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Land and Environment Court of NSW Judicial Newsletter

Legislation

- **Statutes and Regulations**

Planning:

On 1 March 2013 the following provisions of Environmental Planning and Assessment Amendment Act 2012 No 93 commenced:
(a) Schedule 1 [1]–[15], [26] and [27], and
(b) the uncommenced provisions of Schedule 2.
The remaining provisions in Schedule 1 commenced 8 March 2013.

The Department of Planning and Infrastructure has released a Planning Circular [PS 12-003] that outlines the changes to the *Environmental Planning and Assessment Act* 1979 that commenced 1 March 2013, including the savings and transitional provisions relating to application of development control plans in assessing development applications.

Environmental Planning and Assessment Amendment Regulation 2013 published 1 March 2013, amends the Environmental Planning and Assessment Regulation 2000 to:
(a) make further provision in relation to matters that must be complied with before an occupation certificate may be issued that authorises a person to commence occupation or use of a new building or a partially completed new building;
(b) prescribe the maximum amounts that a relevant authority may require a person to pay, under a compliance cost notice, for certain costs and expenses of the authority relating to a notice of intention to give an order and the giving of an order; and
(c) make amendments (including savings and transitional arrangements) consequent on the commencement of certain provisions of the *Environmental Planning and Assessment Amendment Act* 2012.

Environmental Planning and Assessment Amendment (Paper Subdivisions) Regulation 2013 published 8 March 2013, amends the Environmental Planning and Assessment Regulation 2000 in connection with the commencement of Schedule 5 to the *Environmental Planning and Assessment Act* 1979 (relating to "paper subdivisions") as follows:
(a) to require a consent authority determining a development application for land to consider any applicable subdivision order under that Schedule and any development plan under that Schedule that relates to the land;
(b) to prescribe matters to be included in a development plan for land that is to be the subject of a subdivision order under that Schedule that will enable its consolidation and subsequent development;
(c) to set out requirements for the preparation, notification, adoption and amendment of any such development plan;

(d) to set out the ballot procedure for determining whether the requisite number of owners of land to which a proposed development plan is subject consent to the plan;
(e) to specify other matters relating to contributions by owners of the land;
(f) to set out the circumstances when land subject to a proposed development plan may be entered without the owner's consent;
(g) to require notice to be given to local councils of subdivision orders and the completion of subdivision works on land within their areas; and
(h) to require information about development plans and proposed consent ballots for proposed plans to be specified on planning certificates.

Environmental Planning and Assessment Amendment (Port Botany and Port Kembla) Regulation 2013 published 31 May 2013, amends the Environmental Planning and Assessment Regulation 2000 to:

(a) prescribe the operators of the ports of Botany Bay and Port Kembla (the Port Operators) as public authorities so that the Port Operators are determining authorities under Part 5 of the *Environmental Planning and Assessment Act* 1979 for development permitted without consent under *SEPP (Port Botany and Port Kembla) 2013*;
(b) require the consent authority to notify the chief executive of a Port Operator of the determination of development applications relating to Port Botany or Port Kembla land in certain circumstances;
(c) exempt certain structures at Port Botany and Port Kembla from the requirement to obtain an occupation certificate and require the principal certifying authorities for such structures to conduct critical stage inspections during construction; and
(d) enable the Port Operators to issue subdivision certificates.

Local Government:

Local Government (General) Amendment (Minimum Rates) Regulation 2013 published 15 March 2013, increases the minimum amount that may be specified by a council when levying an ordinary rate from $458 to $474. [Circular 13-12]

The NSW Parliamentary Research Service has released an e-brief titled: Local Government: review of current issues. Additionally the Division of Local Government has released Circular [13-13] that contains a link to the Local Government Acts Taskforce (LGAT) Discussion Paper "*A New Local Government Act for NSW*".

Criminal:

The *Criminal Procedure Amendment(Mandatory Pre-trial Defence Disclosure) Act* 2013 assented 25 March 2013 and to commence on a date to be proclaimed, will amend the *Criminal Procedure Act* 1986:

(a) to expand the matters that must be disclosed by the defence and the prosecution before a trial for an indictable offence;
(b) to enable the court (and other parties with the leave of the court) to make proper comments in a trial for an indictable offence in circumstances where the accused person fails to comply with certain pre-trial disclosure requirements; and
(c) to enable the court or the jury in such circumstances to then draw such unfavourable inferences as appear proper.

Following a review of the *Bail Act* 1978 by the NSW Law Reform Commission, the *Bail Act* 2013, which aims to provide a legislative framework for a decision as to whether a person who is accused of an offence or is otherwise required to appear before a court should be detained or released, with or without conditions, was assented to 27 May 2013. The Act will commence on a date or dates to be proclaimed.

Water:

Water Management (General) Amendment (Anabranch Water) Regulation 2013 published 15 March 2013. The *Water Management Act* 2000 empowers a private irrigation board (PIB) to take over an existing water supply work on a site within its private irrigation district (PID), subject to various requirements including the authorisation of the Minister and the Governor. If the take over is so authorised, the control and management of the work vests in the PIB on and from the vesting date specified in a notice of the proposed take over served by the PIB on the landholder of the land on which the work is situated.

The object of this Regulation is to exempt, until 30 June 2014, Anabranch Water (being the PIB for the Great Anabranch of the Darling River Private Water Supply and Irrigation District) from the requirements that it must not serve such a notice after the expiration of 12 months after the constitution of its PID or on any person in respect of a work that belongs to, or is under the control or management of, a public authority.

The commencement proclamation under the *Water Management Amendment Act* 2010 proclaimed 1 March 2013 as the commencement date of a provision of the *Water Management Amendment Act* 2010 that amends the *Water Management Act* 2000 to clarify that water is, for the purposes of that Act, taken from a water source if it is taken in certain circumstances in connection with a mining activity.

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

- Water Sharing Plan for the NSW Murray Darling Basin Fractured Rock Groundwater Sources Amendment Order 2013 — published 15 February 2013
- Water Sharing Plan for the NSW Murray Darling Basin Porous Rock Groundwater Sources Amendment Order 2013 — published 15 February 2013
- Water Sharing Plan for the NSW Border Rivers Regulated River Water Source Amendment Order 2013 — published 22 February 2013
- Water Sharing Plan for the Bellinger River Area Unregulated and Alluvial Water Sources Amendment Order 2013 — published 8 March 2013
- Water Sharing Plan for the Central Coast Unregulated Water Sources Amendment Order 2013 — published 8 March 2013
- Water Sharing Plan for the Coffs Harbour Area Unregulated and Alluvial Water Sources Amendment Order 2013 — published 8 March 2013
- Water Sharing Plan for the Hunter Unregulated and Alluvial Water Sources Amendment Order 2013 — published 8 March 2013
- Water Sharing Plan for the Lower North Coast Unregulated and Alluvial Water Sources Amendment Order 2013 — published 8 March 2013
- Water Sharing Plan for the NSW Great Artesian Basin Groundwater Sources Amendment Order 2013 — published 28 March 2013
- Water Sharing Plan for the Lower Gwydir Groundwater Source Amendment Order 2013 — published 12 April 2013
- Water Sharing Plan for the Upper and Lower Namoi Groundwater Sources Amendment Order 2013 — published 19 April 2013

- Water Sharing Plan for the Kulnura Mangrove Mountain Groundwater Sources Amendment Order 2013 – published 10 May 2013

Miscellaneous:

The National Parks and Wildlife Amendment (Protected Native Plants) Order 2013 published 24 May 2013, revises the list of protected native whole plants under the *National Parks and Wildlife Act* 1974.

Protection of the Environment Operations (General) Amendment (Upper Hunter Air Quality Monitoring Network) Regulation 2013 published 15 February 2013 makes provision for the Upper Hunter Air Quality Monitoring Network, which is an environmental monitoring program established by the Environment Protection Authority under Part 9.3C of the *Protection of the Environment Operations Act* 1997. The Regulation includes provisions:

(a) to require holders of environment protection licences authorising coal mining and the generation of electricity from an energy source (other than wind or solar power) in the Upper Hunter region to pay a levy towards the cost of the monitoring program;
(b) to calculate the amount of the levy payable by those licence holders;
(c) to require licence holders to provide to the EPA information about emissions;
(d) to allow persons authorised by the EPA to enter land owned or occupied by the licence holders for the purposes of the operation of the monitoring program; and
(e) to require the EPA to make air quality data available on its website and to publicly report on the monitoring program.

Swimming Pools Amendment (Consequential Amendments) Regulation 2013 published 26 April 2013, amends the Swimming Pools Regulation 2008 to prescribe a range of matters to:

(a) provide for the establishment and implementation by local authorities of strategies for engaging their communities in relation to the development of swimming pool inspection programs;
(b) prescribe the period within which inspections are to be carried out and the period within which details of certificates of compliance are to be entered on the Register of Swimming Pools;
(c) prescribe the fees payable for the carrying out of inspections and for the provision of information to local authorities for entering on the Register;
(d) prescribe the information that is required to be entered on the Register; and
(e) make the offence of failing to ensure that the prescribed information is entered on the Register an offence for which a penalty notice may be served.

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

The State Environmental Planning Policy (Port Botany) 2013 commences on 31 May 2013, and provides a planning regime for the development and delivery of infrastructure on land in and around Port Botany, identifies certain development as exempt development or complying development, specifies matters to be considered in determining whether to grant consent to development adjacent to development for port purposes, provides for development that does not, by its nature or scale, constitute an actual or potential obstruction or hazard to aircraft, and identifies certain development as State significant development or State significant infrastructure.

Immediately after that commencement, the State Environmental Planning Policy (Port Botany) Amendment (Port Kembla) 2013, published 31 May 2013, commences. That SEPP amends the SEPP (Port Botany) 2013 by including provisions relating to Port Kembla, and amends the SEPP (Major Development) 2005 and the SEPP (Infrastructure) 2007.

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

- SEPP (Major Development) Amendment (Edmondson Park South) 2013 — published 22 February 2013

The Environmental Planning and Assessment Amendment (Light Rail Project) Order 2013 published 20 May 2013, amends the SEPP (State and Regional Development) 2011 to specify development for the purposes of the light rail extension between Circular Quay and Randwick and Kingsford to be critical State significant infrastructure.

SEPP Amendment (Minmi–Newcastle Link Road) 2013 — published 1 March 2013, updates maps in a number of LEPs.

The SEPP (Sydney Region Growth Centres) 2006 has been amended by:

- SEPP (Sydney Region Growth Centres) Amendment (Schofields Precinct) 2013 — published 8 March 2013
- SEPP (Sydney Region Growth Centres) Amendment (Camden and Liverpool Growth Centres Precinct Plans) 2013 — published 15 March 2013
- SEPP (Sydney Region Growth Centres) Amendment (East Leppington Precinct) 2013 — published 15 March 2013
- SEPP (Sydney Region Growth Centres) Amendment (The Hills Growth Centre Precincts) 2013 — published 5 April 2013
- SEPP (Sydney Region Growth Centres) Amendment (Camden and Campbelltown Growth Centres Precinct Plans) 2013 – published 17 May 2013.

- **Bills**

Local Government Amendment (Early Intervention) Bill 2013 amends the *Local Government Act* 1993:

(a) to enable the Minister for Local Government or the Director-General of the Department of Premier and Cabinet to direct a council, a councillor or the general manager of a council to provide information or documents about the council, its operations or its activities;
(b) to enable the Minister to issue an order to a council that directs certain actions to be taken to improve the performance of the council;
(c) to provide for the appointment of temporary advisers to assist councils with complying with performance improvement orders;
(d) to require councils to report on compliance with a performance improvement order;
(e) to enable the Minister to suspend a council for a period of up to 3 months (with a possible extension of a further 3 months) if the Minister considers that the appointment of an interim administrator is necessary to improve or restore the proper or effective functioning of a council;
(f) to provide for the appointment of interim administrators;
(g) to make further provision in relation to public inquiries under the Act, including by permitting the Minister to suspend a council during such an inquiry; and
(h) to make it clear that the Governor may appoint more than one administrator to exercise the functions of a dismissed council.

The Petroleum (Onshore) Amendment Bill 2013, introduced on 22 May 2013, amends the *Petroleum (Onshore) Act* 1991, the *Mining Act* 1992, and other Acts including the *Land and Environment Court Act* 1979, among other things, to:

(a) increase penalties for various offences, revise penalties, and provide new offences;

(b) enable directions relating to compliance with conditions of petroleum titles and addressing adverse environmental impacts of mining for petroleum and to provide for enforcement of conditions and appeal against directions;
(c) provide for audits of prospecting or mining for petroleum;
(d) extend the legal costs that holders of mining authorities or petroleum titles must pay for landholders relating to arrangements for access to land and to make other provision with respect to access;
(e) enable publication of certain environmental information; and
(f) confer jurisdiction in Class 1 of its jurisdiction on the Land and Environment Court for appeals against environmental or rehabilitation directions given under the *Petroleum (Onshore) Act* 1991 and the *Mining Act* 1992.

Local Government Amendment (Conduct of Elections) Bill 2013, introduced 29 May 2013, amends the *Local Government Act* 1993 to provide more flexible arrangements for the administration of local council elections by the Electoral Commissioner.

Aboriginal Land Rights Amendment Bill 2013, introduced 29 May 2013, amends the *Aboriginal Land Rights Act* 1983 in relation to exercise of functions of a Local Aboriginal Land Council by its Board; alter requirements for advertising of staff vacancies; clarify provisions relating to disqualification of a person to hold office as a member; change the basis of calculation of community development levies; and make other administrative amendments.

Protection of the Environment Operations Amendment (Illegal Waste Disposal) Bill 2013, introduced 30 May 2013, amends the *Protection of the Environment Operations Act* 1997 to:
(a) create an offence of knowingly supplying false or misleading information about waste in the course of dealing with waste;
(b) create an offence of committing a strict liability waste offence (which includes polluting waters with waste, polluting land, illegally dumping waste or using land as an illegal waste facility) within 5 years of any previous conviction for such an offence;
(c) authorise the EPA to seize a motor vehicle or vessel it has reason to believe has been used to commit any repeat waste offence and enable the Land and Environment Court to order forfeiture of the motor vehicle or vessel;
(d) extend the offence of using land as a waste facility without lawful authority to cover illegally using a body of water as a waste facility; and
(e) enable the regulations to deal with exemptions form payment of the contribution by licensees of waste facilities, and to prescribe a protocol to be used in determining the amount that represents the monetary benefit acquired by an offender in committing an offence.

- **Consultation Drafts**

The Division of Planning and Infrastructure has released its White Paper on the review of planning legislation in NSW, along with the accompanying bills:

- Planning Administration Bill 2013; and the
- Planning Bill 2013.

The draft regulation to accompany the *Boarding Houses Act* 2012, is open for public consultation -see Circular [13-15] and also circular [13-12], which sets maximum tariffs.

