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# Land and Environment Court of NSW Judicial Newsletter



## Legislation

- **Statutes and Regulations**

**Planning:**

The Environmental Planning and Assessment Amendment Act 2012 was assented to on 21 November 2012. The Act amends the *Environmental Planning and Assessment Act* 1979 and other Acts to:

(a) clarify the purpose, status and content of development control plans and how they are to be taken into account during the development assessment process;
(b) enable the regulations to exclude certain residential development in bush fire prone land from the special consultation and development requirements of the NSW Rural Fire Service;
(c) authorise the Commissioner of the NSW Rural Fire Service to review and revise the designation of land on a bush fire prone land map for an area at any time after the map is certified;
(d) specify development plan costs that may be recovered from owners affected by subdivision orders relating to "paper subdivisions" and makes other amendments relating to the amendment and repeal of such orders and related development plans;
(e) clarify the provisions relating to biocertification of planning instruments in Sydney's growth centres to ensure they apply to all environmental planning instruments applying to the land concerned and to all development assessment processes;
(f) extend indemnification against possible copyright breaches of documents submitted by persons who do not have copyright where the documents are publicly notified or made use of under the Act;
(g) make further provision in relation to the issue of compliance certificates and compliance cost notices;
(h) provide for the transfer of relevant records when there is a change of principal certifying authority for development;
(i) provide for the ongoing assessment of accredited certifiers, require written contracts for certification work, specifys certain matters to be taken into consideration in disciplinary proceedings against accredited certifiers and changs the conflict of interest provisions for the issuing of compliance certificates by accredited certifiers;
(j) change the name of the State Property Authority to Government Property NSW; and
(k) make other minor and consequential changes.

The amendments to the *Threatened Species Conservation Act* 1995 in relation to biodiversity certification commenced on assent. The amendments to the *Building Professionals Act* 2005 and to the *Environmental Planning and Assessment Act* 1979 commence on a date to be proclaimed.

The amendments made to provisions relating to development control plans (DCPs) will apply to DCPs in force immediately before the amendments commence. The newly inserted s 79C(3A), which specifies the extent to which standards imposed in a DCP are to be taken into account in determining a development application, will not apply to determination of a development application made before the commencement of s 79C(3A).

The Environmental Planning and Assessment Amendment (Fees) Regulation 2012, published 2 November 2012, amends the Environmental Planning and Assessment Regulation 2000:

(a) to require a council to notify a person who requests the preparation of a planning proposal if the request is not supported; and
(b) to prescribe certain fees relating to the preparation of reports and the referral and assessment of planning matters.

The Standard Instrument (Local Environmental Plans) Amendment (Definitions) Order 2012. published 5 October 2012, amends the Standard Instrument prescribed by Standard Instrument (Local Environmental Plans) Order 2006, to include definitions for 'people with a disability' and 'people who are socially disadvantaged'.

The Environmental Planning and Assessment Amendment (Fire Sprinkler Systems) Regulation 2012 commenced 1 January 2013. The Regulation:

(a) requires that fire sprinkler systems be installed in certain residential aged care facilities, being facilities at which residential care (within the meaning of the *Aged Care Act 1997* of the Commonwealth) is provided immediately before 1 January 2013;
(b) sets out an implementation schedule outlining the dates by which that installation and certain interim steps must be completed; and
(c) deals with applications for, and the issue of, complying development certificates and construction certificates for the installation of fire sprinkler systems in certain other residential care facilities for seniors.

Growth Centres (Development Corporations) Amendment (UrbanGrowth NSW Development Corporation) Order 2012 commenced 1 January 2013. The Order:

(a) changes the name of the Sydney Metropolitan Development Authority to the UrbanGrowth NSW Development Corporation; and
(b) changes the nature of governance of that development corporation from board governance to chief executive governance.

The *Boarding Houses Act* 2012 partially commenced 1 January 2013. Included in the provisions that commenced on that date are those sections conferring jurisdiction on the Land and Environment Court in relation to enforcement (s 96), and proceedings in relation to offences (s 99). Further information is available on the Division of Fair Trading's website and in the Division of Local Government's circular [13-02].

**Forestry:**

The Forestry Act 2012 No 96 commenced 1 and 7 January 2013. The Act:

(a) constitutes the Forestry Corporation of New South Wales as a statutory State owned corporation and confers on it functions relating to the management of the State's timber resources;

(b) authorises the Corporation to carry out forestry operations in State forests and on other Crown-timber land;
(c) continues without any change the current system of integrated approvals for forestry operations;
(d) provides for the use and management of State forests for non-forestry purposes;
(e) dissolves the Forestry Commission and provides for the transfer of its assets, rights and liabilities to the Corporation;
(f) repeals the *Forestry Act* 1916 and the *Timber Marketing Act* 1977; and
(g) confers jurisdiction on the Land and Environment Court in relation to civil enforcement of certain conditions of approval (s 69S).

The Forestry Regulation 2012, published 21 December 2012, makes provision with respect to:

(a) the control and management of forestry areas (ie State forests, timber reserves and flora reserves), including the control of fires and camping;
(b) applications for licences, forest permits and forest leases and machinery matters relating to licences, permits and leases;
(c) requiring persons who are contracted to harvest timber to hold a contractor licence issued by the Forestry Corporation;
(d) the branding of timber;
(e) miscellaneous offences, including interfering with timber harvesting or hauling equipment in forestry areas; and
(f) miscellaneous machinery matters that are required to give effect to the *Forestry Act* 2012.

**Water:**

Statute Law (Miscellaneous Provisions) Act (No 2) 2012 amends, from 4 January 2013, the *Water Management Act* 2000 to:

(a) enable the Minister for Primary Industries to amend an access licence held by the Commonwealth or the State by increasing the licence's share component, in order to give effect to an agreement entered into by the State and where the licence forms part of the Commonwealth environmental water holdings or is used for certain environmental purposes;
(b) ensure that the holder of an access licence that is amended as provided for above (for example, the Commonwealth) cannot appeal against the Minister's decision to impose a discretionary condition on the licence;
(c) removes any right of appeal to the Court against the Minister's decision to grant an access licence to the Commonwealth or the State under section 63A or 63B of the Act or to impose a discretionary condition on such a licence; and
(d) ensure that it is generally an offence to take water from a water source to which Part 3 of Chapter 3 of the Act applies when related metering equipment is not operating (or is not operating properly), regardless of how the equipment came to be installed.

Water Management (General) Amendment (Water Sharing Plans) Regulation 2012, published 4 October 2012 amends the Water Management (General) Regulation 2011 as follows:
(a) to prescribe further categories and subcategories of water access licences, and further types of specific purpose access licences, for the purposes of the *Water Management Act* 2000 ;
(b) to exempt one of these subcategories of water access licence from also being a specific purpose access licence;
(c) to allow water allocation accounts to be kept in the form of sub-accounts;
(d) to prescribe circumstances in which water may be withdrawn from a water allocation account for the purposes of a provision of the Act that allows water management plans to deal with such matters if prescribed;
(e) to prescribe the issue of an access licence arising from the operation of Schedule 4 of the Regulation as a Ministerial action that must be recorded in the Access Register;

(f) to make provision with respect to certain entitlements under the *Water Act* 1912 to take water from the Namoi, Macquarie Bogan, Barwon-Darling and Murrumbidgee Unregulated and Alluvial Water Sources and the Belubula Regulated River Water Source, being entitlements that are to become access licences to which Part 2 of Chapter 3 of the Act applies; and
(g) to make provision with respect to access licences for the Murrumbidgee Regulated River Water Sources, and to repeal a provision, consequential on the repeal of a part of the Act on 4 October 2012, relating to the Lowbidgee flood control and irrigation works.

Access Licence Dealings Principles Order (No 1) 2013, published 28 December 2012, prohibits certain dealings that may be effected under Division 4 of Part 2 of Chapter 3 of the *Water Management Act* 2000 in the Murray Darling Basin in NSW.

The Water Management (Application of Act to Certain Water Sources) Declaration (No 2) 2012 set 4 October 2012 as the date from which:

(1) Part 2 of Chapter 3 of the *Water Management Act* 2000 applies to certain prescribed water sources, and to each water source to which certain prescribed water sharing plans apply, in relation to all categories and subcategories of access licence for any such water source other than floodplain harvesting access licences; and
(2) Part 3 of Chapter 3 of the Act applies to the prescribed water source, and to each water source to which a prescribed water sharing plan applies, in relation to all approvals for any such water source other than drainage work approvals, flood work approvals and aquifer interference approvals.

The "prescribed water sources" are defined to be the part of the Murrumbidgee Regulated River Water Source referred to in clause 4 (3) (b) of the *Water Sharing Plan for the Murrumbidgee Regulated River Water Source 2003* (as inserted by the *Water Sharing Plan for the Murrumbidgee Regulated River Water Source Amendment Order 2012*), excluding the water referred to in clause 4 (4) of that Plan (as inserted by that Order).

The "prescribed water sharing plans" are defined to be each of the following plans which commenced 4 October 2012:
(a) the Water Sharing Plan for the Barwon-Darling Unregulated and Alluvial Water Sources 2012;
(b) the Water Sharing Plan for the Belubula Regulated River Water Source 2012;
(c) the Water Sharing Plan for the Macquarie Bogan Unregulated and Alluvial Water Sources; 2012;
(d) the Water Sharing Plan for the Murrumbidgee Unregulated and Alluvial Water Sources 2012; and
(e) the Water Sharing Plan for the Namoi Unregulated and Alluvial Water Sources 2012.

Four Water Sharing Plans have been amended by the following orders:

- Water Sharing Plan for the Phillips Creek, Mooki River, Quirindi Creek and Warrah Creek Water Sources Amendment Order 2012, published 4 October 2012
- Water Sharing Plan for the Adelong Creek Water Source Amendment Order 2012, published 12 October 2012
- Water Sharing Plan for the Tarcutta Creek Water Source Amendment Order 2012, published 12 October 2012
- Water Sharing Plan for the Upper Billabong Water Source Amendment Order 2012, published 12 October 2012

Water Sharing Plan for the Gwydir Unregulated and Alluvial Water Sources Amendment Order 2012, published 21 December 2012, amends the Water Sharing Plan for the Gwydir Unregulated and Alluvial Water Sources 2012.

Water Sharing Plan for the Lachlan Regulated River Water Source Amendment Order 2012, published 21 December 2012, amends the Water Sharing Plan for the Lachlan Regulated River Water Source 2003.

**Miscellaneous:**

The *Petroleum (Onshore) Amendment (Royalties and Penalties) Act* 2012 commenced 1 January 2013. The Act amends the *Petroleum (Onshore) Act* 1991 to:

(a) provide that the rate of royalty on petroleum production is to be prescribed by regulations;
(b) increase certain penalties for offences under the *Mining Act* 1992 and the *Petroleum (Onshore) Act* 1991;
(c) confer jurisdiction on the Land and Environment Court to hear proceedings for offences under the *Petroleum (Onshore) Act* 1991; and
(d) make consequential and minor amendments to provisions of the *Criminal Procedure Act* 1986, including enabling elections to be made with respect to summary proceedings for an indictable offence under the *Petroleum (Onshore) Act* 1991.

Schedule 10 [2] and [3] of the *Courts and Other Legislation Amendment Act* 2012 commenced on 28 October 2012. The provisions amend s 63 of the *Land and Environment Court Act* 1979 to:

(a) require leave of the Court for a person to appear in Class 1, 2, 3, 4, and 8 proceedings by an agent, as opposed to an Australian legal practitioner;

(b) require a person (other than an Australian legal practitioner) to provide certain information to a client before the Land and Environment Court may grant leave for the person to appear as an agent for the client in proceedings before that Court; and

(c) require the Court to consider whether the agent has provided the required information, and whether the granting of leave for a person to appear by an agent is in the best interests of the person.

The Local Government Amendment (Conduct) Act 2012 No 94 will commence on 1 March 2013. The Act will amend the *Local Government Act* 1993 to:

(a) authorise the Director-General of the Department of Premier and Cabinet to conduct an investigation to determine whether a councillor has engaged in misconduct and to enable the Director-General to require a councillor or a council staff member, delegate or administrator to
(b) provide information or documents for the purpose of such an investigation;
(c) enable the Director-General to take a range of disciplinary action against a councillor found to have engaged in misconduct, including counselling or reprimanding the councillor, issuing an order directing the councillor to apologise for the misconduct or to participate in training or mediation;
(d) suspend the councillor, or the councillor's right to be paid, for up to 3 months;
(e) enable a decision by the Director-General to take disciplinary action to be made public;
(f) provide that a failure by a councillor to comply with an order issued by the Director-General in relation to an investigation or as part of disciplinary action constitutes misconduct by the councillor;
(g) enable the Local Government Pecuniary Interest and Disciplinary Tribunal to disqualify a councillor found to have engaged in misconduct from holding civic office for up to 5 years;
(h) require administrators of councils to comply with the code of conduct applicable to councillors and enable the Director-General to investigate allegations of misconduct by administrators;

(i) enable the Director-General to investigate allegations of misconduct by former councillors and to refer such matters to the Tribunal for consideration and make it clear that the Tribunal has power to deal with matters relating to former councillors;
(j) enable council meetings at which allegations of misconduct by councillors are discussed to be closed to the public; and
(k) to make other minor miscellaneous amendments.

The Local Government (General) Amendment (Conduct) Regulation 2012, published 21 December 2012, prescribes a model code of conduct for local councils in NSW together with a model procedure for administering that code. Under the *Local Government Act* 1993, each council is required to adopt a code of conduct and procedure that incorporate the provisions of the prescribed model code and model procedure.

The Division of Local Government has released the following materials on the code:

- The New Model Code of Conduct Framework [ Circular 12-45; full code]
- Summary of Standards
- Procedures for the Administration of the Model Code of Conduct for Local Councils in NSW

National Park Estate (South-Western Cypress Reservations) Amendment (Description of Lands) Notice 2012, published 28 December 2012, adjusts the description of lands in Schedules 1 and 6 of the *National Park Estate (South-Western Cypress Reservations) Act* 2010.

The Western Sydney Parklands Amendment Order 2012, published 2 November 2012, extends the land included in the parkland under the *Western Sydney Parklands Act* 2006.

Some provisions of the Swimming Pools Amendment Act 2012 commenced 29 October 2012. The Act amended the *Swimming Pools Act* 1992 to:

(a) require swimming pools to be registered;
(b) provide for the inspection of swimming pools and the issue of certificates of compliance by local authorities and accredited certifiers;
(c) extend provisions of the Act that applied to hotels and motels to all forms of tourist and visitor accommodation;
(d) remove certain exemptions under the Act; and
(e) make powers of entry under the Principal Act by council officers consistent with those under the *Local Government Act* 1993.

Swimming Pools Amendment (Transitional) Regulation 2012, published 23 November 2012, allows the owner of premises on which a swimming pool is situated to apply to the local authority for a certificate of compliance in respect of the swimming pool under s 24 of the *Swimming Pools Act* 1992 (despite the repeal of that section by the *Swimming Pools Amendment Act* 2012 – see above) until the new regime for the issue of such certificates commences 6 months after that repeal.

The Division of Local Government has released a Circular on the amendments [12-40].

The *Coastal Protection Amendment Act* 2012 commenced 21 January 2013. It amended the Coastal Protection Act 1979, by:

(a) renaming “emergency coastal protection works” as “temporary coastal protection works”;

(b) providing that a person does not require regulatory approval for temporary coastal protection works that comply with requirements for those works set out in the Coastal Protection Act;

(c) removing requirements specifying when temporary coastal protection works can be placed, and that they be removed 12 months after placement;

(d) amending the requirements for use and occupation of public land for the placing and maintaining of temporary coastal protection works;

(e) reducing penalties for various offences relating to certain unauthorised anti-beach erosion work and temporary coastal protection works;

(f) removing s 56B from the Coastal Protection Act which enables regulations with regard to categorisation of land within the coastal zone into risk categories, including provision of information in planning certificates issued under s 149 of the *Environmental Planning and Assessment Act* 1979; and

(g) repealing existing regulations made under s 56B.

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

Environmental Planning and Assessment Amendment (State Significant Infrastructure—Northern Beaches Hospital Precinct) Order 2012 , published 26 October 2012, amended the SEPP (State and Regional Development) 2011 to provide that development on land in the Northern Beaches Hospital Precinct that is carried out by or on behalf of a public authority and that has a capital investment value of more than $30 million is State significant infrastructure.

SEPP (Major Development) Amendment (UTS Ku-ring-gai Campus and Wahroonga Estate) 2012, published 21 December 2012, amended maps of the Wahroonga Estate.

SEPP Amendment (Fire Sprinkler Systems) 2012, published 21 December 2012, amends the SEPP (Infrastructure) 2007, SEPP (Exempt and Complying Development Codes) 2008 and SEPP (Housing for Seniors or People with a Disability) 2004 in respect of fire sprinklers.

SEPP (Western Sydney Employment Area) Amendment (Industrial Training Facilities) 2012 , published 27 September 2012, inserted 'Industrial Training Facilities' into the zone objectives and land use table for Zone IN1 of the SEPP (Western Sydney Employment Area) 2009.

SEPP (Affordable Rental Housing) Amendment (Group Homes) 2012, published 5 October 2012, updated the definitions with respect to group homes, people with a disability, people who are socially disadvantaged and complying development in the SEPP (Affordable Rental Housing) 2009.

SEPP (Western Sydney Parklands) Amendment 2012, published 26 October 2012, updated the maps in the SEPP (Western Sydney Parklands) 2009.

State Environmental Planning Policy (Homebush Bay Area) Amendment 2012 , published 19 October 2012, updated the maps in the SREP No 24 - Homebush Bay Area.

- **Bills**

The Courts and Other Legislation Further Amendment Bill 2012, introduced in the Legislative Assembly on 21 November 2012, among other things, sets out to:

(a) amend the *Civil Procedure Act* 2005 by repealing Part 2A, which requires steps to be taken to resolve a dispute before commencing court proceedings; omitting the transitional provisions in Part 6 of Sch 6 Savings, transitional and other provisions; and repealing cl 16 of the Civil Procedure Regulation 2012 which excluded proceedings in the Supreme Court from the operation of Part 2A;

(b) amend the *Court Security Act* 2005 to prohibit the unauthorised use of any device (including a phone) to transmit sounds, images or information forming part of the proceedings of a court from a room or place where a court is sitting to a place outside that room or place;
(c) amend the *Crimes (Appeal and Review) Act* 2001 to specify the ways in which the Supreme Court can determine an appeal by a prosecutor against an order for costs made by the Local Court against the prosecutor in any summary proceedings;
(d) amend the *Fines Act* 1996 to allow for a delegate of the Director-General of the Department of Attorney General and Justice to approve the organizations that can sponsor applicants for work and development orders (that is, orders requiring a person to undertake unpaid work or training or counselling to satisfy a fine debt), as an alternative to approval by the Director-General, which is presently permissible; and
(e) amend the *Land and Environment Court Act* 1979 to provide that a Commissioner of the Land and Environment Court whose term of appointment has expired can complete or otherwise continue to deal with any matters relating to proceedings or conciliation conferences that have been heard or partly heard, or conducted or partly conducted, before the expiry of the Commissioner's term.

- **Consultation Drafts**

The NSW Government has released its response to the Wilcox Report into Lightning Ridge opal mining. The government has announced that it proposes to set rates for compensation for opal prospecting licences and mineral claims; to develop standard Mining Operations Plans for use by opal miners; introduce a system of notifying landholders about the grant of mining rights over their land; and impose limits on the time period during which particular land is available for opal mining. One issue considered in the report was dispute resolution by the Land and Environment Court following abolition of the Mining Warden in 2008; the response proposes the introduction of alternative dispute resolution procedures so disputes can be resolved without the need for a court hearing and to assist people without legal representation through the dispute resolution process. Submissions may be made by 3 February 2013:media release.

- **Miscellaneous**

The Government's response to the NSW Law Reform Commission's report on Bail is available through this link.

The NSW Parliamentary Library Services has released the following:

- Exploration and mining on private land in NSW: a brief legislative history [e-brief 17/2012]
- A history of mineral and petroleum ownership and royalties in NSW [issues backgrounder No 5]
- Mining in NSW [Statistical Indicators 7/12]
- NSW planning reforms: the Green Paper and other developments [summary; full paper]

The Division of Local Government released the following Circular - Model Asbestos Policy for NSW Councils [12-42; full policy].

- **Court Practice and Procedure**

As of 15 January 2013 the face-to-face Registrar's list (Tuesday-Friday) commences at the earlier time of 9:00am.

The Chief Judge has issued a Practice Note for Class 3 Aboriginal Land Claims. The Practice Note commenced on 10 December 2012.

The Chief Judge has issued a Practice Note for Class 5 Proceedings. The Practice Note commenced on 12 November 2012.

## Judgments

- **United Kingdom Court of Appeal**

***Coventry (t/a RDC Promotions) v Lawrence*** [2012] EWCA Civ 26 (Jackson LJ, Lewison and Mummery LJJ agreeing)

Facts: planning permission was granted in 1975 to construct a stadium on land located just outside the rural village of West Row. Once built, the stadium was used for speedway racing. In 1992 arrangements were made for the construction of a motorcross track on land to the rear of the stadium and planning permission was granted to use the land in this way. There were various owners and operators of these two premises after their establishment and the premises continued to be used for motor sports. In January 2006, Ms Lawrence and Mr Shields bought a house in West Row. In April 2006, Ms Lawrence and Mr Shields made complaints to Forest Heath District Council about the noise of motor sports. They claimed that they were unaware of the motor sports activity when they purchased the property. Abatement works were carried out at the premises which reduced but did not eliminate the noise generated by motor sports. Ms Lawrence and Mr Shields still suffered disturbance and continued to make complaints. Ultimately, negotiations having failed, they issued proceedings in the Queen's Bench Division for private nuisance against the various owners and operators of the premises. In March 2011, the trial judge gave judgment, holding that the noise generated by the motor sports at the stadium and the track constituted a nuisance. An order for damages was made and an injunction was also granted to January 2012 restricting the level of noise generated from the stadium and track. The defendants found to be liable appealed the decision.

Issue:

(1) in assessing whether the noise from the stadium and the track constituted a nuisance, whether the judge failed properly to take into account the planning permissions which had been granted. In particular, whether the judge failed to take into account the fact that the implementation of those planning permissions had changed the character of the locality.

Held: allowing the appeal and dismissing the claimant's claim:

(1) the planning system exists to protect the public interest, not to protect private interests. Grants of planning permission may result in the character of an area being changed, with consequential effects upon private rights: at [53];

(2) the authorities on the law of nuisance indicated that a planning authority by the grant of planning permission cannot authorise the commission of a nuisance but the implementation of a planning permission may alter the character of a locality: at [65];

(3) it is a question of fact in every case whether the grant of planning permission followed by steps to implement such permission do have the effect of changing the character of the locality. If the character of a locality is changed as a consequence of planning permission having been granted and implemented, then the question whether particular activities in that locality constitute a nuisance must be decided against the background of its changed character. One consequence of a change of character may be that otherwise offensive activities in that locality cease to constitute a nuisance: at [65];

(4) for the previous 13 years various forms of motor sports had been taking place at the stadium and the track on numerous occasions throughout the year. These noisy activities were an established feature of the locality: at [69] and [74]; and

(5) the judge's finding of private nuisance was therefore based upon an error of law and could not stand: at [76].

- **Federal Court of Australia**

***Secretary to the Department of Sustainability and Environment (Vic) v Minister for Sustainability, Environment, Water, Population and Communities (Cth)*** [2013] FCA 1 (Kenny J)

Facts: the Secretary to the Victorian Department of Sustainability and Environment ("the Secretary") sought judicial review of a decision of the Commonwealth Minister for Sustainability, Environment, Water, Population and Communities ("the Minister") regarding a proposed research trial investigating the effectiveness of strategic cattle grazing as a tool for bushfire risk management ("the proposed action"). Nine of the ten sites selected for the proposed action were located within the Australian Alps National Parks and Reserves ("the Alpine parks"), which appear on the National Heritage List. On 8 December 2011 the Secretary referred the proposed action to the Minister. On 31 January 2012 the Minister determined, pursuant to s 74B of the *Environment Protection and Biodiversity Conservation Act* 1999 ("the EPBC Act"), that the proposed action would have "clearly unacceptable impacts on the National Heritage Values" of the Alpine parks and that Div 1A of Pt 7 of the EPBC Act applied to the referral. Application of Div 1A of Pt 7 removed the referral from the ordinary assessment and approval processes in Ch 4.

Issues:

(1) whether the Minister made his decision on the basis of information that was not in the referral and thereby exceeded the power contained in s 74B(1)(a) of the EPBC Act;

(2) whether, by relying on the National Heritage values of the Alpine parks of "recreation", "aesthetic characteristics" and "social values", the Minister based his decision on matters not protected by Pt 3 of the EPBC Act and thereby exceeded the power contained in s 74B(1)(a) of the EPBC Act;

(3) whether the Minister breached obligations of natural justice in failing to give the Secretary an opportunity to comment on the material not in the referral to which the Minister had regard in making his decision; and

(4) whether the Minister failed to separately consider whether Div 1A of Pt 7 of the EPBC Act should apply to the referral, as required by s 74B(1)(b) of the EPBC Act.

Held: the application was dismissed:

(1) construing s 74B(1)(a) in context of the EPBC Act as a whole, the phrase "on the basis of the information in the referral" contained in that provision was not intended to limit the information the Minister could consider in formulating a decision. It was sufficient that the Minister treated the information in the referral as the foundation for his decision: at [56], [58] and [88];

(2) Pt 3 of the EPBC Act is concerned with protecting particular aspects of the environment, including "the National Heritage values of a National Heritage place", from the impacts of a proposed action, and s 15B limits this particular protection to actions whose prohibition is "appropriate and adapted" to give effect to Australia's obligations under Art 8 of the Biodiversity Convention. Although Art 8 of the Biodiversity Convention does not refer to National Heritage values of a recreational, aesthetic or social nature, in addition to these grounds the Minister principally and independently based his conclusion that the proposed action would have "clearly unacceptable impacts" on the National Heritage values of ecology and species diversity of the Alpine parks, and this established the necessary connection with Art 8. Put another way, the Minister's findings with respect to recreational, aesthetic and social values did not affect the outcome of his decision: at [160];

(3) after referring the proposed action to the Minister, the Secretary was not entitled to be heard before the Minister came to a decision under s 74B(1). This is because decisions made under s 74B(1) are preliminary or provisional in nature, and the procedures for notification in s 74C and reconsideration in s 74D of the EPBC Act enshrined Parliament's requirements as to the procedural fairness required to be afforded in such a case. It remained open to the Secretary to request a reconsideration in respect of the referral: at [91], [96] and [105]; and

(4) construing s 74B(1)(b) in its statutory context, the Minister was not required to undertake a two-step inquiry: first, as to the impacts of the proposed action; and second, as to whether Div 1A should apply. This is because, once the decision was made under s 74B(1)(b) that Div 1A applied, notice was

required to be given under s 74C(1) and, pursuant to s 74C(2)(b), the notice was required to state that the Minister considered that the action would have unacceptable impacts in terms of s 74B(1)(a). In other words, the Minister did not have discretion to make two distinct considerations: at [110]-[117].

