; and

(5) the appeal to save costs by the defendant was not persuasive, the paramount consideration in criminal proceedings is the public purpose served in the appropriate prosecution of offences by the relevant authorities. The administration of justice under r 75.11(4)(a) of the SCR and r 2.1 of the UCPR would not have been achieved by granting the order sought: at [28].

Director General, Department of Environment, Climate Change and Water v Linklater [2011] NSWLEC 30 (Preston CJ)

Facts: the defendant was granted consent to clear native vegetation under the *Native Vegetation Conservation Act* 1997. The defendant not only cleared the area authorised to be cleared, but cleared an additional 166 hectares of land that was not authorised by the consent. The defendant also did not comply with a condition of consent that required a Drainage Irrigation Management Plan to be submitted and approved prior to clearing. The defendant pleaded guilty to the offence of clearing native vegetation contrary to s 21(2) of the Act.

Issue:

(1) considering the objective circumstances of the offence and the offender and the subjective circumstances of the offender, what was the appropriate sentence.

Held: the defendant was convicted as charged, and fined the sum of $82,500. The defendant was also ordered to pay the prosecutor's costs in the agreed sum of $23,000:

(1) the commission of the offence caused actual environmental harm of medium seriousness, which was considered an aggravating factor: at [31];

(2) the defendant was reckless in clearing the additional 166 hectares: at [40], [44], [47] and [50];

(3) the defendant pleaded guilty to the charge at the earliest opportunity and was therefore afforded the full discount of 25% for the utilitarian value of his plea of guilty: at [62] and [82];

(4) the defendant was remediating and conserving native vegetation in the area he cleared illegally in accordance with a remediation direction given by the Department and was thereby making reparation for the harm caused by the offence: at [67]; and

(5) specific deterrence of the defendant was not necessary having regard to his remorse, his actions in complying with the remediation direction, in otherwise operating his property in an environmentally acceptable manner, his lack of prior convictions, his prior good character and the unlikeliness of his re-offending: at [79].

Director-General, NSW Department of Industry & Investment v Mato Investments Pty Ltd (No 3) [2011] NSWLEC 37 (Pain J)

(related decisions: *Director General, NSW Department of Industry and Investment v Mato Investments Pty Ltd* [2010] NSWLEC 56 Preston CJ and *Director General, NSW Department of Industry and Investment v Mato Investments Pty Ltd (No 2)* [2010] NSWLEC 196 Biscoe J)

Facts: the defendants were charged with offences under the *Fisheries Management Act* 1994 relating to clearing of snags and woody debris from specified water courses. Mato Investment Pty Ltd ("Mato") had development consent for an eco-resort on a property known as Kunanadgee near Corowa. Two of the four defendants, Mato and Mr Bennett, sought to have the Record of Interview ("ROI") of Mr Bennett conducted by a Fisheries Officer on 12 November 2007 struck out under ss 90, 137 and 138 of the *Evidence Act* 1995. Mr Coomes (the fourth defendant) was present at the ROI and the Fisheries Officer knew from a prior meeting that he was the project manager for Mato.

Issue:

(1) whether the ROI should be struck out in whole or part.

Held: application refused:

(1) the matters which give rise to unfairness to an accused under s 90 and unfair prejudice in s 137 of the *Evidence Act* were generally similar and a finding that one section applied was likely to mean the other section applied. However, the matters that arose for consideration under s 138 were different. That section refers to evidence that has been improperly obtained and public policy considerations of the importance of upholding public confidence in the administration of justice apply: at [5];

(2) in relation to ss 90 and 137, the defendants did not discharge their onus of establishing on the balance of probabilities unfair prejudice and unfairness becuase:

(a) there was no evidence to support the inference that Mr Bennett would have answered differently had Mr Coomes not been present at the ROI: at [22]. The ROI must be considered in its entirety and at the outset, Mr Bennett was properly cautioned. At the end he had the opportunity to make a further statement and agreed that there was no coercion or inducement in providing his answers: at [23];

(b) there was no evidence to support the suggestion that there was any unfairness or unfair prejudice to Mr Bennett as a result of Mr Coomes later becoming a defendant: at [23]; and

(c) no ambiguity arose from Mr Bennett using the word "we" on numerous occasions in his responses to questions in the ROI, when the context of the questions posed were considered: at [24].

(3) in relation to s 138 of the *Evidence Act*, the defendants did not discharge their onus of establishing that the evidence was improperly obtained. The section did not apply because the presence of Mr Coomes alone did not suggest impropriety in the conduct of the ROI: at [26]–[27]; and

(4) the submission that parts of the ROI should be struck out on the basis that the questions were persistent, sustained or amounted to undue pressure, could not be maintained when the questions and answers were considered. The questioning was orthodox and was relevant to the issues the subject of the charges. There was nothing unusual about the overall circumstances of the ROI: at [27]–[33].

Environment Protection Authority v Huntsman Corporation Australia Pty Ltd [2011] NSWLEC 39 (Craig J)

Facts: the defendant pleaded guilty to an offence against s 64(1) of the *Protection of the Environment Operations Act 1997* ("the POEO Act") in that it held a licence issued under the POEO Act and contravened a condition of that licence. The licence authorised the conduct of nominated activities at the defendant's Matraville plant, namely, the storage of general chemicals and soap and detergent production. A condition of the licence required the defendant to conduct these activities "in a competent manner". On 28 October 2009, there was an emission to the atmosphere of 685kg of ethylene oxide, a toxic gas that at certain levels of concentration can lead to acute and chronic health impacts on humans.

Issues:

(1) consideration of sentencing principles, including any objective circumstances or mitigating factors;

(2) the appropriate sentence to be imposed;

(3) whether recording of a conviction should be waived pursuant to s 10 of the *Crimes (Sentencing Procedure) Act* 1999 ("the CSP Act"); and

(4) costs.

Held: defendant was convicted of the offence and fined $28,000.00:

(1) there was a breach of a licence condition and therefore an offence against s 64(1) of the POEO Act. The breach resulted from a system based failure relating to low catalyst flow, which caused the emission of unreacted ethylene oxide to enter the atmosphere. The defendant accepted that the breach occurred by reason of its failure to carry out the licensed activity in a competent manner: at [36];

(2) objectively, the harm occasioned was of low to medium gravity. No actual environmental harm occurred and there was a low risk of human harm. The defendant undertook practical measures when the incident occurred to minimise impact. The emission of ethylene oxide was reasonably foreseeable and the defendant did have control of the causes of the emission. It was clear that the offence was not deliberately committed and that the defendant gained no commercial advantage from its occurrence: at [89];

(3) subjectively, there were no aggravating circumstances as alleged by the prosecutor in terms of a disregard for public safety. There were several mitigating factors to be taken into consideration (s 21A of

the *Crimes (Sentencing Procedure) Act* 1999). The defendant had not been convicted of any prior offences, save for two penalty infringement notices for breaching its environmental protection licence. The defendant was generally found to be environmentally responsible and of good character. The defendant expressed contrition and remorse and indicated its commitment to improving its environmental performance. The defendant also entered an early plea of guilty and co-operated with the prosecutor: at [95] and [142];

(4) considering the objective circumstances of the offence, its objective gravity and mitigating factors, the appropriate penalty imposed was $28,000. This figure reflected a discount of 25% for the defendant's plea of guilty and other mitigating circumstances. The defendant was ordered to pay this amount to a stormwater harvesting and recycling project in Randwick identified by the prosecutor. The project was to have a notice or display detailing the defendant's offence and its contribution to the project: at [142] and [148];

(5) the defendant's request to apply s 10 of the CSP Act was rejected. The offence was not trivial in nature and the circumstances surrounding emission of ethylene oxide were not extenuating: at [146]; and

(6) The defendant was ordered to pay the prosecutor's costs at the agreed sum of $40,000. In addition, the defendant was ordered to pay the costs of advertising the offence in both a metropolitan and local newspaper: at [141].