- **Miscellaneous**

The NSW Law Reform Commission has released the following reports:

- No 136 – Jury directions

- No 137 – Security for costs and associated costs orders

Planning Circular [PS 13-001] published by the Division of Planning and Infrastructure provides assistance on 'how to characterize development' under a Standard Instrument LEP.

The Report of the Joint Standing Committee on the Office of the Valuer General (Report 2/55-May 2013) on the land valuation system and the exercise by the Valuer General of functions under the Valuation of Land Act 1916 and the Land Tax Management Act 1956 has been tabled: final report; executive summary & recommendations

Court Practice and Procedure

Land and Environment Court Rules (Amendment No 1) 2013 published 15 February 2013, specifies the information that an agent wishing to appear on behalf of a person in proceedings before the Court must provide to the person. The *Land and Environment Court Act* 1979 provides that, in determining whether to grant leave for the person to appear by an agent, the Court is to consider whether the agent has provided this information to the person.

The Uniform Civil Procedure Rules (Amendment No 58) 2013 published 15 March 2013, adds Part 59 to the Rules. Part 59 makes provisions with respect to judicial review proceedings in the Supreme Court and the Land and Environment Court (Classes 4 and 8).

The amendments to the *Land and Environment Court Act* 1979 made by the *Courts and Other Legislation Further Amendment Act* 2013, including provision that a Commissioner of the LEC 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, commenced on assent on 28 February 2013.

Judgments

- **Court of Justice of the European Union**

R (on the application of Edwards and Pallikaropoulos v Environment Agency, First Secretary of State and Secretary of State for Environment, Food and Rural Affairs (Court of Justice of the European Union – Fourth Chamber, C-260/11, 11 April 2013) (Bay Larsen P; Toader, Prechal and Jarašiūnas JJ)

(related decisions: *R (on the application of Edwards and another) v Environment Agency and others* [2010] UKSC 57 (Lord Hope, on behalf of the Panel); *R (on the application of Edwards and another) v Environment Agency and others (No 2)* [2008] UKHL 22 (Lord Hoffman, Lord Hope of Craighead, Lord Walker of Gestinghorpe, Lord Brown of Eaton-under-Heywood and Lord Mance); *R (on the application of Edwards and another) v Environment Agency and others (No 2)* [2006] EWCA Civ 1138 (Auld LJ; Rix and Maurice Kay LJJ agreeing); *R (on the application of Edwards and another) v Environment Agency and others (No 2)* [2005] EWHC 657 (Admin) (Lindsay J)).

Facts: Mr Edwards, with the assistance of legal aid, challenged the decision of the Environment Agency to approve the operation of a cement works (including waste incineration) at Rugby in the United Kingdom

('UK'). The grounds of challenge were based on environmental law and, in particular, on the fact that the project had not been subject to an environmental impact assessment. That challenge was dismissed. Mr Edwards subsequently brought an appeal before the UK Court of Appeal challenging the decision of the lower court to dismiss, but eventually decided to withdraw his case on the final day of hearing. Ms Pallikaropoulos was granted leave, at her request, to take part as Appellant in the remainder of the proceedings. While Ms Pallikaropoulos was not entitled to legal aid, the UK Court of Appeal agreed to issue a protective costs order ('PCO') capping her liability for costs at £2,000 (GBP). The UK Court of Appeal dismissed the appeal brought by Ms Pallikaropoulos, and ordered her to bear her own costs and to pay the opposing parties' costs as capped by the PCO. Ms Pallikaropoulos appealed the UK Court of Appeal's decision to the House of Lords, and requested that she should not be required to provide security for costs in the amount of £25,000 (GBP) as required by that court. Her request was refused, as was the application she made for a PCO. On 16 April 2008, Ms Pallikaropoulos lost her appeal in the House of Lords and was ordered by that court on 18 July 2008 to pay the respondents' costs on the appeal (a figure that eventually totalled £88,100 (GBP)). The jurisdiction of the House of Lords was subsequently transferred to the newly-established Supreme Court of the UK on 1 October 2008. In accordance with the *Supreme Court Rules 2009* (UK) ('the SCRs'), the detailed assessment of the costs was carried out by two costs officers appointed by the President of the Supreme Court. In that context, Ms Pallikaropoulos relied on two provisions, which were from Council Directives that had been passed by the European Union legislature to give effect to Article 9(4) of the Aarhus Convention, to challenge the costs order that had been made against her. Those provisions were: the fifth paragraph contained in Article 10a of Council Directive 85/337/EEC ('Directive 85/337') (which was concerned with the assessment of the effects of certain public and private projects on the environment), and the fifth paragraph of Article 15a of Council Directive 96/61/EC ('Directive 96/61') (which was concerned with integrated pollution and prevention control). Both of those provisions stated that "any [preliminary review] procedure shall be fair, equitable, timely and not prohibitively expensive". On 4 December 2009, the costs officers took the view that they were, in principle, competent to assess the merits of that argument. The respondents in the main proceedings appealed, in the costs proceedings, against that decision to a single judge of the Supreme Court of the UK, requesting that the case be referred to a panel of five judges. This request was granted, and a panel of five judges was constituted to decide on the costs issue. That panel found that the costs officers ought to have confined themselves to the jurisdiction which the SCRs conferred on them and thus to have limited themselves to quantifying the costs. The panel expressed the view that the question of whether the procedure was prohibitively expensive, within the meaning of Directives 85/337 and 96/61, was within the sole jurisdiction of the court adjudicating on the substance of the case, which may adjudicate either at the outset of the proceedings, when determining the request for a PCO, or in its decision on the substance. The panel also expressed the view that the question of whether the order that Ms Pallikaropoulos pay the respondents' costs was contrary to those directives had not been examined by the House of Lords when it considered her application for a PCO. It was in those circumstances that the Supreme Court of the UK decided to stay the proceedings and to refer the matter to the European Court of Justice for a preliminary ruling concerning the interpretation of Directives 85/337 and 96/61 and, in particular, the meaning of the phrase not "prohibitively expensive".

Issues:

(1) how should a national court approach the question of costs against a member of the public who is an unsuccessful claimant in an environmental claim, having regard to the requirements of Article 9(4) of the Aarhus Convention, as implemented by Article 10a of Directive 85/337 and Article 15a of Directive 96/61;

(2) should the question whether the costs of the litigation are or are not "prohibitively expensive" within the meaning of Article 9(4) of the Aarhus Convention, as implemented by those directives, be decided on an objective basis (through reference, for example, to the ability of an "ordinary" member of the public to meet the potential liability for costs), or should it be decided on a subjective basis (by reference to the means of the particular claimant) or upon some combination of these two bases;

(3) is the issue referred to in (2) above entirely a matter for the national law of the Member State subject only to achieving the result laid down by those directives – namely, that the proceedings in question are not "prohibitively expensive";

(4) in considering whether proceedings are, or are not, "prohibitively expensive", is it relevant that the claimant has not in fact been deterred from bringing or continuing with the proceedings; and,

(5) is a different approach to these issues permissible at the stage of (i) an appeal or (ii) a second appeal from that which requires to be taken at first instance.

Held:

(1) the requirement under the fifth paragraph of Article 10a of Directive 85/337, and the fifth paragraph of Article 15a of Directive 96/61, that judicial proceedings should not be "prohibitively expensive" does not prevent the national courts from making an order for costs: at [25]. The requirement that litigation should not be "prohibitively expensive" concerns all the costs arising from participation in the judicial proceedings, and should be interpreted as meaning that the persons covered by those directives should not be prevented from seeking, or pursuing a claim for, a review by the courts that fall within the scope of those articles by reason of the financial burden that might arise as a result. Where a national court is called upon to make an order for costs against a member of the public who is an unsuccessful claimant in an environmental dispute or, more generally, where it is required - as courts in the United Kingdom may be – to state its views, at an earlier stage of the proceedings, on a possible PCO, it must satisfy itself that that requirement has been complied with, taking into account both the interest of the person wishing to defend his rights and the public interest in the protection of the environment: at [27], [35].

(2) the assessment of costs cannot be carried out solely on the basis of the financial situation of the person concerned but must also be based on an objective analysis of the amount of the costs. This is especially so in light of the objective specified in both Article 10a of Directive 85/337 and Article 15a of Directive 96/61, which reflects the desire of the European Union legislature that the public should play an active role in defending the environment. To that extent, the costs of proceedings must not appear, in certain cases, to be objectively unreasonable. The costs of proceedings must neither exceed the financial resources of the person concerned nor appear, in any event, to be objectively unreasonable. Furthermore, the assessment of costs conducted by the national court cannot be based exclusively on the estimated financial resources of an "average" applicant, since such information may have little connection with the situation of the person concerned. The court may also take into account the situation of the parties concerned, whether the claimant has reasonable prospects of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure, the potentially frivolous nature of the claim at its various stages, and the existence of a national legal aid scheme or a costs protection regime: at [32], [39]-[42], [46].

(3) even if neither Article 9(4) of the Aarhus Convention nor Directives 85/337 and 96/61 specify how the cost of judicial proceedings should be assessed in order to establish whether it must be regarded as prohibitively expensive, that assessment cannot be a matter for national law alone: at [30].

(4) the fact that a person has not been deterred, in practice, from asserting his or her claim is not of itself sufficient to establish that the proceedings are not prohibitively expensive for him or her: at [43], [47].

(5) the requirement that judicial proceedings should not be "prohibitively expensive" cannot be assessed by a national court in accordance with different criteria depending on whether it is adjudicating at the conclusion of first-instance proceedings, an appeal or a second appeal: at [45], [48].

- **United Kingdom**

R (on the application of Fox Strategic Land and Property Limited) v Secretary of State for the Communities and Local Government and Anor [2012] EWCA 1198 (Pill LJ, Rimer LJ and Black LJ)

(compare with decision in: *Segal & Anor v Waverley Council* [2005] NSWCA 310; 64 NSWLR 177 (Tobias JA; Beazley and Basten JA agreeing))

Facts: Fox Strategic Land and Property Ltd ("Fox") applied for planning permission to construct up to 280 dwellings and complete landscaping, open space, highway and associated works, on land at Sandbach, Cheshire in the United Kingdom. The land subject to the application consisted of 15.6 ha of agricultural

land, most of which was described as “best and most versatile” (“BMV”) land. The application was refused by Cheshire East Council (“the Council”). Fox appealed against the decision of the Council to refuse planning permission for its development, but this appeal was dismissed by the Secretary of State (“SoS”), who agreed with the recommendations of an Inspector appointed by him to conduct a local planning public inquiry into the matter in April 2011 (“the first Fox appeal”). In reaching his decision in the first Fox appeal, the SoS found that the development proposed by Fox was unacceptable in terms of “spatial vision”.

It was around this time that a different developer, Richborough, appealed against the decision of the Council to refuse it planning permission for a development (which was similar to the development proposed by Fox) involving construction of 269 dwellings on a different green field site in the Sandbach area. Like Fox, Richborough also appealed against the decision of the Council to refuse planning permission for its development. A local planning public inquiry into the refusal of Richborough’s application was conducted by an Inspector, who was appointed by the SoS, in February 2011. The Inspector reported to the SoS on 25 March 2011. The SoS, by letter dated 4 July 2011, ultimately decided to dismiss Richborough’s appeal (“the first Richborough appeal”), despite finding that the development proposed by Richborough was acceptable in terms of “spatial vision”. This effectively meant that the first Richborough appeal was determined after a local planning public inquiry was held, but before a decision was made, in the first Fox appeal. In determining the first Fox appeal, the SoS attributed “no weight” to the first Richborough appeal decision he had made on 4 July 2011 on the basis that the Richborough appeal was subject to a High Court challenge (“the second Richborough appeal”).

The second Richborough appeal was brought by application dated 15 August 2011. In that appeal, Richborough sought to quash the decision to refuse permission for its development on grounds relating to erroneous findings on the issue of land supply. No challenge was made to the findings of the SoS on the issue of “spatial vision” in the first Richborough appeal. The decision in the second Richborough appeal was quashed with the consent of the SoS on October 2011.

In the meantime, Fox appealed the decision of the SoS in the first Fox appeal to the High Court, seeking certiorari (“the second Fox appeal”). On 2 March 2012, a single judge of the High Court allowed the appeal and quashed the decision of the SoS in the first Fox appeal. The SoS appealed the decision reached by the High Court in the second Fox appeal to the Court of Appeal (Civil Division), submitting that the judge had erred in holding that the SoS was not entitled, when making his decision, to accord “no weight” to his earlier decision in relation to a nearby site – i.e. the first Richborough appeal. It was also submitted by the SoS that the judge erred in finding that the SoS had misunderstood his own policy on the use of agricultural land and had failed to apply it properly. The policy in question was PPS7, “Sustainable Development in Rural Areas”, which provided that “where significant development of agricultural land is unavoidable, local planning authorities should seek to use areas of poorer quality land ... in preference to that of a higher quality”. The judge stated that had this ground stood on its own, he would not have quashed the decision.

Issues:

(1) whether the primary judge erred in holding that the SoS was not entitled, when making his decision in the first Fox appeal, to accord "no weight" to his earlier decision in the first Richborough appeal; and

(2) whether the primary judge erred in finding that the SoS had misunderstood his own policy on the use of agricultural land and had failed to apply it properly.

Held: appeal dismissed (Pill LJ; Rimer LJ and Black LJ agreeing).

(1) the SoS could not ignore the decision in the first Richborough appeal when determining the first Fox appeal merely because there was a High Court challenge to the decision reached in the first Richborough appeal. The second Richborough appeal would not serve to disturb the findings of the SoS in the first Richborough appeal with respect to “spatial vision”, as that issue did not form a ground of challenge in the second Richborough appeal. On the contrary, the grounds of challenge in the second Richborough appeal related to erroneous findings on the issue of land supply. It was unfair for the SoS to adopt an approach to treatment of the issue of “spatial vision” in the first Fox appeal that was inconsistent with the first Richborough appeal: at [31]-[33];

(2) the SoS needed to conduct an analysis of the relevance of the decision he had reached in the first Richborough appeal to the decision he was making in the first Fox appeal. In conducting this analysis, the SoS was required to consider whether favourable findings on the issue of “spatial vision” in the first

Richborough appeal had implications for determination of the first Fox appeal. If the SoS had been minded to depart from the spatial findings in the first Richborough appeal, at least an explanation was required of why he proposed to do so. By not engaging with the key question of inconsistency in determining the issue of "spatial vision" in the first Fox appeal, the SoS reached a decision that was not in accordance with the principles articulated in *North Wiltshire DC v Secretary of State for the Environment* [1992] 65 P&CR 137 at 145 (per Mann LJ; Purchase LJ and Sir Michael Kerr agreeing). As such, the decision was unlawful and the judge was right to quash it in determining the second Fox appeal: at [34]-[35]; and

(3) the SoS interpreted PPS7 beyond reasonable bounds by stating, hyperbolically, that the policy requires development to "avoid the permanent loss of BMV land unless absolutely unavoidable". However, this would not constitute a ground for quashing the decision of the SoS in the first Fox appeal, as the hyperbolic statement was used along with a number of other reasons of importance in the case, and the use of the expression was far from being crucial to the decision arrived at: at [43].