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

***Walker Corporation Pty Ltd v Director-General, Department of Environment, Climate Change and Water*** [2012] NSWCCA 210 (McClellan CJ at CL, Hidden and Garling JJ)
(related decision: *Director-General, Department of Environment and Climate Change v Walker Corporation Pty Limited (No 4)* [2011] NSWLEC 119 Pepper J)

Facts: Walker Corporation Pty Ltd ("Walker") was convicted of an offence contrary to s 12 of the *Native Vegetation Act* 2003 ("the Act") which prohibits the clearing of native vegetation except in accordance with a development consent or property vegetation plan, and ordered to pay a fine of $200,000. At trial the respondent had alleged that clearing in the form of mulching trees and shrubs, either in situ or after pushing them over, had taken place over an area of 23ha; the respondent accepted that a number of trees were preserved within the areas cleared. Thirty species were specified in the summons; only seven species were identified in the evidence as having been cleared. The work had been carried out by Environmental Land Clearing Pty Ltd ("ELC"), and at trial employees of ELC acknowledged that ELC had cleared blackberries, mulched smaller standing trees and scrubby bush and cleared a riparian zone. The respondent had called evidence from two experts, based on photographs, satellite images and field data. There was no direct evidence of any of the seven species having been observed and identified within the cleared areas of the property at a time before the clearing and shredding of vegetation. Walker appealed both the conviction and sentence.

Issues:

(1) whether the charge was inadequately particularised in that it failed to specify the actual vegetation that was allegedly cleared, the quantum of vegetation making up the seven species that were identified, or the location of the species or individual plants, beyond an assertion that 23ha of land were cleared;

(2) whether the primary judge erred in holding that the prosecutor discharged its onus of proving that native vegetation was cleared on the land;

(3) whether the primary judge erred in finding that vegetation included, for the purposes of the definition of "native vegetation" in s 6 of the Act, both living and dead plant matter and in finding that the extended clearing of dead plant matter remained unquantified;

(4) whether the primary judge erred in holding that Walker caused ELC to carry out the clearing within the meaning of s 44 of the Act;

(5) whether the primary judge erred in finding that the clearing carried out by ELC was done in accordance with and directly as a result of Walker's instructions;

(6) whether the primary judge erred in finding that Walker was vicariously liable for the acts of ELC;

(7) whether the primary judge erred in holding that the Court was entitled to draw an inference as to the area of land cleared and reached erroneous conclusions about the environmental impact of the offence in circumstances where the quantum and location of the seven species of native vegetation cleared was unknown and not proved; and

(8) whether the primary judge imposed a penalty that was excessive in the circumstances.

Held: dismissing the appeal:

(1) a purposive interpretation of s 6(2) of the Act, which provides that vegetation is "indigenous" for the purposes of the definition of "native vegetation" "if it is of a species of vegetation, or if it comprises species of vegetation, that existed … before European settlement", required that the word "comprises" be construed as "includes". To construe the word as meaning "consists of" would frustrate the Act's stated objects of protecting native vegetation and preventing broad scale clearing that does not improve or maintain environmental outcomes. So to construe s 6(2) would require the prosecution to

painstakingly identify the precise quantum of indigenous vegetation within a large parcel of land. The practical result of Walker's interpretation would preclude many prosecutions even where the evidence suggested that large-scale clearing had incidentally destroyed native vegetation: at [33];

(2) an interpretation of s 6(2) that had regard to context and purpose left no room for ambiguity, and there was therefore no warrant for resorting to the rule that a penal statute ought to be strictly construed at [35];

(3) in any event, at the trial, Walker had no difficulty in understanding that it was charged with removing multiple plants of varying species that were indigenous, and it understood that it was alleged that the species were dispersed throughout 23ha of land which had been cleared by mechanical means although some individual trees remained: at [36];

(4) there was evidence of the presence of three of the seven species in the cleared areas within 2 to 6 weeks after clearing ceased, which was accepted by the primary judge and which was capable of sustaining a finding beyond reasonable doubt that at least those three species had been present and cleared from the land. Evidence obtained from a detailed examination of the areas within and outside the cleared area established the presence of the remaining four species within the cleared area; that evidence was accepted by the primary judge and she was entitled to so accept it: at [45];

(5) the primary judge had carefully considered the evidence of Walker's witnesses in relation to each of the seven species and having found it flawed in relevant aspects, addressed the particular issue having regard to the evidence of the respondent's witness. The primary judge had said that the problems with the evidence of Walker's witnesses left only the respondent's evidence which could in the absence of any demonstrated problems be accepted; she accepted it and in doing so expressed her satisfaction that the relevant fact was proved beyond reasonable doubt. That conclusion was plainly open and the primary judge did not err in reasoning to it: at [57];

(6) the conclusion that "vegetation", for the purposes of s 6 of the Act, includes dead plant matter was not correct; however, the evidence which the primary judge accepted was capable, as found, of proving that extant native vegetation had been cleared irrespective of whether she had erroneously accepted that dead vegetation had been illegally cleared: at [62], [66];

(7) there was no error in the primary judge's approach and finding that Walker had instructed ELC to clear the land in a manner that would lead by all physical necessity to the clearing of native vegetation: at [87];

(8) Walker had not demonstrated that the primary judge was not entitled to make the findings that Walker's instructions included instructions to remove vegetation that was native vegetation, and her rejection of the proposition that Walker relied on ELC's specialist expertise and experience, or that they were incorrect: at [88];

(9) section 6(2) permitted the primary judge to draw the inference that the entirety of the 23ha of land was "native vegetation" on the basis that the seven identified species were dispersed throughout the parcel of land, and in any event the primary judge's reasons showed that she had due regard to the dispersal of the seven species throughout the 23ha of land: at [94];

(10) although the penalty was modest in comparison to the maximum available penalty it was nevertheless high as compared with the fines typically imposed for the type of offence. However, the primary judge had not misjudged the seriousness of the offence or otherwise imposed an excessive sentence: at [96], [98]; and

(11) it was open to the primary judge to give significant weight to such factors as Walker's moral culpability and the need for general and specific deterrence in imposing the penalty that she did, and there was no error in her approach: at [100].

***Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council (Goomallee Claim)*** [2012] NSWCA 358 (Beazley, McColl, Basten and Macfarlan JJA, Sackville AJA)
(related decision: *NSW Aboriginal Land Council v Minister Administering the Crown Lands Act (Goomallee)* [2012] NSWLEC 1, Biscoe J)

Facts: in 2006 the respondent Land Council made a claim under the *Aboriginal Land Rights Act* 1983 ("the ALR Act") in respect of an area of Crown land reserved under the Crown Lands Act 1989 ("the CL Act") from sale for the purpose of "public recreation", being land surrounded by a rural property known as "Goomallee" near Armidale. At the time of the claim the land was subject to a grazing licence granted in 2003 by the appellant Minister to the owners of "Goomallee". In 2010 the Minister refused the claim on the basis that the land, being lawfully used or occupied, was not claimable Crown land under the Act. The Land Council appealed to the Land and Environment Court, which upheld its submission that the land having been reserved for the purpose of public recreation, the licence granted for the purpose of grazing did not give rise to lawful use or occupation and the land was, therefore, claimable Crown land. The Minister appealed.

Issue:

(1) whether if land were reserved from sale for the purposes of public recreation, the Minister had power to grant a grazing licence over the land to a private interest.

Held: dismissing the appeal:

(1) the CL Act conferred a broad range of powers on the Minister, the exercise of any one of which, with respect to particular land, might foreclose the exercise of others: at [20];

(2) a prospective identification of the availability of a power, taking into account the current status of the land at the time the power was to be exercised was preferable to asking, retrospectively after the exercise of both powers, whether they could be "reconciled" by a test of "compatibility": at [22];

(3) even though the scope of the reservation for "public recreation" involved ordinary English words, as did the purpose of the licence for "grazing", the meaning of which did not give rise to a question of law, the construction of the statutory instrument did. That question was not to be addressed by reference to the actual use of the land by the licensee, nor its actual use by members of the public, and evidence of such usage was irrelevant: at [25];

(4) the scope of the power to grant the licence did not depend on the use of the land, actual or potential, under the licence. Rather it depended on the terms of the restraint imposed by the reservation: at [26];

(5) even assuming that the Minister's approach was correct and a licence could be granted for any purpose which was not inconsistent nor incompatible with public recreation, the grazing licence did not satisfy that test: at [29];

(6) the conclusion of the primary judge that the issue of a grazing licence over the claimed land was not a valid exercise of the Minister's power under the CL Act in respect of the land was correct and involved no error of law: at [38]; and

(7) the use and occupation of the land for the purpose of grazing without a valid licence did not involve a lawful use and occupation of the land: at [39].

***Minister Administering the Crown Lands Act v La Perouse Local Aboriginal Land Council*** [2012] NSWCA 359 (Beazley, McColl, Basten and Macfarlan JJA, Sackville AJA)
(related decision: *La Perouse Local Aboriginal Land Council v Minister Administering the Crown Lands Act* [2012] NSWLEC 5, Sheahan J)

Facts: on 30 June 2009 the Malabar police station was closed to the public in preparation for the sale of the land on which it stood. Between that date and mid-September 2009, police used the station mainly for storage. On 27 July 2009 the respondent Land Council lodged a claim under the *Aboriginal Land Rights Act* 1983 ("the ALR Act"). A Ministerial briefing note dated 15 September 2009 referred to the claim, and stated the need to examine options for using/re-occupation of the premises. From mid September 2009

until early December 2009 the land was visited occasionally by police and used as a command centre for an operation in the area. The claim was refused on 8 December 2009. From early December 2009 until mid February 2010 periodic inspections by police officers ceased. On 17 February 2010 the respondent Land Council lodged a second claim. That claim was refused and the Land Council appealed to the Land and Environment Court, which upheld the claim and ordered the transfer of the land to the Land Council. The Minister appealed.

Issue:

(1) whether s 36(1)(b) of the ALR Act permitted a threshold inquiry as to whether the asserted use or occupation of the land as at the date of claim was more than "merely notional" in degree; and

(2) whether the primary judge had erred in considering the evidence including post-claim evidence of use.

Held: dismissing the appeal:

(1) the approach to the construction of s 36(1)(b) of the ALR Act adopted by the Court of Appeal in *Daruk Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (1993) 30 NSWLR 140, that the better reading of "occupied" was "actually occupied" in the sense of being occupied in fact and to more than a notional degree, did not involve anything other than a permissible and helpful exercise in statutory construction: at [47];

(2) it was open to the primary judge to reject the post-claim evidence as not demonstrating continuing use and occupation: at [53];

(3) transitory physical activities on land did not necessarily amount to use or occupation; there was an evaluative process to be undertaken in respect of the facts of each case; and it was a function of the trial court to undertake that evaluation: at [57]; and

(4) the Minister had not submitted that the conclusion reached, namely that the Minister had not established that the land was lawfully used or occupied, was not open on the materials before the Court. Once it was accepted that the trial judge had not erred in his understanding of s 36(1)(b), the Minister's submissions were reduced to a disagreement with the outcome of the assessment, and that was not an available ground of appeal: at [58].

***Valuer-General v New South Wales Golf Club*** [2012] NSWCA 355 (Hoeben JA, Preston CJ of LEC and Ward J)
(related decisions: *New South Wales Golf Club v Valuer-General New South Wales* [2012] NSWLEC 137; *New South Wales Golf Club v Valuer General New South Wales (No 2)* [2012] NSWLEC 186 Lloyd AJ)

Facts: the NSW Golf Course was located on 58.85 ha of land at Botany Bay. The golf course was on Crown land and was the subject of a lease granted under the *Crown Lands Act 1989* ("CL Act"). The New South Wales Golf Club Company Limited ("the Club") was the lessee of the land and the Crown in right of NSW was the lessor. As the lessee of Crown land for private purposes, the Club was liable to pay rates and land tax based on the land value of the land. The land value of land was defined in s 6A(1) of the *Valuation of Land Act* 1916 ("VL Act") to be the fee-simple of the land less the value of any improvements, other than land improvements. Where the land to be valued was Crown land subject to a lease, s 14I of the VL Act required that the land value be determined taking into account certain "restrictions on the disposition or manner of use that apply to the land by reason of its being the subject of the lease concerned." The Valuer-General valued the land, at the base date of 1 July 2009, at $6.01 million. The Club appealed to the Land and Environment Court against the Valuer-General's decision. On 19 June 2012, the primary judge upheld the Club's appeal and made a determination that the land value of the land was nil in place of the Valuer-General's determination. The primary judge found that cl 90 of the lease was a restriction under s 14I(1) of the VL Act. Clause 90 stated that the Minister could withdraw any part of the subject land without payment of compensation and that this could be done upon three months' notice. The Minister's power to withdraw land referred to s 136(1) of the CL Act and the power to do so without compensation was derived from the caveat in s 136(4) of the CL Act, which stated that compensation was payable for land withdrawn under s 136 subject to the conditions attaching to a lease. The primary judge found that cl 90 had a depreciating effect on the price that a hypothetical purchaser would be prepared to pay and that the land value for the land should be determined as nil. The Valuer-General appealed to the Court of Appeal.

Issue:

(1) whether the primary judge erred in his construction of s 14I of the VL Act, and in holding that cl 90 of the lease was "a restriction on the disposition" within the meaning of s 14I of the Act.

Held: upholding the appeal and remitting the matter back to the Land and Environment Court:

(1) the primary judge erred in his construction of s 14I of the VL Act and in holding that cl 90 of the lease was a restriction on disposition that applied to the land by reason of its being the subject of the lease concerned, within the meaning of s 14I of the VL Act: at [11], [48];

(2) the "fee-simple of the land" in s 6A(1) of the VL Act meant the fee simple as the highest estate unencumbered and subject to no conditions. However special provision was made for valuing Crown lease restricted land under s 136(1) of the VL Act so that restrictions of the kind described in s 14I(1), which would not otherwise be taken into account in valuing the hypothetical fee simple of the land, would be taken into account: at [34], [37];

(3) the first component of cl 90, referring to the statutory power of the Minister under s 136(1) of the CL Act to withdraw from the lease land required for a public purpose, was not a restriction within the meaning of s 14I because the power of the Minister to withdraw the whole or part of the land comprised in the lease derived from s 136(1) of the CL Act, and not cl 90 of the lease; an exercise by the Minister of the power under s 136(1) of the CL Act to withdraw land comprised in the lease did not involve a "disposition" of the land; and the power of the Minister under s 136 of the CL Act to withdraw land comprised in the lease was not a "restriction" on the disposition: at [41]-[45]; and

(4) the second component of cl 90, providing that no compensation was payable in respect of a withdrawal of land by the Minister pursuant to s 136(1) of the CL Act, did impose a restriction that applied by reason of the lease. However, this restriction on compensation was not a restriction "on the disposition". Even if the withdrawal of land comprised in the lease could be characterised as being a disposition, cl 90 imposed no restriction on such withdrawal; it was the compensation for the withdrawal that was restricted: at [46]-[47].

***Teoh v Hunters Hill Council (No 6)*** [2012] NSWCA 260 (Allsop P, Beazley and Meagher JJA) (related decisions: *Teoh v Hunters Hill Council* [2008] NSWLEC 263 Sheahan J, *Teoh v Hunters Hill Council (No 3)* [2009] NSWLEC 121, 167 LGERA 432 Sheahan J, *Teoh v Hunters Hill Council (No 4)* [2011] NSWCA 324 Allsop P, Beazley JA, Handley AJA, *Teoh v Hunters Hill Council (No 5)* [2012] NSWCA 75 Allsop P, Beazley JA, Handley AJA )

Facts: by notice of motion filed on 26 April 2012 the applicant sought an order pursuant to the Uniform Civil Procedure Rules 2005 ("UCPR") r 36.16 that leave be granted to reopen proceedings in which the applicant had sought a review of the dismissal of her summons for leave to appeal from the decision of Sheahan J in *Teoh v Hunters Hill Council (No 3)* [2009] NSWLEC 121. In *Teoh v Hunters Hill Council (No 4)* [2011] NSWCA 324 the Court of Appeal had ordered:

"(2) The Registrar is directed, should the applicant file a further motion seeking, in substance, leave to appeal from the judgment of Sheahan J of 31 July 2009 [2009] NSWLEC 121, to promptly vacate the return date, notify the parties, and refer the papers to a Judge nominated by the President to determine, in Chambers, whether the Court should fix a new return date and notify the parties, or whether Mrs Teoh should be invited to show cause in writing why the Court should not, in Chambers, summarily dismiss the proceedings as vexatious and an abuse of process."

On 8 May 2012, Beazley JA made a direction that the applicant be invited to show cause why the Court should not, in chambers, dismiss the proceedings as vexatious and an abuse of process. The Registrar informed the applicant of the direction, and directed her to show cause by 5pm on 31 May 2012 by filing any further written submissions or affidavit evidence in support of her notice of motion. The applicant filed a number of documents including written submissions and affidavits after 31 May 2012, and wrote three letters to the Court.

Issues:

(1) whether the Court should grant leave for the applicant to rely upon the material filed after 31 May 2012; and

(2) whether the application should be dismissed.

Held: dismissing the notice of motion, and directing that should the applicant file any further notice of motion pursuant to UCPR r 36.16, the applicant at the same time file a document comprising no more than five pages showing cause why the Court should not, in Chambers, summarily dismiss the notice of motion as vexatious and an abuse of process:

(1) the Court was entitled to control its own processes. The Court was not obliged to read submissions of a party that were filed after the expiry of the time directed for the filing of written submissions, or that were additional to, or repetitious of submissions already filed, if it considered that those submissions themselves were an abuse of the processes of the Court: at [12];

(2) the Court should only grant leave for the applicant to rely upon her first affidavit and submission, being those filed on 13 June 2012. The later submissions were filed outside the time directed and were in large part repetitious: at [13];

(3) the notice of motion sought to challenge either the findings of Sheahan J in [2008] NSWLEC 263 or in [2009] NSWLEC 121. If it was the former, the applicant had never appealed from that judgment. If it was the latter, the applicant had not raised any new matter that had not been adverted to in her earlier application. The material on which the applicant sought to rely was all material that ought to have been adduced in the original proceedings: at [15]; and

(4) the present application was an abuse of the Court's processes. It raised issues and arguments which had been considered and dealt with in one or more of the four earlier judgments of the Court. The Court was satisfied that the material provided did not identify any fresh argument or change of circumstances that would justify reopening the initial decision refusing leave to appeal from Sheahan J in [2009] NSWLEC 121: at [30].

**Note:** in *Teoh v Hunters Hill Council (No 7)* [2012] NSWCA 356 (Allsop P, Beazley and Meagher JJA) the Court of Appeal dismissed a further notice of motion filed on 12 October 2012 seeking reopening of previous applications and the setting aside of the decision of Sheahan J in [2009] NSWLEC 121, relying on s 46(4) of the *Supreme Court Act* 1970. At [9] the Court stated:

> "[9] If any further application is made it will be necessary to consider whether the Court should consider of its own motion an order under the *Vexatious Proceedings Act 2008* (NSW), s 8."

***Bodalla Aboriginal Housing Company Ltd v Eurobodalla Shire Council*** [2012] NSWCA 408 (Tobias AJA, McColl and Hoeben JJA agreeing)
(related decision: *Bodalla Aboriginal Housing Company Limited v Eurobodalla Shire Council* [2011] NSWLEC 146; (2011) 184 LGERA 315 Preston CJ)

Facts: on 26 August 2011, the Chief Judge of the Land and Environment Court dismissed a summons in which the appellant sought a declaration that certain lands it owned were exempt from council rates pursuant to s 556(1)(h) of the *Local Government Act* 1993 ("LG Act") upon the ground that it was a public benevolent institution or a public charity. Section 556(1)(h) exempts land from all rates, other than water supply special rates and sewerage special rates, where that land belongs to and is used or occupied by a public benevolent institution or public charity for the purposes of the institution or charity. The appellant owned 28 properties in the Eurobodalla local government area, 27 of which were used or occupied as residences for persons of Aboriginal descent. The appellant had paid rates for the properties up to the rating year commencing 1 January 2004 but did not pay rates since then. The appellant sought declaratory relief that the properties were exempt from council rates under s 556(1)(h). The Land and Environment Court rejected the appellant's claim that it was a public benevolent institution and its claim that it was a public charity. The only issue in dispute between the parties on the appeal was whether the appellant was

properly to be characterised as a "public charity" within the meaning of s 556(1)(h). The appellant accepted prima facie that its objects as set out in its Memorandum of Association comprised both charitable and non-charitable objects, with the consequence that it was not a public charity for the purposes of s 556(1)(h). The appellant sought to avoid this consequence by arguing first, that looked at as a whole, the impugned non-charitable objects were in fact ancillary, incidental, dependent or concomitant to the charitable objects and therefore did not have a disqualifying effect. Amongst other arguments, the appellants contended that its actual activities were relevant in characterising the impugned objectives as incidental or ancillary. The primary judge did not accept the submissions made in support of this claim. Secondly, the appellant claimed that s 23 of the *Charitable Trusts Act* 1993 applied, which provided, "(1) A trust is not invalid merely because some non-charitable and invalid purpose as well as some charitable purpose is or could be taken to be included in any of the purposes to or for which an application of the trust property or of any part of it is directed or allowed by the trust"; and, "(2) Any such trust is to be construed and given effect to in the same manner in all respects as if no application of the trust property or of any part of it to or for any such non-charitable and invalid purpose had been or could be taken to have been so directed or allowed." The appellant argued that it held the properties in trust for the charitable purpose of providing housing for persons of Aboriginal descent and that s 23 of the Charitable Trusts Act applied to excise the non-charitable and invalid objects from the valid charitable objects with the result that the appellant was a "public charity" in that its objects were, by virtue of s 23(2), confined to those that were charitable. The primary judge did not accept that s 23 applied. In the appeal, the appellant also sought leave to file fresh evidence to demonstrate that it held the properties on trust for the benefit of the beneficiaries.

Issues:

(1) whether the appellant was a public charity; and

(2) whether the appellant should be granted leave to adduce new evidence.

Held: dismissing the appeal:

(1) the primary judge was correct in holding that the impugned objects were independent and not ancillary or incidental to any other object in the Memorandum and his reasoning should be adopted. The primary judge's finding that it was not appropriate to have regard to the activities of an organisation to determine its charitable status where the constituting document sets out in detail the organisation's purposes or objects was followed: at [46]-[51];

(2) the Charitable Trusts Act and in particular, s 23, had no application to the issue for determination under s 556(1)(h) of the LG Act. The authorities on s 23 make it patently clear that it is applicable only for the purpose of preserving the validity of testamentary or inter-vivos gifts for purposes which are both charitable and non-charitable: at [43];

(3) the relevant issue required to be determined for the purpose of s 556(1)(h) was one of characterisation of the particular body to whom the land belonged: at [44];

(4) if it can be established that a particular body holds land which would otherwise be rateable upon trust for charitable purposes, then that body may be categorised as a "public charity" for the purposes of s 556(1)(h). It does not follow that s 23 of the Charitable Trusts Act has any application to any such trust in the present context or otherwise, for if the trust is for both charitable and non-charitable purposes (the latter not being ancillary or incidental), then the body will not qualify for rate exemption: at [45];

(5) the primary judge did not hold that because the appellant was a company limited by guarantee it could not operate as a trust or otherwise be a trustee. The question of trust or no trust became a live issue at trial so that the appellant had the opportunity to tender the evidence which it sought to tender as fresh evidence: at [32] and [36]; and

(6) no error on the part of the primary judge was therefore demonstrated: at [52].

***Brock v Roads and Maritime Services (formerly Roads and traffic Authority of NSW)*** [2012] NSWCA 404 (Beazley and Meagher JJA, Tobias AJA)

(related decisions: *Brock v Roads and Traffic Authority of New South Wales* [2010] NSWLEC 244; *Brock v Roads and Traffic Authority of New South Wales* [2012] NSWLEC 114, Sheahan J)

Facts: on 31 October 2008, the respondent compulsorily acquired a total of 6.85944ha of the appellant's land at East Maitland. The area of the appellant's land pre-acquisition was 73.6858ha ('the parent land"); it comprised a number of lots and was irregular in shape, and the eastern boundary had a frontage to the Hunter River. The public purpose for which the acquired land was compulsorily taken was for the construction of the Third Hunter River Crossing. The construction of the new stretch of road left, as part of the parent land, a strip of land between the Hunter River and the acquired land. The appellant objected to the amount of compensation offered under the *Land Acquisition (Just Terms Compensation) Act* 1991 ("the JT Act"), being $640,000 for market value, and $74,828 for disturbance. The primary judge assessed the appellant's disturbance claim in the sum of $31,380, being amounts for legal fees, valuation fees, replacing bees and hives, and financial advice, which were not contested by the respondent, together with the sum of $600 for signage. The primary judge adopted the "before and after" valuation method and assessed market value at $437,087, and disturbance in the sum of $31,380. The primary judge rejected disturbance claims for maintenance of the Eastern Creek fence; maintenance/replacement of a stock watering system installed by the respondent; erection of additional cattle yards; and modification of internal fencing to reorient the farming operation on a north-south basis, assessing those claims as part of the "after" valuation of the residue land. The primary judge ordered repayment of the difference between the advance payment made by the respondent pursuant to s 48(1) of the JT Act in the sum of $668,007 and the amount of compensation ultimately awarded; held that each party should pay their own costs, and ordered that the appellant pay the respondent's costs of the Notices of Motion filed by the appellant seeking an order for costs and filed by the respondent seeking an order under s 48(1) of the JT Act. The appellant appealed against the rejection of the disturbance claims, and against the order that each party pay their own costs.

Issues:

(1) whether the primary judge had erred on a question of law in rejecting the disturbance claims; and

(2) whether the primary judge had erred in ordering that each party pay their own costs.