Jeray v Blue Mountains City Council [2011] NSWLEC 28 (Craig J)

Facts: the applicant, a self-represented litigant, brought a charge of contempt against the respondent Council. The charge related to a failure to produce documents in accordance with a notice to produce. A single email was uncovered during evidence as the only document that had not been produced under the notice. In addition to the substantive motion, the applicant applied for the recusal of Craig J. Further, the applicant applied to defer ordering costs on the basis that the proceedings were interlocutory and that any costs order should await determination of the principal proceedings. Finally, the applicant applied for a departure from the ordinary rule that 'costs follow the event' on the ground that the proceedings were brought in the public interest.

Issues:

(1) whether the failure to produce under a notice to produce is susceptible to a contempt charge;

(2) whether the single email was required to be produced under the notice to produce;

(3) whether failure to produce the single email constituted contempt;

(4) whether Craig J was required to recuse himself; and

(5) where the applicant should pay costs.

Held: notice of motion and application for recusal dismissed:

(1) failure to produce under a notice to produce is not susceptible to contempt. In this case the notice to produce was issued under Uniform Civil Procedure Rules 2005 ("UCPR") r 34.1 which allows a party by notice served on the other party to produce to the Court "any specified document or thing." It was held that this rule differs from that of UCPR r 33.12 that deals with issue of a subpoena, failure to comply with which attracts a charge of contempt. An inadequate or incomplete response to a notice to produce is not analogous to this rule and does not constitute contempt: at [35]–[43];

(2) the single email was required to be produced under the notice to produce. UCPR r 34.1 differs in its requirements from that of UCPR r 21.10, which states that the document or thing must be "clearly identified." In the context of the broader terms of the applicant's notice to produce, although the single email was simply an initial step taken by the Council regarding the applicant's inquiries, it was required to be produced: at [45]–[49];

(3) the failure to produce the document did not constitute contempt. The test relevant to be applied is that recently summarised by Campbell JA in *Markisic v Commonwealth of Australia* [2007] NSWCA 92: that the applicant prove beyond reasonable doubt that the breach was "deliberate and not casual, accidental or intentional." The applicant failed to satisfy this test in light of evidence from the council that the failure to produce the single email was an oversight and not a deliberate attempt to disobey the notice: at [56];

(4) there was no apprehended bias, and therefore, no ground for recusal. The basis upon which the applicant made the application for recusal arose from the fact that the judge and counsel for the council had shared the same chambers prior to the judge's appointment to the bench. A second application was also made in respect of a question asked by the judge as to the evidence to be adduced by the applicant on recall of a witness after evidence had closed. It was determined that in the eyes of the "fair minded observer" there was no reasonable apprehension that the judge would consider the motion for contempt on anything other than its merits: at [81]; and

(5) the applicant was ordered to pay the costs of the notice of motion in relation to contempt. While the motion was an interlocutory application, as a contempt charge it was discrete from the applicant's principal proceedings, and therefore, did not escape the rule that "costs follow the event." In addition, the applicant's motion initially alleged two grounds of contempt, the first of which was abandoned only on the final day of hearing. The motion also did not meet the three tiered test for proceedings brought in the public interest outlined in *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd and Minister for Mineral Resources (No 3)* (2010) 173 LGERA 280 at [13]: at [91].

- **Water**

NA & J Investments Pty Ltd v Minister Administering the Water Management Act 2000; Arnold v Minister Administering the Water Management Act 2000 [2011] NSWLEC 51 (Craig J)

Facts: the applicants in these proceedings were farmers or corporations who held licences concerning two water sources. The Minister made amendments to water sharing plans in relation to the water sources in 2006 pursuant to the *Water Management Act* 2000 ("WMA") which affected those licences. Both applicants claimed the respective water sharing plans were invalid. The applicants sought both declaratory relief and also sought damages. The respondents sought to strike out two parts of the applicants' pleadings. First, the pleading alleging that the Minister was required, but failed, to consider mandatory considerations in the form of representations said to have been made by or on behalf of the respondents to some or all of the applicants as to the content of the respective water sharing plans. Secondly, the respondents sought to strike out the pleading that the applicants were entitled to recover damages for negligent misrepresentation arising from those representations.

Issues:

(1) whether the WMA expressly or impliedly imposed an obligation upon the Minister to consider the representations relied upon by the applicants before making or amending the relevant water sharing plans under the WMA; and

(2) whether the claim for damages for negligent misrepresentation was incidental or ancillary to the claim challenging the plans on administrative law grounds.

Held: motion to strike out upheld:

(1) the WMA did not expressly or impliedly impose upon the Minister an obligation to consider the representations in question when making or amending a management plan. The applicants needed to demonstrate that the Act either expressly or impliedly bound the Minister to consider the representations made to them in order to demonstrate that they had a reasonable cause of action within the meaning of the Uniform Civil Procedure Rules 2005 ("UCPR") 13.4 and r 14.28: at [92];

(2) the discretion conferred under s 45(1)(a) of the WMA to amend a water sharing plan is expressed in broad terms and, following *Harvey v Minister Administering the Water Management Act 2000* [2008]

NSWLEC 165, that discretion cannot be fettered by those representations such as to impugn a decision made in lawfully exercising it: at [45];

(3) the representations made did not engage the statutory provision of s 18(1) of the WMA, which required consideration of "socio-economic interests", in the sense of mandating their consideration by the Minister. Consideration of the socio-economic impacts in the context of the Act did not compel consideration of the claimed effect upon a small number of individual licence holders: at [58];

(4) there was no jurisdiction to entertain the negligent misrepresentation claim. Under s 16 of the *Land and Environment Court Act* 1979 the Court can determine a matter that is incidental or ancillary to a matter within jurisdiction. The tort of negligent misrepresentation was not dependent upon the elements necessary to determine the judicial review claim. That tort would require the examination and determination of many more elements of both fact and law not necessary to be determined in the judicial review claim: at [69]; and

(5) there was no reasonable cause of action in relation to the water sharing plans in the manner alleged in the challenged pleadings and the pleadings ought to be struck out: at [53].

- **Trees**

Smith & Hannaford v Zhang & Zhou [2011] NSWLEC 29 (Craig J)

Facts: the applicants sought an order under the *Trees (Disputes Between Neighbours) Act* 2006 ("the Act") that the respondents bear the cost of removal of a Sydney Blue Gum tree. They alleged that the tree, which was growing on the respondents' land, was causing damage to their property. They also sought compensation for damage that, they alleged, was caused by the tree's roots.

Issues:

(1) whether the applicant bore the onus of proof;

(2) what was the relevant test for causation;

(3) whether there was a causal connection between the tree roots and the property damage; and

(4) who should pay costs.