R (on the application of Halebank Parish Council) v Halton Borough Council & Prologis UK Ltd [2012] EWHC 1889 (Admin) (Judge Gilbart QC)

Facts: the Halebank Parish Council ("Parish Council") challenged the grant by Halton BC ("HBC") of conditional planning permission to Prologis UK Ltd permitting the erection of a rail served storage and distribution warehouse with 110,769 sqm floorspace and related development on a site in Halebank, Cheshire, in the parish of Halebank. The site was owned by HBC, and was largely undeveloped land forming part of an agricultural landscape separating two urban areas, in an area bounded by the main Crewe/Liverpool railway line and A562/561 Widnes/Liverpool dual carriageway to the north, industrial and urban development to the east, the rural village of Hale to the west and the eastern end of Liverpool John Lennon Airport. The site was formerly part of the Green Belt. Regional Planning Guidance for the North West (March 2003) contained policy including the provision of strategically located intermodal interchanges to serve the North West. That policy led to proposed allocations in the Halton Unitary Development Plan ("UDP") adopted in 2005, including an area called the "Ditton Strategic Rail Freight Park" which included the site (described as site 253), and other areas 255 and 256 for development. The approved UDP, which was the relevant statutory Development Plan for the purposes of the *Planning and Compulsory Purchase Act* 2004 and the *Town and Country Planning Act* 1990 ("TCPA"), identified sites 253, 255 and 256 for development provided certain criteria were met, including that it was for use by businesses that would utilise the railway for freight, and provided that development would not be permitted on site 253 unless it was part of a comprehensive proposal for a strategic rail freight park at Ditton; development of the strategic intermodal rail freight park on sites 255 and 257 had commenced; that a warehouse development of larger than 25,000 sqm floorspace and of sufficient size and character that would be incapable of being accommodated within the remaining areas in the defined Park was proposed; that the development was designed to be rail served including the provision of dedicated adjacent rail sidings; and that the layout incorporated measures actively to discourage direct movement of goods vehicles to the local road network. HBC officers had originally anticipated that the application would be considered by HBC's Development Control Committee ("the Committee") on 12 September 2011, however on 30 June 2011 the Chief Executive agreed to work to a Committee date of 30 August 2011 for determination of the application. The planning application and an Environment Statement ("ES") of 974 pages was sent to the Parish Council on 21 July 2011 and its response was invited within 21 days. On 6 August 2011 the clerk to the Parish Council wrote asking for an extension of the 21 day period, on the basis that the Parish Council had no scheduled meeting in August, and was appointing planning consultants to help evaluate the application; that request was refused on 9 August 2011. That request was repeated on 10 August 2011, and there was no reply. Three of the five Parish Council members were away for most of August. On 19 August 2011 notice was given that the Committee meeting would be on 30 August 2011. On that date the Committee resolved that officers be granted delegated authority to approve the application subject to conditions. The developer committed to construction of access road and other works in a development agreement made with HBC rather than a planning obligation under s 106 of the TCPA. The conditions of the planning permission granted on 16 September 2011 included the following conditions:

30: No part of the development shall be brought into use until a scheme of noise attenuation and mitigation has been implemented with details submitted to and agreed in writing by the Local Planning Authority. Unless the Local Planning Authority agree to any variation, such scheme shall be designed to ensure that

noise emitted from the site shall be mitigated and attenuated in line with BS 4142 methodology and principles in relation to properties to the south west of the site on Halegate Road including (named properties) …Such a scheme as is agreed and implemented shall be so maintained.

31.No part of the use hereby approved shall be commenced until a scheme of off-site works has been carried out and made available to provide vehicular access to and aggress from the site via the A562/A5300 …junction, unless otherwise agreed by the Local Planning Authority. That scheme shall be in accordance with earlier permissions (numbers given) unless otherwise agreed by the Local Planning Authority.

32:No part of the building hereby approved shall be brought into use, or other such timings as may be agreed by the Local Planning Authority, until the dedicated rail siding has been constructed within the application site in accordance with the approved Plans P003 Rev A or such other scheme as is agreed in writing by the Local Planning Authority. The rail sidings shall thereafter be retained unless otherwise agreed with the Local Planning Authority.

Issues:

(1) whether HBC had afforded the Parish Council sufficient opportunity to participate in the decision making process;

(2) whether the proposal accorded with the relevant policies of the statutory Development Plan;

(3) whether the conditions attached to the planning permission were lawful;

(4) whether HBC could have resolved that an obligation under s106 of the *Town and Country Planning Act* 1990 be entered into;

(5) whether the decision by the Parish Council to institute the proceedings was lawfully reached or was vitiated by the participation of members disqualified from doing so by reason of their having personal interest, namely owning or occupying houses in areas that would be adversely affected by the development; and

(6) whether relief should be refused on the grounds of delay in bringing the proceedings.

Held: granting permission to apply for judicial review and quashing the decision, and ordering the defendant to pay the claimant's costs assessed at £30,000:

(1) it was essential to the Town and Country Planning system that major projects such as that proposed were the subject of public consultation. The proposal was also on a site owned by the planning authority, which would receive a return if the development went ahead, and its interest in the outcome was not altered simply because that return would not amount to a profit. It followed that it was especially important that the process be conducted and seen to be a fair one: at [56], [57];

(2) the consultation was not conducted fairly or effectively. Those who disagreed with the proposal were put at a considerable disadvantage, and (knowingly or otherwise) were not informed that they had even less time to have their comments made than they had anticipated. When they asked for more time their requests were dismissed without authorised consideration and when put to the Committee were rejected without any known consideration let alone reasons, despite the terms of HBC's own adopted consultation policy. That amounted to a breach of Article 6 of the European Union Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (as amended and now consolidated Directive 2011/92/EU), and was in any event contrary to the legitimate expectation the Parish Council had as to the conduct of the consultation process: at [71];

(3) a local planning authority had to proceed on a proper understanding of the Development Plan. It was impermissible to use the Supplementary Planning Document ("SPD") (dated August 2009, stated to be supplementary planning guidance based on the UDP policies) to change the effect of properly interpreted Development Plan policy, and one could not use the SPD to alter its meaning: at [80];

(4) the Development Plan had been misunderstood and applied in a way that was not consistent with its correct interpretation: at [85];

(5) conditions 30, 31 and 32 related to the execution of works required to effect noise attenuation, road access and rail access. All of those were matters of significance which could have a permanent effect

on the control of potential environmental impacts and the way in which the developed warehouse would function in land use terms. There was a strong public interest to be protected of the public being able to comment on matters which would affect it. The "tailpiece" conditions offended against the principle that the scope for variation or discharge of a condition to be achieved by a non-statutory method, bypassing the statutory safeguards for the public, must be extremely limited, and were unlawful. It was common ground that the offending parts of the conditions were capable of being excised: at [101], [102];

(6) it was not unlawful for HBC to decide that, in the absence of being able to enter into a s 106 agreement, it would follow a different route. While the development agreement route did not provide the same transparency as the s 106 route, because the s106 agreement would have to be kept on the register, a redacted version of the development agreement could have been made available: at [105] – [107];

(7) the claim that the proceedings were issued without authority had not been substantiated and HBC had taken no steps to challenge that decision: at [114];

(8) in any event it was important to consider the context in which the issue arose. The relevance of the interests of a member of the Parish Council might cover a wide spectrum. In this case it was not a decision to grant or withhold some consent nor to bestow or withhold contractual rights, but to make comment for consideration. The application for development on which the Parish Council had the right to express a view had the potential to have a very substantial effect on the whole Parish. If members of a Parish Council such as Halebank, which was a small community affected by a very large proposed development, would be unable to take decisions including the right to decide to make representations because they would be more seriously affected personally than they would be in the case of a less substantial development, the requirement to consult statutory authorities in the form of Parish Councils would be frustrated: at [115];

(9) the effect of waiting for the proceedings to be commenced had not caused any significant prejudice, given the developer's stated intention not to implement this permission but to apply for another; and the Parish Council gave ample notice at an early stage of an impending claim for judicial review. The Parish Council acted with reasonable promptness: at [118], [119];

(10) based on the conduct of the consultation by HBC; the haste with which the application was dealt with; the preconditions in the UDP policy designed to address important objectives of not releasing what had been Green Belt land and was still greenfield land unless the case was made for it and in a sequential process; and that site was owned by the HBC, the discretion should be exercised in favour of the grant of relief: at [123], [124]; and

(11) the claimant's costs had exceeded the reciprocal cap under the protective costs order made and varied by consent, and the court ordered that the defendant pay the claimant's summarily assessed costs of £30,000: at [126].

R (on the application of RWE Npower Renewables Limited) v Milton Keynes Borough Council [2013] EWHC 751 (Admin) (J. Howell QC, sitting as a Deputy High Court Judge)

Facts: on 24 July 2012, Milton Keynes Borough Council ("the Council") adopted the "Wind Turbines Supplementary Planning Document and Emerging Policy" ("the Wind SPD"). The Wind SPD contained an "Emerging Policy" ("the EP") that planning permission would be granted for proposals to develop wind turbine renewable energy sources unless, inter alia, any turbine generator over 25 metres in height was located within a certain minimum distance of residential premises. Planning permission would still be granted, even if the relevant minimum distance was not observed, in circumstances where the owners and occupiers of all the residential premises within the relevant minimum distance area agreed to the wind turbine's construction. The EP did not provide, however, that planning permission would be refused if such conditions were not met. The EP also prescribed certain minimum distances to be observed between a turbine generator and bridleways, public footpaths and high pressure fuel lines. If the EP in the Wind SPD was valid, it would rank as a material consideration in determining any future application for planning permission for a wind turbine in the Borough. With this in mind, RWE Npower Renewables Limited

("RWE") – which had two proposals for wind farms in the Borough – became concerned about the application of the separation distances in the EP to its current proposals. RWE was also concerned about the wider significance of the emergence of policies, such as the Wind SPD, which identified minimum separation distances from other places for wind turbines regardless of their actual impact in any particular case on them. This being so, RWE applied for judicial review of the Council's adoption of the Wind SPD in the UK High Court. RWE submitted that the Wind SPD was wrongfully adopted by the Council as a "supplementary planning document" ("SPD") and should have been adopted as a "development plan document" ("DPD"). This was because the Wind SPD contained statements, falling within reg 5(1)(a)(iv) of the *Town and Country Planning (Local Planning) (England) Regulations 2012* ("the 2012 Regulations"), regarding development management policies intended to guide the determination of applications for planning permission, and that as a DPD, it was required to have survived a more rigorous examination than it had been exposed to as a SPD. RWE further submitted that even if the Wind SPD was properly characterised as a SPD, its adoption was still unlawful where the EP in it conflicted with the adopted local development plan, contrary to reg 8(3) of the 2012 Regulations. RWE argued that there was a clear difference between the residential separation distances in the EP and in Policy D5, which provided that wind energy development would be permitted provided any adverse impacts could be satisfactorily addressed.

Issues:

(1) whether the Council had the power to adopt the Wind SPD as a SPD, and whether the Council was required to treat the Wind SPD as a DPD;

(2) in the event that the Wind SPD was adopted lawfully as a SPD by Council, whether the Wind SPD was in conflict with the adopted development plan for the Borough;

(3) whether the Council, in preparing the Wind SPD, failed to have regard to national policies and advice applicable to wind turbine development which is contained in guidance issued by the Secretary of State as it was required to do; and

(4) in the event that the Wind SPD was adopted lawfully as a SPD by the Council, whether the Council was obliged to exercise its discretion to treat the Wind SPD instead as a DPD, rather than as a SPD, or failed to have regard to the Secretary of State's guidance which indicated that it should have done so.

Held: application granted:

(1) whether the Council was required to treat the Wind SPD as a DPD, and whether the Council could treat it as a SPD, depended on whether the Wind SPD was a document of a description falling within one of the sub-paragraphs in reg 5(1)(a) of the 2012 Regulations and, if it did, within which of those sub-paragraphs it fell. The new statements of policy in the EP that were not already contained in the adopted development plan did not fall within sub-paragraph (i) or (iv) of reg 5(1)(a). But they did fall within sub-paragraph (iii) of reg 5(1)(a). They were statements regarding the environmental, social and design objectives that the Council considered relevant to the development of wind turbines. The development of wind turbines is something that, under policies D4 and D5 in its Local Plan, the Council wished to encourage in the period in which those policies still had effect. Accordingly, the Council was entitled to adopt the Wind SPD as a SPD, and this ground of challenge failed: at [66], [67], [77], [82], [205];

(2) no reasonable person could have concluded that the minimum separation distances from any residential dwelling in excess of 350 metres specified in the EP were not in conflict with the adopted development plan. Policy D5 in that Plan stated that, if certain other conditions are satisfied, planning permission would be granted for a wind turbine if it is at least 350 metres from any residential dwelling. Planning permission would only be granted for a proposed wind turbine, in accordance with the EP, if it met the minimum distances in excess of 350 metres specified in that Policy. In substance, therefore, the EP sought to amend the relevant minimum distance requirement in Policy D5 and was plainly in conflict with it. A proposal that was granted planning permission in accordance with Policy D5 would not be granted planning permission in accordance with the EP. The EP in the Wind SPD conflicted with the adopted development plan which effectively meant that there was a breach of reg 8(3) of the 2012 Regulations. Accordingly, this ground of challenge succeeded: at [135], [150], [151], [208], [218];

(3) **Obiter**: even if the EP was not in conflict with the adopted development plan, and merely provided further detail to supplement what was in that plan, there was nothing to suggest that the Council had failed to have regard to the Secretary of State's guidance when providing further detail to supplement what was in that plan. Accordingly, this ground of challenge failed: at [215], [216]; and

(4) a local planning authority could only treat a "local development document" as a DPD under reg 5(1)(a) of the 2012 Regulations and adopt it as such if it was a document which the Secretary of State had specified as one which was a "development plan" document. The Council had no discretion to treat the Wind SPD as such a document. Even if it did, the Council was entitled to treat the Wind SPD as a SPD and RWE could not demonstrate that the Council did so for any improper purpose generally or having regard to the Secretary of State's guidance. Accordingly, this ground of challenge failed: at [217].