Held: allowing the appeal in part, setting aside the order made in relation to the claim for compensation for loss attributable to disturbance with respect to the stock watering system, ordering that the respondent pay the appellant's costs of the proceedings and her Notice of Motion seeking an order for costs, directing the parties to consult for the purpose of attempting to compromise the claim with respect to the stock watering system on the basis that if no agreement can be reached the Court will order that the issue be remitted for further consideration and determination, and ordering the respondent to pay 75 percent of the costs of the appeal:

(1) the primary judge's finding that the claim for eastern fence maintenance should be included as a factor to be adjusted in the "after" scenario contained the implicit finding of fact that the construction of the eastern fence and its ongoing maintenance would result in a decrease in the value of the residue land by reason of the construction of the proposed road. The taking of the acquired land did not, of itself, require the erection of the fence; the public purpose for which it was taken, being the new road with its increased traffic, did. No error of law had been demonstrated in the approach to that claim: at [41];

(2) it was open to the primary judge to find, as he did, that the internal fencing modification was not a direct and natural consequence of the acquisition; that was a finding of fact that could not be impeached on appeal: at [49];

(3) the primary judge's reasons on the claim for costs of maintenance and replacement of the stock watering system, being a maximum amount of $30,828.46, contained a number of legal errors, and the Court was bound to remit that issue to the Land and Environment Court. It was appropriate that before the issue was remitted the parties should have an opportunity to see whether they could reach agreement on an appropriate amount: at [57]-[60];

(4) no error of law had been demonstrated with respect to the rejection of the claim for new cattle yards: at [75];

(5) neither of the two factors considered by the primary judge as relevant to the issue of costs, being the appellant's decision not to accept the statutory offer or the offers of compromise made close to the date of trial, or his observation that she may have had unrealistic hopes or expectations for her litigation, could, as a matter of principle, carry determinative weight in the application of the discretion with respect to costs. Neither factor was capable of displacing the principle that a claimant for compensation with respect to compulsory acquisition should usually be entitled to recover the costs of proceedings where he or she has acted reasonably in pursuing the proceedings and ahs not conducted them in a manner which gives rise to unnecessary delay or expense: at [94];

(6) there was no finding by the primary judge that the appellant had acted in any way unreasonably in conducting the litigation, and no finding that she had pursued a vexatious, dishonest to grossly exaggerated claim. The order that the appellant should bear her own costs of the proceedings was inconsistent with the application of the correct principles, and the appellant was entitled to an order that the respondent pay the costs of the proceedings: at [97]-[99];

(7) the respondent should pay the appellant's costs of the Notice of Motion that the respondent pay her costs of the proceedings: at [100]; and

(8) both parties had been partially successful with respect to the issues argued on the appeal. On the other hand, the issue of costs clearly involved a much larger sum of money and the appellant was successful in her challenge to the order made by the primary judge. The appellant was entitled to 75 percent of her costs of the appeal: at [101]-[102].

***MM Constructions (Aust) Pty Ltd v Port Stephens Council*** [2012] NSWCA 417 (Allsop P, Basten JA, and Bergin CJ in Eq)

(related decision: *MM Constructions (Aust) Pty Ltd v Port Stephens Council (No 6)* [2011] NSWSC 1613 Johnson J)

Facts: the plaintiffs, a company engaged in land development, and its principal, Mr Milan Maruncic, brought proceedings alleging negligence and misfeasance in public office in relation to the conduct of the council and one of its officers, Ms Gale, in the handling of a development application and subsequent modification applications under s 96 of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act") concerning a residential flat development at Church Street Nelson Bay. The primary judge dismissed the claim in negligence on the ground that the respondent owed the appellants no duty of care to act with reasonable care so as to avoid the infliction of financial or economic loss to the appellants, and dismissed the claim in misfeasance in public office. The appellants appealed, asserting that the primary judge had failed to engage with the evidence relevant to the issues for disposition.

Issues:

(1) whether the primary judge had erred in finding that the respondent owed the appellants no duty of care;

(2) whether the primary judge had engaged satisfactorily with the evidence concerning the misfeasance case in circumstances where delivery of judgment took place 12 months after the conclusion of addresses and 15 months after conclusion of the evidence; and

(3) whether the primary judge had erred in his acceptance of Ms Gale as a frank, honest and reliable witness and his not finding that she had acted with an intention of harming the appellants.

Held: dismissing the appeal with costs:

(1) the power exercised by the council in a decision under a provision such as s 96 of the EPA Act was not unconstrained; as public power it was subject both to appeal and to judicial review. The power to be exercised involved the honest and bona fide attendance to questions, many of which involved the evaluation of interests and values either irrelevant to, or even inimical to, the financial and economic interests of an applicant: at [86]-[87];

(2) it was to be accepted that the negligent exercise of the power would or could cause economic detriment to the appellants. Delay in, or rejection of, a development approval could readily be seen to

have economic consequences for a developer. There was, however, no relevant reliance, no assumption of responsibility and no vulnerability. Further, the posited duty did not conform to the statutory framework: at [93];

(3) in addition to the lack of reliance and vulnerability, the duty of the council to consider the interests of others, including nearby landholders and the environment and local amenity, as well as relevant considerations from ss 5 and 79C of the EPA Act, made it inappropriate to impose a duty of care of the kind posited. That was reinforced by the circumstance that administrative law and appellate review were available to persons in the position of the appellants. The asserted duty of care was not to be imposed: at [100]-[101];

(4) it could be accepted that the judgment took a significant period of time to produce; it was also plain that the documentary evidence put before the primary judge was voluminous. There was a significant body of other material directed to negligence and breach of duty. A significant task, carried out fully by the primary judge, was the chronological structure of what the facts showed from the documentation and surrounding material. Set against that, in relation to misfeasance in public office, the primary judge was faced with believing or not believing the one person accused of intentionally acting to harm the appellants. Nothing from the record or the surrounding circumstances indicated that the finding of credit concerning Ms Gale was inherently weak. The context of that finding was a meticulous examination of the primary material of a documentary character; there had been no demonstrated failure of process; and the finding of credit was adequately explained: at [159]; and

(5) to approach the reasons given by the primary judge as presumptively infected by error, because of the delay in delivering them, was to reverse the proper approach. Rather, to the extent that the appellants were able to point to aspects of the reasons which were unsatisfactory or suggestive of error, it might have been relevant to take account of the delay in determining whether there had in fact been a miscarriage of justice. Were the approach suggested by the appellants correct, it would tend to be destructive, rather than protective, of the proper administration of justice. As a practical matter, some delay was inevitable; and indeed a degree of delay sufficient to allow a careful reconsideration of the documentary and oral evidence in the light of final submissions might be desirable if not essential; and thereafter it was necessary for a judge to balance the pressures of additional cases. If delay were to lead to retrial in a significant number of cases, the effect would be self perpetuating and those to suffer most would be litigants themselves not merely in the cases requiring retrial but in all cases: at [228].

- ## Land and Environment Court of NSW

### Judicial Review

***V'landys v Land and Environment Court of NSW*** [2012] NSWLEC 218 (Biscoe J)
(related decision: *Dive v Hunters Hill Council* [2012] NSWLEC 1045 Brown ASC)

Facts: the Dives, the third respondents, lodged a development application with Hunters Hill Council, the second respondent, for the renovation of their dwelling. Pursuant to the provisions of the Hunters Hill Development Control Plan No 20 – Notification Policy ("the DCP"), the applicant, a neighbour of the Dives, was notified of the application, and made objections and submissions primarily concerning the loss of views from his property. The council refused consent, and the Dives filed an appeal with the Court, the first respondent.

At the hearing of the appeal, the Dives' solicitor tendered four conditions proposed by the Dives together with some plans. The council's solicitor objected to the plans on the grounds that they were an amendment of the development application and it was a denial of procedural fairness to require him to deal with them at that late stage. The Dives' solicitor responded that he was not seeking to amend the application and the plans were merely an aide-memoire of the Dives' proposed conditions. The Commissioner ruled that there was no amendment and admitted the Dives' conditions with the attached plans. The Commissioner adjourned the hearing to give the council's solicitor an opportunity to explain the plans to his client. The applicant was present at the Commissioner's hearing, and during the adjournment the council's solicitor and a council officer explained the Dive's conditions and plans to him, as well as the council's proposed

conditions. When the hearing resumed, the council called the applicant who gave evidence on the Dives' conditions and plans, saying that he did not think they addressed his concerns about view sharing. The Commissioner granted consent on conditions, including the four conditions proposed by the Dives and one of the council's proposed conditions ("the contentious conditions"). The contentious conditions changed the form of the roof over the new balcony, with a consequent repositioning of some stairs, and the form of the roof over the new second storey.

The applicant commenced proceedings in the Supreme Court, which were transferred to this Court, alleging jurisdictional error and error of law on the face of the record, and seeking prerogative relief in the nature of certiorari to quash the Commissioner's decision. The applicant relied on the same two grounds to establish jurisdictional error and error of law on the face of the record. First, the DCP ground: that the Commissioner had significantly amended the development application by adopting the contentious conditions; in doing so, he had not complied with cl 10.1 of the DCP, which provided that "Proposals for significant amendments to development applications will be notified to any person notified of the original application"; and, therefore, the applicant had been denied procedural fairness in circumstances where, in breach of s 79C(1)(a)(iii) of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act"), the Commissioner failed to consider the requirements under the DCP to afford the applicant procedural fairness. Alternatively, the *Mison* ground: that the contentious conditions did not amend the application but instead significantly altered the development for which the application was made so that the purported grant of consent was not to the development application which was lodged, in contravention of the principle expressed by Priestley JA in *Mison v Randwick Municipal Council* (1991) 23 NSWLR 734 at 737.

Issues:

(1) whether the adoption of the contentious conditions was a "significant" amendment of the development application within the meaning of cl 10.1 of the DCP or a "significant" alteration of the development within the meaning of the *Mison* principle;

(2) whether cl 10.1 of the DCP applied to the hearing before the Commissioner; and

(3) whether there was jurisdictional error or error of law on the face of the record.

Held: summons dismissed with costs:

(1) there was a marked similarity between the expressions "significant amendments" (cl 10.1) and "significantly altering" (*Mison*), though the context was different in that cl 10.1 was concerned with an amendment to an application whereas the *Mison* principle was concerned with the effect of a condition on a development: at [93]. In his judgment, the Commissioner described the changes brought about by the conditions as "minor", and did not say that he would not have granted consent absent the changes. A condition which makes the difference between consent and no consent is not necessarily determinative of whether it significantly amends an application or significantly alters a development: at [97]. Considering the contentious conditions in light of the facts and decisions in *Mison* and *Kindimindi Investments Pty Ltd v Lane Cove Council* [2006] NSWCA 23 and treating the development as a whole, the changes brought about by the contentious conditions did not significantly alter the development so as to result in a significantly different development. These conditions only modified details of the development, which was permissible: at [99] – [105]. Similarly, even if the Commissioner amended the development application (which was not accepted), that amendment was not significant such as to attract cl 10.1 of the DCP: at [106];

(2) there were three reasons why cl 10.1 of the DCP was irrelevant to the hearing before the Commissioner. First, it only addressed changes made to a development by way of proposed amendments to the development application by the applicant for consent. Leave to amend the application was neither sought nor granted at the Commissioner's hearing, the Dives' solicitor had said that he was not seeking to amend, and the Commissioner ruled that there was no amendment. The Commissioner granted consent subject to conditions that changed the proposed development: at [109]. Secondly, even if what happened constituted an amendment of the application, the Court was not bound to take cl 10.1 into consideration under s 79C(1)(a)(iii) of the EPA Act. In an appeal under s 97 of the EPA Act, the Court's only obligation in relation to a development control plan is, in determining the application, to consider the development control plan if it is of relevance to the development the subject of the application. This obligation is concerned with substantive matters in a development

control plan because they are relevant to the determination. It does not extend to procedural provisions of the development control plan such as for notification of proposed amendments. Such procedural provisions are antecedent to the function exercised in determining an application. Moreover, cl 10.1 was intended only to bind the council, not the Court on appeal: at [110]. Thirdly, the applicant could not invoke cl 10.1 because neither the parties nor he did so at the hearing or before the Commissioner delivered judgment. The Court is only bound to address the principal contested issues joined between the parties, a losing party cannot raise a new argument on appeal that it failed to put at the hearing, and the parties are bound by the way they conducted the case. In a s 97 appeal, the council is a party and represents the interests of its constituents including objectors. Where it is said that the duty to accord procedural fairness equates to adjourning a hearing to give notification in accordance with a development control plan that the Court is bound to consider, it is incumbent upon a party or an objector to make that adjournment application. An objector's complaint of a Commissioner's failure to adjourn so as to provide such notification cannot normally be regarded as a denial of procedural fairness if no application for such an adjournment was made, especially where the objector was present at the hearing: at [111] – [112]; and

(3) therefore, there was neither jurisdictional error nor an error of law which appeared on the face of the record: at [113] – [114]. If the two grounds had been made out, both would have constituted jurisdictional error. However, only the *Mison* ground, and not the DCP ground, would have constituted error of law on the face of the record because it was not apparent from the face of the record whether or not the hearing was adjourned and notice was given under the DCP: at [38].

***Cessnock City Council v Laila Investments Pty Ltd*** [2012] NSWLEC 206 (Pain J)

Facts: Cessnock City Council ("the council") sought a declaration that the occupation certificate issued under Pt 4A of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act") in relation to a development consent was invalid and of no effect. The consent was for the development of six residential units on land at Branxton, NSW. The respondents did not oppose the making of the declaration. The principal certifying authority and accredited certifier who issued the certificate filed a submitting appearance. The council also sought a consequential order that Laila Investments Pty Ltd and its director be restrained from relying on the occupation certificate until a final occupation certificate was granted for those buildings.

Issues:

(1) whether there was a basis to declare the occupation certificate invalid; and

(2) whether there was utility in making the consequential order.

Held: declaration made:

(1) several essential conditions in the development consent were not complied with before the occupation certificate was issued: at [5]-[6]. Section 109H(2) specifies a mandatory requirement that an occupation certificate must not be issued unless any preconditions specified in the development consent are complied with. As that did not occur in this case, the issuing of the occupation certificate by the certifier was a breach of the EPA Act and there was a basis to declare the certificate invalid. It was appropriate for the Court to exercise its discretion to remedy the breach, under s 124, given the substantial nature of the work required by the development consent conditions: at [9]; and

(2) given that the occupation certificate was declared invalid and could not be relied on, there was no utility in making the consequential order: at [10].

***Blacktown City Council v Haddad*** [2012] NSWLEC 224 (Pepper J)

Facts: Blacktown City Council ("the council") sought a declaration that a complying development certificate issued 12 October 2011 ("the CDC") by the first respondent, Mr Haddad, for the construction of a two storey building in Toongabbie, was void and of no effect. The council also sought an order that the second and third respondents, the registered proprietors of the premises, be restrained from carrying out any

development works pursuant to the CDC. The CDC was issued pursuant to the State Environmental Planning Policy (Affordable Rental Housing) 2009 ("the SEPP"). No construction had commenced.

The CDC was for the construction of a two storey "permanent group home" comprising 29 bedrooms, each with an ensuite bathroom, a bench and sink area with provision for "tea making", washing/drying laundry facilities, television and access to Foxtel, and (for 22 of the 29 bedrooms) access to a private balcony or outdoor area. Communal spaces included a laundry, a kitchen with two cooktops and capacity to seat 12 persons, three small areas marked "lobby", and a terrace.

Issues:

(1) whether the CDC was validly issued, that is, whether the proposed development was properly characterised as a "permanent group home" under cl 42 of the SEPP, specifically;

   (a) whether the development was for a "dwelling";

   (b) whether the dwelling was to be occupied by a "single household";

   (c) whether the dwelling was to provide "permanent" household accommodation; and

   (d) whether the dwelling was to provide permanent household accommodation for people "with a disability or people who are socially disadvantaged".

Held: the CDC was not validly issued:

(1) the term "permanent group home" is not defined in the SEPP, but is defined in the Standard Instrument (Local Environmental Plans) Order 2006 ("the Standard Instrument") as a "dwelling" that is "occupied by persons as a single household" and that is "used to provide permanent household accommodation for people with a disability or people who are socially disadvantaged". The proposed development was not properly characterised as a "permanent group home" because:

   (a) the proposed development did not constitute a "dwelling" as defined in the Standard Instrument ("a room or suite of rooms occupied or used or so constructed or adapted as to be capable of being occupied or used as a separate domicile") because the large number of proposed bedrooms, particularly when viewed in the context of other features of the development, was not suggestive of a living arrangement consistent with any modern "family" group in the ordinary way of life: at [41];

   (b) even if the proposed development could be characterised as a "dwelling", its tenants would not, when taken as a whole, occupy it "as a single household" because, by reason of the absence of any communal living area, the provision of individual laundry and tea making facilities, including a sink and electrical outlet where food preparation could occur, and minimum tenancies of three months, the tenants would not live as a cohesive unit, but would instead live as discreet and individual households: at [53]-[54];

   (c) the proposed three month minimum residential tenancy agreement was not sufficiently "permanent" to satisfy the definition of "permanent group home": at [58]-[60]; and

   (d) the term "socially disadvantaged" includes people who are financially disadvantaged and, given the mechanism contained in the proposed Plan of Management of ensuring that only very low, low and moderate income households would be accepted as tenants, the development would be used to provide accommodation to people who were "socially disadvantaged": at [74]-[75].

***Pitty v Bega Valley Shire Council*** [2012] NSWLEC 242 (Sheahan J)

Facts: this was a challenge by the Pittys to an approval given by council for the development of a McDonald's restaurant, on the western corner of the Princes Highway (Carp St) and Swan St, Bega. The Pittys were among many objectors who responded to council's notification of the development. They were particularly concerned with flooding, noise, visual impact, and overshadowing effects, and the placement of a high-density business in a low-density residential zone.

The nominated lots of land were covered by two separate zones, the 2(a) Residential Low Density Zone, and the 3(a) General Business Zone, under the Bega Local Environment Plan 2002 ("the LEP"). It was

common ground that under the LEP the development constituted a "refreshment room", and that it was prohibited in the 2(a) zone, but permissible, with consent, in the 3(a) zone, subject to cl 8(3) which provided that consent "must not be granted to development proposed within a zone unless the consent authority has taken into consideration such of the objectives of the zone as are relevant to the proposal and is satisfied that the development is consistent with those objectives".

Clause 66 of the LEP provided for development that would otherwise be prohibited, if it were permissible in a zone within 50m of the boundary of that zone, and the consent authority was satisfied that the proposed development satisfied the objectives of the zone in which it was to be carried out. The proposal was, therefore, permissible in the 3(a) zone, subject to compliance with cl 8(3), and, in the 2(a) zone, only if it were entitled to the benefit of cl 66.

The application came before the council on 26 July, 27 September and 18 October 2011. The council officers initially recommended refusal, but the proposal was amended, and draft conditions were prepared by the council officers, and, on 18 October 2011, the council resolved 5 votes to 4 to grant consent.

Throughout the council's meetings and materials, there was reference to the relevant clauses, and the concepts of "consistency" and "satisfaction", as well as other terms, such as "compliance", "in keeping with", "achieves", and "compatible".

Issues:

(1) whether cl 66 of the LEP required the council to be satisfied that the development satisfied *all* objectives of the 2(a) zone; and

(2) whether the council appropriately engaged with cl 66 and cl 8 when making its decision to grant development consent.

Held: the applicants' summons was dismissed, with the question of costs reserved:

(1) clause 66 opened the door for the grant of consent to development, which, without the benefit of it, would be prohibited, and it was, therefore, both logical and justified that that clause impose a stricter test than cl 8. The deliberate use of the word "relevant" in cl 8, compared with its absence in cl 66, could not be disregarded. The consent authority was, therefore, required to reach a state of satisfaction as to all of the objectives of the 2(a) zone: at [130]-[131];

(2) where the materials before the consent authority did not contain a reference to the zone objective which required consideration, an inference could be drawn that it was not considered when the decision to approve (or deny) consent was made. Further, there was a requirement to make more "than a mere formalistic reference" to the relevant considerations: at [132];

(3) the presumption of regularity applied to council decision making, and although there was some inconsistency in the way that cl 66 was framed in the council materials, cl 66 was alive in the minds of the councillors, and there was ample evidence before the Court to support the finding that council considered and engaged with that clause, as required by its terms: at [132]-[137];

(4) the council was aware of, analysed, and engaged with, cl 8(3), and balanced the zone 2(a) objectives against the zone 3(a) objectives, forming an opinion, prior to granting consent, as to whether the development was consistent with both sets of zone objectives: at [139]; and

(5) the applicant had not established any basis for the Court to find that the council's decision to grant consent should be held to be invalid: at [140].

***Lisarowaid Inc v Gosford City Council*** [2012] NSWLEC 232 (Craig J)

Facts: the applicant sought a declaration that a development consent for an 800 seat place of public worship was invalid. The report prepared by council staff had recommended approval of the application. The council adopted a resolution supporting the proposal and delegating to its General Manager the authority to determine the application subject to the conditions contained in the report. The General Manager thereafter purported to grant development consent for the place of public worship. The respondents consented to the making of a declaration that the development consent was invalid.

Issues:

(1) whether there had been a valid exercise of power to determine the development application;

(2) whether the Court should exercise its discretion to make orders for conditional validity of development consent under Div 3 Pt 3 of the *Land and Environment Court Act* 1979 ("the Court Act").

Held: development consent declared invalid:

(1) the development consent granted by the council was invalid: at [11]. The error which founded the declaration was the manner in which the council purported to delegate its function to the General Manager: at [13]. The delegation required the General Manager to grant consent subject to conditions he was to determine: at [6]-[7]. That was not only an improper fetter upon the function under s 80 of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act") but meant that neither the council nor General Manager considered the development application as required by s 79C of the EPA Act: at [13]-[14]; and

(2) the council's failure to consider the application in accordance with s 79C was so fundamental that it was inappropriate for the Court to exercise its discretion under Div 3 of Pt 3 of the Court Act: at [13]. Two further relevant factors spoke against the exercise of that discretion. Firstly, no party sought the exercise of the discretion. That was important in the context of the provisions of s 56 of the *Civil Procedure Act* 2005. Secondly, and related to the first basis, was that each party sought to bring the litigation to an end without incurring any further costs. If directions had been made in accordance with Div 3 of Pt 3, the litigation could well have been extended and this would have incurred further costs: at [14].

***Kennedy v Stockland Developments Pty Ltd (No 7)*** [2012] NSWLEC 257 (Pepper J)

(related decisions: *Kennedy v Stockland Developments Pty Ltd* [2012] NSWLEC 168 Lloyd AJ, *Kennedy v Stockland Developments Pty Ltd (No 6)* [2012] NSWLEC 34 Pepper J, *Kennedy v Stockland Developments Pty Ltd (No 5)* [2012] NSWLEC 21 Pepper J, *Kennedy v Stockland Developments Pty Ltd (No 4)* [2012] NSWLEC 3 Sheahan J, *Kennedy v Stockland Developments Pty Ltd (No 3)* [2011] NSWLEC 249 Pepper J, *Kennedy v Stockland Developments Pty Ltd (No 2)* [2011] NSWLEC 186 Sheahan J and *Kennedy v Stockland Developments Pty Ltd* [2011] NSWLEC 185 Biscoe J)

Facts: the respondent, Stockland Developments Pty Ltd ("Stockland"), has the benefit of an approved modified concept plan and major project approval pursuant to the now repealed Pt 3A of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act") for the construction of a 181 lot subdivision at Sandon Point, with ancillary works and a boundary readjustment, including the construction of a road running east to west along the southern boundary of the site. Condition A3 of the major project approval required the project to be undertaken in accordance with an Environmental Assessment Report prepared in 2007 ("the EAR") and all subsequently approved drawings. Condition A4 required Stockland to comply with all "relevant" conditions of the approved concept plan.

Mr Kennedy claimed that Stockland had breached the major project approval by undertaking unauthorised works comprising the clearing, excavation and construction of a shared road, which involved the removal of an informal pedestrian walkway known as "Wilkies Walk" and the building of a nearby temporary pedestrian pathway. The road partially traversed land owned by Stockland and land owned by a third party, the Anglican Retirement Villages ("ARV"). Wilkies Walk was located near the border between the Stockland and ARV lands.

Issues:

(1) whether Stockland had breached condition A3 of the major project approval by undertaking works on Wilkies Walk and the ARV land;

(2) whether Stockland had breached cl B1 of Sch 2 of the approved concept plan, and therefore condition A4 of the major project approval, by carrying out works on Wilkies Walk and the ARV land without having first conducted an anthropological investigation into the potential Aboriginal cultural heritage values of a "Women's Area" on those sites; and

(3) whether, by reason of those breaches, Stockland had breached s 76A of the EPA Act insofar as it carried out development without consent.

Held: the summons was dismissed:

(1) the impugned works were carried out in conformity with condition A3 because they were undertaken in accordance with approved drawing SK09. The evidence did not demonstrate that the building works went beyond the parameters of drawing SK09 or the EAR: at [60]-[62]. Specifically: there were no restrictions on the earthworks to be undertaken on the ARV land, provided they were undertaken for the purpose of constructing the road; the works had not intruded into or impacted on the nearby Turpentine forest; and, as required by condition A1 of the major project approval, once the road was constructed Stockland was required to apply for a boundary readjustment to ensure the road was located entirely on Stockland land: at [64]-[66];

(2) Stockland was not obliged to satisfy cl B1 of Sch 2 of the approved concept plan because it was not a "relevant" condition picked up by condition A4 of the major project approval. This was because, as evinced from the text of cl B1 and the concept plan when construed as a whole, cl B1 applied only to ARV as "the proponent", and not to Stockland: at [70], [73]-[75] and [80]. In any event, ethnographical studies had been conducted into the existence of a "Women's Area" at Sandon Point and the land where the road and temporary path were to be built, squarely addressing the matter raised by cl B1: at [81]; and

(3) section 76A, contained in Pt 4 of the EPA Act, did not apply because the development was approved under Pt 3A. Section 75R of Pt 3A expressly provided that Pts 4 and 5 of the EPA Act did not apply in respect of major projects approved under Pt 3A: at [83].