Held: application dismissed:

(1) expert evidence was adduced during the hearing and from an onsite investigation at which exploratory excavation was undertaken: at [17];

(2) the applicant did not bear the onus of proof in an administrative matter. Rather, under s 10(2) of the Act the Court must be satisfied that the causal nexus between the tree root and the damage existed. This did not require satisfaction that the tree be the sole cause of the damage alleged. It was sufficient if a conclusion could be reached that the tree was a cause of the damage claimed. The relevant test was whether it was in the "preponderance of probability" that the causal nexus existed and to this end, whether a "state of belief" as to that causal connection was held: at [38];

(3) there was no causal connection between the tree root system and damage to the applicants' property. The evidence suggested that the damage was restricted to structural damage within the property. The excavation undertaken and the preponderance of expert evidence revealed that the damage had, in all probability, been from rock movement associated with local geology and not by the tree root system: at [59]; and

(4) although the applicant was unsuccessful, no special order for costs should be made: at [67].

- **Mining**

Martin v State of NSW and Central West Scientific Pty Ltd [2011] NSWLEC 50 (Preston CJ)

Facts: on 26 November 2008, Lucknow Gold Ltd ("Lucknow") applied for a second renewal of Exploration Licence 6499 ("EL 6499"). The Department of Industry and Investment ("the department") wrote to Lucknow advising that it intended to refuse the application for further renewal because Lucknow had failed to carry out an airborne survey, which was a condition of the licence. On 13 May 2009, Lucknow withdrew its application and EL 6499 expired. On 7 August 2009, Central West Scientific Pty Ltd ("CWS") lodged a Form 3 application for a new exploration licence over the same area as the previous EL 6499. On 8 March 2010, the Department sent CWS a draft exploration licence in the form of a deed. The draft licence was signed by Mr Tully Richards, Director of CWS. Mr Tully Richards, had been, for some of the term of EL 6499, a director of Lucknow. On 20 May 2010, Mr Steve Hughes, exercising a delegation from the Minister, granted an exploration licence, which became Exploration Licence 7547 ("EL 7547"). Mr Martin challenged the grant of licence EL 7547 to CWS. During opening submissions, Mr Martin articulated 11 grounds of challenge to the validity of EL 7547.

Issues:

(1) whether CWS was provided by the Department with, and used in its application, confidential intellectual property of Mr Martin and departmental information not available to the general public;

(2) whether Lucknow's failure to complete the exploration work program required by EL 6499 was a relevant matter that the Minister was bound to consider when determining CWS's application for a new exploration licence;

(3) whether there was a valid instrument of delegation of the power to grant an exploration licence, and whether the delegation was validly exercised;

(4) whether compliance with the information requirements on the approved Form 3 application was a jurisdictional fact that had to be satisfied to enliven the power to grant an exploration licence, and whether the decision-maker's opinion that CWS's application complied with the requirements of the Form 3 application and the *Mining Act* 1992 miscarried in law;

(5) whether a validly executed deed is a precondition to the grant or taking effect of an exploration licence;

(6) whether there is an overarching principle of good faith in the *Mining Act* and whether the grant of the exploration licence was pleaded or proven to be in bad faith;

(7) whether the grant of the new licence circumvented a departmental policy in relation to renewal of exploration licences, and whether departure from the policy resulted in invalidity of the licence;

(8) whether the department breached the *Mining Act* by not updating publicly accessible records of titles and thereby denied Mr Martin the opportunity to make his own application for an exploration licence over the area;

(9) whether Mr Martin held an equitable interest in the exploration licence;

(10) whether the department was giving preferential treatment to CWS; and

(11) whether the licence was granted to CWS to facilitate personal monetary gain by the Minister or departmental officers.

Held: the proceedings were dismissed. Mr Martin was ordered to pay the Minister's costs of the proceedings and the out-of-pocket expenses incurred by the CWS in and for the purpose of the proceedings:

(1) Mr Martin did not establish that confidential information or non-public information was provided by the Department to CWS and used by CWS in its application. Even if Mr Martin had established those facts, Mr Martin did not show how they caused EL 7547 to be invalid: at [41]–[47];

(2) Lucknow's performance under EL 6499 was not a mandatory relevant consideration in the grant of EL 7547, because the *Mining Act* neither expressly nor impliedly required the Minister, when determining whether to grant an exploration licence, to consider the performance of an "associated entity" which previously held a licence over the same area: at [50]–[52];

(3) the instrument of delegation was valid and effective and the power was validly exercised by the Minister's delegate: at [55]–[68];

(4) the information requirements of the Form 3 application were not jurisdictional facts that had to exist in order to enliven the power of the Minister to grant an exploration licence. Mr Martin did not prove that the Minister's opinion that CWS's application complied with the statutory requirements miscarried in law. In any event, Mr Martin failed to establish that CWS's application did not in fact comply with the requirements of the approved Form 3 and of the *Mining Act*: at [92]–[110];

(5) the execution of the deed by the grantee of the exploration licence was not a necessary condition for the grant or the taking effect of the exploration licence. In any event, Mr Martin did not prove that the deed was invalidly executed: at [115]–[122];

(6) there was no overarching, fundamental principle of good faith in the *Mining Act*. Mr Martin did not produce any evidence proving bad faith on the part of the Minister: at [123]–[125];

(7) there was no legal requirement for the Minister to consider and to follow the departmental policy on renewal of exploration licences when exercising the power to grant a new exploration licence. In any event, Mr Martin did not establish that the policy actually applied to CWS's application: at [135]–[139];

(8) Mr Martin did not establish any breach of the *Mining Act* in relation to the keeping of records on the exploration licences EL 6499 or EL 7547. Mr Martin did not claim, and there was no evidence, that he had a legitimate expectation, or was otherwise denied procedural fairness by the Department: at [145]–[148];

(9) Mr Martin did not adduce any evidence establishing the creation of an equitable interest in EL 7547. Even if Mr Martin did have an equitable interest, it had no effect on the validity of the licence: at [149]–[152];

(10) there was no evidence to establish that the Department was giving CWS preferential treatment. Mr Martin did not explain the legal basis upon which preferential treatment to CWS would result in the invalidity of EL 7547: at [153]; and

(11) there was absolutely no evidence at all supporting Mr Martin's claim that the licence was granted to CWS to facilitate personal monetary gain by the Minister or departmental officers: at [154].

- **Costs**

Gillespie v Wolseley Investments Pty Limited and Woollahra Municipal Council [2011] NSWLEC 24 (Sheahan J)

Facts: the applicant, Mrs Gillespie, became a shareholder in Wolseley Investments Pty Ltd in 2000, entitling her to the exclusive use of Unit 9 in the residential flat building 'Cliveden'. In March 2005 she entered into an agreement to acquire further shares entitling her to the rooftop flat for the purpose of using it as a residential unit but not to consolidate it with Unit 9. In August 2007 Woollahra Municipal Council ("the Council") granted approval for the rooftop flat to be used for residential purposes subject to fire safety orders pursuant to s 121B of the *Environmental Planning Assessment Act 1979* ("EPAA") and granted a construction certificate in August 2008. The company intended to use the proceeds from this sale to fund fire measures for the whole building. After losing proceedings in the Supreme Court for specific performance of the March 2005 deed, Mrs Gillespie commenced Class 4 proceedings in March 2009 to set aside the construction certificate, on the basis that the company had not complied with Council orders. These proceedings were resolved by consent orders in July 2009, by the Court declaring that the construction certificate was void.