- **Supreme Court of India**

Orissa Mining Corporation Ltd v Ministry of Environment and Forests and Ors, WP (C) No. 180 of 2011, decided on 18 April 2013 (K.S. Radhakrishnan J on behalf of the Court, Aftab Alam J and Ranjan Gogoi J agreeing)

Facts: on 28 February 2005, the State Government of Orissa ("the State Government") forwarded a proposal to the Ministry of Environment and Forests ("MOEF") for diversion of around 661 ha of forest land for mining bauxite ore ("the Bauxite Mining Project") in favour of the state-owned Orissa Mining Corporation ("OMC") in the Kalahandi and Rayagada Districts. On 2 March 2005, the Central Empowered Committee ("CEC") sent a letter to the MOEF stating that pending the examination of the project by the CEC, the proposal for diversion of forest land and/or mining be not decided. Vedanta Resources ("Vedanta"), however, subsequently filed an application before the Supreme Court of India ("the Court") seeking a direction to the MOEF to take a decision on the application for forest clearance for bauxite mining submitted by the State Government on 28 February 2005. The question posed by the Court in deciding the application was whether Vedanta should be allowed to set up an Alumina Refinery Project ("the ARP") in Lanjigarh Tehsil of District Kalahandi. The CEC had objected to the grant of clearance sought by Vedanta on the ground that the ARP would be totally dependent on mining of bauxite from Niyamgiri Hills, Lanjigarh, which was vital wildlife habitat and formed part of an elephant corridor. The CEC had also objected on the ground that the ARP would obstruct the proposed wildlife sanctuary and the residence of tribes like Dongaria Kondh. On 23 November 2007, the Court held that it was not agreeable to grant clearance to the ARP and disposed of Vedanta's application. However, the Court did grant liberty to Sterlite (a parent company of Vedanta) to move the Court if they would agree to comply with the conditions suggested by the Court. Sterlite, the State Government and OMC subsequently accepted the conditions suggested by the Court when it disposed of Vedanta's application on 23 November 2007. The MOEF subsequently agreed in principle with the proposal forwarded to it by the State Government and, on 28 April 2009, granted environmental clearance to OMC ("Stage I approval"). The in principle Stage I approval was subject to various conditions, including a requirement for OMC to obtain the necessary forestry clearances under the *Forest (Conservation) Act 1980* (India) ("the FC Act").

The State Government then forwarded the final proposal to the MOEF on 10 August 2009 stating that the user agency had complied with all the conditions stipulated in the letter of MOEF dated 11 December 2008. The final proposal was subsequently placed before the Forest Advisory Committee ("the FAC") on 4 November 2009. The FAC recommended that the final clearance should be considered only after the Gram Sabha had determined the community rights of forest dwelling scheduled tribes ("FDSTs") and other traditional forest dwellers ("TFDs") pursuant to s 6 of *The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006* (India) ("the FR Act"). According to s 6(1) of the FR Act, the Gram Sabha was the authority with power or responsibility for initiating the process for determining the nature and extent of individual or community forest rights or both that may be given to FDSTs and TFDs within the local limits of its jurisdiction under the FR Act. Examples of such rights that could be determined by the Gram Sabha to exist included the right to use and collect forest products (including fish and other products from forest water bodies) and the right to occupy forests for habitation. After further expert investigations had taken place into the issue of community rights, the FAC opined that it was a fit case for

applying the precautionary principle and recommended for the temporary withdrawal of the in principle Stage I approval accorded previously to OMC by MOEF. On 24 August 2010, MOEF considered the recommendations made by the FAC and decided to reject the request by OMC for Stage II clearance approval to divert around 661 ha of forest land for the Bauxite Mining Project, making orders to that effect. It was the legality of those orders that OMC sought to challenge in this case. More specifically, OMC sought certiorari to quash the orders made by the MOEF on 24 August 2010.

Issue:
(1) whether the Court should grant certiorari to quash the orders made by the MOEF on 24 August 2010.

Held: the Writ Petition was disposed of by the giving of directions.

(1) the question of whether FDSTs and TFDs, like Dongaria Kondh, Kutia Kandha and others, possess any religious rights – i.e. rights of worship over the Niyamgiri hills – has yet to be considered by the Gram Sabha and must be considered by that authority. Under s 6 of the FR Act, the Gram Sabha is the authority to initiate the process for determining the nature and extent of individual and/or community forest rights that are possessed by FDSTs and TFDs within the local limits of the jurisdiction. If the Lanjigarh Bauxite Mines would affect the religious rights of FDSTs and TFDs in any way, especially their right to worship their deity (Niyam Raja) in the Niyamgiri hills, that right has to be preserved and protected. This aspect of the matter had not been placed before the Gram Sabha for their active consideration, but only the individual claims and community claims received from the Rayagada and Kalahandi Districts, most of which the Gram Sabha had dealt with and settled: at [51], [58];

(2) the Gram Sabha should also be free to consider all the community, individual, cultural and religious claims over and above the claims which have already been received from the Rayagada and Kalahandi Districts. Any such fresh claims should be filed before the Gram Sabha within six weeks from the date of the Court's judgment. The State Government, as well as the Ministry of Tribal Affairs and the Government of India, is to assist the Gram Sabha in settling both individual and community claims: at [59];

(3) the State of Orissa is to place these issues before the Gram Sabha with notice to the Ministry of Tribal Affairs and the Government of India. The Gram Sabha is to make a decision on these issues within three months and communicate the same to the MOEF, through the State Government. On the conclusion of the proceeding before the Gram Sabha determining the claims submitted before it, the MOEF shall take a final decision on the grant of Stage II clearance for the Bauxite Mining Project, in the light of the decisions of the Gram Sabha, within two months thereafter: at [60]; and

(4) the proceedings of the Gram Sabha shall be attended as an observer by a judicial officer of the rank of a District Judge, nominated by the Chief Justice of the High Court of Orissa who shall sign the minutes of the proceedings, certifying that the proceedings of the Gram Sabha took place independently and completely uninfluenced either by the Project proponents or the Central Government or the State Government: at [62].

- **High Court of Australia**

Minister for Immigration and Citizenship v Li [2013] HCA 18 (French CJ, Hayne, Kiefel, Bell and Gageler JJ)

Facts: the first respondent Ms Li applied for a Skilled –Independent Overseas Student (Residence) (Class DD) visa on 10 February 2007. A relevant criterion for that visa is that "a relevant assessing authority has assessed the skills of the applicant as suitable for his or her nominated skilled occupation, and no evidence has become available that the information given … is false or misleading in a material particular". By the date of her application Ms Li had obtained a skills assessment from a relevant assessing authority, Trades Recognition Australia ("TRA"), which had relied on details of her employment as a cook. A delegate of the Minister refused Ms Li's application on the basis that some of the information she had provided was not genuine. Ms Li applied to the Migration Review Tribunal ("MRT") for review of that decision. Ms Li had admitted to the Minister's delegate that she had not in fact been employed at one restaurant as claimed in

the information provided to TRA, and claimed that her former migration agent had provided that information without her knowledge. On 21 September 2009 the MRT wrote to Ms Li inviting her comment on the false information. In response the migration agent now appointed by Ms Li confirmed the admissions made by Ms Li, and advised that since the date of her application she had accumulated further work experience as a cook and that she was awaiting a decision of TRA with respect to her application for a fresh assessment of her skills. The MRT convened a hearing on 18 December 2009. Following that hearing the MRT wrote to Ms Li inviting comment on answers she had given to Departmental officers which were relevant to evidence she gave at the hearing. Ms Li's migration agent responded advising that the second skills assessment by TRA had been received but that it was not favourable, and that Ms Li had applied to TRA for a review of its assessment, and conveyed confidence that it would be successful. The migration agent requested that the MRT forbear from making any final decision until the outcome of the skills assessment was known. On 25 January 2010 the MRT made its decision affirming the delegate's decision. In its reasons the MRT stated "the applicant has been provided with enough opportunities to present her case". On 12 April 2010 TRA provided a successful assessment.

Ms Li applied for review of the MRT decision. The Federal Magistrates Court held that the MRT's decision to proceed was unreasonable in the *Wednesbury Corporation* sense, and constituted an improper exercise of its power which went to its jurisdiction. On appeal to the Full Court of the Federal Court, Greenwood and Logan JJ held that an unreasonable refusal of an adjournment meant that the MRT had not discharged its core statutory function of reviewing the decision, and that an unreasonable refusal of an adjournment would mean that the MRT had not conducted its review function in a way that was "fair", that being a requirement of ss 353 and 357A(3) of the *Migration Act* 1958 ("the Act"). Collier J held that the MRT had failed properly to consider the application for an adjournment and that failure constituted a failure to give Ms Li a proper hearing within the meaning of s 360 of the Act. The Minister was granted special leave to appeal to the High Court.

Issue:

(1) whether the discretionary power conferred by s 363(1)(b) of the Act to "adjourn the review from time to time" had been exercised reasonably.

Held: dismissing the appeal with costs:

(1) (by French CJ):

(a) Div 5 of Part 5 of the Act did not deal with the matter of an application for an adjournment in order to provide additional material or, as in this case, the provision of a third party assessment the existence of which was a criterion for the grant of a visa. Accordingly the common law hearing rule of procedural fairness applied. The MRT denied Ms Li what would have been, in the circumstances, a reasonable opportunity to acquire the TRA skills assessment which was essential to her success. The migration agent had shown the MRT that there was a proper basis for expecting a favourable outcome to the request for review by TRA, and there was no practical countervailing consideration disclosed in the MRT's reasons for refusing to defer its decision. Ms Li was denied procedural fairness and that denial constituted jurisdictional error: at [18]-[21]; and

(b) the decision of the MRT to proceed to its determination was not, on the face of it, informed by any consideration other than the asserted sufficiency of the opportunities provided to Ms Li to put her case. It did not in terms or by implication accept or reject the substance of the reasons for a deferment put to it by the migration agent; it did not suggest that her request for a deferment was due to any fault on her part or on the part of her migration agent; it did not suggest that its decision was based on any balancing of legislative objectives set out in s 353 of the Act; its decision was fatal to the application. There was in the circumstances, including the already long history of the matter, an arbitrariness about the decision, which rendered it unreasonable: at [31];

(2) (by Hayne, Kiefel and Bell JJ): the discussion at the hearing on 18 December 2009 of the forthcoming second skills assessment, and the subsequent request for an adjournment of the review while TRA reviewed the second skills assessment, must have conveyed to the MRT that Ms Li did not consider that she had presented her case. In deciding whether to adjourn, that was what the MRT had to consider in the context of the statutory purpose of s 360, which required the MRT to "invite the applicant to appear …to give evidence and present arguments relating to the issues arising in relation

to the decision under review", but it did not appear that it did so: at [79]. It was not apparent why the MRT decided, abruptly, to conclude the review: at [85]. It was not apparent which of the possible errors of taking into account an irrelevant consideration, giving too much weight to the fact that Ms Li had had some opportunity to present evidence and argument and insufficient weight to her need to present further evidence, or failing to have regard to the purposes for which the statutory discretion in s 363(1)(b) was provided in arriving at its decision, was made, but the result itself bespoke error. In the circumstances of the case, it could not have been decided that the review should be brought to an end if all relevant and no irrelevant considerations were taken into account and regard was had to the scope and purpose of the statute. Because error had to be inferred it followed that the MRT did not discharge its function of deciding whether to adjourn the review according to law. The MRT did not conduct the review in the manner required by the Act and consequently acted beyond its jurisdiction: at [85]; and

(3) (by Gageler J): Ms Li had been in Australia for some years and the review by the MRT had been on foot for nearly a year without any delay on her part. What she sought was an adjournment of the review for a highly specific purpose clearly articulated by her migration agent which was to await the outcome of the review she had already sought of TRA's second skills assessment which she contended was erroneous for reasons the migration agent explained to the MRT, reasons which were coherent on their face and might well have justified an expectation that a favourable skills assessment would be obtained. Nothing in the MRT's reasons for decision suggested that the MRT took a different view of Ms Li's prospects and there was no reason to infer that the MRT considered that the adjournment would be likely to have been unduly protracted. The MRT identified no consideration weighing in favour of an immediate decision on the review and none was suggested by the Minister. Ms Li was entitled to expect a decision according to law, and she was also entitled to expect a decision according to reason, and to expect the MRT to be reasonable. No reasonable tribunal, seeking to act in a way that was fair and just and according to substantial justice and the merits of the case, would have refused the adjournment: at [122]-[124].

- **Northern Territory Court of Appeal**

Attorney-General (NT) v Director of Public Prosecutions [2013] NTCA 2 (Mildren ACJ, Kelly and Blokland JJ)

Facts: the respondent, Sarah McNamara, is a Registrar of the Court of Summary Jurisdiction of Alice Springs. In September 2012, she was appointed a Relieving Magistrate for a short period. On 3 October 2012, she was listed to hear a summary charge against Sharleen Jane Waye. Ms Waye was represented by a solicitor employed by the Central Australian Aboriginal Legal Aid Service ("CAALAS"). Counsel for the informant applied for her Honour to disqualify herself from hearing the matter because of her marriage to the Principal Legal Officer ("the PLO") of CAALAS, Mr Mark O'Reilly. Mr O'Reilly has overall responsibility for the representation of CAALAS clients and CAALAS lawyers practise under his supervision. No submission was made that the Magistrate had any actual knowledge of the case, merely that a fair-minded lay observer would have cause for concern that her Honour was presiding, given her husband effectively was responsible for representing the defendant through an employed solicitor. Mr O'Reilly had no direct involvement in the matter. Ms McNamara declined to excuse herself, reasoning that there was no articulation of a logical connection between this matter and the feared deviation of the Court deciding the case otherwise than on its merits, as required by the High Court's test in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

On 5 October 2012, the Director of Public Prosecutions brought proceedings in the Supreme Court seeking an order to prohibit the Magistrate hearing the matter, together with orders in the nature of certiorari and a declaration prohibiting her from sitting generally in cases involving CAALAS. At first instance Barr J made a declaration that the Magistrate was disqualified by reason of apprehended bias from dealing with the specific proceeding. Justice Barr concluded that the association was such that a fair-minded lay observer might reasonably apprehend that the Magistrate might not bring an impartial and unprejudiced mind to deciding the case, from the combination of four relevant facts: the defendant was represented by a CAALAS lawyer; the PLO was responsible for supervising CAALAS lawyers; Mr O'Reilly was the PLO; and

Mr O'Reilly was married to the Magistrate. The Attorney-General, intervening, appealed to the Court of Appeal.

Issue:

(1) whether the Relieving Magistrate ought to have disqualified herself on the basis of apprehended bias from hearing a summary matter, because of her relationship with the Legal Aid Service's Principal Legal Officer who had ultimate supervisory responsibility for the solicitor representing the defendant.