***Gilbank v Bloore (No 2)*** [2012] NSWLEC 273 (Pain J)

(related decision: *Gilbank v Bloore* [2012] NSWLEC 172 Craig J)

Facts: in judicial review proceedings the applicants challenged the grant of development consent by Orange City Council ("the council") to the first and second respondents for alterations to their house and the addition of a two-car garage in the front yard. The applicants were the neighbours on either side of the property. The property was within a heritage conservation area and was set back 30m from the street. The single garage on the property was served by a straight driveway located along the eastern boundary in the front yard. The first applicant's house "Mena", on the eastern boundary, was heritage listed and set back 8m from the street. The development consent approved the construction of a new detached double garage in the front garden forward of the existing house, construction of a new sealed apron between the proposed new driveway and the entry to the new double garage, and a two-storey addition on the eastern side of the existing house which included the existing garage at the front of the house. There was a vacant space at the eastern boundary of the property between the house and Mena ("eastern side passage").

Issues:

(1) whether there was a failure to consider, and a failure to discharge the duty to inquire into, the suitability of the site as required by s 79C(1)(c) of the *Environmental Planning and Assessment Act* 1979 in several respects, in particular failing to consider the adequacy of the eastern side passage as a new driveway and the suitability of the rear yard for a new garage, and failing to consider impact on views from Mena; and

(2) whether the decision to grant development consent was unreasonable in the *Wednesbury* sense in several respects in particular for the failure to discharge the duty to inquire into the adequacy of the eastern side passage, or alternatively, whether the decision was illogical or irrational for the same reasons; and

(3) whether there was a failure to properly consider a development control plan ("DCP").

Held: proceedings dismissed:

(1) the council was required to assess the development application before it. There was no duty imposed on a council to consider alternative proposals. The development application did not seek consent to

use the eastern side passage or rear yard for any purpose: at [51], [56]. The expert evidence of a traffic consultant concerning the application of the relevant Australian standard to use of the eastern side passage was irrelevant. Further, the council inspected the eastern side passage and the statement of environmental effects addressed why it and the rear yard were not preferred for the proposed development: at [53]. There was no failure to consider views from Mena: at [61]. The other allegations of failure to consider mandatory relevant considerations also failed: at [54]-[55], [57]-[60]. No duty to inquire into those matters arose: at [62]-[67];

(2) as the applicant could not establish the first ground, the matters which overlapped the first ground, including the failure to consider the adequacy of the eastern side passage could not be relied on in the second ground: at [78]. The applicant did not establish the limited circumstances in which a duty to inquire arises in the context of the *Wednesbury* unreasonableness ground: at [82]-[85]. The other allegations also failed, some being merit considerations alone: at [79]-[81]. For the same reasons, the applicant could not establish that the decision was illogical or irrational: at [86]; an

(3) provided that the DCP is the focal point in a council's consideration of a development application, it need not be strictly complied with. The consideration of all relevant elements of the planning outcome on street setbacks in an assessment report confirmed that the relevant sections of the DCP were a focal point of the Council's consideration: at [99]. The planning outcome on heritage concerned the development of a heritage item, not a neighbouring property as in this case. In any event the council considered the possible impact of the proposed development on the heritage significance of Mena: at [101]-[102].

## Compulsory Acquisition

***McGeary v Richmond Valley Council*** [2012] NSWLEC 204 (Biscoe J)

Facts: the council compulsorily acquired from the applicants a small parcel of land on a ridge, on which stood a concrete water tank. A quarry was operated on the retained land. The parties agreed on $25,000 for the market value of the acquired land, and on $8,657 for disturbance loss. The applicants' remaining claims were for the decrease in the value of the retained land and for quantity surveyor's fees for a report containing a replacement cost estimate in relation to the water tank. The applicants had wrongly believed that they owned the water tank and had claimed its replacement cost as part of their claim for the market value of the acquired land. When a deed, signed by the applicants, was discovered showing that the council owned the water tank, the applicants abandoned that component of the claim. However, the applicants claimed the costs of the report as an item of disturbance loss. In relation to the decrease in the value of the retained land, the parties disputed the best and likely location of a potential house on the retained land. The applicants submitted that the house would be situated just above the water tank because of the good, expansive views from that elevated location, but that the views would be substantially impaired by the water tank. The council submitted that the house would be located out of sight of the water tank either nearer the quarry or in a cleared meadow, and that in either of those locations there would be no diminution in the value of the retained land. The council also submitted that there was no decrease in value because the retained land was generally affected by a number of blights. The parties' valuers agreed that the value of the retained land immediately following, but without considering the consequences of, the compulsory acquisition was $478,400. The applicants' valuer assessed the consequential diminution in value at 5 per cent of the value of the retained land.

Issues:

(1) what amount of compensation should be ordered for the decrease in the value of the retained land; and

(2) whether the applicants' claim for $4,950 for the costs of the quantity surveyor's report as an item of disturbance loss should be accepted.

Held: compensation determined in the sum of $57,657:

(1) the best and likely location of a potential house on the retained land was at the location submitted by the applicants: despite the steepness of that location, it was still accessible by vehicle, and houses had been built in recent years in the locality in a street of similar steepness; a quarry manager for whom the

house was built would not be expected to double as a security guard such that the house would be located close to the quarry; the far better visual amenity of the elevated area close to the water tank would contribute so much to lifestyle as to make it the likely location of the house; and the blight of a nearby telecommunications tower would not deter construction in that area: at [15] – [18]. The blights generally affecting the retained land were insufficient to deter the construction of a house at the applicants' proposed location: at [19]. Therefore, the applicants' percentage figure reasonably represents the decrease in value, which should be rounded up to $24,000: at [13], [21]; and

(2) the applicants' disturbance loss claim for the costs of the quantity surveyor's report should be refused. From the outset, they should have been aware of the deed which they signed. As they did not own the water tank, a claim for its value was not allowable and there was no need or basis to obtain the report relating to its replacement cost: at [24].

***El Boustani v Minister Administering the Environmental Planning and Assessment Act 1979*** [2012] NSWLEC 266 (Pepper J)

Facts: Mr and Mrs El Boustani grew tomatoes and other vegetables in igloos on 1.95ha of land in Leppington ("the land"). Camden Council had issued a development consent for use of the igloos on 16 June 2007, which lapsed on 16 June 2012. On 23 July 2010, 1.35ha of the land was acquired by the respondent ("the Minister") pursuant to the *Land Acquisition (Just Terms Compensation) Act* 1991 ("the Act") for the purposes of the South West Rail Link project, leaving a residue of 0.61ha, which included the family home and two smaller igloos. The El Boustanis rejected an offer for the acquisition of the entirety of their land, electing instead to remain living in their house on the residue land.

On 19 August 2010 the Valuer-General determined compensation for the acquired land in an amount of $1,242,000 (including $10,000 for disturbance), 90% of which had already been paid to the El Boustanis. The acquired land comprised the rear portion of the land upon which a number of igloos and a dam were situated. Prior to the resumption date, the 2010 crop of tomatoes had been planted for harvest in late December 2010 or early January 2011. However, the El Boustanis were were required to vacate the acquired land by 30 November 2010, thereby preventing them from harvesting the 2010 crop.

Issues:

(1) what was the market value of the acquired land;

(2) the extent to which reliance could be placed on evidence of comparable sales presented by the expert valuers;

(3) whether the El Boustanis were entitled to any compensation for injurious affectation;

(4) whether the El Boustanis were entitled to the relocation costs of establishing their business elsewhere, and in particular whether:

  (a) s 59(c) or (f) of the Act applied;

  (b) the El Boustanis would have been permitted to continue the use after 16 June 2012; and

  (c) s 61 of the Act applied to exclude any entitlement to relocation costs; and

(5) the quantum of compensation to which the El Boustanis were entitled for lost profits.

Held: the Minister was ordered to pay the El Boustanis $1,436,059 in compensation:

(1) expert valuation evidence of comparable sales supported a dollar value per square metre rate of $70 per $m^2$: at [59]. Based on this figure, taking into account the value of improvements in both the 'before' and 'after' scenario, and adjusting for injurious affectation in the 'after' scenario, the market value of the property was calculated as $1,194,556: at [71];

(2) limited reliance could be placed on evidence of comparable sales provided by the El Boustanis' expert valuer because he failed to clearly articulate a logical and transparent reasoning process justifying the assumptions he made in deriving his expression of value as a unitary rate: at [53];

(3) the residue land would be significantly affected by noise emanating from the railway line and approval of any further residential development would be unlikely. However, the significance of these issues

would be diminished if development of the Leppington Town Centre proceeded and the land was rezoned to commercial use. A discount of 20% for injurious affectation was made for the 'after' scenario: at [66] and [69];

(4) recovery of relocation costs by the El Boustanis was precluded by operation of s 61 of the Act:

(a) s 59(c) applied in relation to costs reasonably incurred in re-establishing their horticultural business elsewhere because the business could not be established on the residue land: at [84]-[87]. Section 59(f) also applied because these re-establishment costs would be reasonably incurred as a direct and natural consequence of the acquisition: at [92]-[93];

(b) notwithstanding that the land was due to be rezoned in 2012 and subsequently developed as a town centre, it was likely that an extension of at least five years would have been granted: at [112]; however

(c) s 61 applied to preclude the El Boustanis' entitlement to relocation costs because the market value of the acquired land was assessed on the basis that the land had the potential to be used for a different purpose, namely, urban development, and relocation costs were effectively already taken into account because these costs would have been incurred in order to realise the urban development of the land: at [126] and [136]-[137]; and

(5) the El Boustanis were entitled to compensation for three years of lost profits, allowing one year to find a new property and construct facilities and two years for the first tomato crop to be produced. The sale price of $1.61 per kg of tomatoes was adopted, with lost profits calculated as $237,310: at [150].

## Criminal

***EPA v Shannongrove Pty Ltd (No 2)*** [2012] NSWLEC 202 (Craig J)

(related decision: *EPA v Shannongrove Pty Ltd* [2010] NSWLEC 162 Craig J)

Facts: the defendant was convicted of two offences against s 143(1) of the *Protection of the Environment Operations Act* 1997 ("the POEO Act") and was now before the Court for sentencing. The offences consisted of transporting liquid waste from a waste processing facility to a dairy farm where it was injected into the soil of a farm paddock. The defendant submitted that the injection of the liquid waste was beneficial to the land and that the environmental impact of the offence was therefore irrelevant to sentencing. The prosecutor contended otherwise.

Issues:

(1) whether the environmental impact of disposing of the waste was relevant to sentencing for a transportation offence under s 143(1) of the POEO Act; and

(2) consideration of sentencing principles:

(a) the objective seriousness of the offence;

(b) subjective factors; and

(c) appropriate sentence to be imposed.

Held: the defendant was fined $35,000 plus costs and a publication order was made:

(1) the environmental impact of injecting the transported waste was relevant to sentencing of an offence under s 143(1) for two reasons. Firstly, s 143(3C) provided a defence to the charge as brought. This meant that although deposition was not an element of the offence as charged under s 143(1), the provisions of s 143(3C) indicated that the deposit of waste at the site was a relevant consideration: at [6]. Secondly, because s 241(1)(a) explicitly requires consideration of the extent of environmental harm caused, evidence directed to the consequence of depositing the waste was clearly relevant: at [7]-[8]; and

(2) (a) the objective seriousness of the offences was low: at [80]. At all times during the charge periods the defendant was required to be licensed for the transportation and deposit of waste. While the prosecutor was prepared to provide a licence to the defendant, that licence would not have allowed waste to be deposited in the volume or manner undertaken by the defendant: at [20]-[25]. The offence was in the low range of environmental harm as the waste had short-term environmental impacts in the form of elevated soil salinity: at [50]-[52]. It was determined that: practical measures to mitigate the harm were available but not taken; the environmental harm was reasonably foreseeable; and, the defendant had control over the causes giving rise to the offences: at [54]-[63]. While the Court accepted that the defendant's directors believed a licence was unnecessary, they should have made enquiries in the circumstances: at [69]-[78];

(b) it was an aggravating factor that the offence was undertaken for reward: at [78]-[79]; mitigating factors included: no prior convictions; the good character of the defendant's directors and otherwise responsible business conduct; subsequent application for a licence; expression of remorse; and assistance to the prosecutor: at [81]-[87]. Given the considerable period of time over which the offences occurred, there was a need for specific deterrence, however, this was only a minor consideration as the likelihood of re-offending was remote: at [88]-[91]; and

(c) the appropriate penalty was determined as $30,000 for the first charge period and $20,000 for the second: at [94]-[98]. This accounted for the fact that the maximum statutory penalty applicable to the second charge period had significantly increased and that most of the waste was transported during the first charge period. Applying the totality principle, the appropriate aggregate penalty was $35,000, consisting of $20,000 for the first charge period, and $15,000 for the second: at [99]-[102]. This took into account the defendant's liability for the prosecutor's costs of $118,224.76 and the making of a publication order pursuant to s 250(1)(a) of the POEO Act.

***EPA v Terrace Earthmoving Pty Ltd & Page*** [2012] NSWLEC 216 (Craig J)

Facts: Terrace Earthmoving Pty Ltd ("Terrace") was charged with committing two offences against s 143 of the *Protection of the Environment Operations Act* 1997 ("the POEO Act"). Geoffrey Page was the sole director of Terrace. He was charged pursuant to s 169 of the POEO Act with offences identical to those brought against Terrace. Although the charges were founded upon a continuous course of conduct, two charges against each defendant were brought by reason of amendment to ss 143 and 169 during the charge period.

The conduct of the defendants said to be in breach of s 143 was the transportation of selected demolition materials, including bricks, tiles and concrete, to a rural property in order to construct an internal access road at the request of the landowner. The prosecutor submitted that, in both charge periods, the deposition of that material onto the land was an element of the offence under s 143; that the material transported was "waste" under the POEO Act; and, that the material was "industrial waste" due to asbestos contamination and was thereby an activity that required a licence under Sch 1 to the POEO Act. The defendants pleaded not guilty to the charges, submitting that the material was not "waste" under the POEO Act and that the prosecutor had not proved beyond reasonable doubt that asbestos found on the property was transported there by the defendants.

Issues:

(1) whether the deposition of the alleged waste was an element of the waste transportation offence as charged under s 143(1) of the POEO Act;

(2) whether the material transported was "waste" under s 143 of the POEO Act; and

(3) whether the prosecutor had proved beyond reasonable doubt that the presence of asbestos on the land was transported there by the defendants.

Held: the offences were not proved beyond reasonable doubt. Entry of formal verdicts of not guilty was deferred to allow prosecutor to submit a question of law to the Court of Criminal Appeal pursuant to s 5AE(1) of the *Criminal Appeal Act* 1912:

(1) applying the ordinary meaning of "transport" to a charge under s 143(1) of the POEO Act, the Court found that the deposition of waste was not an element of the offence: at [158]. The Court found that the transportation of material from one place to another is necessarily anterior to the deposition or use of material at the place to which it is transported: at [162]. In making this determination the Court contrasted the provisions of s 143(1), which proscribe the transportation of waste, with other sections of the Act that went to the unlawful disposal of waste and the unlawful use of land as a waste facility for waste: at [159]. This process of interpretation demonstrated that s 143(1) is focused upon transportation of waste and that a distinction should be drawn between the transportation and the deposition of waste: at [160]-[161];

(2) after considering the definition of "waste" applicable during each charge period and the factors to be considered under those definitions, it was determined that, in the circumstances, the material transported was not "waste": at [167]. As "waste" is defined inclusively under the POEO Act, its ordinary meaning is not precluded: at [175]-[177]. Rather, the process of interpretation should adopt a commonsense approach that considers a number of factors specific to the material being considered in the particular case: at [178]-[180]; and

(3) the prosecutor did not prove beyond reasonable doubt that the material transported by the defendant contained asbestos: at [202]. Given that the evidence on which the prosecutor sought to rely in support of the allegation was circumstantial, it was necessary that the prosecutor exclude all other rational hypotheses in order to prove this fact to the requisite standard: at [189]-[191]. The Court determined that this onus was not discharged and that there were a number of other rational hypotheses to explain the presence of the asbestos material in the vicinity of the road: at [192]-[203]

***Md Abdul Halim Miah v Canterbury City Council*** [2012] NSWLEC 193 (Pain J)

Facts: Mr Miah appealed under s 31(1) of the *Crimes (Appeal and Review) Act* 2001 against the severity of the sentenced imposed by the Burwood Local Court. Mr Miah undertook work on the replacement of an outbuilding/granny flat on his land at Wiley Park, NSW. After pleading guilty to an offence under s 125 of the *Environment Planning and Assessment Act* 1979 ("the EPA Act") of carrying out development without consent contrary to s 76A of the EPA Act, Mr Miah was fined $2,000 and ordered to pay Canterbury City Council's ("the council's") legal costs of $3,000. He then obtained development consent and a construction certificate for the work and proceeded with building.

Held: appeal dismissed:

(1) the size of the partially built detached outbuilding/granny flat was large in the context of the block of land being over 40sqm. The objective gravity of the offence was at the low end of the possible range of seriousness: at [9]; and

(2) the magistrate took into account Mr Miah's limited financial means in imposing the penalty and legal costs. The penalty was very low given the need for general deterrence to discourage such illegal building work: at [9], [12]. The Court had more information about Mr Miah's financial affairs than was before the magistrate: at [14]. The costs incurred by Mr Miah for regularising unauthorised work by applying for a building certificate and a development consent for the balance of the work not then undertaken was not a mitigating consideration: at [11]. Mr Miah was able to pay the fine imposed: at [14]. As the council's legal costs were properly incurred they were not reduced: at [15].

***Environment Protection Authority v Ravensworth Operations Pty Limited*** [2012] NSWLEC 222 (Pain J)

Facts: Ravensworth Operations Pty Limited ("the defendant") pleaded guilty to polluting waters contrary to s 120 of the *Protection of the Environment Operations Act* 1997 ("the POEO Act") by causing sediment laden waters to flow through a pipe installed through sediment control structures along a gully and into Bowmans Creek. The defendant was expanding the open cut mining area at the Narama mine and stripped off 30cm of topsoil of a 45ha area. A ground disturbance permit and an erosion and sediment control plan were developed to carry this out safely but were not followed by a contractor. When it rained significantly on 17 March 2011, instead of the stormwater being diverted into a dam, it flowed into Bowmans Creek. After noticing the discharge the defendant repaired the sediment control structures and took samples. It

estimated that the volume of sediment laden water discharged was approximately 1.64ML. The following day it took more samples and reported the incident to the Environment Protection Authority ("EPA"). The EPA's officers attended the site on 19 March 2011. The defendant prepared an incident cause analysis method report on 23 March 2011 which found that a number of factors contributed to the incident.

Issue:

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

Held: finding that the appropriate penalty was $50,000, and deferring final orders to allow the parties to explore a suitable project for the making of an environmental services order in lieu of a penalty:

(1) in determining that the offence was of low to moderate objective seriousness, the Court took into account factors required under POEO Act s 241(1) such as the environmental harm caused by the offence was low. The cumulative impact was relevant to the actual harm caused and the potential for harm where a single event contributes to an existing sediment load: at [33]. The harm arising from the pollution incident was foreseeable: at [37]. The defendant accepted its personnel could have taken practical steps to prevent the actions resulting in the incident: at [35]. It acted quickly and effectively after the incident to identify the scope of the incident: at [36]. The defendant had control over the events leading up to the offence: at [38]. The circumstances were accidental, thereby reducing the objective gravity of the offence: at [41];

(2) some of the mitigating factors considered were that the defendant pleaded guilty at the earliest opportunity; expressed remorse; cooperated with law enforcement authorities; it had no prior convictions; and had a good corporate character (at [59]-[64]); and

(3) the appropriate penalty was $50,000. Final orders were not made to allow the parties to explore a suitable project for the making of an environmental services order under POEO Act s 250(1)(e) in lieu of a penalty: at [72], [76]. A publication order under s 250(1)(a) would be made: at [75]. The defendant agreed to pay the prosecutor's costs and investigation costs: at [73].

***Director-General, Department of Planning & Infrastructure v Integra Coal Operations Pty Ltd*** [2012] NSWLEC 255 (Craig J)

Facts: the defendant, Integra Coal Operations Pty Ltd, pleaded guilty to an offence under s 125(1) of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act"). The offence involved carrying out an open cut coal project that was in breach of a condition attached to the project approval under s 75D of Pt 3A (now repealed) of the EPA Act. The condition limited the height for out-of-pit waste rock emplacement to 27m above existing ground level at the mine site. It was breached when the rock emplacement was found to reach a height of up to 37m above existing ground level at the mine site. Prior to committing the breach, the defendant had recognised that the maximum height was going to be exceeded but sought only to amend its Mine Operations Plan with approval so to do under the *Mining Act* 1992. The defendant failed to appreciate the need to address the height limit imposed by the project approval under the EPA Act.

Issue:

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

Held: defendant fined $84,000 plus costs:

(1) the objective seriousness of the offence was in the low to medium range: at [36]. Factors taken into account included the fact that the offence was not deliberate and the fact that the originally approved height of the out-of-pit rock emplacement had since been increased by modification granted in accordance with the EPA Act. A further factor relevant to objective seriousness was the need to preserve the integrity of the system of development control by enforcing adherence to the terms upon which consents and approvals are granted under the EPA Act: at [31]-[35];

(2) the subjective circumstances of the defendant weighed significantly in its favour: at [42]. The defendant had no prior convictions; made an early plea of guilty; cooperated with the prosecutor; engaged with the local community; and had implemented a number of measures to prevent future

breaches: at [38]-[42]. The presence of corporate representatives of the defendant and the defendant's parent company in Court throughout the hearing was also taken into account: at [41]. Although the defendant had been issued with three penalty infringement notices for breach of conditions of the project approval in the past 12 months, these matters did not weigh heavily in determining the appropriate sentence: at [37]; and

(3) the defendant was ordered to pay a fine of $84,000, one half of which was to be paid to the prosecutor pursuant to s 122(1) of the *Fines Act* 1996. The defendant was ordered to pay prosecutor's costs of $38,000.

***Ku-ring-gai Council v Steve Nolan Constructions Pty Ltd*** [2012] NSWLEC 258 (Pain J)

Facts: Ku-ring-gai Council ("the council") appealed against the dismissal by a magistrate of two charges of pollute waters in breach of s 120 of the *Protection of the Environment Operations Act* 1997 ("the POEO Act") ("charges 866 and 180") and one charge of carrying out development not in accordance with a development consent in breach of s 76A and s 125 of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act") ("charge 875"). The council also appealed against the sentence imposed for a charge of carrying out development not in accordance with consent ("charge 426"), which the magistrate dismissed under s 10(1)(a) of the *Crimes (Sentencing Procedure) Act* 1999 ("CSP Act"). The offences occurred in December 2010 and January 2011. The respondent building company was working on a development site in Dumaresq Street, Gordon. As a prosecutor, the council's right to appeal under s 42 of the *Crimes (Appeal and Review) Act* 2001 was limited to grounds involving questions of law alone.

Issues:

(1) whether the magistrate misconstrued the definition of water pollution;

(2) whether the magistrate misconstrued a development consent condition;

(3) whether there was a denial of procedural fairness in the magistrate's refusal to allow the council to identify additional evidence it sought to rely on before ruling that this would not be admitted; and

(4) whether the Court should impose a different sentence for the charge proved, of carrying out development not in accordance with development consent.

Held: upholding the appeal in relation to the water pollution charges 180 and 866 and remitting those charges to the Local Court for further determination; dismissing the appeal against dismissal of the development consent charge 875; and dismissing the appeal against the sentence imposed for charge 426:

(1) in relation to charges 866 and 180, the magistrate misconstrued the definition of water pollution in the POEO Act by not referring to and not applying to the facts, that part of the definition relating to deemed pollution: at [11]. The magistrate's error vitiated her decision as the evidence before her did have the potential to prove deemed water pollution: at [12];

(2) in relation to charge 875, the magistrate addressed the wording of the consent condition in the context of the evidence before her. The council did not identify a question of law alone: at [21];

(3) a ground based on procedural fairness is commonly analysed by considering the circumstances. The magistrate's refusal to allow evidence to be identified by the prosecutor did not occur in a factual vacuum so that this ground failed as it did not involve a question of law alone: at [32]; and

(4) the magistrate's failure to conduct a sentencing hearing including hearing from the council before dismissing the charge under s 10 of the CSP Act, resulted in a denial of natural justice amounting to a question of law alone. The appeal was therefore maintainable: at [40]. The offence was trivial and the circumstances suggested that a s 10(1)(a) dismissal was warranted: at [64]-[73].

***Warringah Council v Bonanno*** [2012] NSWLEC 265 (Sheahan J)

Facts: this matter concerned the sentencing of the defendant, Joseph Bonanno, following entry of his guilty plea to a charge by Warringah Council under s 125(1) of the *Environmental Planning and Assessment Act*

1979 (“the EPA Act”), which prescribes as the maximum penalty a fine of $1.1M. The charge was that the defendant cut down and/or removed trees and other vegetation from an area agreed to be 123m2, without the appropriate consent, from a Crown Reserve managed by the council, on the North Narrabeen beachfront, between the sea and the rear of his then residential property. The key species cleared by the defendant were *Acacia longifolia* (known as Sydney Golden Wattle) and *Banksia integrifolia* (known as Coastal Banksia), both of which are primary and typical components of a foliage community classified as Coastal Heath and Spinifex Grassland. The affected vegetation was cut back, with a chainsaw, to a height estimated at 100mm. The estimated cost of repairing the damage caused by the clearing varied from approximately $3,000 to $5,000. At the time of the alleged offence, the defendant was under financial stress resulting from his business turnover, and his failure to sell another residence before buying the subject property. He was anxious to maximise the quality of the presentation of the subject property, which was then up for a somewhat forced sale. At all times the defendant admitted his responsibility for the clearing, and he immediately commenced his attempts to commit to the council to be responsible for the reparation of the site. The council elected to continue with the prosecution.

In September 2012, the defendant unsuccessfully proffered to the council a cheque in favour of a quoting contractor for $5,016. The offer to be responsible for the cost of remediation was renewed by counsel for the defendant at the sentencing hearing. The defendant also accepted that he would be ordered to pay the prosecutor’s costs, but disputed its estimate of $28,800.

The defendant was the principal of a business of 20 employees, which was described as an "internationally recognised and respected market leader in concert and event video production". He was married with two small daughters, and travelled overseas regularly, assisted by his entitlement to an APEC card, which would not be available if he were convicted of a criminal offence.

Issues:

(1) whether the defendant should be convicted of the offence charged, or whether he should be dealt with under s 10 or 11 of the *Crimes (Sentencing Procedure) Act* 1999; and

(2) what penalty the Court should impose upon the defendant.