In March 2010 the applicant commenced a further Class 4 proceeding seeking an order that the company carry out the Council's requirements. The applicant declined to involve her fire expert in the ongoing negotiations between the company and the Council until proceedings were well advanced. The Council's s 121B of the EPAA order was subsequently varied on 9 July 2010, and the proceedings lost any utility. The proceedings were to be discontinued, but the parties could not agree on the appellant's claim and notice of motion for her costs. In respect of the substantive proceedings, Council did not claim its costs, but the company did.

Issues:

(1) whether the circumstances of the case were such to reverse the ordinary rule that costs will be awarded against an applicant who discontinues proceedings prior to a merits hearing, absent any public interest aspect of the matter; and

(2) whether the 'supervening event' of the modified order displaced the applicant's cause of action such that she neither abandoned, nor surrendered in the proceedings.

Held: the applicant was granted leave to discontinue the proceedings, but ordered to pay (1) the first respondent's costs of the proceedings, the motion, and the hearings on 2, 9, 15 and 28 July 2010 on a party-party basis, and (2) the second respondent's costs on the motion and the hearings on 2, 9, 15 and 28 July 2010 on a party-party basis. This was because:

(1) there was no utility in the applicant's Class 4 proceedings from at least the time when the s 121B of the EPAA order was formally modified on 9 July 2010: at [55];

(2) the circumstances of the case did not call for the Court to reverse the normal rule that a discontinuing applicant pay the costs of the respondents: at [84];

(3) in discontinuing the proceedings the applicant was not responding to the 'supervening event', but was abandoning her application for injunctive relief that she insisted upon and refused to negotiate in respect of: at [76]; and

(4) the company correctly exercised its option to seek modification of the Council orders rather than appeal against them: at [72]–[73] and [78].

Lend Lease GPT (Rouse Hill) Pty Ltd v Hills Shire Council (No 2) [2011] NSWLEC 26 (Sheahan J)
(related decision: *Lend Lease GPT (Rouse Hill) Pty Ltd v The Hills Shire Council* [2010] NSWLEC 30 Sheahan J)

Facts: the proceedings concerned a costs hearing in Class 3. The proceedings were brought under s 554 of the *Local Government Act* 1993 ("the *LGA*"), which provided that land was rateable unless exempt. The applicant appealed a rate notice pursuant to s 574 of the *LGA*, claiming that the subject land should be exempt under s 555(1)(a) of the *LGA* because it was not leased for a private purpose. Judgment on the substantive matter was delivered in favour of the respondent and costs were reserved.

Rule 42.1 of the Uniform Civil Procedure Rules 2005 ("the UCPR") provided that costs follow the event unless it appears to the Court that some other order should be made. By virtue of UCPR r 1.5 and Sch 1, r 42.1 of the UCPR did not apply to Class 3 proceedings. Rule 3.7(1) of the Land and Environment Court Rules 2007 ("the LECR") provided that it was fair and reasonable to order costs in specified Class 3 proceedings, such as an appeal under s 574 of the *LGA*. Rule 3.7(3) of the LECR provided the circumstances the Court might consider in making such a determination. These circumstances included proceedings that involved, as a central issue, a question of law, or mixed law and fact, where the determination was potentially determinative of the entire proceedings and was preliminary to, or had not yet involved, an evaluation of the merits of the application.

Issue:

(1) whether costs should follow the event in Class 3 proceedings where the issue for determination was a strict legal question.

Held: ordering that the applicant pay the respondent's costs of the substantive proceedings and the costs application:

(1) what was fair and reasonable in determining whether to order costs in Class 3 proceedings would turn on the facts and circumstances of each case. In this case, the respondent's submissions were preferred as the matter was akin to revenue litigation, where costs normally follow the event. The 'event' in this case was that the respondent was successful in the proceedings by having the applicant's claim for exemption declined: at [30], [31] and [33]; and

(2) the applicant may have asserted militating factors against an order for costs, but costs were compensatory not punitive. Courts would often consider allegations of unreasonable or disentitling conduct, but none were made in this matter. A refusal to order costs against a party was not a decision to be made to somehow reward a party for good conduct. If it were, a model litigant would win all its costs disputes, regardless of merit: at [32].

- **Practice and Procedure**

Gray v Macquarie Generation (No 3) [2011] NSWLEC 3 (Pain J)

(related decisions: *Gray v Macquarie Generation* [2010] NSWLEC 34 and *Gray v Macquarie Generation (No 2)* [2010] NSWLEC 82 Pain J)

Facts: in *Gray v Macquarie Generation* [2010] NSWLEC 34 ("Gray No 1") the Court summarily dismissed part of the applicants' amended pleadings in which they argued that the respondent did not have lawful authority under s 115 of the *Protection of the Environment Operations Act* 1997 ("the PEO Act") to emit carbon dioxide ("CO_2") into the atmosphere at Bayswater Power Station. The claim by the applicants' that the respondent was not permitted to emit CO_2 in a manner that did not have reasonable regard and care for the interests of other persons and/or the environment had to be repleaded. The applicants sought leave to rely on an amended pleading. The respondent opposed the grant of leave pursuant to r 14.28 of the Uniform Civil Procedure Rules 2005 ("UCPR") submitting that the amended pleading should be struck out.

Issues:

(1) whether leave to rely on an amended pleading ought be granted;

(2) whether the pleading should be struck out; and

(3) whether the Court had jurisdiction to hear the proceedings.

Held: granting leave to the applicants to amend their pleading subject to the provision of further particulars:

(1) the Court was not a court of strict pleading but an applicant had to articulate his or her case in a manner which enabled the opposing party to understand the case to be met. The Court could grant leave to a party to amend a pleading at any time according to s 64 of the *Civil Procedure Act* 2005 ("CP Act"): at [56];

(2) the circumstances in which the subsections in r 14.28 of the UCPR applied are not defined or limited and there is potential overlap between them. Pleadings are embarrassing if unintelligible, ambiguous or so imprecise in the identification of material facts and allegations so as to deprive the opposing party of proper notice of substance of a claim: at [58];

(3) the test for summary dismissal was applied given that had the respondent been successful, the applicants' case would be at an end unless further leave to replead was granted. The test for summary dismissal had a high threshold and required a high degree of certainty. The applicants' case had to be taken at its highest: at [60]–[61];

(4) it was not an abuse of process to allow the applicants' case to continue. The applicants had clarified that the parts of the claim that were allowed to continue in *Gray No* 1 were directed to the extent of lawful authority held by the respondent. The respondent had further opportunity to make submissions to

address the applicants' case so that it did not suffer undue prejudice in the applicants seeking to press their claim: at [65]–[66].