Held: appeal allowed and declaration set aside (at [32] and [42]):

(1) a logical connection was not established between the actual case and the feared deviation from deciding it on its merits. There was no logical reason for a fair-minded lay observer to reasonably fear that the Magistrate might consciously or unconsciously determine the outcome otherwise than on its merits: [28] and [34]–[38];

(2) the ordinary practice is that a judicial officer must not sit in a case where his/her spouse appears as counsel or solicitor for a party. This was not directly applicable. CAALAS was a wholly publicly funded body and CAALAS lawyers have no financial interest in outcomes. Mr O'Reilly was only personally involved in significant cases. He had no personal involvement in this case: at [25]–[27]; and

(3) the Court below fell into error by accepting that Mr O'Reilly had a professional interest in the case. Most cases of association by interest sufficient to disqualify a judicial officer concern relationships between the judicial officer and either a litigant or litigant's lawyer. Few cases involve a blanket finding that a judicial officer cannot sit on any cases involving a class of parties. Given the structure of CAALAS and volume of cases there was no reason to infer that Mr O'Reilly was acting for a particular client or had a particular interest in the outcome of this case. Practically, he could not familiarise himself with every matter: at [28]–[41].

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

Coffs Harbour City Council v The Minister for Planning and Infrastructure [2013] NSWCA 44 (Ward JA; Tobias AJA and Preston CJ of LEC)

(related decision: *Coffs Harbour City Council v The Minister for Planning and Infrastructure & Others* [2011] NSWLEC 4 Sheahan J)

Facts: on 19 January 2006, a planning consultancy, Planning Workshop Australia ("PWA"), prepared and lodged with the Director-General, on behalf of Sandy Shores Development Pty Ltd ("Sandy Shores"), an application for concept plan approval for a project involving a residential subdivision at Sandy Beach North near Coffs Harbour. The application for concept plan approval was lodged under s 75M(3) of the *Environmental Planning and Assessment Act 1979* ("the EPA Act"). The lodgement of this application for concept plan approval was authorised, on the recommendation of the Department of Planning, by the Minister on 11 October 2006. On 20 October 2006, the Director-General notified PWA of the environmental assessment requirements ("the EARs") for the concept plan for the project. Those requirements specified, among other things, that the EARs were to expire on 20 October 2008 (i.e. two years from the date of issue). Sandy Shores subsequently lodged, via their lawyers, an environmental assessment ("the 2007 EA") with their concept plan application on 21 September 2007. The 2007 EA was treated as a "draft" by the Department, who sought to consult with PWA about the issues arising from this "draft" environmental assessment. On 22 December 2008, following several months of consultation, Worley Parsons – a consultancy firm that had, by this time, incorporated PWA – lodged (on behalf of Sandy Shores) a copy of the environmental assessment for the concept plan application. On 12 January 2009, the 2007 EA (now revised) for the concept plan application was again lodged with the Department ("the 2009 EA"). On 4 February 2009, the Department wrote to Worley Parsons advising that the Director-General had determined, for the purposes of s 75H of the EPA Act, that the 2009 EA adequately addressed the Director-General's EARs. After accepting the 2009 EA, the Department publicly exhibited it from 1 April to 4 May 2009. On 22 April 2010, lawyers acting for Sandy Shores wrote to the Department advising that all future correspondence with the applicant should be through its project management team,

namely, Bill Yassine (Director, Sydney NSW Property Consultants). On 19 December 2010, the Director-General gave his environmental assessment report to the Minister (pursuant to s 75I of the EPA Act). The Director-General's report included a statement relating to compliance with the Director-General's EARs as required by s 75I(2)(g). The Director-General recommended that the Minister consider the Director-General's report, approve the concept plan application subject to terms of approval, and sign the attached concept plan approval. On 20 December 2010, the Minister accepted the recommendation and signed the concept plan approval ("the approval"). The approval relevantly provided that: 1) pursuant to s 75P(1)(b) of the Act, the approval to carry out the project shall be subject to Part 3A of the EPA Act; 2) the proponent was "Sydney NSW Property Consultants Pty Ltd" or any party acting upon the approval; and, 3) the proponent was required to carry out the concept plan and all related future applications generally in accordance with the EARs (pursuant to s 75P(2)(c) of the EPA Act), preferred project report and addendum letter as well as the statement of commitments (which the Minister omitted to attach to the approval). Coffs Harbour City Council ("the council") instituted judicial review proceedings in the Land and Environment Court of NSW challenging the validity of the approval on three grounds. The primary judge rejected each of the three grounds of challenge, and also held that if he was wrong, he would have also declined relief in the exercise of his discretion. As a result, the primary judge dismissed the council's amended summons. The council appealed to the NSW Court of Appeal against the decision in respect of all three grounds as well as on the basis that the primary judge failed to provide adequate reasons.

Issues:

(1) whether the Minister had the power to give the approval or, alternatively, failed to take into account a mandatory relevant consideration on the basis that there were no unexpired EARs with respect to the project at the time the 2009 EA was submitted to and accepted by the Director-General;

(2) whether the terms of the approval were so inconsistent, and its operation so uncertain, as to render it invalid;

(3) whether the approval was given otherwise than to a legal entity and/or to an entity other than the proponent;

(4) whether the primary judge was correct to decline relief in the exercise of his discretion; and

(5) whether the primary judge had failed to provide adequate reasons for his decision.

Held: appeal dismissed with the appellant to pay the appeal costs of the respondents (Preston CJ of LEC; Ward JA and Tobias AJA agreeing):

(1) the specified expiry date of 20 October 2008 (i.e. two years from the date the EARs were issued) was not itself an EAR. The expiry date was also legally ineffective to cause the notified EARs to cease to be operative and effective requirements under s 75F(2), as EARs notified under s 75F(3) do not legally expire. Furthermore, the EPA Act did not confer an ancillary power to fix a time period for the operation and effectiveness of the EARs notified under s 75F(3). On the contrary, s 75Z(a) of the EPA Act provided the power to make a regulation prescribing the time limit within which the proponent had to submit a report to the Minister. However, no such regulation was made and, as a consequence, there was no time limit prescribed for submission of the environmental assessment required. An environmental assessment could, therefore, be submitted under s 75H(1) of the EPA Act and accepted by the Director-General under s 75H(3) after its expiry: at [48]-[52];

(2) the proponent had submitted an environmental assessment under s 75H(1) before the specified two year period expired when it lodged with the Department the concept plan application and the 2007 EA: [53];

(3) the Director-General had the power to accept an environmental assessment submitted after the date of expiry: at [55]-[57]. Even if there was a breach of the time limit specified in the notification of the EARs, it was an administratively imposed requirement (as opposed to a requirement under statute or regulation). The submission of an environmental assessment in breach of an administratively imposed time requirement would not render invalid any subsequent approval given under s 75O of the EPA Act: at [58];

(4) the council's alternative argument that the Minister failed to have regard to a mandatory relevant consideration (i.e. that the notified EARs had expired at the time the 2009 EA was submitted) was

rejected on the basis that the EARs had not expired, the 2007 EA was submitted before the expiry of the time period, and the Director-General had the power to accept an environmental assessment even in the event that it was submitted after the time period had expired. Section 75O of the EPA Act fixed two preconditions in s 75O(1) that had to be satisfied and three relevant matters in s 75O(2) that the Minister was bound to consider in the exercise of power under s 75O(1). The council's stated matter was not, either expressly or by implication, one of these preconditions or matters: at [59]-[60];

(5) the approval could be construed so as to avoid the asserted uncertainty and give it practical effect. The terms of the Minister's actual determination stated in the concept approval were intelligible and were able to be supported by a source of power. While the Minister made erroneous references to the statutory provisions said to be the source of the power to make the determinations (the erroneous references being s 75P(1)(b) and s 75P(2)(c) of the EPA Act), a mistake in the source of power to make a determination worked no invalidity. Validity of the determination simply depended on whether a relevant power existed at the relevant time. Section 75P(1)(a) of the EPA Act conferred the relevant power in this case, which effectively meant that the Minister's mistaken citation of the source of power said to have been exercised to make the relevant determinations in the approval did not operate to contradict their otherwise clear terms: at [69]-[75];

(6) s 75O(1) of the EPA Act neither expressly nor by implication required, as a precondition to the exercise by the Minister of his powers to give an approval for the concept plan for a project, the identification of a legal entity as a "proponent". Hence, the misdescription in the approval of the proponent as "Sydney NSW Property Consultants Pty Ltd" worked no invalidity: at [88]; and

(7) in light of the Court's reasons and conclusion that the primary judge was correct in rejecting each of the council's grounds of challenge to the concept approval, the questions relating to discretionary refusal and inadequate reasons did not arise: at [90]-[92].

Lester v NSW Minister for Planning and Ashton Coal Operations Pty Ltd [2013] NSWCA 45 (Tobias AJA; Young AJA and Preston CJ of LEC)

(related decision: *Lester v Minister for Planning & Ashton Coal Operations Pty Ltd* [2011] NSWLEC 213 Moore AJ)

Facts: Ashton Coal Operations Pty Ltd ("Ashton") carried out a coal mining project at Camberwell in the Upper Hunter Valley under a development consent granted by the Minister for Planning in October 2002 ("the approval"). The coal mining project was originally approved under Part 4 of the *Environmental Planning and Assessment Act 1979* ("the EPA Act"). However, the coal mining project was subsequently declared to be state significant development under the Act and, by operation of cl 8J(8) of the *Environmental Planning and Assessment Regulation 2000*, it was taken to be an approval under Part 3A of the EPA Act for the purposes of any modification of the approval. On 28 February 2011, Ashton requested the Minister to modify the approval by duly completing a standard form for modification requests. The modification request was accompanied by a report called "Ashton Coal Project Environmental Assessment for the Modification of DA 309-11-201-i (Mod 7)" ("the EA"). The EA accompanying the modification request was provided voluntarily by Ashton; it was not required by the Minister under s 75W(3) of the EPA Act. The Department of Planning then purported to make the modification request and EA (including its appendices) publicly available by uploading these documents onto their website. While the links to the modification request and the EA worked, the link to appendices 1 to 4 did not provide electronic access to these appendices; rather, the link to appendices 1 to 4 provided a link to appendices 5 to 8. The link to appendices 5 to 8 did provide electronic access to appendices 5 to 8, which effectively meant that appendices 5 to 8 had been uploaded twice onto the Department's website whereas appendices 1 to 4 had not been uploaded at all. On the same page of the Department's website on which the links to the appendices were located was a printed message which stated: "For further information, please contact the planner, Nicholas Hall, via email at Nicholas.Hall@planning.nsw.gov.au". On 15 June 2011, the Minister's delegate reached a determination, pursuant to s 75W(4) of the EPA Act, to modify the approval with conditions ("the Minister's determination"). Mr Lester sought judicial review of the Minister's determination in the Land and Environment Court of NSW, but this application was dismissed by the primary judge. As a result, Mr Lester appealed the decision of the primary judge (i.e. to dismiss his application for judicial review of the Minister's determination) to the NSW Court of Appeal. Mr Lester alleged that the Director-

General of the Department of Planning had failed to comply with the requirements in s 75X(2)(f) of the EPA Act to make certain documents publicly available (i.e. "requests for modifications of approvals given by the Minister and any modifications made by the Minister") and, as a consequence, the exercise of power by the Minister to modify the approval under s 75W(4) of the EPA Act was invalid.

Issues:

(1) whether the EA accompanying the request for modification (including its appendices) is encompassed within a request for modification of approval under s 75X(2)(f) of the EPA Act and hence was required to be made publicly available;

(2) whether the EA included the appendices;

(3) whether the appendices were made publicly available by identifying on the website a person from whom further information could be obtained (i.e. "the planner"); and,

(4) in the event of a breach of the requirement in s 75X(2)(f) of the EPA Act, whether that breach rendered invalid the Minister's determination.

Held: appeal dismissed with the appellant to pay the appeal costs of the first and second respondents (Preston CJ of LEC; Tobias AJA and Young AJA agreeing):

(1) the expression "requests for modifications of approvals" in s 75X(2)(f) of the EPA Act must be interpreted not only in its own terms but also in the context of s 75X(2) of the EPA Act, the process of requesting and approving modifications of approvals in s 75W of the EPA Act, and more generally the legislative scheme in Part 3A of the EPA Act for making applications, undertaking EA, considering applications and EAs and approving applications. The text and context of this legislative scheme established that the expression "requests for modifications of approvals" refers only to the request under s 75W(2) of the EPA Act lodged with the Director-General under s 75W(3) and not any documents that might accompany such a request: at [27];

(2) the legislature had been specific in both the description and the selection of the categories of documents that the Director-General was required to make publicly available. The category of documents specified in s 75X(2)(f) did not expressly or by necessary implication include any documents that might accompany a request for modification of approval under s 75W(2). Furthermore, the EA was not a modification request; rather, it was a document accompanying the modification request. A document that accompanies another document is not considered to be part of that other document. Consequently, the Director-General was not required under s 75X(2) to make the EA publicly available. The fact that the Director-General endeavoured to do so, but was not successful in relation to appendices 1-4, did not have the legal consequence of causing a non-compliance with s 75X(2) or invalidating the Minister's subsequent modification under s 75W(4): at [28]-[37];

(3) while the chain of reasoning above was dispositive of Mr Lester's challenge to the modification and of the appeal, the Court decided to consider the other grounds of appeal and contention: at [38];

(4) ***Obiter***: the primary judge erred in splitting the EA from the appendices to that EA in his original decision. Both as a matter of general principle and in the particular context of the EA considered in the case before the Court, an EA which includes appendices comprises the whole of the document. There was no justification for splitting the EA into parts, whether on the basis of commentary in the body of the report compared to appendices or otherwise, for the purpose of making publicly available one or more parts but withholding from the public domain one or more other parts: at [39]-[45];

(5) ***Obiter***: the primary judge erred in finding that appendices 1 to 4 were made publicly available. The requirement in s 75X(2) that documents "are to be made publicly available" required that a certain state of affairs (i.e. the public availability of the document) presently existed. It was not sufficient to establish a means by which that state of affairs could have existed in the future (e.g. by identifying action a member of the public could take in order to be able to view the document in the future). The making available of a document only to, and on request of, an individual member of the public does not make the document "publicly available". The printed message inviting people to "contact the planner" for further information did not operate to make the documents referred to on the Department's website publicly available: at [46]-[52]; and

(6) ***Obiter***: even if there had been a breach of the requirement in s 75X(2)(f) of the EPA Act in the circumstances of the case before the Court, the legislature did not intend, either expressly or by implication, for such a breach to invalidate a determination made by the Minister to modify an approval under s 75W(4) of the EPA Act: at [53]-[58].