Held: Joseph Bonanno was found guilty and was convicted of the offence charged in the summons. He was fined $37,500, and ordered to pay the prosecutor’s costs and appropriate investigation expenses, as agreed or assessed. At [56] the Court concluded that:

(1) the offence was “objectively serious”, with some “aggravating” features, and that a conviction, fine and costs order were called for. There was no justification for an order under either s 10 or s 11 of the *Crimes (Sentencing Procedure) Act* 1999;

(2) the offers the defendant made to the prosecutor indicated that he had the means to pay the fine and the costs;

(3) the level of harm was foreseeable by the defendant, even if it was not intentional or premeditated. He had control of the operation constituting the offence, and ignored practical measures at his disposal to avoid it. The environmental harm occasioned was substantial, and was likely never to be fully remediated;

(4) the defendant was motivated by his need, and desire, to maximise the sale price he achieved on his property adjacent to the clearing site;

(5) there was evidence of financial stress, but no evidence of any resulting financial gain; and

(6) the defendant was a family/business-man of very good character, with no previous convictions. His frank admissions, willingness to remediate and to fund other initiatives, and the observations of his referees, in addition to the plea, and his cooperation with the prosecutor, satisfied the Court of his contrition and remorse, and that he would not offend again.

The Court considered the appropriate level of fine to be $50,000, but due to the defendant’s very early guilty plea, allowed a 25% discount, resulting in a fine of $37,500.

***Chief Executive, Office of the Environment and Heritage v Rummery*** [2012] NSWLEC 271 (Pepper J)

Facts: Mr Rummery pleaded guilty to an offence against s 12(1) of the *Native Vegetation Act* 2003 ("the Act") for clearing 248ha of native vegetation on his rural property known as "Yarragool" without development consent or a Property Vegetation Plan ("PVP"). Mr Rummery conducted the clearing for approximately three days per week between 13 August 2008 and 17 August 2010. He cleared vegetation along fencelines, tracks and dams, with an additional 30m along some fences and tracks to provide mustering routes for the movement of livestock between paddocks. The predominant species cleared comprised native trees, and also included some native groundcover, mid-storey shrub and possibly an endangered ecological community ("the EEC").

Issues:

(1) whether, and the extent to which, any of the exemptions contained in s 11(1) of the Act applied, specifically those permitting clearing for the routine agricultural management activity ("RAMA") of:

  (a) constructing, operating and maintaining rural infrastructure ("the rural infrastructure RAMA"); or

  (b) removing or reducing an imminent risk of serious personal injury ("the imminent risk RAMA");

(2) what was the area subject to unlawful clearing;

(3) the extent of environment harm caused by the unlawful clearing;

(4) whether the offence was committed negligently or recklessly;

(5) whether the offence was committed for financial gain;

(6) whether the utilitarian value of the guilty plea was reduced because Mr Rummery contested a number of issues regarding the applicability of statutory exemptions; and

(7) whether Mr Rummery's financial circumstances acted to mitigate the penalty imposed.

Held: Mr Rummery was fined $80,040 and ordered to pay the prosecutor's costs:

(1) the rural infrastructure RAMA applied, permitting clearing of 47ha of vegetation around fences, tracks and dams: at [46];

(2) the imminent risk RAMA did not apply because, although mustering is an inherently dangerous activity, it does not of itself involve an "imminent risk" as that term is properly construed, having regard to the scope, context and purpose of the provision and the Act as a whole. The imminent risk RAMA permits clearing where native vegetation creates an immediate danger, and not where an indeterminate danger is created by mustering activities. The vegetation cleared did not pose an immediate danger to persons of serious injury: at [55]-[61];

(3) taking into account the area cleared lawfully pursuant to the rural infrastructure RAMA, the total area unlawfully cleared was 239ha: at [72];

(4) the commission of the offence caused moderate to substantial environmental harm: at [120]. This was because the unlawful clearing resulted in: the near total removal of forest and woodland vegetation over an extensive area; the clearing of approximately 18,000 to 20,000 trees, the majority of which were between 40 and 80 years old; some clearing of the EEC (although to an unknown extent); and indirect impacts on woodland-dependent fauna species due to the clearing of habitat: at [85], [101], [105]-[106] and [111]. There was some evidence of regeneration: at [113];

(5) Mr Rummery committed the offence negligently because, first, he erroneously relied upon the imminent risk RAMA exemption to undertake clearing over a wide area, and second, he did not seek any advice as to the lawfulness of the clearing: at [129];

(6) while a commercial advantage was derived from the clearing, this was incidental and did not provide the motivation for the commission of the offence: at [140]-[141];

(7) Mr Rummery was entitled to the full 25% discount for the early entry of a guilty plea because there had been substantial agreement on matters material to sentence; the hearing was conducted in an orderly and efficient manner; Mr Rummery was self-represented; and Mr Rummery could not be penalised for putting the prosecution to proof on the specific matters he contested: at [152]; and

(8) the imposition of a fine would cause Mr Rummery a degree of financial distress, which was taken into account as a factor in mitigation, even though this impact could not be quantified with precision: at [168] and [193].

## Development Appeals

***Presrod Pty Limited v Wollongong City Council*** [2012] NSWLEC 240 (Sheahan J and Brown C)

Facts: this was an appeal under s 97 of the *Environmental Planning & Assessment Act* 1979 ("the EPA Act") against the refusal by Wollongong City Council of a development application (DA 2011/1112) lodged on 16 September 2011 for the conversion and reconfiguration of some hotel accommodation suites in an existing hotel. Hotel accommodation was a permissible use on the subject site, under Wollongong Local Environmental Plan 2007 ("LEP 2007"), but prohibited under the Wollongong Local Environmental Plan 2009 ("LEP 2009"), which was gazetted on 26 January 2010, and commenced, pursuant to cl 1.1AA, on the date on which it was first published on the NSW legislation website.

Although DA 2011/1112 was for a prohibited use under LEP 2009, the subject site already had the benefit of a number of development approvals, upon which the applicants relied to establish existing use rights and/or continuing use rights. Specifically relevant was the approval granted (by the Land and Environment Court) on 23 October 2009 for DA 2008/358, lodged in March 2008, for the change of use of the building from serviced apartments to hotel accommodation, and for the construction of an additional storey. A further relevant development consent was DA 2009/867, for the change of use of the existing serviced apartments to hotel accommodation, which was lodged on 22 July 2009, and granted by the Court, on 30 July 2010.

DA 2009/897 was determined following the gazettal of LEP 2009, and was, therefore, for a prohibited use, but, as it had been lodged prior to the gazettal of the LEP, cl 1.8A applied, and required the application to be determined as if LEP 2009 had not yet commenced.

The applicants relied on DA 2009/897, which both parties agreed had "commenced" for the purpose of the existing use provision within the EPA Act, and had the benefit of continuing use rights pursuant to s 109B of the EPA Act, to establish the permissibility of DA 2011/1112.

Both the council and the Court received various written and oral objections from residents and owners of land close to the proposed development, who were concerned that the development would cause increases in traffic, loss of privacy, inadequate parking and adverse noise impacts.

Issues:

(1) whether cl 1.8A operated to defer commencement of LEP 2009 for the purpose of DA 2009/897, so that the subject site would have existing use rights pursuant to s 106 of the EPA Act;

(2) whether continuing use rights pursuant to s109B of the EPA Act operated to permit the making and determination of DA 2011/1112; and

(3) whether the development would have an unacceptable impact on the amenity of adjoining residential development by way of increased traffic, noise, and loss of privacy.

Held: the applicant's appeal under s 97 of the EPA Act against the respondent's refusal to grant approval to DA 2011/112 was dismissed, with the question of costs reserved:

(1) there was nothing in LEP 2009 that indicated a commencement date for some provisions, which was different from that for others. Clause 1.8A did not operate to alter the timing of the commencement of LEP 2009 or the provisions within it, but allowed an application lodged within a certain time frame to be determined under an earlier instrument: at [63];

(2) a development consent granted before the commencement of an environmental planning instrument (or a specific provision within it) falls within the definition of existing use in s 106, but that is different from a situation where a development application is lodged before commencement of the relevant instrument, but not determined until after it has commenced. The site did not benefit from existing use rights under s 106 of the EPA Act: at [65-67];

(3) although s 109B is a savings provision sitting within the "existing uses" division (Part 4 Div 10) of the EPA Act, and ought, therefore, be given a broad interpretation, there was nothing in that section which provided a consent authority with power to grant development consent: at [83];

(4) as the subject application was for a prohibited use, it was not development to which Part 4 Div 2 applied, and, in the absence of existing use rights, there was no power within the EPA Act to grant the consent sought: at [86]; and

(5) although the Court was satisfied that any increase in traffic, and any increased amenity impacts, brought about by the reconfiguration and the additional rooms, would not warrant the refusal of the application, as DA 2011/1112 was for a prohibited use, the appeal must fail: at [91] and [92].

***Toner Design Pty Ltd v Newcastle City Council*** [2012] NSWLEC 248 (Sheahan J)

Facts: this was a Notice of Motion ("NOM") filed on behalf of the council, seeking an order that the Court determine, as a separate question, whether or not a development application ("DA"), which was the subject of a Class 1 appeal, was an application in respect of designated development. The DA, which was lodged on 20 December 2010, sought consent to remediate a portion of the site to a standard suitable to support residential use, erect a seniors' living development, use another portion of the site for the containment of approximately 27,480 cubic metres of contaminated soils excavated from the site, in 2 capped mounds, and refill the excavated area with clean fill to the required flood level.

It was accepted that the extensive contamination of the subject site - largely from the days of its partial use as a scrap metal/recycling operation, with associated petroleum storage and usage - could be effectively dealt with, but that the residential proposal could not proceed on the site in its present state. The owner of the site commissioned a Remediation Action Plan**,** which the experts agreed depicted the area and depths of contaminated soil on the site to be at least 4.4 hectares, with the volume at least 42,180 cubic metres. The 27,480 cubic metres was to be excavated from a total area of 2.93 hectares.

On 13 March 2012 the council resolved to refuse the DA, as it considered the site unsuitable for the development proposed due to contamination, flooding, and the unreasonable impacts it would have. The council also considered the proposal contrary to the public interest.

Part 1 of Schedule 3 of the Environmental Planning and Assessment Regulation 2000 ("the Regulation") defines designated development, and includes contaminated soil treatments works (cl 15) that "treat contaminated soil originating exclusively from the site on which the development is located and (i) incinerate more than 1,000 cubic metres per year of contaminated soil, or (ii) treat otherwise than by incineration and store more than 30,000 cubic metres of contaminated soil, or (iii) disturb more than an aggregate area of 3 hectares of contaminated soil". However, cl 37A of Part 3 of the Schedule provides that development specified in Part 1 is not designated development if it is ancillary to other development, and not proposed to be carried out independently of that other development.

Issues:

(1) whether cl 15 of the Regulation was engaged by the DA; and

(2) if so, whether cl 37A provided a "complete answer" to the engagement of cl 15.

Held: the earthworks component of the proposal before the Court was "designated development". The costs of the separate question were reserved. The Court accepted that:

(1) the creation of the mounds was a "storage" measure, but the compaction of the materials, and their "capping" and "shaping" to ensure "free drainage", amounted to "treatment", and their establishment on top of existing contamination amounted to a "treatment" of that material as well, as it added to the safety of humans and the environment: at [50];

(2) although all of the earthworks proposed were for the purpose of making the site suitable for development of the proposed seniors' living project, and, notwithstanding that they varied in intensity across the various sectors of the site, and in the areas of land affected, none of them could be regarded as *de minimis.* They were collectively substantial, and would "disturb" the whole of the site: at [53]; and

(3) clause 37A abrogated the decision in *Residents Against Improper Development Inc v Chase Property Investments Pty Ltd* [2006] NSWCA 323, 149 LGERA 360, and reinstated and reinforced the appropriateness of the principles laid down in *Baulkham Hills Shire Council v O'Donnell* (1990) 69 LGRA 404, namely that the test of the concepts of "ancillary" and "independent" development/use (including any allegation that one might "subserve" another) is objective in character, is a question of fact and degree in all the circumstances, and is to be applied from a town planning perspective: at [56].

***Cracknell & Lonergan Architects v Leichhardt Municipal Council*** [2012] NSWLEC 194 (Craig J)

Facts: the applicant appealed against a decision of Leichhardt Municipal Council ("the council") refusing development consent for the demolition of a warehouse building and erection of a two-storey residential flat building. The proposed development did not meet certain controls imposed by the *Leichhardt Local Environmental Plan* 2000 ("the LEP"), nor did it meet with the provisions of Leichhardt Development Control Plan 2000 ("the DCP").

A development consent granted in 1985 was commenced and use pursuant to it was continued until January 2007. Since 2007, no use pursuant to any consent was made of the premises and the evidence was that the owner did not intend to recommence the use authorised by that consent. The applicant contended that the 1985 consent was preserved by s 109B of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act"), which had the consequence that there was an existing use of the premises for the purpose of ss 107 and 108 of the EPA Act. This had the consequence, so the applicant contended, that the development standard in the current instrument could not be used to prohibit the development sought.

Issues:

(1) whether s 108 of the EPA Act was necessarily engaged where consent for past use was preserved under s 109B of the EPA Act;

(2) whether the development standards imposed by the planning instrument "derogate" from the incorporated provisions made under s 108 of the EPA Act and are therefore of "no force or effect" for the purposes of determining the development application; and

(3) whether, on merit, applying the provisions of s 79C of the EPA Act, development consent should be granted.

Held: development consent refused, appeal dismissed:

(1) the Court identified two different rights under Div 10 of Pt 4 of the EPA Act directed to the entitlement to continue to use land when an environmental planning instrument prohibits that use:

(a) first, the right directed to an "existing use" as defined. The provisions of ss 106, 107 and 108, when read together, both limit the entitlement to continue an "existing use" and also provide for the manner in which that use may be subject to change. Continuity of use is essential not only to maintain an "existing use" but also to maintain the entitlement to seek development consent in accordance with the incorporated provisions: at [48], and;

(b) second, the right to which the provisions of s 109B are directed. The purpose of s 109B is to preserve an operative consent. Such consent will continue to operate because it is an instrument under the EPA Act and according to its own terms: at [49].

Here, the consented use preserved under s 109B had been abandoned in January 2007. Accordingly, the essential element of continuity was absent and it was therefore not a use that could engage s 108 and the incorporated provisions: at [57];

(2) the provisions of the LEP did not derogate from the incorporated provisions: at [84]. By imposing development standards, the planning instrument did no more than stipulate the manner in which a use may be carried out with or without development consent under the Act: at [84]. The applicant's contention in respect of derogation, and the case law that supported that contention, relied on cl 41(1)(d) of the *Environmental Planning and Assessment Regulation* 2000 ("the Regulation") as it appeared prior to the 2006 amendment of the Regulation: at [75]-[80]. Whereas cl 41(1)(d) prior to the

2006 amendment was broad and permissive, the clause in its present form is restrictive and narrow: at [73]-[75]. Necessarily, the case law decided prior to the amendment was distinguished and the applicant's submissions were not accepted: at [80]-[83]; and

(3) although some departure from the development standards of the LEP and DCP was justified, when the development was considered under the provisions of s 79C of the EPA Act, it did not have sufficient merit to warrant the grant of development consent: at [91], [92], [109]. The proposed development was not only inappropriate for the site because of its inconsistency with the character of the neighbourhood, but also because of its unreasonable impact on neighbouring properties due to the building size and orientation: at [94], [98]-[107], [108].

***Kenoss Pty Ltd v Palerang Council (No 2)*** [2012] NSWLEC 208 (Biscoe J)

(related decision: *Kenoss Pty Ltd v Palerang Council* [2012] NSWLEC 179 Biscoe J)

Facts: the applicant submitted a development application for the subdivision of land which was located on floodplain land. Clause 21(b) of the Yarrowlumla Local Environmental Plan 2002 (LEP) provided that consent could not be granted to a subdivision of land within the Village Zone unless the council was satisfied that the subdivision did not "take in unsuitable areas such as floodplain land". The council refused consent on the ground that the land to be subdivided was floodplain land. The applicant contended that the council had to be further satisfied that the floodplain land was an unsuitable area. A separate question was ordered on this issue of construction.

Issues:

(1) on the proper construction of cl 21(b) of the LEP, in considering the grant of consent for subdivision of land in the Village Zone where the subdivision takes in floodplain land:

  (a) is the only question whether the consent authority is satisfied that the subdivision takes in floodplain land? or

  (b) is there a further question whether the consent authority is satisfied that that floodplain land is an unsuitable area?

Held: separate question answered (a) Yes, and (b) No:

(1) the proper construction of cl 21(b) was that in the case of floodplain land in the Village Zone, consent to subdivision cannot be granted and no further question of assessment of unsuitability of the area arises: at [16];

(2) whilst construction of a particular word or phrase required the context and purpose to be taken into account, the process of coming to an understanding of the meaning of the disputed word or phrase must begin with a consideration of the text itself, and the meaning of the word or phrase was a convenient starting point. The words "such as" in cl 21(b) meant "for example": that which followed those words was an example of that which preceded them. Therefore, "floodplain land" was an example of "unsuitable areas", and if an area was floodplain land, then under cl 21(b) it was an unsuitable area and consent for subdivision could not be granted: at [17];

(3) it was consistent with the principles of statutory construction that the words "such as floodplain land" were inserted to guard against the possibility that the general ("unsuitable areas") might be read as not including the particular ("floodplain land"): at [18];

(4) this construction was consistent with the objective of the Village Zone: at [19];

(5) there was nothing irrational about requiring the council to be satisfied, before granting consent, that a subdivision of land in the Village Zone did not take in floodplain land because it was anticipated that an application for residential development would follow the subdivision of land in the Village Zone, and cl 21(b) guarded against the risk of loss of property or life during flooding on new lots in the Village Zone: at [20]; and

(6) the context provided by the other provisions of the LEP did not support the applicant's construction of cl 21(b): at [21].

***Australian International Academy of Education Inc v The Hills Shire Council*** [2013] NSWLEC 1 (Craig J)
(related decision: *Australian International Academy of Education Inc v The Hills Shire Council* [2011] NSWLEC 208 Biscoe J)

Facts: the appellant applied to the Hills Shire Council ("the council") to modify four conditions of a development consent ("the Consent") to construct a school in Kellyville, pursuant to s 96(1A) of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act"). Condition 98 required dedication of a local road by the school to the council free of cost. Council refused the application for modification of the Consent and the appellant appealed to the Court under s 97AA of the EPA Act. The applicant sought to have condition 98 of the consent deleted. The applicant identified the absence of any need for the new road, together with the absence of any identified requirement in the Contributions Plan for a monetary contribution or dedication of land consequent upon the development of an educational establishment. The applicant contended that neither s 94(1) nor s 94B(1) were satisfied, with the consequence that condition 98 was not validly imposed. The council denied that condition 98 was invalid, and asserted that it was both reasonable and necessary. The council submitted that the development would not be substantially the same development without condition 98.

Issues:
(1) whether condition 98 was lawfully imposed as a condition of the Consent having regard to s 94 and s 94B(1) of the EPA Act;
(2) whether it was appropriate to modify the development consent by deleting condition 98; and
(3) whether the development would be substantially the same, without condition 98, as the development which was consented to by the Joint Regional Planning Panel.

Held: appeal allowed:
(1) condition 98 of the consent was not validly imposed: at [118]. No aspect of the proposed development gave rise to a need for the road. The power to impose a condition of development consent is found in s 80A of the EPA Act and where dedication of land is required, it is constrained to one "authorised to be imposed" by s 94 of the EPA Act: at [70]. In order to fulfil the requirement of s 94(1), it was necessary that a nexus between the proposed development and the contribution or dedication required existed: at [77]. The use of the site for school purposes in the manner proposed by the Consent quarantined that use from any need for that road: at [81]. The requirement to engage s 94(1) of the EPA Act in order to sustain the imposition of condition 98 was not satisfied: at [81]. Neither the requirement of s 94(1) nor s 94B(1) had been satisfied, with the consequence that condition 98 was not validly imposed;
(2) condition 98 was imposed beyond power and would be appropriately deleted from the consent: at [120];
(3) the development of the site would be substantially the same development as that for which the Consent was granted, if condition 98 was deleted, as deletion of it neither changed the purpose of use, nor affected the obligation to construct the new local street: at [40] and [45]; and
(4) there was no impediment, in principle, to the determination in Class 1 proceedings that a condition of consent sought to be deleted in an appeal under s 97AA was invalid (*Helman v Byron Shire Council* (1985) 87 LGERA 349): at [104]-[110].

## Civil Enforcement

***Warringah Council v Ulrich*** [2012] NSWLEC 234 (Pepper J)

Facts: Mr Ulrich collected and stored items over several decades at his property located at 17 Ballyshannon Road, Killarney Heights ("the premises"). The items included televisions, video tapes, clothing, scrap metal, tins of food, books etc. Upon his two storey dwelling reaching maximum storage capacity, Mr Ulrich moved outside to live (sleep, cook, read, watch television and listen to music) in his front yard. Warringah Council ("the council") received complaints from some of Mr Ulrich's neighbours regarding the unsightly nature of the premises and disturbance late at night caused by noise emanating from Mr Ulrich's television set and stereo.

On 11 May 2011 the council issued two sets of orders under s 124 of the *Local Government Act* 1993 ("the LGA") and s 121B of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act"), requiring Mr Ulrich to remove items from identified areas on the premises, cease storing items on the "cleared areas", and otherwise remove items so as not to attract or harbour vermin, create odours, create a fire risk or prevent access to the interior of the dwelling or to sewage and water facilities ("the 2011 orders"). The council alleged that the orders had not been complied with, and sought their enforcement.

Issues:

(1) whether Mr Ulrich was carrying out a separate and distinct collection and storage use without development consent on the premises, in breach of s 76A of the EPA Act;

(2) whether the 2011 orders had been complied with; and

(3) whether the orders proposed by and as agreed between the parties ("the new proposed orders") were appropriate, specifically:

  (a) whether it was appropriate to order the removal of materials;

  (b) whether the Court had power to make an order pursuant to s 678(10) of LGA and s 121ZJ(11) of the EPA Act permitting the council to enter the premises to give effect to the clean-up orders in the event of non-compliance; and

  (c) whether any further orders should be made.

Held: the Court made orders in accordance with the new proposed orders with some amendments:

(1) in light of the new proposed orders, it was not necessary to resolve the issue of whether the use of the premises for collection and storage was permissible, although the evidence demonstrated that the use of the premises travelled beyond the boundaries of ordinary domestic use: at [89]-[90];

(2) notwithstanding efforts made by him to clean up the premises, given the location, nature and volume of items stored on the premises, Mr Ulrich remained in breach of the 2011 orders: at [92]:

(3) the new proposed orders were appropriate:

  (a) it was necessary to order removal of certain items because they collectively posed a threat to public health given the emission of foul odours and the presence of rats and mosquitos and they presented a demonstrable fire hazard in an area known to be at risk from bushfires: at [93];

  (b) the Court had power to make orders permitting the council and its contractors to enter onto the premises to undertake works to effect the orders in the event of non-compliance: at [21]; and

  (c) the orders were refined by the Court with the assistance of the parties to determine with precision the items that Mr Ulrich would be permitted to retain. An additional order was made restraining Mr Ulrich from occupying (including cooking, watching television and listening to music) the front yard area of the premises between 9pm and 9am: at [100].

***Camden Council v Rafailidis (No 3)*** [2012] NSWLEC 217 (Biscoe J)

(related decisions: *Camden Council v Rafailidis* [2012] NSWLEC 51 Lloyd AJ; *Camden Council v Rafailidis (No 2)* [2012] NSWLEC 125 Biscoe J)

Facts: in 2008, the council granted development consent to the respondents for the erection of a new dwelling on their land on conditions that a separate development application be lodged for the demolition of an existing dwelling. The respondents erected the new dwelling but failed to comply with the conditions, and leased the old dwelling. The council issued orders for compliance with the conditions, and commenced Class 4 proceedings when the respondents failed to comply. In [2012] NSWLEC 51, the Court ordered, inter alia, that the respondents were within 90 days to demolish the old dwelling or obtain "an appropriate development consent" to allow it to remain (Order 2). The respondents lodged a development application to retain the old dwelling, which the council refused. As the 90-day period was about to expire, a stay of Order 2 was granted in [2012] NSWLEC 125 on condition that the respondents file a Class 1 appeal against the council's refusal. The Class 1 appeal was allowed after the parties reached agreement at a conciliation conference, and consent was granted for the retention of the old dwelling on conditions that certain works

be carried out on the old dwelling (2012 consent). By now, the 90-day period in Order 2 had expired. The council filed a notice of motion in the Class 4 proceedings seeking an extension of the stay of Order 2 on the ground that an appropriate development consent would not exist until all the conditions of the 2012 consent had been satisfied. The respondents opposed the motion, contending that the 90-day period only governed the time for demolition, not the time for obtaining a consent, and that Order 2 was therefore spent. The respondents further submitted that the 2012 consent lapsed in five years, and that the council's motion was an abuse of process as it sought to vary this.

Issues:

(1) whether the 90-day period in Order 2 applied to the obtaining of "an appropriate development consent"; and

(2) whether the initial stay of Order 2 should be discharged and whether a new stay should be ordered.

Held: the initial stay of Order 2 was discharged and Order 2 was varied by extending the 90-day period to 4 July 2013:

(1) Order 2 required that, within 90 days, either the old dwelling be demolished or its presence on the land be legalised by "an appropriate development consent", which meant that if a conditional consent were obtained within the 90-day period, all the conditions had to be satisfied within that period. Only then would the presence of the old dwelling be lawful. If this were not so, Order 2 would permit the old dwelling to unlawfully remain on the land at least until the 2012 consent expired in five years, which would not be a reasonable construction of Order 2. Thus, the respondents would be in breach of Order 2 and in contempt of court unless there was a further stay of Order 2 or an extension of time for compliance with Order 2: at [15]; and

(2) it was appropriate to discharge the initial stay. Power to order a stay of Order 2 may be available under s 135 of the *Civil Procedure Act* 2005 but, contrary to the parties' assumption, does not seem to be available under s 67 of that Act, which authorises the Court to stay "proceedings". However, the preferable course was to extend the 90-day period in Order 2 pursuant to the power in r 7.3 of the *Land and Environment Court Rules* 2007: at [18] – [19].