(5) issue estoppel did not arise as there had been no final disposition of the issues in *Gray No 1*: at [67];

(6) the applicants' case was arguable and underpinned by a cause of action. While the case was novel and lacked supportive authority addressing it directly, it was not so lacking in legal logic that the high threshold necessary to strike out the pleading had been met. The standard of care alleged was an implied limitation conferred by the PEO Act and/or the environment protection licence: at [68]–[81];

(7) particulars are not required to specify every fact on which a party relies but are necessary to identify the nature of the case a respondent must answer. Greater particularisation of the applicants' claim was necessary, but the pleading was not so embarrassing that it should be struck out: at [82]–[85]; and

(8) the Court had jurisdiction to consider the applicants' claim. Under s 20 of *Land and Environment Court Act* 1979, the Court can hear cases concerning Pt 8.4 of the PEO Act and the power to dispose of proceedings before it in relation to any planning or environmental law, including the PEO Act: at [88]–[89].

Wollondilly Shire Council v Foxman Environmental Development Services Pty ltd (No 4) [2011] NSWLEC 35 (Pepper J)

(related decision: *Wollondilly Shire Council v Foxman Environmental Development Services Pty Ltd (No 2)* [2011] NSWLEC 25 Pepper J)

Facts: the applicant, Wollondilly Shire Council ("the council"), made an application on the last day of a seven day hearing, during closing submissions, to reopen its case to adduce further documentary evidence produced pursuant to a subpoena. The subpoena, issued 25 February 2011, to the Department of Environment, Climate Change and Water ("DECCW"), sought a volumetric survey of the material stored at a waste facility operated by one of the respondents. The purpose of the survey information was to demonstrate that the waste facility was exceeding its licensed storage capacity and that the respondents had to remove some of the material, which it did to the land the subject of the proceedings, thereby making the material unwanted and therefore "waste" under the *Protection of the Environment Operations Act* 1997. The subpoena had been stood over to 3 March 2011, pending the finalisation of an agreed statement of facts by the parties. The Court did not receive the statement until the penultimate day of the hearing. The council did not offer an explanation as to why the subpoena was issued only one week before the commencement of the hearing.

Issues:

(1) whether leave to reopen a case to adduce further documentary evidence should be granted.

Held: dismissing the application for leave to reopen:

(1) a closer examination of the volumetric survey revealed that a materially significant portion of the material stored at the waste facility was undefined, was raw material or was soil. These materials may or may not have been relevant material for the purpose of the licence. The information contained in the volumetric survey was therefore entirely equivocal: at [18]–[19];

(2) a covering letter that the council sought to adduce to remedy the ambiguous nature of the information contained in the volumetric survey would inevitably have resulted in further delay in the finalisation of the hearing of the proceedings because it would have necessitated counsel for the respondents obtaining instructions about the contents of the letter and the volumetric survey:at [20]–[21];

(3) it was not in the interest of justice to grant leave to reopen, given the negligible probative value of the survey; the prejudice that the tender of this survey and the accompanying cover letter could cause the respondents; and the very high likelihood that a further adjournment of these proceedings would have been required in order to provide the respondents with an opportunity to consider their position in relation to the late evidence: at [22]; and

(4) the granting of leave to reopen the applicant's case in this instance would not have facilitated the overriding purpose of the just, quick and cheap resolution of the real issues in the proceedings: at [23].

Xstrata Mangoola Pty Ltd v Muswellbrook Shire Council [2011] NSWLEC 46 (Pepper J)

Facts: Muswellbrook Shire Council ("the council") sought an order that Xstrata Mangoola Pty Ltd ("Xstrata") provide it with verified discovery of classes of documents specified in a schedule attached to the application. In total there were 45 categories of documents sought. Certain classes of documents were conceded by Xstrata to be relevant to facts in issue. The proceedings related to an appeal, pursuant to s 526 of the *Local Government Act* 1993 ("the LGA"), against a decision of the respondent to assess land as mining, which had previously been assessed as farm land under Pt 3 Ch 15 of the LGA.

The Practice Notes with respect to Class 1, 2, and 3 of the Court's jurisdiction were silent in relation to discovery. The Practice Notes in relation to Class 4 of the Court's jurisdiction stated that discovery should only be ordered in exceptional cases.

Issues:

(1) whether the Court could make an order for verified discovery in Class 3 of the Court's jurisdiction; and

(2) whether the order should be made.

Held: allowing informal discovery of certain classes of documents specified in the schedule:

(1) at this early stage of the proceedings, the documents sought could not be identified with sufficient precision to enable a notice to produce to be issued: at [8];

(2) the implication that no orders for discovery were permitted in Class 3 proceedings was not available, absent clear and express words to this effect in the *Land and Environment Court Act* 1979, the Land and Environment Court Rules 2007 or the Practice Notes governing Class 3 proceedings: at [15];

(3) merely because discovery could be ordered by the Court in Class 3 of its jurisdiction, it did not automatically follow that the Court should exercise its discretion to make the order sought: at [16];

(4) the cost in producing a verified list of discovered documents was not proportionate to the importance of the subject matter in dispute (s 60 of the *Civil Procedure Act* 2005): at [30]; and

(5) the documents conceded to be relevant to facts in issue in the proceedings were to be produced, along with those that were relevant to determining the actual dominant use of the land at the time of reassessment by the council: at [33]–[38].

Walker v Manly Council [2011] NSWLEC 21 (Craig J)

Facts: Mr Walker sought review of a decision made by the Registrar on 9 February 2011 refusing an application to vacate the dates fixed for hearing. Mr Walker also sought an adjournment of the matter on the basis that his state of health and cognitive function were poor, due to medication he was taking for an injury sustained as a result of a fall. Mr Walker's capacity to give evidence, so it was stated in a medical certificate produced to the Court, may have been impaired. The application for adjournment was opposed by the second respondent. The application was heard in the context of proceedings brought by Mr Walker alleging a development consent granted by the respondent council to the second respondent was invalid.

Issues:

(1) whether the medical evidence in support of the application was sufficient;

(2) what was the effect of the delay by Mr Walker in the commencement of proceedings and in the making of any application for adjournment on the proceedings; and

(3) what was the effect of the consideration of even-handed treatment of the matter in the interests of justice in accordance with s 58 of the *Civil Procedure Act* 2005 ("the CPA").

Held: application refused:

(1) the medical evidence provided was insufficient for the purpose of granting an adjournment and vacating the hearing. The evidence adduced was the same as before the Registrar when the order to refuse was made, with the single addition of a medical certificate from Mr Walker's doctor which stated his capacity to give evidence may be impaired "due to pain and clouded memory and thought processes caused by morphine based pain killers he is taking." It went on to say that "the stress of being cross-examined in court will make him worse." In knowing that the first application had been refused on similar evidence, the applicant should have supplied a more thorough and rigorous account of Mr Walker's condition in support of the application. The failure to do so rendered the evidence insufficient: at [10]–[12];

(2) the delay in making the application to vacate and in the commencement of proceedings supported a finding against Mr Walker. Mr Walker knew of the hearing dates at the beginning of January 2011 when he fell, yet did not file the application to vacate, before the Registrar, until 4 February 2011, a significant delay that was not explained: at [18]; and

(3) in the interests of justice and treating the matter even-handedly, the application for adjournment was refused applying the provisions of s 58 of the CPA. The provisions of s 58(2) of the CPA made it necessary to consider the expedition with which the proceedings had been approached and the injustice that might be suffered by interested parties if the application was allowed. The delay by Mr Walker and potential practical disadvantage to the respondents was sufficient a basis for refusing the application for adjournment, and not disturbing the decision of the Registrar: at [16]–[17].