Campbell v Crane [2013] NSWCA 43 (Bathurst CJ, Barrett JA and Tobias AJA)

(related decision: *Campbell v Crane* [2009] NSWSC 363 Smart AJ)

Facts: the properties of the parties adjoin each other. The appellants alleged that there were some ten specified encroachments by the respondent on the appellant's property, and commenced proceedings in the Supreme Court by way of summons seeking declarations that the respondent had encroached and trespassed on their property and orders that the encroachments be removed and that the respondent pay the appellants damages including exemplary damages. In an Amended Statement of Claim filed on 16 December 2008 the appellants sought an order under s 3(2)(c) of the *Encroachment of Buildings Act* 1922 ("the EB Act") that the encroachments be removed and an order under s 3(2)(a) that the respondent pay the appellants compensation. On the same day the respondent filed a cross claim seeking an order pursuant to the EB Act that there be a conveyance, transfer or lease to him of that part of the appellants' land which was encroached upon and an order that no compensation was payable. The proceedings were heard by the primary judge on 16 and 17 December 2008 and judgment was delivered on 8 May 2009. In that judgment Smart AJ found that the encroachments were "minor" and an order for their removal was not warranted, and that the appropriate relief was that the appellants should convey to the respondent a narrow strip 300mm wide adjacent to and extending along the western boundary of the appellants' land ("the strip"). Smart AJ was not satisfied that the encroachments did not arise from negligence in that a survey was not obtained when it was prudent to do so, and that compensation was to be paid in respect of the conveyance of the strip in accordance with s 4 of the EB Act. The orders made by Smart AJ on 2 June 2009 included an order that compensation was to be paid at three times the value of the land having regard to s 4(2) of the EB Act, and included in Order 8 provision that failing agreement between the partes on that figure the parties were to agree on a single expert to calculate that figure; and failing agreement as to the single expert, the matter be referred to the President of the NSW Chapter of the Institute of Arbitrators to nominate an expert to make such a valuation or appraisal, that person to act as an expert and not as an arbitrator. The parties failed to agree on a figure or on an expert, and the President of the NSW Chapter of the Institute of Arbitrators nominated Mr Michael Whelan, a registered surveyor. Mr Whelan made his Expert Determination on 23 April 2010, determining that the value of the strip was $15,000 so three times that value was $45,000. Mr Whelan noted that the appellants' submissions had included a report by a licensed builder, which estimated that as a consequence of the boundary adjustment an air conditioning unit, and surcharge gulley and point would need to be relocated at a cost of $8,450; and because the building on the appellants' land would be closer to the new boundary than the minimum setbacks required by the Lake Macquarie City Council and by the Building Code of Australia, the western wall would have to be fire rated, at a cost of $63,700. In his report Mr Whelan expressed the opinion that the costs associated with the proposed movement of the boundary should be paid by the respondent.

On 22 December 2010 the appellants filed a Notice of Motion seeking an order under r 20.24(1) of the Uniform Civil Procedure Rules 2005 ("UCPR") that Mr Whelan's report be adopted, and that judgment be entered for the appellants against the respondent in the sum of $117,150. On 6 April 2011 the primary judge declined to adopt Mr Whelan's report, or order the payment of $117,150, and dismissed the Notice of Motion, noting that the sum of $45,000 payable under the orders made on 2 June 2009 was subject to any variation, if the appellants should successfully apply to re-open. The final orders in respect of which the appeal was brought were made on 2 September 2011 by the Chief Judge in the unavailability of the primary judge, in effect ordering that upon the transfer from the appellants to the respondent of the strip, the respondent was to provide to the appellants a bank cheque in the sum of $45,000 (Order 5). The appeal to the Court of Appeal extended to the order dismissing the Notice of Motion and the consequential order for costs of the Notice of Motion.

Issues:

(1) whether the orders made on 2 June 2009 amounted to a referral under UCPR Part 30 Div 3 or whether they amounted to "otherwise ordering" under UCPR Part 20.23;

(2) whether there was an agreement between the parties to submit the matter to an expert; and

(3) whether if Order 8 was beyond power and was set aside, the matter should be remitted for further determination of the matter of compensation payable.

Held: dismissing the appeal with costs:

(1) there was no reference under UCPR r 20.14. There was an obvious distinction between a referee appointed under UCPR Part 20 Div 3 and an expert who was not to act as an arbitrator as Order 8 provided. Furthermore, the clear implication from UCPR 20.14 and 20.15 was that the Court was required to appoint a particular person as a referee whose suitability and qualifications it could assess as appropriate to determine the question or issue to be referred, and Order 8 did not comply with those rules: at [33];

(2) that part of Order 8 added by the primary judge for appointment of an expert in default of agreement of the parties was not added either with the consent or at the request of the parties, and there was nothing in that part of Order 8 that signified that the parties had agreed to be bound by the determination of the expert: at [34];

(3) pursuant to s 3(2) of the EB Act a discretion was vested in the Land and Environment Court to make such orders as it may "deem just" with respect to, among other things, the payment of compensation; the matters that could be taken into account were referred to in s 3(3). Where an order was made in accordance with s 3(2)(b), "the situation and value of the subject land, and the nature and extent of the encroachment", then s4(1) provided for the payment of minimum compensation being the value of the land or in an appropriate case three times that value. Section 4(2) then empowered the Court to determine whether compensation should exceed that minimum and if so by what amount, and in exercising that discretion the Court was bound to have regard to the three factors set out in s 4(2), which included (a) "the value … of the subject land to the adjacent owner" and (b)"the loss and damage that has been or will be incurred by the adjacent owner through the encroachment and through the orders proposed …": at [35];

(4) it would be open to the Court to refer the issue raised by s4(2)(b) to a referee for determination provided that the Court upon receiving the referee's report was prepared to adopt it and otherwise determine in its discretion whether compensation should be paid that exceeded the minimum provided for by s 4(1). Equally it was possible that the parties could, by agreement, determine that compensation be assessed by a third party by whose decision they would be bound. Neither of those processes occurred in the present case, and the arrangements provided in Order 8 were beyond power: at [36]-[37];

(5) while if there were to be a remitter it would be necessary for all issues to be re-determined and not just the question of compensation, it was inappropriate for there to be any remitter: at [39]. Counsel for the appellants had not sought compensation under s4(2) in a form that accorded with Mr Whelan's assessment: at [48]; no attempt was made to lead evidence as to the impact or consequences of an order for conveyance of the strip: at [49]; no explanation was forthcoming as to why evidence of the consequential costs was not called in either the December 2008 or June 2009 hearing: at [49]; no step was taken by the appellants to lead evidence to support a claim for additional compensation as a consequence of any alleged loss or damage of the nature of that referred to in s 4(2)(b): at [50]; and the appellants could have applied to re-open but never did, and in this respect the onus was on the appellants to claim and prove any such loss or damage: at [52]. If the appellants intended to claim more than the minimum compensation payable pursuant to s 4(1) of the EB Act it behoved them to seek leave to re-open their case to prove that they had sustained loss or damage of the nature referred to in s 4(2)(b) so as to justify the exercise of discretion to award compensation in excess of the minimum, and this they failed to do: at [60];

(6) justice required that the position of the respondent be considered as well as that of the appellants when determining whether the appellants should be bound by the manner in which they conducted their case below over an extended period of time: at [62]; and

(7) it was not now open to the appellants to seek to set aside Order 5 made by the Chief Judge on 2 September 2011; and in the absence of that order being set aside, no basis existed for setting aside the other relevant orders made on 2 June 2009, 6 April 2011 and 2 September 2011: at [63].

De Marco v Chief Commissioner of State Revenue [2013] NSWCA 86 (McColl and Basten JJA, Gzell J) (related decision: *Hayward v Chief Commissioner of State Revenue (RD)* [2011] NSWADTAP 17)

Facts: before December 2002, when their caravan was destroyed by a bushfire, and for a continuous period of at least six months, the appellants had lived on land they owned in Arcadia in a mobile home and then a caravan. The appellants did not have approval under s 68 of the *Local Government Act* 1993 ("the LG Act") for the installation of a moveable dwelling on the land. The respondent raised assessments to land tax under the *Land Tax Management Act* 1956 ("the LTM Act") for the land tax years 2004 to 2008. The appellants objected, claiming entitlement to the principal place of residence exemption provided by s 10(1)(r) of the LTM Act. Clause 2(1) of Sch 1A of the LTM Act provided that land "used and occupied by the owner as the principal place of residence of the owner of the land and for no other purpose" was exempt if, among other things, the land was a parcel of "residential land". The term "residential land" was defined in cl 3 to mean land used and occupied for residential purposes "that use and occupation being use and occupation of a building or buildings designed, constructed or adapted for residential purposes…". The appellants did not use and occupy their land during the land tax years 2004 to 2008, however they relied on the concession provided in cl 8(1) of Schedule 1A enabling the principal place of residence exemption to be claimed where the owner had used and occupied the land as principal place of residence for a continuous period of at least 6 months. The appellants appealed from a decision of an Appeal Panel of the Administrative Decisions Tribunal ("ADT") finding in favour of the respondent on the basis that the appellants' unlawful use and occupation of the land precluded them from taking advantage of the principal place of residence concession.

Issues:

(1) whether, to engage the concession, the use and occupation of the land as principal place of residence must be "lawful"; and

(2) what was the appropriate order to make.

Held: allowing the appeal, by majority, and remitting the case to the ADT for determination of the question of whether the appellants' use and occupation of the land satisfied the definition of "residential land":

(1) (per Basten JA): the language of cl 8 was satisfied by use and occupation which was, as a matter of fact, as a principal place of residence. The legislative scheme did not call for, and therefore did not permit, the introduction of an additional constraint, namely that use and occupation had to be lawful in the sense of complying with the requirements of the relevant planning legislation, at least in circumstances where the use and occupation were permissible with consent: at [79];

(2) (per Gzell J):the Chief Commissioner's general administration of the LTM Act and other State taxation laws should not be expanded to require him to determine whether the use and occupation of land was lawful; that was the function of Councils of areas within New South Wales: at [152]; and

(3) there was a live issue as to whether the use by the appellants of a caravan or mobile home, apparently not connected to Council services, satisfied the definition of "residential land", and the matter had to be remitted for that issue to be determined: at [81], [166]. It was appropriate that it be remitted to the Revenue Division of the ADT so as to preserve any appeal rights of a dissatisfied party: at [83], [167].

Allandale Blue Metal Pty Ltd v Roads and Maritime Services [2013] NSWCA 103 (Macfarlan, Meagher and Ward JJA)
(related decisions: *Allandale Blue Metals & Anor v Roads and Maritime Services* [2011] NSWLEC 242 Biscoe J; *Quarry Products (Newcastle) Pty Ltd & Anor v Roads and Maritime Services (No 3)* [2012] NSWLEC 57 Sheahan J)

Facts: Allandale Blue Metal Pty Ltd ("Allandale") commenced Class 3 proceedings in the Land and Environment Court appealing from the Valuer-General's determination of compensation payable to it under the *Land Acquisition (Just Terms Compensation) Act* 1991 ("the Act") as a consequence of the compulsory acquisition in 2010 by the respondent Roads and Maritime Services ("RMS") of land owned by it in Allandale NSW. The land acquired previously formed part (54.6982ha) of an irregularly shaped eight lot holding with a combined area of 630.78ha. On part of the overall landholding, (lots 177 and 198), a quarry was operated by Allandale's lessee. The land acquired by the RMS, which was outside lots 177 and 198, was acquired for the public purpose of construction of the Hunter Expressway and formed a road corridor passing through a number of Allandale's lots. Allandale claimed that the effect of the acquisition was that quarrying could no longer occur on areas of residue land adjacent to the road corridor and a significant amount of the resource would become inaccessible or sterilised. Allandale's claim for compensation included under s 55(a) of the Act (market value on the date of acquisition) an amount representing a reduction in the present value of the royalties from the quarry land on the assumption that there was a reduced life of the quarry due to the inability to access the resource from the buffer land. At issue in that regard was whether Allandale was lawfully entitled to have access to the resource from the whole of lots 177 and 198, rather than simply from the area in a circle labelled on an Indicative Plan lodged with the development application when development consent was granted for the quarry in 1979, or whether the area to be quarried could not be expanded without a further development consent. On the application of the RMS, Biscoe J ordered under rule 28.2 of the Uniform Civil Procedure Rules 2005, determination of a separate question, being whether the development consent granted in 1979 only permitted quarrying within the area of the circle labelled "proposed quarrying area" on the Indicative Plan, or in the alternative was void for uncertainty. Sheahan J determined the separate questions, and held that reference might permissibly be made to the development application and the documents accompanying it when construing the 1979 development consent, and determined that the 1979 development consent permitted quarrying only within the area identified on the Indicative Plan included in the development application. Allandale sought leave to appeal from both interlocutory decisions. Allandale had waited until after the decision of Sheahan J before seeking leave to appeal from the decision of Biscoe J, and required and sought an extension of time for the filing of its summons so far as it related to the decision of Biscoe J. A shorter extension of time for the filing of the application for leave to appeal from the decision of Sheahan J was also required, and was not opposed.

Issues:

(1) whether an extension of time for the filing of the application for leave to appeal from the decision of Biscoe J should be granted;

(2) whether Biscoe J had erred in law in ordering the determination of the separate question;

(3) whether the order for determination of the separate question should be set aside; and

(4) whether Sheahan J had erred in law in answering the stated question in the affirmative.

Held: extending the time for the filing of the summons seeking leave to appeal from the decision of Sheahan J and dismissing the application for leave to extend the time for the filing of the summons seeking leave to appeal from the decision of Biscoe J; granting leave to appeal from the decision of Sheahan J and dismissing the appeal; and ordering the appellant to pay the respondent's costs of the summons seeking leave to appeal and the appeal:

(1) (by Meagher and Ward JJA, Macfarlan JA dissenting): where Allandale had made a forensic decision to wait for the determination of the separate questions and in doing so committed both parties to incurring the costs of that argument, the application for extension of time for the filing of the application for leave to appeal from the decision of Biscoe J should be refused: at [39], [82];

(2) (by Macfarlan JA, Meagher JA not deciding): in circumstances where a post-acquisition judicial determination of the proper construction of the development consent would not be relevant at the final

hearing as to the assessment of market value of the acquired land and no saving in time and expense was likely to result from the separate question order, Biscoe J had erred in law in ordering the determination of separate questions: at [17]-[18];

(3) (by Ward JA, obiter): having regard to the potential relevance of the proper construction of the development consent and the potential for significant cost and time savings if the determination of the question was in the negative, the exercise of discretion to state a separate question for determination did not miscarry and was not plainly wrong: at [141]-[144], [151];

(4) (by the Court): the determination of the question had possible significance in the underlying proceedings, and the extension of time for the making of the application for leave to appeal from the decision of Sheahan J and leave to appeal from that decision should be granted: at [20], [40], [77];

(5) (by Meagher and Ward JJA, Macfarlan JA dissenting): Sheahan J did not err in answering the question in the affirmative, and reference might permissibly be made to the development application and the documents accompanying it when construing the development consent to identify (Meagher JA at [55]) or to resolve the ambiguity as to (Ward JA at [201]) the area referred to in the development consent in respect of which quarrying was approved; and

(6) (by Macfarlan JA): Sheahan J had erred in concluding that the development consent letter, standing alone, was not capable of proper construction because crucial details such as the size and location of the quarry were not identified in that letter. Being a decision concerning the construction of documents, that conclusion involved an error of law, and the separate question should have been answered in the negative: at [34].