***Shoalhaven City Council v Ellis*** [2012] NSWLEC 225 (Biscoe J)

(related decision: *Shoalhaven City Council v Ellis* [2012] NSWLEC 189 Biscoe J)

Facts: the council brought five separate civil enforcement proceedings against the respondents, who owned lots in a paper subdivision, alleging that they were using dwelling houses on their lots which had been erected without development consent in circumstances where no consent could have been granted. The respondents, relying on numerous constitutional grounds to oppose the orders sought by the council, claimed to be citizens of the "Free State of Australia" ("FSA"), an independent religious state, and therefore beyond the jurisdiction of the Court and the application of NSW law. The respondents had given notices of the constitutional issues to the Attorneys-General. Under the current local environmental plan, the respondents' lots were of insufficient size for consent to be granted for a dwelling house. Under a newly proposed local environmental plan, the respondents' lots would still be too small. No consents were ever sought for the dwellings, and none existed.

Issues:

(1) whether the failure of the Attorneys-General to intervene in the proceedings were admissions that the respondents were not bound by NSW law and that the Court had no jurisdiction;

(2) whether the Court lacked jurisdiction because the proceedings concerned fee simple interests and issues under the Commonwealth Constitution ("the Constitution") which were only within federal jurisdiction;

(3) whether the respondents were not subject to the requirements of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act") and the Court's jurisdiction because they were the holders of estates in fee simple;

(4) whether the respondents were not subject to NSW law or the Court's jurisdiction because they were citizens of the FSA and because of ss 116 to 118 of the Constitution;

(5) whether the respondents' dwellings had been erected unlawfully;

(6) whether the Court should exercise its discretion to make the declarations as to the unlawful developments and the orders restraining the use of the dwellings which the council sought; and

(7) whether there should be a stay of any orders made and what the length of that stay should be.

Held: declarations that the dwellings were erected and were being used without development consents, orders restraining the use of the lands and dwellings and that the respondents take all reasonable steps to prevent any person using the lands and dwellings until development consents were obtained (these two orders were stayed for eight weeks), and orders restraining further works being carried out on the lands without development consents:

(1) the non-intervention of the Attorneys-General was irrelevant, and the council had contested the issues raised by the respondents: at [6];

(2) fee simple interests did not constitute a matter only within federal jurisdiction, and the submission that the Court had no federal jurisdiction was rejected. The Court may exercise federal jurisdiction and determine questions arising under the Constitution by reason of ss 76(i) and 77(iii) of the Constitution and s 39(2) of the *Judiciary Act* 1903 (Cth). The Court had jurisdiction to hear and dispose of proceedings, such as these matters, brought to remedy or restrain breaches of the EPA Act: at [7];

(3) ownership of an estate in fee simple did not mean that the law did not apply in respect of that land. Restrictions on the use of land, including land held in fee simple, may be imposed by statute or the common law, and the EPA Act imposed restrictions on the use of land within NSW, including the respondents' lots: at [8] – [9];

(4) the respondents' asserted citizenship of the FSA did not have any constitutional significance or affect the operation of NSW laws. The sections of the Constitution cited were irrelevant, and the FSA was not formed in accordance with the procedures set out in the Constitution: at [12] – [13];

(5) there was no doubt about the unlawful nature of the developments which had occurred on the respondents' lots without the necessary development consents: at [33];

(6) the declarations and orders sought should be made. They were sought by way of enforcing a public duty and vindicating the public interest in orderly and lawful development in accordance with the EPA Act. The council had a responsibility to enforce the EPA Act in order to protect the environment and maintain the integrity of the planning process. Allowing the respondents to continue the unlawful use of their lots for an unduly prolonged period of time would be contrary to the environmental objectives of the EPA Act and inequitable: at [36]. There was no evidence from the respondents of any specific hardship that would be suffered if the orders were made: at [37]. The respondents had been given reasonable notice of the council's action and had been given a reasonable opportunity to make alternative arrangements for accommodation: at [38] – [40]. There was no prospect of any change in the applicable zoning constraints that would assist any of the respondents: at [41]. The continued unlawful use of the respondents' lots presented safety concerns regarding bushfire risks, compliance with the Building Code of Australia and the onsite waste management systems servicing the dwellings: at [42] – [43]; and

(7) there was an inherent hardship in the respondents having to cease using their dwellings and thus there should be a stay of some of the orders for eight weeks to mitigate that hardship: at [44] – [45].

## Costs

***Pyntoe Pty Ltd v Valuer-General of NSW (No 2)*** [2012] NSWLEC 231 (Craig J)

Facts: the applicants sought an order for costs against the Valuer-General following a successful appeal pursuant to s 37 of the *Valuation of Land Act* 1916. Accepting that under Pt 3, r 3.7 of the *Land and*

*Environment Court Rules* 2007 ("the LECR"),an order for costs should only be made if it was"fair and reasonable in the circumstances" to do so, the applicants submitted that there was a collective and cumulative justification to make an order for costs. In making this submission the applicants relied on four grounds: (i) its success in the appeal; (ii) successful appeals to the Court on two prior occasions against the Valuer-General's determination of land value for the subject land; (iii) that the proceedings involved the determination of a preliminary question of fact; and (iv) that it made an offer to resolve the proceedings prior to the hearing which was higher than the land value determined by the Court. The Valuer-General opposed a costs order being made.

Issue:

(1) whether pursuant to r 3.7 of the LECR it was "fair and reasonable in the circumstances" to make an order for costs against the respondent.

Held: respondent ordered to pay applicants' costs of the proceedings:

(1) the combined effect of the earlier decisions, the applicant's success in the present appeal and the offer of settlement made by the applicant were circumstances that rendered it fair and reasonable that the Valuer-General pay the applicant's costs of the proceedings: at [41], [43]-[45], [54];

(2) the debate between the parties as to the significance of the earlier decisions and comparison of the results with the determination made in the present proceedings was finely balanced in the context of the application for costs. That balance was altered, and tipped in favour of the applicant, when considering the offer of settlement: at [46]-[53];

(3) none of these factors, considered in isolation, would have been sufficient to reach this conclusion: at [54]; and

(4) by reference to r 3.7(3)(a), the Court did not accept that the preliminary determination of a question of fact was a factor to be considered in whether a costs order should be made: at [26]-[31].

***Garners Pty Ltd v Gloucester Shire Council*** [2012] NSWLEC 205 (Biscoe J)

Facts: the applicant challenged the validity of two consents which were granted by the first respondent council to the second respondent. After the respondents filed points of defence but before any evidence was filed, the second respondent surrendered the first consent and applied to the council to modify the second consent. The modification was granted. The applicant then decided that there was no further utility in the proceedings and, by consent, the proceedings were discontinued. The applicant now sought an order for the costs of the proceedings. The respondents sought an order that there be no order as to costs except that the applicant should pay their costs of the costs hearing.

Issues:

(1) whether the surrender of the first consent and modification of the second consent constituted an effective surrender by the respondents to the applicant or, alternatively, a supervening event;

(2) whether an order for costs should be made in favour of the applicant; and

(3) whether the respondents should have their costs of the costs hearing.

Held: no order for costs except that the applicant was to pay the respondents' costs of the costs hearing:

(1) there is a distinction between an effective surrender by one party to the other which ordinarily would attract the usual costs order, and a supervening event that so removes or modifies the subject matter of the dispute that no issue remains except that of costs where ordinarily no costs order will be made: at [16]. The surrender and modification of the two consents did not constitute an effective surrender by the respondents to the applicant. Rather, they constituted a supervening event: at [17] – [18]. Despite the surrender and modification, the fourth ground of challenge to the modified consent remained an issue and the applicant had abandoned this ground in discontinuing the proceedings. Further, the surrender of the first consent was the second respondent's act and not that of the council: at [19]. There were also three decisions of this Court on analogous facts in which no orders for costs were

made because supervening events had occurred. These three decisions were not wrongly decided: at [20] – [21];

(2) r 42.19 of the Uniform Civil Procedure Rules 2005 creates a presumption that the discontinuing party ought to pay the costs of the proceedings unless there is a discretionary decision to order otherwise. The discontinuing party has the onus of making a costs application if it does not propose to pay the other parties' costs, and there must be some good reason for departing from the ordinary course: at [11]–[14]. General costs principles raised by the applicant were not persuasive as to the applicant being awarded costs: at [22]. As the surrender and modification constituted a supervening event, the proper exercise of the costs discretion was to make no order as to costs: at [18]; and

(3) the applicant should pay the respondents' costs of the costs hearing. As soon as the substance of the matter had been resolved, the council proposed that the appropriate order would be for each party to pay its own costs. The applicant unreasonably maintained an entitlement to costs despite any hearing or determination of the merits. The respondents had received the costs result that the council proposed, and the applicant's decision not to agree to the proposal had led to the costs of the costs hearing being incurred, which otherwise would have been avoided: at [23].

***Martin v The State of New South Wales (No 6)*** [2012] NSWLEC 227 (Lloyd AJ)

(related decisions: *Martin v The State of New South Wales* [2011] NSWLEC 63 Craig J; *Martin v State of New South Wales (No 4)* [2011] NSWCA 274 Basten JA and Handley AJA; *Martin v State of New South Wales (No 2)* [2011] NSWLEC 108 Pain J; *Martin v State of New South Wales (No 11)* [2011] NSWCA 288 Basten JA and Handley AJA; *Martin v State of New South Wales (No 3)* [2011] NSWLEC 88 Pain J; *Martin v State of New South Wales (No 12)* [2011] NSWCA 289 Basten JA and Handley AJA; *Martin v The State of New South Wales* [2012] NSWLEC 182 Lloyd AJ; *Martin v State of New South Wales (No 5)* [2012] NSWLEC 214 Pain J)

Facts: the applicant sought a number of declarations relating to the non-renewal or non-determination of a number of applications for exploration licences ("EL") under the *Mining Act* 1992. The respondent conceded that the decision to refuse the application for the renewal of EL 6949 was liable to be set aside on the ground that the applicant had been denied procedural fairness. By notice of motion, the respondent sought a declaration to that effect but, as the applicant opposed it, no declaration as to the validity of EL 6949 was made. In [2012] NSWLEC 182, the Court declared that the refusal of the application for renewal of EL 6949 was invalid and remitted that application for consideration. The applicant's summons was otherwise dismissed and costs were reserved. The parties were now before the Court on the question of costs.

Issues:

(1) whether by expressly reserving costs the Court's discretion had been exercised contrary to r 42.1 of the Uniform Civil Procedure Rules 2005, that costs follow the event, and this determination should not now be overruled, and whether this determination was tantamount to declaring that the respondent had been involved in some form of misconduct relating to the litigation leading to disentitling conduct;

(2) whether the respondent's actions and decisions in relation to the applicant's applications for exploration licences were in contempt of the court proceedings because they occurred after the summons was filed;

(3) whether the applicant was entitled to recover his costs of certain interlocutory proceedings in which the respondent was unsuccessful;

(4) whether allegations by the applicant as to illegality in the respondent's conduct of other proceedings were relevant to the question of costs in the subject proceedings;

(5) whether the respondent was not entitled to costs because a citizen's right to challenge administrative decisions raised a public interest in the challenge; and

(6) whether costs should follow the event and the applicant should pay the respondent's costs.

Held: the applicant was to pay the respondent's costs of the proceedings:

(1) the applicant clearly misunderstood the effect of an order that costs be reserved. Such an order means that the question of costs is reserved for determination. As the question of costs was not the subject of submissions in the principal proceedings, the reservation gave the parties the opportunity to make submissions on that question before it was determined: at [11];

(2) in the absence of any interlocutory injunction, there was nothing improper or unlawful in the respondent taking actions and making decisions in relation to the applicant's applications after the filing of the summons: at [12];

(3) a successful party in interlocutory proceedings who fails in the ultimate trial of the action should not be entitled to recover his costs of the interlocutory proceedings, as was the case here. Equally, a successful party in principal proceedings who fails in interlocutory proceedings should not be entitled to the costs of the interlocutory proceedings. However, a successful party in interlocutory proceedings who also succeeds in the principal proceedings is entitled to his costs of the interlocutory proceedings as costs in the cause: at [13];

(4) the Court can only determine the question of costs in relation to the parties' conduct in the subject proceedings. The other proceedings in which the applicant alleged that the respondent had been involved in illegality were not before the Court and may be the subject of separate costs orders in those proceedings if illegality were to be established. There was no illegality in the subject proceedings: at [14];

***Lester v Ashton Coal Pty Ltd (No 2)*** [2012] NSWLEC 254 (Preston CJ)
(related decision: *Lester v Ashton Coal Pty Ltd* [2012] NSWLEC 181 Preston CJ)

Facts: on 10 August 2012, the Court dismissed civil enforcement proceedings brought by an Aboriginal elder of the Plains Clan of the Wonnarua people, Mr Lester, to remedy and restrain activities by the first respondent, Ashton Coal Operations Pty Ltd ("Ashton"), which Mr Lester considered may have harmed or be harming Aboriginal objects in breach of s 86(1) of the *National Parks and Wildlife Act* 1974 ("the Parks Act"). Mr Lester was represented in the proceedings by a non-legally qualified agent until March 2012 when he engaged solicitors. The Court found that Mr Lester had not proven that Ashton had breached s 86(1) of the Parks Act and the question of costs was reserved. Ashton and the Office of Environment and Heritage then each filed notices of motion seeking an order that the unsuccessful applicant pay their costs of the proceedings, including of interlocutory applications brought by Mr Lester. Mr Lester submitted that no order as to costs should be made (so that each party would bear their own costs) on the basis that the proceedings were brought in the public interest. Rule 4.2(1) of the Land and Environment Court Rules 2007, applicable to Class 4 proceedings, provided that the Court has discretion not to make an order for the payment of costs against an unsuccessful applicant if satisfied that the proceedings were brought in the public interest. The respondents contended that the Court should take into account countervailing considerations including that at least one of Mr Lester's purposes in maintaining the proceedings was to attempt to pressure Ashton to reopen negotiations for the provision of a financial package to the Plains Clan of the Wonnarua people; Mr Lester made numerous amendments to his pleadings, ultimately abandoning many of the claims he originally made; Mr Lester conducted the litigation unreasonably by seeking inappropriate interlocutory relief and failing to provide adequate particulars of his claims.

Issue:

(1) whether no costs order should be made on the basis that the proceedings were brought in the public interest.

Held: ordering that the applicant pay the respondents' costs with respect to certain aspects of the proceedings and that each party should pay their own costs of the respondents' motion for costs:

(1) in determining whether to depart from the usual costs rule, courts are to first determine whether the litigation can be characterised as being brought in the public interest; secondly, if so, whether there is "something more" than the mere characterisation of the litigation as being brought in the public interest; and thirdly, whether there are any countervailing circumstances which speak against departure from the usual costs rule: at [6];

(2) the litigation as finally pleaded could be characterised as being brought in the public interest. The litigation changed during the course of the proceedings but in the end, the only claims were that Ashton had breached s 86(1) of the Parks Act by harming Aboriginal objects at three locations. The proceedings sought to uphold and enforce important obligations in a public welfare statute intended to protect Aboriginal cultural heritage and the environment. Mr Lester had a special interest in the protection of Aboriginal cultural heritage at these locations but the protection of Aboriginal cultural heritage was of broader interest to both the Aboriginal community and the non-Aboriginal community. Mr Lester would not benefit financially by the outcome of the proceedings: at [8]-[11], [17];

(3) the nature, extent and other features of the public interest involved in the litigation were significant and constituted something more than the mere characterisation of the proceedings as being brought in the public interest. Mr Lester's claim was the first civil enforcement case involving s 86 as reformulated after 2010 amendments to the Parks Act. The case raised some novel issues of general importance: at [13], [14], [17];

(4) Mr Lester conducted some aspects of the litigation unreasonably which unnecessarily increased the costs to the respondents. This unreasonable conduct occurred during the period when Mr Lester was represented by the non-legally qualified agent. First, Mr Lester unreasonably raised and pursued, but then abandoned, points which had little or no merit. Secondly, Mr Lester made numerous applications for interlocutory relief which occupied considerable time and involved considerable cost. Thirdly, Mr Lester provided at least two notices to produce to the second respondent which were unclear in their terms and caused the second respondent unnecessarily to incur costs. Fourthly, Mr Lester failed to adequately particularise his claims. In particular, he failed to identify the Aboriginal objects he claimed Ashton had harmed in breach of s 86(1) of the Parks Act, both in his original and amended pleadings and in response to requests: at [25]-[32];

(5) Mr Lester's negotiations to settle the proceedings on terms which might have resulted in pecuniary benefits for the Plains Clan of the Wonnarua people were not part of the unreasonable conduct. The evidence was insufficient to establish that Mr Lester's conduct of the litigation was motivated by the matters raised in the negotiation: at [33];

(6) Mr Lester's ultimately pleaded claims of breach, and the evidence in support, were not so manifestly deficient that it could be said that Mr Lester's pursuit of the claims was unreasonable: at [34]; and

(7) an appropriate balancing of these considerations was to exercise the discretion to depart from the usual order as to costs by reason of the litigation being brought in the public interest, but not for the respects of unreasonable conduct of the litigation: at [36].

***Director-General, NSW Department Of Industry & Investment v Coomes*** [2012] NSWLEC 251 (Pain J)

(related decision: *Director-General, NSW Department of Industry & Investment v Mato Investments Pty Ltd (No 4)* [2011] NSWLEC 227 (Pain J)

Facts: in *Director-General, NSW Department of Industry & Investment v Mato Investments Pty Ltd (No 4)* [2011] NSWLEC 227 the Court dismissed charges in eight proceedings, being three charges under the *Fisheries Management Act* 1994 ("the FM Act") and one charge under the *Environmental Planning and Assessment Act* 1979 ("the EPA Act") of carrying out development forbidden by s 76A(1)(b) of the EPA Act, against two defendants, Mr Coomes and Mr Bennett. The defendants sought costs under s 257C of the *Criminal Procedure Act* 1986 ("the CP Act"), or a certificate under s 2 of the *Costs in Criminal Cases Act* 1967 ("the CCC Act") specifying that if the prosecution had, before the proceedings were instituted, been in possession of evidence of all the relevant facts, it would not have been reasonable to institute the proceedings, and that any act or omission of the defendant that contributed, or might have contributed, to the institution or continuation of the proceedings was reasonable in the circumstances.

Issue:

(1) whether costs ought be awarded or certificates ought be granted to the defendants.

Held: applications partially successful and granting certificates in relation to charges under the EPA Act:

(1) the defendants did not establish any of the grounds relied on for the claims under s 257 of the CP Act, namely that the investigation was conducted in an unreasonable manner, that there was unreasonable failure to investigate, or that the prosecution was brought without reasonable cause: at [57]-[76], [83]-[86], [91]-[95], [103]-[105], [106]; and

(2) the defendants did not establish any grounds for granting certificates under s 2 of the CCC Act for the FM Act charges. In relation to the EPA Act charges, they did establish that if the prosecutor had been aware of the possible legal consequences of two notices of development consents being issued for the same development before proceedings commenced, it was not reasonable to commence the proceedings. Certificates were granted for those charges: [121]-[137].

***McDonald's Australia Limited v Ashfield Council (No 2)*** [2012] NSWLEC 268 (Sheahan J)

(related decisions: *McDonalds v Ashfield Council,* NSWLEC, unreported, 23 February 2011, Brown C; *McDonalds Australia Limited v Ashfield Council* [2011] NSWLEC 1140, Brown C)

Facts: the respondent, Ashfield Council, sought an order requiring the applicant ("McDonald's") to pay some, if not all, of its costs of Class 1 proceedings. The substantive proceedings concerned a development application ("DA"), lodged with the council on 18 September 2009, to erect a typical McDonald's restaurant on a site in the suburb of Haberfield. The proposal was refused by the council on 8 December 2009, and the applicant's Class 1 appeal was commenced on 17 August 2010. Following commencement of the proceedngs, the applicant filed two Notices of Motions ("NOM"), on 17 August and 22 November 2010, seeking leave to rely on amended DAs. Consent orders were made on both occasions, with leave to amend granted on the basis that the applicant pay the respondent's costs, (1) related to the assessment of, and proceedings relating to, the original DA in the amount of $10,000 (regarding the NOM filed on 17 August), and (2) thrown away (regarding the NOM of 22 November). The relevant costs were paid by the applicant, and after the hearing on 13 and 15 December 2010, Commissioner Brown gave an interim judgment on 23 February 2011. In that judgment the Commissioner commented on various issues in dispute, and gave "Directions" regarding certain matters requiring further consideration by the applicant, including the amendment of the plans so that the design of the building reflected something similar to that identified in an exhibit tendered earlier in the proceedings. Following the Commissioner's interim findings, the applicant provided an amendment package to the council on 1 April, a further amendment package on 5 May, and a final package of amendments on 16 May 2011. Council responded to the amendments, and a public information session was held, as a result of which some further submissions were received from objecting residents. The various amendments were tendered to the Court in the final hearing, and on 2 June 2011 the Commissioner upheld the appeal, granted consent with conditions, and reserved costs.

Issues:

(1) whether s 97B in its original, and unamended form, applied to the amendments made by the applicants following the Commissioner's interim judgment; and

(2) whether it was fair and reasonable for the Court to make an order for the costs.

Held: the respondent's NOM was dismissed. The Court considered that:

(1) nothing turned upon whether the amendment(s) relied upon were formally filed with the Court, or came before it as an exhibit. An unduly restrictive interpretation of s 97B was not justified: at [121];

(2) whether the amendments were responsive to something said by the Court, or initiated purely of the applicant's own accord, was not relevant in determining whether s 97B applied, unless it could be shown that the applicant was truly directed by the Court to amend its DA. However, as the applicant in this case was clearly directed to reconsider its proposal, and amend its plans, s 97B did not apply: at [122] and [124];

(3) the amendments focussed on the appearance of the external building, and there was no change in the development concept, nor were there any new issues arising out of the amended plans. Although reassessment by the council and its experts was required, the amended DA was not significantly different from the DA which was the subject of the Commissioner's interim findings, and it largely

adopted the evidence of the council's expert. Therefore, in the context of s 97B, the amendments were "minor": at [125]-[127]; and

(4) there is a limit on the type and number of amendments, which are considered reasonable by the Court. However, the Court was satisfied that it was not unreasonable for the applicant to pursue its preferred scheme, and also took into account that the two earlier amendments had already been the subject of costs orders. It was not, therefore, appropriate to order the applicant to pay the respondent's costs of the proceedings, from and including 28 February 2011: at [130].

(5) as the applicant sought an order for its costs on the motion, and asked to be further heard on that question, the parties were directed to approach the Registrar to obtain a date for the futher hearing on the costs of the motion.

***Ralph Lauren 57 Pty Ltd & Ors v Byron Shire Council & Minister for Climate Change and the Environment*** [2012] NSWLEC 274 (Sheahan J)

Facts: this case concerned the determination of questions of costs regarding two class 4 matters, which, pursuant to leave granted by the Court, were discontinued on 17 June 2011. The costs argument was heard on 31 August 2011 and judgment was reserved. However, on 2 November 2011, following lengthy correspondence between the applicants and the respondent council regarding submissions which had been made orally by counsel for the council at the costs hearing on 31 August, some of the applicants sought to reopen the matter and make further submissions on costs. The further evidence that the applicants wished to lead included documents upon which the council sought to claim legal professional privilege, and had refused to produce, on the basis of their asserted irrelevance. On 3 February 2012, argument was heard on the applicants' Notice of Motion ("NOM") to reopen the evidence on costs.

The substantive proceedings concerned land owned by the applicants, in the Belongil Beach area of the Byron Shire, and actions taken by council and/or residents to protect it from storm and wave damage. Relevantly, council and two of the applicants had previously commenced class 4 proceedings before the Land and Environment Court ("LEC") during 2009 and early 2010, concerning the alleged failure of beach stabilisation works, for which the council had granted a consent to itself in 2001. Comprehensive consent orders were agreed upon during the 2009-2010 Law Vacation, while those two matters were part-heard. Those orders provided for the matters to be discontinued, but without prejudice to any claim for damages or other relief which the applicants may have against the council. At the time of the hearing of those proceedings, the council had been working with the State Government on "a draft coastline management plan" ("CZMP"), which, in October 2009, was placed on exhibition for two months. After considering all the submissions it had received on the draft, council made some amendments to it, and then submitted it to the Minister. On 28 January 2011, the first of the two class 4 proceedings involved in this judgment was commenced against the council seeking (1) a declaration that the draft CZMP was void, invalid, unlawful, and of no effect, (2) an order in the nature of certorari quashing the resolution to adopt the draft, and (3) costs. Throughout February 2011 further amendments to the draft were recommended, despite the applicants' request that the Minister not take any further action in the matter until after determination of the LEC proceedings. On 1 March 2011, the applicants commenced the second class 4 proceedings against both the Minister and the council, seeking declarations that the draft CZMP was void, and orders restraining the respondents from taking any further steps in the drafting of the plan or its certification. In the event, the council resolved to withdraw its draft CZMP, and to prepare a new one, under the new statutory guidelines and the amended provisions of the coastal legislation. The proceedings, therefore, lost utility, and were discontinued.

Issues:

(1) whether the applicant should be permitted to reopen the costs argument to adduce additional evidence; and

(2) determination of the costs of the two, more recent, discontinued class 4 matters.

Held: the parties were ordered to each pay their own costs of the proceedings, and of the hearing on costs. The NOM to reopen was dismissed, and those applicants who brought it were ordered to pay the costs incurred by both respondents, since 31 August 2011, on a party-party basis. The Court was satisifed that:

(1) the council's counsel had not misled the Court in any way at any stage of the matter, and there was no basis upon which the Court should exercise its discretion to reopen the costs matter. The interests of justice were best served by refusing to reopen the matter: at [250];

(2) the applicants' NOM to reopen had no merit, and should be dismissed with costs. As the Court was not asked to consider ordering such costs on an indemnity basis, they were ordered on a party-party basis: at [251]; and

(3) the applicants had overcome the presumptive rule requiring them to pay the respondent's costs of the discontinued proceedings, but made no real case to recover any of their costs from the respondents. Further, there was some evidence upon which the respondents could easily have relied to argue for some of their costs. In all those circumstances, the Court considered that there should be no orders for costs in respect of the two proceedings in the LEC and their discontinuance: at [253]-[255].

## Practice and Procedure and Orders

***Peregrine Mineral Sands Pty Ltd v Wentworth Shire Council*** [2012] NSWLEC 237 (Sheahan J)

Facts: the applicants filed a notice of motion seeking the transfer of proceedings to the Supreme Court of New South Wales, pursuant to s 149B of the *Civil Procedure Act* 2005.