CFS Managed Property Ltd as Trustee for 120 Pitt Street Trust v Valuer-General [2011] NSWLEC 47 (Biscoe J)

Facts: the applicant appealed valuations of land under s 37 of the *Valuation of Land Act* 1917. In order to save considerable costs and hearing time, the Valuer-General sought directions pursuant to r 31.20 of the Uniform Civil Procedure Rules ("UCPR") relating to the exclusion of quantity surveying evidence. At the directions hearing the Valuer-General's preferred course was to object to that evidence at the hearing if directions were now made that, if the quantity surveying evidence was admitted, there would be an adjournment to permit the Valuer-General to adduce evidence in reply.

Issues:
(1) whether the directions proposed by the Valuer-General should be made.

Held: making directions proposed:

(1) given the purpose of Pt 31 Div 2 of the UCPR and the potential for considerable savings in costs and hearing time if the issue was determined in the Valuer-General's favour, the course proposed by the Valuer-General was appropriate. Directions were made accordingly: at [13]; and

(2) as the issue in contention in the proceedings was very similar to the issue in another valuation appeal recently heard by the Court, the Valuer-General should have brought it to the Court's attention because it would have been appropriate for the two proceedings to have been heard and determined together, or consecutively, by the same judge: at [14].

Martin v State of New South Wales [2011] NSWLEC 20 (Pain J)

Facts: in Class 8 proceedings, Mr Martin ("the applicant"), a litigant in person, sought a declaration that exploration licence 7613 ("EL 7613") granted by the Minister for Mineral Resources (now known as the Minister for Primary Industries) under the *Mining Act* 1992 to Highlake Resources Pty Ltd ("the second respondent") was null and void. The second respondent sought the following orders: that the pleading be struck out, security for costs, that proceedings be stayed until such security was provided and the imposition of conditions in the event the applicant was permitted to replead. The Court's power to make those orders was conferred by r 14.28 and r 42.21 of the Uniform Civil Procedure Rules 2005 ("UCPR").

Issues:

(1) whether the whole or part of the pleading should be struck out; and

(2) whether a security for costs order ought be made.

Held: granting the orders sought by the second respondent:

(1) the applicant did not appear to have standing to bring the proceedings either under the *Mining Act* or at common law. His wife may have had a legal and/or equitable interest in the proceedings as she was the owner of an expired exploration licence that overlapped part of the area covered by EL 7613: at [38];

(2) no administrative law errors that could be considered in judicial review proceedings under s 293(1)(q) of the *Mining Act* were identified: at [39];

(3) most of the pleading, raising allegations of theft of intellectual property and misuse of that information by several persons including the Director-General and a previous Minister, were embarrassing. There were insufficient material facts to establish a cause of action. In any event, the Court lacked jurisdiction to consider these allegations: at [40];

(4) there were no material facts underpinning serious accusations against the Director-General and a previous Minister: at [41] and [43];

(5) existing Ministerial delegations, such as the delegation under which EL 7613 was granted, did not become invalid because of the appointment of a new person as Minister (see *Martin v Minister for Mineral and Forest Resources* [2010] NSWLEC 131): at [47]; and

(6) the Court had wide discretion to consider security for costs applications where the circumstances in r 42.21(1) of the UCPR arise and more generally. The proceedings concerned private interests under the *Mining Act* as between rival competitors seeking approvals under that Act. The applicant's wife stood to gain from the litigation but did not offer to provide any security. This circumstance fell within r 42.21(1)(e). The applicant declined to answer a notice to produce concerning his financial records and put on no evidence about his financial position. The inference was that it was reasonably possible that he would not be able to meet a costs order. Further, there were already a number of outstanding costs orders against him. The amount of security for costs sought by the second respondent was not excessive. In the circumstances, a security for costs order was warranted: at [54]–[55] and [57]–[59].

Kennedy v Stockland Development Pty Ltd (No 2) [2011] NSWLEC 10 (Pain J)

(related decisions: *Kennedy v Stockland Development Pty Ltd* [2010] NSWLEC 250 and *Kennedy v Stockland Development Pty Ltd (No 3)* [2011] NSWLEC 16 Pain J)

Facts: Mr Kennedy ("the applicant") brought proceedings contending that Stockland Development Pty Ltd ("the respondent") breached various conditions of the Major Project Determination for development on land at Sandon Point. It was alleged that the respondent also breached sections of the *Environmental Planning and Assessment Act* 1979, the *Protection of the Environment Operations Act* 1997 in relation to escape of polluted water from the land, and the *National Parks and Wildlife Act* 1974 in relation to the destruction of the Sandon Point Aboriginal Place. The respondent sought a security for costs order in the sum of $20,000 to be provided by the applicant. The Court can make such an order and stay proceedings until the security is given under r 42.21(1) of the Uniform Civil Procedure Rules 2005 ("UCPR") in identified circumstances. However, in Class 4 proceedings the Court may decline to do so if it is satisfied that the proceedings were brought in the public interest (r 4.2(2) of the Land and Environment Court Rules 2007).

Issue:

(1) whether a security for costs order ought to be made.

Held: the application was refused:

(1) the circumstances in r 42.21(1) of the UCPR are only part of the exercise of discretion as to whether or not to make a security for costs order and on what terms. The fact that these circumstances arise does not mean that an order will be made. The relevant authorities suggest that security for costs orders

should not be lightly made in the case of an impecunious litigant, who is a natural person; where their effect would be to stop litigation; where the circumstances in r 42.21(1) do not arise; and where other special circumstances do not apply: at [39];

(2) the relevant principles in determining applications for security for costs orders were applied as follows:
   (a) the application was brought promptly;
   (b) the applicant's case was not weak because the grounds in the pleading were arguable on their face and the applicant wished to present additional evidence;
   (c) the applicant's undisputed impecuniosity was not caused by the respondent;
   (d) the respondent's application was oppressive as it would deny the applicant the opportunity to litigate these proceedings; and
   (e) there was no evidence of any person standing behind the applicant who would benefit in a material way: at [42]–[51];

(3) considerations applying to awarding costs in public interest cases after the completion of proceedings were not relevant in determining whether or not to grant a security for costs order: at [57];

(4) factors suggesting an order ought to be made were that the application was timely; there had been other unsuccessful proceedings challenging aspects of the Sandon Point development by the same applicant that had resulted in limited costs orders against him; and if the applicant was unsuccessful the respondent was unlikely to recover any substantial costs: at [63];

(5) factors suggesting that no order ought to be made were that the applicant was motivated by public interest considerations in undertaking the litigation; the applicant was an Aboriginal man who sought to protect Sandon Point Aboriginal Place, a gazetted area of significant Aboriginal cultural and physical heritage, and was acting for the benefit of Aboriginal people and the wider community; given the burden of litigation, it was not certain that another Aboriginal person would have pursued the litigation if a security for costs order was made; and that the applicant lived in close proximity to the Sandon Point development site, which suggested that his interest was more than a motivation to enforce the law: at [50], [53]–[54], [58], [60] and [63]; and

(6) all the factors had to be weighed up in light of the fundamental purpose of the security for costs order, which was to secure justice between the parties. This was to be done principally by ensuring that unsuccessful proceedings did not occasion injustice to a respondent. In the circumstances, the interests of justice required that the application be refused: at [62]–[63].