McNeil v Narrabri Shire Council [2013] NSWCA 112 (Barrett and Emmett JJA, Preston CJ of LEC)

Facts: the appellant appealed from orders made by the District Court directing judgment for the respondent council in the sum of $40,687.26, plus interest, being recovery of the cost of remediation undertaken on behalf of the council on property owned by the appellant at 61 Rose Street Wee Waa ("the property"). The property consisted of two separate parcels of land, Lot 1 DP 998352 ("Lot 1") and Lot 2 DP 226829 ("Lot 2") which together formed a rectangle. As at January 2006 there was situated on the property a shop that had been a commercial bakery. In October 2003 the council had given approval for part of the shop building to be used as a pizza shop. On 29 January 2006 the part of the building being used as a pizza shop suffered damage in a fire, and the shop front and residential part of the building were largely destroyed by fire. The council gave to the appellant a clean-up notice under s 91 of the *Protection of the Environment Operations Act* 1997 stating that the land had been contaminated with friable asbestos as a result of fire and requiring that all clean up activities on the site cease and that an appropriately qualified contractor be required to undertake all clean-up activities associated with the site. There was correspondence between the appellant's solicitors and the council regarding requests for an extension of time to comply with that notice. Item 21 of the table in s 124 of the *Local Government Act* 1993 ("the LG Act") empowers a council to order the owner or occupier of land or premises to do or refrain from doing such things as are specified in the order "to ensure that land is, or premises are, placed or kept in a safe or healthy condition"; an order can be given in circumstances where "the land or premises are not in a safe or healthy condition". In June 2006 the council gave notification under s 132 of the LG Act of a proposed order under s 124 ("the s 132 notice"), stating that the proposed order would apply to "Lot 1 DP 998352, 61 Rose Street Wee Waa" and would require "restoration of the land to a safe and healthy condition". The s 132 notice stated that that was required because the site was not in a safe and healthy condition as a result of "the presence of a dilapidated structure and the presence of friable asbestos waste", and stated that restoration of the land would be required to be undertaken in accordance with three specified requirements. The notice stated that the appellant could relieve the need for the council to consider serving an order under s 124 by completing the required restoration works before 7 July 2006. The work was not completed by 7 July 2006 and on that date the council gave the appellant a document purporting to be an order under s 124 ("the s 124 order"). That document was described as an order "relating to Lot 1 DP 998352, 61 Rose Street Wee Waa" and no mention was made of Lot 2. The s 124 order stated the reason for its issue and that the "restoration of the land" had to be completed in accordance with three requirements, which were identical to the three requirements in the s 132 notice; however, it did not, in terms, require restoration to a safe and healthy condition, as had been foreshadowed in the s 132 notice. The appellant took no steps to

appeal to the Land and Environment Court under s 180 of the LG Act against the s 124 order, and did not complete the three requirements specified in the s 132 notice and s 124 order. Following notice of intention to enter the property to carry out the work, contractors retained by the council cleared the property, and the council commenced proceedings for recovery of the sum charged by the contractors. The appellant's defence was that the purported order was invalid, and that he had not failed to comply in that as at the date the s 124 order was given the property was not unsafe and unhealthy and hence the s 124 order did not require him to do anything. The appellant filed a cross-claim claiming damages for trespass and negligence. Judge Toner SC directed judgment for the council, and ordered the appellant to pay the council's costs, on an indemnity basis after 24 November 2010, and dismissed the cross-claim.

Issues:

(1) whether the s 124 order was invalid and a nullity because it did not order the appellant to do, or refrain from doing, anything;

(2) whether s 124 and item 21 of the table in s 124 authorised an order requiring demolition or removal of a building;

(3) whether the s 124 order, even if otherwise valid and effective in relation to Lot 1, was ineffective in relation to Lot 2; and

(4) whether the s 124 order was invalid and a nullity because it was based on the premise that friable asbestos material was present on the property, in circumstances where a finding should have been made that there was no friable asbestos on the property.

Held: dismissing the appeal with costs:

(1) the s 124 order did require the appellant to do something, being clean-up works on the property to restore safe and healthy conditions. While no specific work was stated in the s 124 order as being necessary or adequate to restore safe and healthy conditions, the requirement to do so had to be understood in the light of the reason given for the issue of the s 124 order. It was clear enough that the s 124 order was saying that, in order to restore safe and healthy conditions, it was necessary to remove the dilapidated structure and friable asbestos waste. Accordingly, the s 124 order was clear enough in identifying what it was that the council was ordering the appellant to do. The s 124 order required what the s 132 notice informed the appellant it would require: at [33]-[36];

(2) the express reference in item 1 in the table to s 124 to demolishing or removing a building did not indicate that subsequent items, such as item 21, should be read down so as not to authorise an order requiring a person to do a thing consisting of demolishing or removing a building: at [41];

(3) on a fair reading of the s 132 notice and the s 124 order, it was clear that notwithstanding that there was an express reference to Lot 1 and no reference to Lot 2 in the two instruments, the site that was the subject of both instruments was the rectangular property known as 61 Rose Street Wee Waa which included both Lot 1 and Lot 2. While the failure to refer to Lot 2 was indicative of less than ideal administration on the part of the council, the omission did not invalidate the s 124 order: at [44], [46];

(4) on the face of the s 124 order, there was no reason to doubt that the circumstances set out in item 21 existed, namely that the property was not in a safe and healthy condition, and the onus was on the appellant to establish the contrary. The appellant had not discharged the onus of establishing that there was no friable asbestos on the property, and there was clearly evidence available to the primary judge upon which such a conclusion could be based: at [49], [71]; and

(5) in so far as that was a jurisdictional fact necessary for the validity of the s 124 order, the appellant had failed to establish the absence of the alleged jurisdictional fact. He had not established that the s 124 order was invalid on that ground: at [72].

Kyluk Pty Ltd v Chief Executive, Office of Environment and Heritage [2013] NSWCCA 114 (Price, McCallum and Schmidt JJ)
(related decisions: *Chief Executive, Office of Environment and Heritage v Kyluk Pty Ltd* [2012] NSWLEC 22, *Chief Executive, Office of Environment and Heritage v Kyluk Pty Ltd (No 3)* [2012] NSWLEC 56 Pain J)

Facts: the appellant appealed from the sentence imposed on conviction of an offence contrary to s 118A(2) of the *National Parks and Wildlife Act* 1974 ("the NPW Act") of picking plants that were part of an endangered ecological community ("EEC") being *Shale/Sandstone Transition Forest* (SSTF). The appellant was the registered proprietor of a rural property of approximately 40.31ha, and had pleaded guilty to the charge of picking SSTF; another charge relating to the EEC being *Cumberland Plain Woodland* (CPW) was withdrawn. The extent of the area of SSTF picked by the appellant was in dispute. The prosecutor tendered a report from Mitchell Tulau, a soil scientist, who was of the opinion that the spatial extent of the areas of the property consistent with the soils and landforms described in the final determination of the Scientific Committee listing the SSTF EEC ("the final determination") as SSTF was approximately 5ha. Mr Tulau's report included description of the methodology used during the field inspection of the property, including the sampling undertaken, and stated that "samples for laboratory analysis were submitted to the Department's Yanco Natural Resources Laboratory through a documented chain of custody". The email of the results from the Yanco Natural Resources Laboratory was not included in the report. The prosecutor also tendered reports by Theresa James, a botanist, who had estimated that the area of SSTF cleared was 12.54ha. Ms James had prepared three reports for Campbelltown City Council in relation to the picking of SSTF on the property. She was subsequently engaged by the respondent as an expert witness in the prosecution, and for that purpose prepared two reports. In both those reports she acknowledged that she had read the Expert Witness Code of Conduct ("the Code") and agreed to be bound by it. In one of those reports Ms James stated that "this supplementary report should be read in conjunction with …" the earlier reports prepared for the council, that had been withdrawn by the prosecutor. The prosecutor pressed those two reports. Following a *voir dire* on the admissibility of the reports, the trial judge admitted the report of Mr Tulau and the reports of Ms James. In sentencing the appellant, the trial judge found that the area of SSTF cleared by the appellant was 12.54ha; that the offence was of moderate to severe objective seriousness; and allowed a 15 percent discount on sentence for the utilitarian value of the guilty plea. There were 13 Grounds of Appeal, four relating to the admissibility of the expert evidence adduced by the prosecution; three relating to the proper construction of the final determination of the Scientific Committee; five relating to the approach to be adopted in sentencing in Class 5 matters; and one relating to the issue of whether the sentence was too severe.

Issues:

(1) whether the report of Mr Tulau was admissible;

(2) whether if admissible the report should have been excluded under s 135 of the *Evidence Act* 1995 ("the Evidence Act");

(3) whether the trial judge erred in admitting into evidence the expert report of Ms James;

(4) whether the trial judge erred in holding that the evidence was capable of proving to a criminal standard that a definite area of land meeting the definition of SSTF had been picked;

(5) whether the trial judge erred in identifying the essential elements of the definition of SSTF formulated by the Scientific Committee; and

(6) whether the trial judge erred in attributing to the defendant actual foresight that harm to the environment would result from clearing or picking of the land in issue, in her consideration under s 194(1)(d) of the NPW Act of "the extent to which the person who committed the offence could reasonably have foreseen the harm caused or likely to be caused by the commission of the offence".

Held: granting leave to appeal and allowing the appeal against sentence, quashing the penalty imposed and other orders made, and remitting the matter to the Land and Environment Court:

(1) on the admissibility of the report of Mr Tulau:

(a) (by Price J): the trial judge was entitled to reach the conclusion that the report of Mr Tulau was admissible, as Mr Tulau had identified the facts and reasoning process upon which his opinions were substantially based: at [55]. However, in the absence of the email from the laboratory or

some evidence as to the qualifications of the person or persons conducting the tests and documentation establishing the chain of possession, the probative value of that report was substantially outweighed by the danger that the evidence might be unfairly prejudicial to the appellant, and her Honour should have refused under s 135 of the Evidence Act to admit the report: at [68];

(b) (by McCallum J): agreeing with the conclusion of Price J as to s 135 of the Evidence Act, and adding that since the proceedings were criminal proceedings, it followed that the exclusion of the report was mandated by s 137 of the Evidence Act: at [137];

(c) (by Schmidt J): the failure to adhere to the Code, which required that the report identify "any examinations, tests or other investigations on which the expert has relied, including details of the qualifications of the person who carried them out…", was an important one in the circumstances, given the nature of the charges for which the appellant was being sentenced and the role which the results of the analysis of the soil samples had played in the opinions which Mr Tulau had reached as to the extent of the transitional soil at the site: at [146]. For expert opinion evidence to be admissible under s 79 of the Evidence Act it had to satisfy the two criteria identified by the plurality in *Dasreef Pty Ltd v Hawchar* [2011] HCA 21; (2011) 243 CLR 588, that is it must establish that the expert "has specialised knowledge based on the person's training, study or experience" and that the opinion expressed by the expert "is wholly or substantially based on that knowledge"; the evidence must also be presented in a form which reveals the facts and reasoning on which the opinion rests: at [176]. The report was inadmissible, as the probative value of Mr Tulau's opinions could simply not be tested or assessed, in the absence of evidence establishing crucial facts on which his conclusions about the soil rested. Even if the report had been admissible, in a criminal trial such as this, the discretion provided by s 135 of the Evidence Act to exclude the evidence, given its prejudicial effect in relation to the critical question of the extent of the transitional soil at the site, had to be exercised: at [179];

(2) the finding of the trial judge that Ms James' report could be read as a stand alone report when viewed in its entirety was clearly correct, as the report identified the methodology used, the site inspections undertaken, the facts upon which her opinion was based, the references relied upon and contained an annexure of the results and data collected by her during the inspections she carried out to prepare her report. It was plain when Ms James prepared the two reports that she firmly had in mind the Code when referring to the material in the reports to the council, and she was not merely "rubber stamping" those reports. The trial judge did not err in admitting the report into evidence: at [81]-[82];

(3) the description of SSTF in the final determination had as its characteristics an assemblage of listed plant species ("the flora"), and soils that are transitional between the clay soils derived from Wianamatta Shale and the sandy soils derived from Hawkesbury Sandstone ("transitional soil"), located within the Sydney Basin Bioregion. There were no "dominant" or "subordinate" characteristics in the final determination, and the characteristics of flora, transitional soil and location were interlinked and must be present. In order to establish that the area cleared by the appellant was an EEC of SSTF as described in the final determination, the prosecution was required to prove beyond reasonable doubt not only that the trees fell within the assemblage of plants listed in the final determination, but also that those trees had been growing on soils that were transitional between the clay soils derived form Wianamatta Shale and sandy soils derived from Hawkesbury Sandstone. The trial judge's construction of the final determination was incorrect, and the evidence was not capable of establishing to the criminal standard that 12.54ha of SSTF had been cleared by the appellant: at [112]-[123];

(4) section 194(1)(d) of the NPW Act was neither exclusively dependant upon the actual knowledge of an offender nor the objective circumstances of the offending. The question that had to be asked was to what extent (if any) a reasonable person in the position of the offender could have foreseen the harm caused or likely to be caused. The position of the offender involved a consideration of all the available evidence including what the offender actually knew or ought reasonably to have known that was relevant to the foreseeability of the harm cause or likely to be caused. The trial judge erred in not making reference to the evidence that was available as to the appellant's position and confining her consideration to the objective circumstances of the harm: at [130]-[132]; and

(5) reasonable foreseeability of the harm caused or likely to be caused was a factor that increased the objective seriousness of the offence and accordingly had to be established beyond reasonable doubt: at [132].

- **NSW Supreme Court**

Dansar Pty Ltd v Byron Shire Council [2013] NSWSC 17 (McCallum J)
(related decisions: *Vaughan v Byron Shire Council*, unreported, NSWLEC, 15 March 2002, Hoffman C; *Vaughan v Byron Shire Council* (No 2) [2002] NSWLEC 158, Lloyd J)

Facts: Dansar Pty Ltd ("Dansar"), a property developer, brought a claim in negligence against Byron Shire Council ("the council"). Dansar's claim was for pure economic loss in respect of the proposed construction of a residential complex at Byron Bay, resulting from disappointed profit expectations and wasted expenditure due to Dansar holding the property. The claim concerned access to sewage treatment capacity. Population growth had placed excessive loads on the area's two treatment plants. In 1997 a moratorium on new development had been imposed pending capacity improvements. On 19 September 2000, the council ended the moratorium for the West Byron Sewage Treatment Plant, opening an opportunity for new development. This required council to quantify the spare capacity and monitor uptake. Council calculated spare capacity as 92.7 ET ("equivalent tenement", an effluent estimate per household).