The proceedings were brought in Class 3, under s 574 of the *Local Government Act* 1993, by three companies seeking to appeal against seven rates notices issued to them on 31 July 2012. At the time of commencing the Class 3 proceedings, there were two related matters in the Supreme Court, one in the Equity division, and one in the Common Law division, with the Equity matter involving the same parties as the Class 3 proceedings. It was common ground that if the Court ordered the transfer sought by the applicants, it would be to the Equity matter that it should be attached. The council thought that both those matters should be heard together, but in the Land and Environment Court.

In all three proceedings the companies claimed that they did not owe the council the rates assessed and claimed. They relied on an agreement entered into with council in 2006, asserting that their liability was governed by its terms, and its underpinning representations, and that s 574, therefore, did not apply. Allegations of misleading or deceptive conduct, contrary to trade practices/fair-trading legislation, and claims of estoppel were also involved. As council relied on s 574, the applicants commenced the Class 3 proceedings to protect their position.

Issue:

(1) whether the Court should order the transfer of the class 3 proceedings.

Held: the ordering the transfer of proceedings to the Supreme Court, with each party to pay its own costs of the motion for transfer:

(1) the proceedings in the Land and Environment Court were clearly related to the proceedings in the Supreme Court – Equity Division: at [17]; and

(2) the specialist aspects of Land and Environment Court did not weigh strongly against the transfer in the prevailing circumstances of the litigation as a whole at [19].

***North Sydney Council v Perini*** [2012] NSWLEC 239 (Pepper J)

Facts: the defendant, Mr Perini, had pleaded guilty to a charge under ss 76A(1)(b) and 125(1) of the *Environmental Planning and Assessment Act* 1979 brought by North Sydney Council ("the council") in that he had carried out development without consent and contrary to the provisions of the North Sydney Local Environmental Plan 2001. Consent had been obtained for the demolition of an existing swimming pool, site excavation, construction of a new three storey dwelling and carport, landscaping works and boundary adjustment. However, a number of unapproved works were also carried out including, relevantly, the construction of a new swimming pool with a collar extending above the approved garage. The sentence hearing took place in August and October 2011 and judgment was reserved.

By notice of motion, Mr Perini sought leave to re-open his case to rely upon fresh evidence, namely, a building certificate issued by the council after the hearing had concluded, which certified construction of the swimming pool and collar at issue in the proceedings, in order to demonstrate that the environmental harm caused by the commission of the offence in respect of those works was not as serious as contended by the council.

Issues:

(1) what were the legal principles applicable to an application for leave to re-open to adduce fresh evidence:

  (a) in criminal proceedings; and

  (b) where the application is made whilst judgment is reserved; and

(2) whether leave to re-open to rely upon evidence should be granted.

Held: leave to re-open to admit the building certificate was granted:

(1) different considerations apply on an application for leave to re-open criminal, rather than civil, proceedings. The touchstone for granting leave is whether it is in the interests of justice and fairness to permit the re-opening. If the evidence is of sufficient importance a court should generally be inclined to permit the re-opening, especially where the evidence is brief and material. If the re-opening will involve substantial inconvenience or expense, or it is likely to cause prejudice to another party, this will generally militate against leave being granted. Similarly, if there was a conscious decision to omit the evidence during the trial a court will generally be disinclined to grant leave: at [24] and [33];

(2) where judgment is reserved, many of the admonishments and cautionary epithets in respect of the granting of leave to adduce fresh evidence on appeal do not apply. The importance of the principle of finality of litigation is also considerably more muted: at [27]; and

(3) in this case, the evidence sought to be adduced was not available at the time of the hearing; was brief; was material; and was not likely to cause any substantial inconvenience or raise a practical obstacle to the prosecution by reason of its late admission. On balance, the interests of justice meant that Mr Perini should be given the opportunity to rely upon this evidence: at [35]-[36].

***Illawarra Residents For Responsible Mining Inc v Gujarat NRE Coking Coal Limited*** [2012] NSWLEC 259 (Sheahan J)

Facts: this was a notice of motion pursuant to r 42.21 of the Uniform Civil Procedure Rules 2005 (“UCPR”), seeking an order that the applicant (Illawarra Residents for Responsible Mining Inc) provide security for costs in the sum of $75,000.

The applicant commenced the proceedings on 26 June 2012 against the respondent corporation (Gujarat NRE Coking Coal Limited), under s 123 of the *Environmental Planning and Assessment Act* 1979 (“the EPA Act “). The applicant primarily sought an order restraining the respondent from carrying out mining at an area referred to as “Longwall 4”, until specific approval under the EPA Act was granted. In defence, the respondent relied on cl 8K of the Environmental Planning and Assessment Regulation 2000, to submit that s 74 of the *Mining Act* 1992 continued to operate, so that Longwall 4 was effectively exempt from any requirement for any approval under the EPA Act, until the "earlier of an approval being obtained, or the end of the 'transition period', which was 30 September 2012". The respondent also relied on existing use rights pursuant to s 109 of the EPA Act.

The applicant was a not-for-profit association with 15 members, and was predominantly comprised of residents of the Illawarra area, some of whom were in some form of paid employment. The association was formed in January 2011 to advocate for responsible mining, and to engage on issues associated with the expansion of the colliery. It incorporated in December 2011, for reasons that included enabling it to open a bank account. As at 17 July 2012, it had a net asset position of $115.00, with limited income and assets, and the association’s secretary provided evidence during the hearing of the motion that she was unwilling to personally provide security, or bring proceedings in her own name.

Issues:

(1) whether the Court should order security for costs; and

(2) if so, what the quantum of the order should be.

Held: the respondent's notice of motion seeking security for costs was upheld. Pursuant to Rule 42.21 of the UCPR, the applicant was ordered to provide within 28 days, security for the costs of the respondent, in the sum of $40,000. The costs of the motion were reserved:

(1) the commencement of the proceedings was *bona fide*, and they had reasonable prospects of success: at [53] and [81];

(2) if it failed in its challenge, and was ordered to pay the respondent's costs of the proceedings, there was a high risk that the applicant would be unable to pay them: at [82];

(3) the respondent did not cause the applicant's impecuniosity: at [82];

(4) the respondent's application was brought promptly: at [84];

(5) although an order of security might frustrate the plaintiff's right to litigate its claim, because of its impecuniosity, that would not automatically lead to its refusal: at [62];

(6) in the absence of evidence from the other members of the association, going to their willingness or ability to personally provide security for the proceedings to continue, or to bring proceedings personally, the applicant had not provided the Court with sufficient evidence to support its submission that the proceedings would be stultified: at [64];

(7) the association's members were protected from its debts and liabilities, as a result of its incorporation, and no members had offered any personal undertaking to be liable for costs of the proceedings: at [83];

(8) the application was not brought specifically, and/or solely, to prevent an impecunious applicant from litigating its case, and was not considered to be oppressive: at [64];

(9) the matter concerned the proper administration of public law and environmental law, and the issues of interpretation, which it raised, were important. There was, therefore, an element of public interest involved. However, the matter was not entirely without consequence for the private interests of the members of the association, who were mainly local residents, with the development potentially affecting the amenity of the area within which they lived, or owned property: at [73]; and

(10) the bulk of the respondent's costs would be expected to concern its discretionary defence, and some procedural measures could be implemented to reduce the potential costs of the proceedings. A separate question may have been appropriate, but that issue was not argued before the Court: at [89].

***Leimroth v Wingecarribee Shire Council*** [2012] NSWLEC 256 (Sheahan J)

Facts: this was an application under r 49.19 of the Uniform Civil Procedure Rules 2005 ("UCPR") seeking the review of a decision by the Acting Registrar to join the second and third named respondents ("the Lidstones"), as full parties to the proceedings.

The Class 1 application that commenced the proceedings was filed by the applicants ("the Leimroths") on 23 May 2012, and concerned an appeal under s 121ZK of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act"), against an order issued by the council pursuant to ss 121B and 125 of the EPA Act. The order required the Leimroths "to cease the use of" certain premises on the grounds that (1) there was no development consent for the use, (2) it was not an existing use (as defined in the EPA Act), and (3) the land on which it was being undertaken was located within Zone E3 Environmental Management in the Wingecarribee Local Environmental Plan 2010, wherein a "vehicle repair station" is prohibited. Compliance was required within 3 months.

On 2 October 2011, following a conference under s 34 of the *Land and Environment Court Act* 1979 held on 11 September, in which the council, the Leimroths, and the Lidstones participated, the council and the Leimroths reached an agreement that they wished the Commissioner to implement. However, on the same day, the Lidstones filed their notice of motion seeking joinder under r 6.24 of the UCPR. The Commissioner, therefore, adjourned the matter whilst the joinder application was being determined.

On 10 October 2011, the Registrar determined that r 6.24 applied, and thought that the test of necessity was satisfied. She also noted that if she was wrong on that point, she would nonetheless join the Lidstones on discretionary grounds, to ensure there was a more meaningful contradictor.

Issues:

(1) whether the matter was solely one of practice and procedure;

(2) the correct test for joinder pursuant to r 6.24;

(3) whether the joinder of the Lidstones was "necessary", and/or whether the Lidstones "ought to have been joined"; and

(4) whether the Lidstones should continue as parties to the proceedings.

Held: the notice of motion, filed by the applicants was dismissed, and the orders made by the Acting Registrar, on the issues of joinder and costs, were confirmed. All parties were ordered to pay their own costs of the motion, and the hearing. The Court:

(1) was not convinced that the matter was solely a matter of practice and procedure, nor that the opportunity would arise for the Lidstones to make submissions on truly merits matters: at [71];

(2) accepted the submission that r 6.24 requires a gateway to be satisfied ("ought", or, "necessary" to be joined), before it considers exercising its discretion to join an additional party: at [42];

(3) considered that the Leimroths' right to conclude their matter against the council, by reaching an agreement, must be balanced against the Lidstones' rights to have their environmental and amenity impacts fully and properly weighed in the process: at [72];

(4) held that the Acting Registrar's decision to join the Lidstones as respondents should stand: at [73]; and

(5) considered that the questions raised on the review motion were never free of doubt, nor beyond argument, so all parties should pay their own costs of that hearing: at [74].

***Hume Coal Pty Ltd v Alexander*** [2012] NSWLEC 267 (Sheahan J)

Facts: this matter concerned an Exploration Licence granted under the *Mining Act* 1992 ("the Act") to the plaintiff company ("Hume"), over an area of at least 89 sq km in the Sutton Forest area of the Southern Highlands. A land access agreement was granted to Hume, by Robert Koltai of "Lane's End", Golden Vale Road, allowing it to carry out "prospecting" on his land, on detailed conditions, which included one requiring Hume to fully and promptly repair all damage to the surface of the Prospecting Area and/or compensate Koltai in accordance with the Act.

Various lands in the immediate area, including the Koltai land, were burdened by a covenant in favour of a legally represented non-party, namely Karin Spiegel-Keighley, and/or the National Trust. The covenant restricted the use of the land in various ways. Clauses 8 and 9 provided that the property was not to be used as a quarry, or "for any industrial or commercial purpose except for the production of agricultural produce or livestock". The defendants (the Alexanders), who own land on which there was a right of carriageway (known as Carter's Lane) which provided access to the Koltai land, essentially argued that any prospecting on the Koltai land would be in breach of the covenant. Therefore, in an effort to obstruct Hume's access to the neighbouring Koltai lands, and thereby prevent the prospecting for coal, the defendants, with the support of others,"blockaded" the carriageway. While Carter's Lane was the most convenient way for Hume to access the Koltai land, it was not the only available way to do so.

On 8 November 2012, Hume, who wished to prospect for coal on the Koltai land as soon as possible, commenced proceedings seeking, among other things, an interlocutory injunction under s 295(1)(d) of the Act, to remove the blockade over the carriageway. It chose to pursue civil proceedings, but also suggested to the Court that the blockade may have involved the commission of an offence against that Act. Success at the interlocutory stage would effectively bring the proceedings to an end, given the limited scope of, and the limited time required to complete, the exploration task. No proceedings had been commenced to uphold the objections of the blockaders or other opponents of the Hume project at the time of the judgment.

Issue:

(1) whether the Court should grant Hume an interlocutory injunction under s 295(1) of the Act requiring the Alexanders to remove the blockade over Carters Lane.

Held: the plaintiff's Notice of Motion for an interlocutory injunction was dismissed, and the costs of the interlocutory proceedings were reserved. The Court considered that:

(1) the proceedings were the reverse of the normal situation, namely where those opposed to a development seek an injunction to prevent it: at [114];

(2) the objectors had staged a largely peaceful protest/blockade, on private land the owner of which was a prime mover against the project: at [115];

(3) rather than preserving the “status quo” until a further hearing, an Injunction in this case would disturb it: at [117];

(4) there was no shortage of “serious issues to be tried”: at [119];

(5) there was "public interest" involved in assessing the State's coal reserves, and in then exploiting them, but there was also a "public interest" involved in applying the precautionary approach where environmental harm may result: at [120];

(6) the balance of convenience turned on the consequences for Hume of the Court's delaying until a full hearing, if not excluding completely, the granting of constructive approval to its accessing the Koltai land via the Alexander land, as against the possible harm to the environment and to third party rights of allowing access now, by denying the Alexanders the right to block it: at [121]; and

(7) if an interlocutory injunction was granted there was a quite serious risk of doing an injustice: at [122].

***Urquhart v Hayman (No 2)*** [2012] NSWLEC 269 (Sheahan J)

(related decision: *Urquhart v Hayman* [2010] NSWLEC 1248, Moore SC and Galwey AC)

Facts: this matter concerned a dispute regarding compliance with, and performance of, a complex suite of 19 orders made after the hearing of proceedings under the *Trees (Disputes Between Neighbours) Act 2006* (“the Act”). The substantive proceedings concerned the impact of two Canary Island Date Palms growing in the rear of the respondent’s property, on a wall built essentially on the applicant's side of the parties’ shared property boundary. At the hearing the Commissioners considered that, if the pressure caused by the root balls of the trees were not removed, cracking of the wall would be exacerbated. The Commissioners were not persuaded that the wall had not been constructed in accordance with the engineering drawings, and they were also satisfied that the wall was adequate. They were not satisfied, however, that the trees were likely to cause any personal injury, or that further root pruning would impact on their stability. As a result, they made orders requiring action by both parties, which involved, sequentially, the demolition of part of the wall near the trees, the pruning of the root ball, the reconstruction of the demolished part of the wall, the reimbursement of the cost of reconstruction, and a regime of ongoing pruning and maintenance.

Both parties proceeded to take steps in an attempt to comply with the orders, and there was much correspondence in relation to that purported compliance. Of specific relevance, was a letter dated 21 January 2011, personally served on Hayman on 5 February 2011, notifying him that Urquhart had completed the reconstruction works on 16 December 2010. A receipted account from the contractor for $23,335, was enclosed, with a reminder that Hayman had 180 days from the service of the account to make the payment. When the payment was not made, Urquhart filed a Notice of Motion in the Land and Environment Court, seeking a declaration to put beyond doubt, or further dispute, any question of his compliance with his obligations under the orders. Local Court proceedings were also commenced, to recover the amount, plus the costs of the structural engineer’s report, certifications, legal costs, filing fees, and flights.

Issue:

(1) whether the applicant had complied with his obligations under the orders, and was thereby entitled to reimbursement of the cost of reconstruction of the wall.

Held: the Court found that the applicant had complied with Orders 1, 2, 4, 8, and 11, made by the Commissioners on 7 September 2010. The respondent was ordered to pay the applicant's costs incurred on the Notice of Motion filed on 24 February 2012 on a party-party basis, as agreed or assessed. The Court was satisfied that:

(1) it had jurisdiction to entertain the applicant's Notice of Motion, on the basis of the principles regarding the "working out" of orders, and that a remedy was available, despite the fact that the Commissioners in their orders did not grant to either party any "liberty to apply": at [83];

(2) the appropriate course, in a class 2 enforcement matter, as distinct from a class 4 matter, is for the Court to make findings of fact, rather than bare declarations: at [90];

(3) the applicant had complied with the orders, and that they were enforceable by taking action for recovery of the amount, as a judgment debt, in the civil claims jurisdiction of the Local Court: at [92] and [94]; and

(4) as the applicant had been entirely successful in the proceedings, it was just and reasonable that the respondent be ordered to pay his costs: at [95].

***Perilya Broken Hill Limited v Valuer-General (No 2)*** [2012] NSWLEC 276 (Preston CJ)

(related decision: *Perilya Broken Hill Limited v Valuer-General* [2012] NSWLEC 235 Lloyd AJ)

Facts: On 19 October 2012, Lloyd AJ gave judgment and made three orders, first, upholding the appeal of Perilya Broken Hill Limited ("Perilya") under s 37 of the *Valuation of Land Act* 1916 ("the VL Act"); secondly, revoking the Valuer-General's decision that the land value of Perilya's land at Broken Hill for the valuing year commencing 1 July 2007 was $20.9 million; and thirdly, making a decision that the land value of the land for the valuing year commencing 1 July 2007 was $4.9 million in place of the Valuer-General's decision. The Valuer-General gave effect to the orders made by Lloyd AJ by altering the Register of Land Values under s 14DD(1) of the VL Act to record the land value as $4.9 million, and by providing a supplementary list to the relevant rating authority – Broken Hill City Council ("the council") – under s 49(1) of the VL Act containing the altered land value of $4.9 million. The Valuer-General was dissatisfied with the decision of Lloyd AJ and filed a notice of intention to appeal with the NSW Court of Appeal. This did not operate to commence proceedings in the Court of Appeal by virtue of rule 51.9(3) of the Uniform Civil Procedure Rules 2005 ("UCPR"), and the Valuer-General subsequently filed a notice of appeal which did commence proceedings on 10 December 2012. The council filed a notice of motion in the appeal in the Land and Environment Court ("the Court") on 10 December 2012 and sought, first, an order for the council to be joined as a second respondent to the appeal in the Court for the purpose of, next, seeking orders for a stay of orders 2 and 3 of Lloyd AJ's orders and for the alteration of the Register of Land Values made by the Valuer-General consequent upon the Court's judgment to be reserved. On 18 December 2012, the Valuer-General was granted leave to file in court and have returnable instanter, a motion seeking the same orders that the council wished to be joined in order to seek. On the hearing of its notice of motion on 18 December 2012, the Valuer-General orally sought two additional orders, namely, that, consequent upon the Valuer-General reversing the alteration to the Register of Land Values, the Valuer-General give another supplementary list to the council containing information about the reversal of the alteration to the Register, and that Perilya be restrained from taking any step or action to recover any overpayment of rates pursuant to the *Local Government Act* 1993 based on the land value of the land for the valuing year commencing 1 July 2007 (the Council had calculated that the overpayment of rates could potentially amount to approximately $6.88 million). Perilya opposed the grant of the orders sought in both notices of motion and orally at the hearing.

Issues:

(1) whether a stay of Lloyd AJ's orders 2 and 3 should be made ("the first order");

(2) whether the Court was able and prepared to reverse the alteration of the land value of the land in the Register of Land Values that the Valuer-General had earlier made under s 14DD(1) of the VL Act ("the second order");

(3) whether the Court was able and prepared to give a supplementary list to the council reflecting the reversal of the alterations to the Register of Land Values ("the third order"); and

(4) whether the Court was able and prepared to issue an order restraining Perilya from taking any step or action to recover any overpayment of rates by Perilya from the council ("the fourth order").

Held: The Valuer-General's notice of motion filed on 18 December 2012 was dismissed, as was the council's notice of motion filed on 10 December 2012. No costs order in relation to the notices of motion was made.

(1) the Court declined to make the first order for three reasons, each relating to the fact that those orders had no ongoing operation or effect to be stayed. First, Lloyd AJ's orders 2 and 3 took effect upon their pronouncement, meaning that those orders had already done their work and had no ongoing work to do. Secondly, the failure of the Valuer-General to institute an appeal of Lloyd AJ's decision within 30 days effectively meant that Lloyd AJ's decision was final pursuant to s 41(2) of the VL Act. Thirdly, the Valuer-General's subsequent actions of, first, altering the land value of the land in the Register of Land Values under s 14DD(1) of the VL Act and, secondly, giving a supplementary list to the Council with the altered land value under s 49(1) of the VL Act, gave effect to Lloyd AJ's orders 2 and 3. In these circumstances, therefore, there was no ongoing operation of Lloyd AJ's orders 2 and 3 which could be stayed: at [10]-[19];

(2) **Obiter**: even if there had been an order with ongoing operation to be stayed, the Court considered that the discretionary considerations, on balance, would not have favoured granting a stay: at [20]-[28];

(3) the Court declined to make the second order for three reasons. First, because the Court declined to make the first order, there was no basis for the Valuer-General to make an alteration to the Register of Land Values to give effect to a decision to stay Lloyd AJ's orders 2 and 3. Secondly, even if the Court had made an order staying Lloyd AJ's orders 2 and 3, the Court's stay of Lloyd AJ's orders 2 and 3 would not answer the description of being a "decision on objection or appeal under this Act" within s 14DD(1)(b) of the VL Act. An order staying a substantive decision disposing of the appeal under s 37(1) of the VL Act is not itself a substantive decision. Thirdly, the Court was not persuaded that it had, in the circumstances of the case before it, the power to order the Valuer-General to make an alteration to the Register of Land Values by way of reversal of the alteration the Valuer-General had earlier made: at [29]-[33];

(4) the Court declined to make the third order for two reasons. First, because the Court declined to make the first order, there was no change in the information entered in the Register and hence no need to make an order requiring the giving of a supplementary list to the Council under s 49(1) of the VL Act. Secondly, the Court was not persuaded that it had, in the circumstances of the case before it, the power to order the Valuer-General to give a supplementary list: at [34]-[36]; and

(5) the Court declined to make the fourth order for two reasons. First, any future action that Perilya could take would involve the commencement of proceedings to claim a refund for overpayment of rates paid to the council. The right which constituted the cause of action to recover overpaid rates would arise from a source other than the Court's judgment and orders. Indeed, it was the Valuer-General's actions in giving effect to the Court's judgment that could give rise to any future claim Perilya could have for a refund of any overpayment of rates, not the Court's decision itself. Secondly, the Court was not persuaded that it had, in the circumstances of the case before it, the power to prohibit Perilya from taking action to commence proceedings in another court to claim a refund of any overpayment of rates otherwise than by way of enforcement of the Court's judgment or orders: at [37]-[42].

***Wilpinjong Coal Pty Limited v Mid-Western Regional Council; Ulan Coal Mines Limited v Mid-Western Regional Council*** [2012] NSWLEC 277 (Preston CJ)

Facts: Wilpinjong Coal Pty Limited ("Wilpinjong") and Ulan Coal Mines Limited ("Ulan") were two mining companies that owned significant parcels of rateable land in the Mudgee area. Originally, the parcels of

land owned by the two mining companies had been categorised variously as farmland, residential or business. However, Mid-Western Regional Council ("the council") subsequently made multiple declarations under s 525 of the *Local Government Act* 1993 ("the LG Act") which had the effect of re-categorising the parcels of land as "mining coal". The two mining companies, by separate applications in respect of the separate parcels of rateable land, applied under s 525 of the LG Act for the rateable land to be re-categorised back to the original categories of farmland, residential or business rather than the new category of "mining coal". All of those applications were rejected by the council, who made further declarations affirming the new category of "mining coal" for each individual parcel of rateable land. It was those further declarations that the mining companies sought to appeal to the Land and Environment Court ("the Court") under s 526 of the LG Act. The number of proposed appeals to be brought by the two mining companies had the potential to be considerable. Ulan sought to appeal 20 individual declarations relating to 20 separate parcels of rateable land they owned while Wilpinjong sought to appeal 100 individual declarations relating to 100 separate parcels of rateable land they owned. With this in mind, the two mining companies by their respective notices of motion sought for the 20 appeals in Ulan's case and the 100 appeals in Wilpinjong's case to be dealt with in two separate originating processes.

Issues:

(1) whether the two mining companies were entitled as of right, without seeking the leave of the Court, to have all of their respective appeals dealt with in two separate originating processes; and

(2) if the two mining companies were not so entitled, whether the Court was both able and prepared to grant leave for the two mining companies to join all of their respective appeals in two separate originating processes.

Held: The notices of motion were dismissed, with the Court finding that, for the purpose of proposed appeals, it will be necessary for the mining companies to bring separate appeals in respect of each declaration with which they are dissatisfied under s 526 of the LG Act. Each party was ordered to pay their own costs of the notices of motion.

(1) in order for the two mining companies to have the 20 appeals in one case (Ulan) and the 100 appeals in the other case (Wilpinjong) dealt with in two separate originating processes, r 6.18 of the Uniform Civil Procedure Rules 2005 ("UCPR") needed to entitle the mining companies to claim relief against the Council in respect of each of those appeals in the one application. Rule 6.18(1)(a)-(c) enabled the two mining companies to do so as of right without seeking the leave of the Court if the circumstances in those paragraphs were satisfied, whereas paragraph (d) gave the Court the power to grant leave for causes of action to be dealt with in the same proceedings in circumstances other than those in paragraphs (a)-(c). The two mining companies sought to rely on paragraphs (a) and (d) of r 6.18 of the UCPR: at [5];

(2) in relying upon r 6.18(1)(a), the two mining companies encountered difficulty as paragraph (a) required the Council to be "liable" to the plaintiff in respect of each cause of action. In the case of an appeal under s 526 of the LG Act, the council that makes a declaration under s 525 of the LG Act is not liable to anyone. The making of an administrative decision by council to declare that the land be within a category and to accept or reject an application made by a rateable person for a change of category does not create any liability to the rateable person: at [6]; and

(3) the Court was unable to grant leave for the two mining companies to join all of their respective appeals in two separate originating processes. Rule 6.18 of the UCPR does not apply to an appeal made under s 526 of the LG Act as this type of appeal is not a "cause of action". Rather, this type of appeal gives rise to a procedural right to lodge an appeal against a declaration made under s 525 of the LG Act and ask for the Court to determine the correct category on the merits review appeal: at [7]-[9].

## Section 56A Appeals

***Chehade v Bankstown City Council*** [2012] NSWLEC 221 (Sheahan J)
(related decision: *Chehade v Bankstown City Council* [2012] NSWLEC 1122 Morris C)

Facts: on or about 11 March 2011 Chehade lodged a development application ("DA") with Bankstown City Council ("the council") proposing the demolition of an existing dwelling and associated out-buildings, and construction of a ten-room boarding house. The DA was refused by council on 2 September 2011, and Chehade subsequently appealed under s 97 of the *Environmental Planning and Assessment Act* 1979. The issues in the appeal before the Commissioner were (1) whether the development was compatible with the character of the local area, (2) whether the proposal was permissible on the site, and (3) whether the Court should apply either the current or previous provisions of the *State Environmental Planning Policy (Affordable Rental Housing)* 2009 ("the SEPP"), which was revised while the DA was before the council.