- **Section 56A Appeals**

Codling v Manly Council [2011] NSWLEC 57 (Pain J)

(related decision: *Codling v Manly Council* [2010] NSWLEC 1299 Pearson C)

Facts: a development application for the use of a function and conference centre on L 1 of the Manly Bathers Pavilion was refused. It related to an area zoned Environmental Protection under Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 ("SREP"). In dismissing the appeal, the Commissioner found that Codling applied for two independent uses of a conference facility and a function centre and that the former was permissible with consent as an innominate use, whilst the latter was prohibited as a water-based restaurant under cl 18 of the SREP. Codling challenged these findings on alleged errors of law and of mixed fact and law.

Issues:

(1) whether the proposed use was properly characterised as for two uses;

(2) whether the function centre use was as a restaurant and therefore prohibited; and

(3) alternatively, whether it was erroneous to treat the independent uses as a single use for the purposes of determining the appeal and dismiss the appeal with respect to the permissible use.

Held: upholding the appeal:

(1) the second ground was dealt with first and upheld:

(a) the parties were in disagreement with the application of the principles relevant to characterisation to the facts: at [30];

(b) the terms "use" and "purpose" are not interchangeable. The use of land is the physical acts by which the land is made to serve some purpose. Authorities referred to by the parties suggested intention had a role to play in assessing the purpose of a use and the identification of purpose may have required more than the use of the built form to be considered. The Commissioner's reasoning largely considered the use of the built form in identifying the purpose of the intended use and the hours of operation. The intended purpose was specified in the development application as that of a function centre, not a restaurant: at [34]–[36], [39] and [40]; and

(c) the same premises can have two different uses which each have different town planning incidents. In relation to the persons attending a restaurant in contrast to those attending a function centre, the different incidents arose in large part because of the differing purpose of a function centre compared to that of a restaurant. That the physical use of land could fit more than one description of activity did not render the purpose of the use (able to be described as a restaurant) that of a restaurant. The Commissioner's reasoning appeared to equate use with purpose: at [37]–[39]; and

(2) as a consequence of upholding the second ground, both identified uses of conference facility and function centre were permissible with development consent. Therefore, it was unnecessary to consider the other grounds raised in the appeal: at [43]–[44].

In Adam Pty Ltd v Valuer-General [2010] NSWLEC 55 (Biscoe J)

(related decision: *In Adam Pty Ltd v Valuer-General* [2010] NSWLEC 1262 Moore SC and Cowell AC)

Facts: Two Commissioners of the Court upheld objections to valuations of a heritage restricted building. The applicant appealed under s 56A of the *Land and Environment Court Act* 1979.

Issues:

(1) whether the Commissioners erred in law in not deducting a "heritage costs penalty" pursuant to s 14G(1)(b1) of the *Valuation of Land Act* 1916; and

(2) whether the Commissioners' decision should otherwise be upheld without their reference to the costs of notional renovation.

Held: upholding the appeal:

(1) the Commissioners' erred in law in not deducting the "heritage costs penalty": at [28]–[29]; and

(2) the Commissioners' decision was otherwise upheld without their reference to the costs of notional renovation: at [17]–[20].

Commissioner decisions

- **Development Appeals**

Capuano v Port Macquarie-Hastings Council [2011] NSWLEC 1043 (Brown C)

Facts: the applicant sought development consent for the demolition of an existing general store and fuel outlet and the construction of a restaurant with drive through facility, car parking, boundary adjustment and

signage to be operated by McDonalds at Port Macquarie. A "refreshment room" was permissible with consent within Zone 2(a1) under the *Hastings Local Environmental Plan* 2001. The site was within Zone R1 General Residential under the draft Port Macquarie-Hastings Local Environmental Plan 2010 ("the draft LEP") that had been on public exhibition. The draft LEP included a savings provision in cl 1.8A under which a development application made before the commencement of the draft LEP would be determined as if the draft LEP had been exhibited but had not commenced.

Issues:

(1) whether the proposed development was appropriately characterised as a "refreshment room";

(2) whether the proposed development was permissible under the draft LEP;

(3) what weight should be given to the draft LEP;

(4) whether the proposed development was consistent with the objectives of the draft LEP; and

(5) whether the proposed development would have an unacceptable impact on the amenity of the nearby residential development by reason of visual impact, noise, odour and traffic.

Held: dismissing the appeal:

(1) the purpose was for a "refreshment room", and that purpose had different uses such as the take away and drive-through components of the business: at [32];

(2) the draft LEP was imminent and certain: at [45]–[46];

(3) the draft LEP adopted the format of the Standard Instrument which had changed from more traditional planning instruments where land uses were individually identified, to a document that adopted a "genus" and "species" approach by identifying a number of distinct groups of land use terms (the genus, for example "retail premises") that had a number of related land uses that fell under the umbrella of the group term (the species, for example, "take-away food and drink premises"): at [54];

(4) the term "food and drink premises" was defined in the Dictionary to the draft LEP to mean "retail premises used for the preparation and sale of food or drink…", and for the development to be permissible in the R1 zone, "retail premises" also had to be permissible: at [51]–[52];

(5) the proposed development would provide facilities to meet the day-to-day needs of people who were not residents, contrary to the third zone objective: at [58];

(6) the proposed development would have a dominant commercial character by way of likely patronage, design, signage, illumination and hours of operation that would be inconsistent with the desired future character for the zone, which would be a basis for refusal: at [61];

(7) noise and odour impacts would not warrant refusal of the application: at [70] and [75]; and

(8) there were no traffic and parking reasons why the proposed development should not be approved: at [78].

CSA Architects Pty Ltd v City of Sydney Council [2011] NSWLEC 1065 (Brown C)

Facts: the applicant sought development consent for alterations and additions to an existing industrial building in Alexandria and its conversion into a residential flat building comprising 5 x 1 bedroom apartments and 10 x 2 bedroom apartments over 4 levels including basement/car parking. The surrounding area was generally characterised by industrial/warehouse buildings. The proposed use was permissible with consent under the *South Sydney Local Environmental Plan* 1998 ("the LEP"), cl 10 of which provided that consent could not be granted unless the proposal was consistent with the relevant zone objectives. The *South Sydney Development Control Plan 1997: Urban Design – Part G: Special Precinct No.9 Green Square* ("DCP – Part G") applied. Clause 1.3 stated that DCP-Part G complements *South Sydney Development Control Plan* 1997 (DCP 1997) and must be used in conjunction with DCP 1997 and that where there is an inconsistency, the provisions of DCP-Part G prevail. The council contended that the proposed development breached the

applicable floor space ratio ("FSR") and height controls resulting in an overdevelopment of the site and a development that was incompatible with the desired future character of the area.

Issues:

(1) whether the proposal was consistent with the zone objectives; and

(2) whether on assessment of the development against the relevant planning controls the proposal should be approved.