Importantly, without the SEPP being successfully invoked, a boarding house was not a permissible use of the site, which was zoned 2(a) under Bankstown Local Environmental Plan 2001 ("the LEP"). In order to invoke the SEPP, the 2(a) zone needed to be considered to be a land use zone in which land uses were permitted, which were "equivalent" to those in the Residential zones in the *Standard Instrument (Local Environmental Plans) Order* 2006 ("the Order"). Clause 5(1)(b) of the SEPP relevantly set out what was meant by "equivalent" land use zones.

The Commissioner conducted a review of the land uses permitted in the four residential zones contained within the Order and compared those with the uses permitted in the 2(a) zone under the LEP. She considered the number of uses, and the nature of those uses, and concluded that, on either manner of assessment, the 2(a) zone was not equivalent to any of the residential zones under the Order, and dismissed the appeal.

The applicant appealed under s 56A of the *Land and Environment Court Act* 1979 against the Commissioner's decision.

Issues:

(1) whether the Commissioner erred in law in the construction of clause 5(1)(b) of the SEPP in forming the opinion that the Residential 2(a) zone under the LEP was not equivalent to the R1 and R2 residential zones under the Order;

(2) whether the Commissioner erred in law by failing to form any requisite or necessary opinion pursuant to clause 5(1)(b) of the SEPP; and

(3) whether the Court should set aside the Commissioner's orders dismissing the appeal and refusing consent.

Held: the appeal was dismissed with costs:

(1) clause 5 of the SEPP was formulated in a specific way, distinct from the way that other provisions in the instrument were formulated, and strict adherence to its terms was required: at [46]-[47]; and

(2) the Commissioner's application of the instruments was correct: at [48].

***Bathurst Regional Council v Taylor*** [2012] NSWLEC 226 (Lloyd AJ)

(related decision: *Taylor v Bathurst Regional Council* [2012] NSWLEC 1140 Fakes C)

Facts: the respondent was using a former factory building as a dwelling and had carried out works to the building for its use as a dwelling in circumstances where no development consent had been granted for the use of any part of the building as a dwelling or for the works. In order to sell the building, the respondent applied to the appellant council for a building certificate for the work he had done and for a development consent to use the building as a dwelling. The council refused both applications but a Commissioner upheld appeals against both refusals. The consent was granted subject to conditions requiring the completion of rectification works to the building to make it structurally adequate for occupation as a residence. The council appealed under s 56A of the *Land and Environment Court Act* 1979 on grounds

directly concerning the granting of the development consent and submitted that if its appeal against the consent was upheld then the granting of the building certificate must also be set aside in the absence of any consent. In relation to the zone in which the subject land was situated, cl 28 of the Bathurst Regional (Interim) Local Environmental Plan 2005 provided that consent could not be granted to "the erection of a dwelling-house" unless the lot on which the dwelling house was proposed to be erected had a minimum area of 100ha. The subject land had an area of 1.614ha. Pursuant to s 4(2)(b)(i) of the *Environmental Planning and Assessment Act* 1979, the definition of erection of a building included the making of alterations. The council submitted that the policy inherent in cl 28 was that dwelling houses should only exist on lots having an area of not less than 100ha and it was mandatory to consider such a policy which was at the heart of the assessment process.

Issues:

(1) whether the Commissioner erred in her construction of cl 28 in holding that it did not apply to the subject development;

(2) whether the Commissioner failed to consider the policy inherent in cl 28 in considering the development application;

(3) whether cl 28 necessarily applied as a consequence of the conditions relating to the carrying out of building work which the Commissioner imposed on the development consent; and

(4) whether the granting of the building certificate must be set aside if the development consent was set aside.

Held: appeal allowed:

(1) the Commissioner was correct in finding that cl 28 did not apply to the development application as submitted. The notion of "the erection of a dwelling house" does not include a change of use of a building to a dwelling house. The language of cl 28 was clear and unambiguous. It referred only to the erection of a dwelling house, and it would have been a simple matter for the draftsman to include the additional word "use" if that were the intention. Such a construction limiting the operation of cl 28 did not lead to an absurd outcome as any development application to use an existing building as a dwelling house must still satisfy the merit tests: at [19]–[22];

(2) this ground of appeal was not established. It was accepted without deciding that the policy inherent in cl 28 was a mandatory consideration. However, the Commissioner clearly considered the policy in her merit assessment of the application and gave it little weight having regard to the other circumstances of the case: at [25], [28];

(3) the conditions imposed on the development consent by the Commissioner relating to the structural work necessarily engaged cl 28 and it became a mandatory requirement in that, rather than being merely a matter which was to be taken into consideration as a circumstance of the case, the mandatory terms of cl 28 meant that there was no power to consent to the development application as the subject land was less than 100ha in area. This question was not raised before the Commissioner, but as it went to the jurisdiction of the Court to grant consent and did not involve the calling of more evidence, there was no bar to it being raised on appeal. Thus, the third ground of appeal must be upheld and the Commissioner's consent must be set aside: at [30]–[32]; and

(4) the Commissioner's decision to grant the building certificate must also be set aside as the decision to uphold that appeal was dependent on the decision to grant consent to the use of the premises as a dwelling: at [33].

***The Northern Eruv Incorporated v Ku-ring-gai Council*** [2012] NSWLEC 249 (Craig J)

(related decision: *The Northern Eruv v Ku-ring-gai Council* [2012] NSWLEC 1058 Morris C)

Facts: the appellant proposed to construct an Eruv in St Ives and lodged development applications with Ku-ring-gai Council ("the council") seeking consent under the *Environmental Planning and Assessment Act 1979* ("the EPA Act") and also under the *Roads Act 1993* ("the Roads Act"). The council refused all applications and the appellant appealed to the Court pursuant to s 97 of the EPA Act. In relation to those

elements of the Eruv that required approval under the EPA Act, a Commissioner of the Court granted conditional development consent. In relation to the principal elements of the Eruv located along public roads that required approval under the s 138(1)(a) of the Roads Act, the Commissioner held that pursuant to s 39(2) of the *Land and Environment Court Act 1979* ("the Court Act") the Court did not have jurisdiction to grant consent. The present case was an appeal pursuant to s 56A(1) of the Court Act against the Commissioner's decision.

Issue:

(1) whether the Commissioner erred in determining that s 39(2) of the Court Act did not found a power in the Court to consent to the application made by the appellant under the *Roads Act.*

Held: appeal dismissed:

(1) no legal error was found in the Commissioner's articulation of the scope of the power afforded under s 39(2) of the Court Act: at [60], [63]. The Commissioner correctly recognised that the requirement to obtain consent under the *Roads Act* was independent to the need to obtain consent under the EPA Act and that one is not subordinate to the other: at [55], [60]-[65]. The Commissioner was correct in finding that the requirement that the development applications under the EPA Act and the application under the *Roads Act* be "enmeshed" was not satisfied: at [59]; and

(2) to engage the power under s 39(2) of the Court Act, there must be a 'nexus' that involves an exercise of power that is legally indispensable to the exercise of power to determine the subject matter of an appeal: at [53]. The exercise of the function available to the council to determine the application under the *Roads Act* for works and structures along 20kms of public road was not indispensible to the power to determine the appeals under s 97 of the EPA Act for the erection of poles and wires on nine separate properties: at [60]. Accordingly, the necessary nexus did not exist in the present case: at [59].

## Commissioner Decisions

***Geitonia Pty Limited v Leichhardt Council*** [2012] NSWLEC 1263 (Moore SC)

Facts: the applicant was granted development consent in 2005 for the erection of a mixed-use development (comprising commercial and residential units) on Parramatta Road at Annandale. The conditions of development consent required retention of part of the existing building including the majority of its front and side facades and the stepped front veranda cantilevered over the Parramatta Road footpath. The plans disclosed how the retained facades would be supported and protected during the course of demolition of the remainder of the fabric of the building. Although some rearrangement of the Parramatta Road facade was approved (to accommodate an entrance to the development), this facade was to be restored in situ. Despite these requirements, retention of the facade did not occur and, effectively, it was entirely demolished along the Parramatta Road frontage with limited portions of the eastern and western return wings being retained. The applicant sought approval to modify the development consent to delete the requirement for retention of the now demolished Parramatta Road facade and to reconstruct that facade. The reconstruction was to be partially in new material and, to the extent possible, in salvaged material from the original facade. The council rejected the application to modify the consent on the basis that the statutory test in s 96(2) of the *Environmental Planning and Assessment Act* 1979 was not satisfied.

Issue:

(1) whether the reconstruction of the Parramatta Road facade as proposed would result in a development that remained substantially the same development as that for which consent was originally given.

Held: dismissing the appeal and refusing the application to modify the development consent:

(1) an assessment was required by a comparison of the originally approved development with the resultant development (if modified) on two bases. The first was whether the resultant development would be quantitatively the same as the originally consented development whilst the second was whether it would be qualitatively the same: at [7] - [9];

(2) against the quantitative test, a reconstructed facade using as much of the original fabric as could be salvaged, subject to conditions to ensure as faithful adherence to the original facade as possible, would be sufficiently similar to satisfy the first test: at [21];

(3) this conclusion was reached as the statutory provisions permitting modification of consents is to be regarded as facultative and beneficial: at [22];

(4) the heritage experts agreed that there was an important heritage distinction to be made between that which was approved and that which was proposed through the modification application (in that the demolition that had occurred was not compatible with the heritage conservation objectives in the *Leichhardt Local Environmental Plan* 2000): at [25];

(5) the difference between an approved development that is compliant and a proposed modification to it that is not compliant with the objectives of a critical provision of the LEP is sufficient in itself to warrant refusal on a qualitative basis: at [27];

(6) one of the reasons why the original development consent was approved, although not compliant with a development standard for floor space ratio, was the benefit to be obtained by the retention of the façade: at [30];

(7) a single element of a proposed development can be of such significance to the development to inform the essence of the consent that was given: at [29];

(8) retention of the facade was a fundamental element of the development and reflected a substantial qualitative element. The circumstances in which the approval was granted made it clear that the retention of the facade was such a significant element in the proposed development as to be an essential qualitative element (now lost), thus warranting refusal: at [30], [33]; and

(9) even if, on their own, the separate reasons were not sufficient basis for refusal, their cumulative effect was sufficient to warrant refusal of the modification application: at [35].

***Meriton Property Services Pty Ltd v Council of the City of Sydney*** [2012] NSWLEC 1308 (Pearson C)

(related decision: *Meriton Property Services Pty Ltd v Council of the City of Sydney* [2012] NSWLEC 169 Biscoe J)

Facts: Meriton Property Services Pty Ltd ("Meriton") obtained development consents for the construction of mixed use developments comprising residential units, retail space and car parking on two sites in the Green Square Redevelopment Area identified under the *South Sydney Local Environmental Plan* 1998 ("the SSLEP"), one at South Dowling Street Waterloo ("the ACI site") and the other at Defries Avenue Zetland ("the VSQ site"). The conditions imposed on both consents included a condition requiring payment of an affordable housing contribution under cl 27Q of the SSLEP, which included a contribution calculated at the rate of 3% of total floor area for the residential unit component of each development. The conditions specified that before the issue of a construction certificate, Meriton had to provide evidence that the monetary contribution had been paid, or a bank guarantee lodged, with the Department of Planning; and that before the issue of an occupation certificate, Meriton had to provide evidence that the bank guarantee had been redeemed. The rate of contribution was to be indexed annually in accordance with a formula provided in the conditions. For the ACI site, the initial development consent was granted in 2004; Meriton paid the affordable housing contribution required under condition 29 of the development consent to the Department of Planning in 2006; the Department of Planning paid the contribution to City West Housing Pty Ltd ("City West"), the provider of affordable housing; and that money was spent by City West. For the VSQ site, the initial development consent was granted in 2010; and Meriton provided a bank guarantee in accordance with condition 40 of that consent in 2011 and a construction certificate was issued. At the time of the hearing of the appeal, construction was nearly complete. In 2006 (ACI site), and 2010/2011 (VSQ site), the council granted development consent for the change of use of the residential units in each development to serviced apartments. In 2012 Meriton applied under s 96(1A) of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act") to modify both development consents, to amend the conditions so as to require payment of the affordable housing contribution at the rate applicable to the floor area "not intended to be used exclusively for residential purposes" under cl 27P(2)(a)(ii) of the SSLEP,

which was 1%. Meriton appealed under s 97AA of the EPA Act against the deemed refusal of the modification applications, and the appeals were heard together. The council submitted that cl 27P(3)(b) of the SSLEP, which provides that a change of use "does not give rise to a claim for a refund of any amount that has been contributed", precluded recovery of any contribution made for affordable housing, so that the issue of whether use for the purpose of serviced apartments was a use exclusively for residential purposes was hypothetical and determination of that issue would be futile.

Issues:

(1) whether the approved use for the purposes of serviced apartments was a use "exclusively for residential purposes" for the purposes of the application of cl 27P of the SSLEP;

(2) whether s 94F(4) of the Act applied so that the amounts contributed could be taken into account in any future consideration by a consent authority proposing to impose a condition requiring payment of an affordable housing contribution;

(3) whether, if development for the purposes of serviced apartments was not exclusively for residential purposes, the conditions ought to be modified so that the affordable housing contribution was levied on 1% of the total floor area rather than 3%; and

(4) whether, if the conditions ought to be modified, the Court would be precluded from doing so as a result of cl 27P(3)(b) of the SSLEP.

Held: finding that the appeal in relation to the ACI site should be dismissed, and directing the parties to provide the final version of an amended condition 40 in relation to the VSQ site:

(1) the issues of whether the now approved use as serviced apartments was a use for "residential purposes" and if not, whether condition 40 should be modified, were live issues in relation to the VSQ site, and there was utility in determining them: at [46];

(2) it was not appropriate to rely on the definition of "residential development" in cl 27KC, which was in Div 2A of Part 4 of the SSLEP, in the interpretation of cl 27P which was in Div 3 of Part 4. Clause 27KC expressly applied to Div 2A; and while Divs 2, 2A and 3 together related generally to the redevelopment of the Green Square area, the statutory scheme gave each division different work to do: at [73];

(3) the authorities, while considering terms and phrases defined in other planning instruments, supported an interpretation of the word "residential" as used in cl 27P(2) to require a degree of permanency or residence for a considerable period of time, or as a person's settled or usual abode: at [81];

(4) such an interpretation was consistent with the definition of "residential use" in Sch 1 to the SSLEP, being for long-term accommodation, which applied specifically in Green Square: at [82];

(5) it was immaterial that cl 27P used the term "residential purposes" rather than "residential use". The common element was "residential", and any use had to be for a purpose: at [83];

(6) the use for the purpose of a serviced apartment, being for short-term accommodation for people whose residence was elsewhere, was not a use "for residential purposes", and cl 27P(2)(a)(ii) would apply to the calculation of affordable housing contributions at the rate of 1%: at [84];

(7) whether or not the reference in cl 27P(3)(b) to "any amount that has been contributed" was to be construed as restricted to actual payment of money, or more broadly to include a commitment to pay, the contribution in relation to the ACI site was covered by cl 27P(3)(b) and there could be no claim for a refund: at [94];

(8) in relation to the VSQ site, the provision of a bank guarantee was a promise to pay, albeit by a third party, and not the making of a payment, and given the indexation provisions the total amount payable would not be known until the moment of payment. The reference in cl 27P(3)(b) to "any amount that has been contributed" was a reference to direct payment or payment by the redemption of a bank guarantee; cl 27P(3)(b) would preclude a claim for a refund only at that time, and did not apply in the circumstances to the contribution required for the VSQ site: at [95];

(9) section 94F(4) of the Act, which permits a consent authority to take into consideration contributions previously made for the purpose of affordable housing "otherwise than as a condition of a consent", did not apply: at [96];

(10) in relation to the ACI site, there was no practical utility in modifying condition 29, and in circumstances where Meriton had paid the contribution without protest and carried out the approved development, the proper course was to refuse the application to modify condition 29 of that consent: at [104]; and

(11) in relation to the VSQ site, cl 27P(3)(b) did not apply; Meriton had to comply with condition 40 before it obtained an occupation certificate; and the modification application was made within a relatively short period after the granting of the consent to authorise the change of use. There was no reason not to exercise the discretion to modify condition 40 to reflect the approved change of use: at [105].

***Flowers v Wollondilly Shire Council*** [2012] NSWLEC 1340 (Tuor C)

Facts: the applicants live on a 2ha site in Eagles Road, Razorback, and operate a tree lopping business, which undertakes the lopping and removal of trees in the local Macarthur area. The applicants had undertaken works without consent, including earthworks, the importation of fill, and construction of retaining walls to enable the site to be used to park vehicles, store machinery and materials, including wood chip mulch and logs associated with the tree lopping business. They appealed under s 97 of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act") against the council's refusal of a development application for "the continued use of site for depot, excavations, retaining walls, and construction of a new farm shed and retaining walls". The applicants' description of the proposal included the storage of vehicles, machinery and equipment in connection with a tree lopping business, the use of a room in the dwelling as an office for the tree lopping business, as well as parking for employees cars.

The site is in the Rural RU2 Zone under *Wollondilly Local Environmental Plan* 2011 ("LEP"). The use of the site for a "depot" is permissible with consent. "Commercial premises" and "business premises", as innominate uses, are prohibited in the zone. "Depot" is defined under the LEP as:

"**depot** means a building or place used for the storage (but not sale or hire) of plant, machinery or other goods (that support the operations of an existing undertaking) when not required for use, but does not include a farm building".

Issue:

(1) whether the proposed use was for the purpose of a "depot", or was prohibited in the RU2 zone under the LEP.

Held: dismissing the appeal and refusing the development application:

(1) to determine whether the proposal was prohibited it was first necessary to establish, on its facts, whether the proposed development, properly characterised, was development for a purpose that was expressly listed in the zoning table. It was not correct, or necessary, to determine whether or not the proposed development, properly characterised, was development for a purpose that was not expressly listed in the zoning table: at [54];

(2) the component of the development that involved the storage, when not in use, of vehicles and plant that supported the operations of the tree lopping business would fall within the definition of "depot". However, the uses that were proposed on the site were broader than storage and were not for the purpose of a depot. The parking of staff cars and administration were activities directly associated with the tree lopping business, not the depot: at [59];

(3) an "existing undertaking" did not have to be limited to a use that was permissible within the zone. Given that the EPA Act regulates land use planning, an "existing undertaking" that is occurring on the site should be a lawful use of the land, by either having a valid development consent, existing use rights, not requiring development consent, or being a use for which consent could be granted, prior to any consent for a "depot": at [64]; and

(4) for the "depot" to be permissible on the site it had to support the operations of an "existing undertaking". The tree lopping business was not an "existing undertaking" for the purposes of the

definition of "depot" in the LEP as, in its current form, it was not a lawful use of the land as it required consent and no consent had been granted. Therefore the proposal, on the facts of this case, was not permissible within the RU2 zone: at [72].

***Davis v Gosford City Council*** [2012] NSWLEC 1329 (Brown C, Fakes C)

(related decisions: *Davis v Gosford City Council* [2007] NSWLEC 795 Roseth SC; *Davis v Gosford City Council* [2012] NSWLEC 62 Lloyd AJ)

Facts: the applicant sought development consent under the *Environmental Planning and Assessment Act* 1979 ("the EPA Act") for a waste resource recovery facility within the Somersby Industrial Park ("SIP"). The proposal involved clearing and developing 4.05 ha of the 11 ha site for the annual processing of up to 75,000 tonnes of construction and demolition waste. The proposal was permissible with consent under *Gosford Local Environmental Plan 22* ("GLEP 22"). A similar proposal was the subject of an unsuccessful appeal to the Court in 2005.The SIP contains a number of Aboriginal heritage areas as well as several threatened species of flora and fauna including the Eastern Pygmy Possum and the local population of *Hibbertia procumbens*. The Plan of Management Somersby Industrial Park (2005) ("POM") applies to the site. The POM was based on a number of broad biodiversity studies conducted in 1997, 2003 and 2005. The POM identifies a number of management zones intended to protect the areas of Aboriginal significance and of biodiversity value. The site contains four designated Management Zones – Aboriginal heritage, *Hibbertia procumbens*, Riparian zones and habitat protection, and Habitat links. The POM also identifies areas suitable for development. The majority of the proposed development is in the southern section of the site, an area identified in the POM for development, but also encroaches into the *Hibbertia procumbens* management zone. A new development application was lodged in 2011, and rejected by the council on the basis that a Species Impact Statement ("SIS") was required in regards to the *Hibbertia procumbens* and the Eastern Pygmy Possum. An appeal under s 82B of the EPA Act was subsequently refused by council's Independent Development and Environment Panel. In subsequent Class 4 proceedings Lloyd AJ declared, amongst other things, that on the evidence before him, an SIS was not required. After Lloyd AJ's decision, the council commissioned an ecologist to undertake further surveys targeting the Eastern Pygmy Possum and the local population of *Hibbertia procumbens*. The survey included the installation of over 100 passive tube traps in the southern section of the site and nearby zones. It found up to nine individual Eastern Pygmy Possums with another three sharing a single tube within 20m of the proposed development site. Prior to this targeted survey only two to three live individuals had been found on or close to the applicant's land. In regards to the *Hibbertia procumbens* the study found fewer plants than the numbers identified in the applicant's ecologist's reports. The applicant's ecologist maintained that the proposal would not have a significant impact on the local populations of either the Eastern Pygmy Possum or *Hibbertia procumbens*. In regards to the Eastern Pygmy Possum, he was of the view that some individuals could be trapped and relocated. The council's ecologist argued that the proposal would remove the best quality habitat on the site for the Eastern Pygmy Possum, and given the numbers of individuals found, it was likely to be a viable breeding population that would be placed at risk of extinction should the development proceed.

Issues:

(1) whether the proposal was an abuse of process as the development application was almost the same as the appeal dismissed by the Court in 2007;

(2) whether there would be an unacceptable impact on threatened fauna, specifically the Eastern Pygmy Possum; and

(3) whether there would be an unacceptable impact on threatened flora, specifically *Hibbertia procumbens* and if so, whether that could be offset.

Held: dismissing the appeal and refusing development consent:

(1) the application was not an abuse of process as the differences between the applications and the new evidence on the Eastern Pygmy Possum clearly raised the need for a different assessment: at [23];

(2) the habitat area for the Eastern Pygmy Possum was within the portion of the site not identified in the POM as being affected by a management zone but this did not preclude the consideration required by s 79C(1)(b) of the EPA Act: at [40];

(3) while the management zones in the POM were determined on the best information at the time, the surveys were limited in their area and scope: at [41]–[43];

(4) the number of individual Eastern Pygmy Possums found in the most recent survey appeared to be a significant finding and comparable to those identified in the Scientific Committee's Final Determination for the species: at [43]–[46];

(5) the applicant did not satisfactorily address the question in s 5A(1) of the EPA Act as to whether there was likely to be a significant effect on the Eastern Pygmy Possum – a threatened species: at [47]–[49];

(6) the amelioration measures proposed by the applicant were likely to have unintended and detrimental consequences: at [50];

(7) the proposal was likely to have an unacceptable impact on the Eastern Pygmy Possum in the locality (s 79C(1)(b)), and was inconsistent with cl 24(b) of the GLEP 22 in that it did not protect ecologically significant land, and the application should be refused: at [52]; and

(8) the proposed incursion into the *Hibbertia procumbens* management area would have a moderate impact on the local distribution of *Hibbertia procumbens* and in itself would not be a reason to warrant refusal of the application: at [66].

***Alamdo Holdings Pty Limited v The Hills Shire Council*** [2012] NSWLEC 1302 (Dixon C)

Facts: the applicant appealed under s 97(1) of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act") against the refusal by the council of an application to use part of an existing building in a light industrial complex as a bulky goods premise. The council refused the application because the use, although permissible under the *Baulkham Hills Local Environmental Plan* 2005 ("LEP 2005"), was prohibited under the then draft *The Hills Local Environmental Plan* 2010. After the conclusion of the hearing and before judgment was handed down the draft LEP was gazetted and commenced as *The Hills Local Environmental Plan* 2012("LEP 2012").

The development application the subject of the appeal was then subject to the savings provision in clause 1.8A of the LEP 2012, which directed the consent authority to determine the application "… *as if the plan had not commenced*". The gazetted version of the savings provision in cl1.8A was different from the draft savings provision, which would have directed the consent authority to determine the application "…*as if this Plan had been exhibited but had not commenced*".

Issues:

(1) whether the savings provision in cl 1.8A of LEP 2012 directed the consent authority not to consider the LEP 2012 in its determination of the development application;

(2) whether, in directing the consent authority to treat the LEP 2012 as not having been commenced for the purposes of this application, the LEP 2012 was an environmental planning instrument under s79C(1)(a)(i) or (ii) of the EPA Act;

(3) whether the LEP 2012 was a consideration as an aspect of the public interest under s79C(1)(e); and

(4) if so, what weight could be attributed to it when cl1.8A spoke against the instrument operating to prohibit the present application.

Held: upholding the appeal, concluding that cl1.8A directed the Court not to consider the LEP 2012 in its determination of the development application, and that on the merits the application should be approved:

(1) the words that underlined the reasoning of the Court in *Terrace Towers Holdings Pty Ltd V Sutherland Shire Council* (2003) 129 LGERA 195 "…*as if the Plan had been exhibited*" were purposively removed from cl18A of the LEP 2012. Accordingly, it must follow that the prevailing planning instrument remained the LEP 2005 for this application by dint of the savings provision in cl1.8A of LEP 2012. This

interpretation of the savings provision was consistent with the fundamental legal principle that a law that is said to not commence has no operation (subject to the *Interpretation Act* 1987 provisions, which enable an instrument to be made under that law to take effect when the law itself commences). This interpretation was consistent with the principle in *Victorian Stevedoring and General Contracting Co Pty Ltd v Dingnan* (1931) 46 CLR 73 that a law which has been repealed is taken never to have operated: at [20];

(2) the LEP 2012 had no legal status for this application because cl1.8A directed the consent authority to determine the application as if it not been exhibited or commenced. Therefore, the LEP 2012 could not be a relevant consideration under s79C (1)(a)(i) or (ii) of the EPA Act: at [21]; and

(3) while LEP 2012 was a consideration under s79C (1)(e), as part of the public interest, the wording in the savings provision in cl1.8A removed it from consideration: at [21].

## COURT NEWS:

New Court's new website was officially launched on 6 December 2012.