Held: dismissing the application:

(1) there was no obligation on an applicant seeking to utilise part of an existing building to demolish or partly demolish the building to comply with the numerical requirements of a DCP, and no obligation on an applicant to justify the retention of a building or part of a building on the basis that the retention could be supported on sustainability grounds through the reuse of materials and energy savings: at [25];

(2) the numerical standards in the DCP and the relevant objectives had to be considered conjunctively rather than greater weight being given to the numerical requirements or to the objectives: at [26];

(3) whether the FSR of the proposed development was 1.97:1 (as calculated by the council) or 1.87:1 (as calculated by the applicant) it provided for a significant variation to the FSR requirement of 1.25:1 which would be available subject to the provision of some form of material public benefit: at [28];

(4) visual impact and perception of bulk associated with FSR was only part of the consideration required, and consideration also had to be given to the numerical FSR standard: at [31];

(5) the existing industrial building did not have a similar floor area to that proposed in the application, as the exclusion of the basement level from the assessment of floor space for the proposal because it was used for car parking was misleading. The basement floor area was effectively transferred to the top of the upper level of the building as new floor area, which added to the bulk and visual appearance of the building: at [32];

(6) the question of floor area also needed to be considered in the wider planning outcomes sought by DCP-Part G, which not only specified the amount of floor area but also the distribution of floor area over the site. If a building was built to the perimeter of the site it did not mean that there was an entitlement to fill the site from boundary to boundary with floor space: at [34];

(7) precedent was a relevant matter to take into consideration as the proposed development was the first development in the locality to change from traditional industrial use to a residential development and the proposed development with its significant variation to the FSR requirement could reasonably be used as a benchmark for other nearby redevelopment: at [35];

(8) the breach of the height requirement was unacceptable because of the excessive floor area that manifested itself through the new upper level: at [37];

(9) the proposed development was inconsistent with objective (c) of the zone objectives and applying cl10 the application had to be refused: at [41];

(10) the assessment that led to the failure of the development to be consistent with the zone objective would mirror the merit assessment of the development against the relevant planning controls: at [45]; and

(11) to allow an FSR of around 1.9:1 when the maximum FSR was 1:1, would be to effectively abandon the numerical requirements for FSR in DCP-Part G and DCP 1997, even allowing for the general flexibility available for a DCP and the specific requirements that allowed for variations in DCP-Part G and DCP 1997: at [46].

- **Hedges**

Wisdom v Payn [2011] NSWLEC 1012 (Moore SC, Hewett AC)

Facts: the applicants brought proceedings under Pt 2 of the *Trees (Disputes Between Neighbours) Act* 2006 ("the Act") seeking orders in respect of vines growing over and through a fence and a palm tree and orders under Pt 2A of the Act in respect of a Bottlebrush, a group of Ti trees and a Magnolia tree, and a group of Lilly Pillys and Brush Cherrys. The respondents were the owners of one of two duplexes constructed by the applicants in the early 1990s, and the Bottlebrush had been planted during the course of that development. The applicants also sought orders that the respondents be required to demolish what the applicants claimed was a deck and barbeque area constructed without council consent.

Issues:

(1) whether there was jurisdiction to make orders under Pt 2 of the Act in relation to the vines and the Palm tree;

(2) whether the Bottlebrush formed part of a hedge as defined in s 14A of the Act;

(3) whether the Ti Trees and Magnolia constituted a hedge as defined in s 14A of the Act;

(4) whether orders should be made in relation to the Lilly Pilly and Brush Cherry trees; and

(5) whether there was jurisdiction to make the proposed demolition order.

Held: dismissing the application:

(1) the possibility of injury to a person endeavouring to prune the vines did not satisfy the test in s 10(2)(b): at [27];

(2) while there was some displacement of the fence immediately adjacent to the Palm tree, it was entirely negligible, and did not impact on the functionality of the fence or on the outlook from the applicants' property. Although there was jurisdiction to make an order, as a matter of discretion it was not appropriate to do so: at [32];

(3) there must be a degree of regularity and arrangement, in a linear fashion, of trees being considered as "forming a hedge", and a purely random planting of trees or a single tree could not be so regarded. The Bottlebrush was at a different relative height to other plantings in the vicinity, it did not form part of any regular or arranged landscape, and it was planted by the applicant, and as a consequence it was a sole tree in isolation and the Court had no jurisdiction over it: at [45], [46] and [48];

(4) even if there were jurisdiction, the fact that the applicant caused the planting of the Bottlebrush was sufficient reason to refuse any application concerning the tree: at [50];

(5) the applicant should have disclosed the planting of the Bottlebrush but failed to do so: at [51];

(6) as none of the Ti trees or Magnolia rose at least 2.5 m above existing ground level, none of those trees satisfied the jurisdictional test in s 14A(1)(b) of the Act: at [59];

(7) the Lilly Pilly and Brush Cherry trees as a complete grouping satisfied the tests in s 14A(1): at [66] and [68];

(8) the impact on views of the Lilly Pilly and Brush Cherry trees could not be regarded as severe: at [83]–[93]; and

(9) there was no jurisdictional basis under the Act (or any other legislation) which could found any orders by Commissioners to demolish the structures alleged to have been constructed without consent: at [94].

Pham v Papaioannou [2011] NSWLEC 1044 (Brown C, Galwey AC)

Facts: the applicants brought proceedings under Pt 2A of the *Trees (Disputes Between Neighbours) Act* 2006 ("the Act") in relation to seven Lillypilly trees ranging in height between 2.76 m and 3.25 m located on the respondents' land. The applicants sought orders that the trees be maintained at regular intervals so that the top level of the trees would always remain at or below the level of the top of the existing colour bond fencing on the common boundary, or at most 250 mm above the fence. The respondents maintained that the trees should be maintained to a height of 1.1 m above the colour bond fence.

Issues:

(1) whether there was severe obstruction of sunlight to a window as required by s 14D(1)(a) of the Act;

(2) whether there was severe obstruction of any view from the applicant's dwelling as required by s 14D(1)(b) of the Act; and

(3) whether pruning of the trees was appropriate.

Held: ordering that the trees be pruned and maintained at a height of no more than 500 mm above the height of the fence or 1.6 m above the height of the path adjoining the fence:

(1) only four of the Lillypillies could affect sunlight to two east facing windows and this obstruction was not "severe": at [17];

(2) even if the obstruction could be regarded as severe, the living room of the applicant's dwelling had expansive windows and full height doors on its northern and western elevations that would provide extensive sunlight access to the living room: at [18];

(3) there was a view available in an easterly direction, however, any view loss associated with some of the trees was from the rear yard and not a "dwelling" as required by s 14D(1)(b) of the Act: at [21];

(4) the pruning of other trees was appropriate to obtain reasonable access to views for the applicant and to provide reasonable levels of privacy for the respondent: at [22];

(5) the appropriate level of pruning was 500 mm above the level of the fence which would provide a reasonable level of protection from overlooking from any person walking along the path adjoining the common boundary and also allow views from inside the house over the trees: at [23]; and

(6) the applicant should contribute equally with the respondents to the cost of the initial pruning and thereafter the responsibility would be with the respondent to maintain the trees: at [26].

Court News

- **Arrivals/Departures**

The Court congratulates Maria Anastasi, who has been appointed to the position of Manager Court Services and Assistant Registrar at the LEC effective as of 21 February 2011.

Julianne Reeves commenced as the Commissioner Support Officer on 4 January 2011.

Alison Ludewig from Registry has accepted Sheahan J's offer of part-time appointment, commencing as of 18 April 2011.

The Court congratulates Amber and Lee Kosnetter on the birth of their baby girl, Elizabeth Bray Kosnetter.

The Court has farewelled Christine Craig who was job sharing as Sheahan J's Associate.