On 6 February 2001 Dansar lodged a development application for the construction of 18 dwellings assessed as requiring 11.6 ET of sewage capacity. Consent required the council's satisfaction that cl 45(1) of the Byron Local Environmental Plan 1988 ("the Byron LEP") had been met, including that "prior adequate arrangements" had been made for the "provision of sewerage, draining and water services to the land." The council did not determine Dansar's application before it was deemed to be refused under s 82(1) of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act"). In August 2001, Dansar appealed to the Land and Environment Court ("the LEC") under s 97 of the EPA Act, concurrent with the council's consideration of the application. The LEC dismissed the appeal. An appeal against that decision was also dismissed. The council considered Dansar's application in 2001, deferring its decision due to various concerns including its assessment that the 92.7 ET was absorbed by other applications. In 2002 Dansar lodged new development applications. These were approved. In 2005 Dansar sold the property.

Issues:

(1) whether the council owed a duty of care, arising from cl 45 of the Byron LEP, to the class of persons comprising Dansar in the processing of development applications to give "proper consideration" to an application and to act upon correct information; and

(2) whether the council was negligent by erroneously maintaining that the capacity remaining unabsorbed by other applications from the 92.7 ET was less than the 11.6 ET required for Dansar's proposal.

Held: Dansar's claim dismissed:

(1) the council did not owe a duty of care as asserted by Dansar: at [95];

(2) the case did not fall within the category of duty posited by Hodgson JA in *Makawe Pty Ltd v Randwick City Council* [2009] NSWCA 412; (2009) 171 LGERA 165 (at [43]) that where an approving authority is subject to a statutory requirement not to give consent unless it is satisfied of something, a duty may be owed to exercise reasonable care in considering whether it is so satisfied. The cases considered in *Makawe* were distinguishable because in those cases the harm alleged was a physical feature of the development which ought to have been detected by the council and caused damage: at [48]–[54];

(3) where a novel duty of care is asserted, the correct approach is an evaluative judgment of the "salient features", which in this case was informed by the statutory regime including the council's dual function as consent authority and sewerage management authority. Chapter 7 of the *Local Government Act* 1993 conferred a regulatory function regarding sewerage works. Specific approval for connection was required and could only be granted if compatible with the public interest. The council also had the function of assessing Dansar's development application under the EPA Act, considering the matters in ss 79C, 80(2) of that Act. The relevant environmental planning instrument was the Byron LEP. A

disconformity existed between the duty asserted and these statutory functions. A private right to recover damages for a failure to allocate sewage treatment capacity is "inimical" to the unimpeded exercise of council's public functions: at [46]–[47], [58]–[61], [66]–[72], [74], [82] and [94];

(4) it was undesirable to produce an incoherent body of law between the asserted duty and the conclusions in *Codlea Pty Ltd v Byron Shire Council* [1999] NSWCA 399: at [78]–[81] and [94]; and

(5) further, harm of the nature claimed was inherent in the assessment process. There was no specific reliance, no assumption of responsibility and no relevant vulnerability. The council had control but it was circumscribed by the many competing considerations. The capacity calculation was theoretical and council had no legal duty to allocate all capacity. Proximity weighed in favour of a duty (given the group of applicants was determinate) but not so as to outweigh the other features: at [83]–[93].

- **District Court of NSW**

Holloway v Newcastle City Council [2013] NSWDC 62 (Mahony SC DCJ)

Facts: Newcastle City Council ("the council") owned land at the rear of the property owned by the plaintiffs. The plaintiffs alleged that in 1997 the council planted on that land a number of trees and had, at all material times since, been responsible for the growth, care and maintenance of the trees. The plaintiffs claimed that roots from those trees had encroached onto the plaintiffs' land extracting water and moisture from under the foundations of the plaintiffs' house which led to shrinkage of soil undermining the foundations which caused damage including cracking in brickwork and pavement and misalignment of windows, and that a sewer pipe was broken and leaked water further exacerbating the damage. In 2009 the rear of the plaintiff's house was underpinned. In October 2009 the plaintiffs provided to the council an engineer's report which noted that despite the underpinning the house had continued to drop and was suffering further damage, and stated the belief that the principal cause of the previous and ongoing damage was the due to the presence of the trees. The plaintiffs claimed damages in nuisance, pleading that since October 2009 the council had been aware of the nuisance and had failed to abate the continuing nuisance to their property. The damages claimed included abatement costs in respect of installation of a root barrier along the rear of the property, and rectification costs claimed for two periods, namely work carried out due to damage to the property that was rectified in 2009, and rectification costs for damage since that work. The council denied that the damage was caused by roots from the trees and alleged that there were numerous other factors causing differential changes in the soil on the plaintiffs' property, including that the soil was highly reactive clay; inadequate footings; mine subsidence; and that the underpinning work carried out in 2009 was inappropriate. The council also pleaded that the builder who carried out the work and the engineer who designed it were concurrent wrongdoers, and also pleaded contributory negligence being inadequate stormwater drainage and failure to repair the leaking sewer pipe in a timely manner.

Issues:

(1) whether the planting of the trees constituted an actionable nuisance by way of the encroachment of tree roots;

(2) whether the council had become liable for the nuisance by actual or constructive knowledge of it since October 2009;

(3) if so, what damage was caused by the nuisance;

(4) whether the claim was an apportionable claim between other concurrent tortfeasors pursuant to s 34 of the *Civil Liability Act* 2002, and if so, what was an appropriate apportionment; and

(5) whether the plaintiffs contributed to the damage by way of their own negligence.

Held: verdict for the defendant, with costs:

(1) applying *Robson v Leischke* [2008] NSWLEC 152, 72 NSWLR 98, the onus was on the plaintiffs to prove that as and from 26 October 2009 the council had or ought to have had knowledge of the encroachment of roots on the plaintiffs' land and damage created by that encroachment, and had failed to act without undue delay to remedy that damage: at [115];

(2) there was no issue that the house had suffered damage, nor that the council was on notice of that damage from October 2009. The real issue was whether the damage to the house was caused by the encroachment of tree roots in the manner alleged by the plaintiffs, namely by such roots extracting moisture from the soil under the foundations of the plaintiffs' house, thereby undermining those foundations and causing the house to flex giving rise to torsional forces which in turn caused the damage: at [116];

(3) the evidence and reasoning of the arborist employed by the council was preferred to that of the consultant botanist retained by the plaintiffs. The council's arborist carried out in 2011 excavation of a number of holes along the rear fence line to determine the existence of tree roots, and based on that investigation was of the opinion that only a small number of roots had passed under the fence on to the plaintiffs' property. Given the high clay content of the soil on the site, he was of the opinion that the root system would remain shallow; and that given the topography of the land directing water to the trees and shrubs, direct physical extraction of water from directly under the dwelling would be minimal. The plaintiffs' expert had considered no other factor as a cause of the damage in which was clearly a multi-factorial issue; had conducted no testing on the site and based his opinion merely on the observation of the trees at the rear of the premises; and had no knowledge of the depths of the roots or how many roots were involved: at [125]-[126];

(4) of the three separate sets of experts who had examined the damage to the property up to 2006, being consulting engineers retained by the plaintiffs in 2006, the Mines Subsidence Board in 2006, and geotechnical engineers retained by the plaintiffs in 2009, none identified tree roots invasion from the neighbouring council property as being the cause of the damage: at [129];

(5) the author of the October 2009 report provided to council had no proof for the contention that the principal cause of the previous and ongoing damage was due to the presence of large trees on the council land. The photographic evidence demonstrated the root encroachment to be minimal; he had carried out no measurements nor soil profile assessments; geotechnical engineers had found that not to be the cause; the underlying contention that it was the evaporation of water from the sub-soil under the house caused by tree roots could only be regarded as theoretical and somewhat speculative; and he had not independently assessed the structural adequacy of the footings: at [132] – [133]; and

(6) the Court was not satisfied on the balance of probabilities that the damage prior to 2006 was caused by the encroachment of tree roots, however was satisfied that following the repair work carried out in 2009 it was not caused by encroachment of tree roots but was caused by the underpinning work carried out on behalf of the plaintiffs: at [139]. The plaintiffs had not discharged the onus of proof on them, there was no actionable nuisance and the council was not liable for the damage: at [141]. The further issues therefore fell away: at [142].

- **NSW Administrative Decisions Tribunal**

Donnellan v Ku-ring-gai Council [2013] NSWADT 115 (Higgins DP)

Facts: Mr Donnellan's company, Staldone Corporation Pty Ltd, applied to Ku-ring-gai Council ("the council") for development consent for the construction of a residential flat building. Adjoining the land the site of the proposed development was land owned by Mr and Mrs Coleman; Mr Gurney and Ms Dougall owned land that adjoined the land owned by Mr and Mrs Coleman. Objectors to the development application included Mr Gurney, Ms Dougall, Mr and Mrs Coleman, and the Friends of Beaconsfield. Mr Gurney, Ms Dougall, and Mr and Mrs Coleman were also members of the Friends of Beaconsfield. The council refused consent, and on appeal the Land and Environment Court ("LEC") approved the development application, subject to some amendments: *Staldone Corporation Pty Ltd v Ku-ring-gai Council* [2012] NSWLEC 1035 (11 January 2012), *Staldone Corporation Pty Ltd v Ku-ring-gai Council* [2012] NSWLEC 1055 (13 March 2012). Mr Donnellan requested access under the *Government Information (Public Access) Act* 2009 ("the GIPA Act") to emails between any council staff member or councillor and Mr and Mrs Coleman, Mr Gurney, Ms Dougall and the Friends of Beaconsfield, between July 2011 to April 2012. The council consulted with the objectors in accordance with s 54(1) of the GIPA Act. In its determination of Mr Donnellan's access application, the council identified 242 emails as falling within the

access application and determined, subject to information that was a mobile telephone number or work number of one or more of the objectors, that it was in the public interest for the information in the emails to be disclosed. Mr Donnellan, and Mr Gurney, Ms Dougall and Mrs Coleman (on behalf of herself and her husband) ("the third party applicants"), applied to the Tribunal for review of the council's determination. The applications for review were joined to the extent that they were to be determined together by the same Tribunal member, and determined on the papers pursuant to s 76 of the *Administrative Decisions Tribunal Act* 1997.

The table in s 14(2) of the GIPA Act includes as public interest considerations against disclosure, if disclosure of the information could reasonably be expected to have one or more of the following effects:

3 Individual rights, judicial processes and natural justice

…

(a) reveal an individual's personal information,

…

(c) prejudice any court proceedings by revealing matter prepared for the purposes of or in relation to current or future proceedings,

…

4 Business interests of agencies and other persons

…

(a) undermine competitive neutrality in connection with any functions of an agency in respect of which it competes with any person or otherwise place an agency at a competitive advantage or disadvantage in any market,

…

(d) prejudice any person's legitimate business, commercial, professional or financial interests,

…

Mr Donnellan did not dispute the determination of the council in regard to the deletions of the mobile, home and work telephone numbers of the third party applicants that were contained in the disputed emails. The third party applicants contended that the information contained in the emails was personal information; that it set out the substance of claims which the third party applicants were considering pursing by legal proceedings in which Mr Donnellan and his companies would inevitably be a party, and some of the information may well be the subject to a claim for legal professional privilege in any such proceedings; that disclosure could prejudice court proceedings; and that disclosure would be likely to endanger or prejudice a system or procedure for protecting the environment. Mrs Coleman contended that disclosure would reasonably be expected to prejudice her and her husband's legitimate financial interests.

Issues:

(1) whether the information in the emails was information falling within the relevant public interest considerations against disclosure set out in s 14(2) of the GIPA Act; and

(2) if so, whether on balance the public interest considerations against disclosure outweighed the public interest considerations in favour of disclosure.

Held: subject to certain additional deletions from the information in the emails, affirming the decision of the respondent to provide access:

(1) the words "could reasonably be expected to" in the table to s 14 were to be given their ordinary meaning and required a judgment to be made as to whether it was reasonable, as distinct from something that was irrational, absurd or ridiculous to expect to have the prescribed consequences: at [36];

(2) there was no dispute about the disclosure of the name of the third party applicants as their identity was known to Mr Donnellan; what he was seeking was the substance of the email communication between

them and the council. To the extent that the emails contained email addresses, that was personal information about each of them as individuals. With a few exceptions the remaining information was not personal information, as defined in s 4 of the GIPA Act. The emails were sent or received by the third party applicants in their capacity as members of the Friends of Beaconsfield; the emails related to issues concerning the council's consideration of the development application and the relevant zoning of the land the subject of the application; and while the information contained some expressions of opinion, they were primarily opinions about the development application and issues related thereto and not about an individual, and were opinions/submissions made on behalf of the Friends of Beaconsfield: at [41]-[43];

(3) the third party applicants had not specified the information they asserted to fall within a claim for legal professional privilege, and had not made a claim that the conclusive presumption provided by s 14(1) of overriding public interest against disclosure relating to client legal privilege applied, and had failed to establish their claim in regard to privilege: at [53];

(4) many of the disputed emails came into existence at the time the council was involved in the LEC proceedings. The third party applicants were not a party to those proceedings, however they supported the decision of the council the subject of those proceedings, and some of the information in the disputed emails appeared to have been tendered in those proceedings. Issues raised in the disputed emails, sent or received prior to the decisions of the LEC, appeared to be issues also raised in those proceedings. As those proceedings had concluded it was difficult to see how the public interest consideration against disclosure in item 3(c) of the table to s 14(2) could apply to the information that came into existence before March 2012: at [55];

(5) in relation to the emails after March 2012, while there might be further development applications to which the third party applicants might make an objection, the Tribunal was not persuaded that those objections would necessarily include the information the subject of the review applications or that they would give rise to court proceedings, or that the information was prepared for the purpose of or in relation to future court proceedings: at [57];

(6) while s 55(1)(a) of the GIPA Act provided that an applicant's motives in making the access application can be taken into account, it was clear that those motives were relevant to the issue of determining where the public interest lies, on balance. It first and foremost had to be established that one or more of the public interest considerations against disclosure in s 14(2) applied to the information in issue; once established, the issue of motive became relevant, but that motive had to be established on reliable evidence and not by mere assertion. The onus was on the third party applicants to establish those matters: at [60];

(7) issues concerning the protection of the environment did not fall within item 4(a) of the table to s 14(2); item 5(a) did prescribe a public interest consideration against disclosure where disclosure could reasonably be expected to endanger or prejudice any system or procedure for protecting the environment. The information in the disputed emails was in the nature of an objection to actions, or lack of action by the council in regard to an issue of environmental concern to the third party applicants and did not involve a "system or procedure" for protecting the environment, and the public interest consideration against disclosure in item 4(a) and 5(a) did not apply: at [61]-[62];

(8) the mere fact that Mr and Mrs Coleman owned property adjoining the property the subject of the development application was not sufficient to establish the public interest consideration against disclosure in item 4(d) of the table to s 14(2): at [64];

(9) public interest considerations in favour of disclosure were that disclosure of the information could reasonably be expected to enhance Government accountability and contribute to positive and informed debate on development applications and other issues of public importance in relation to such applications, and also to inform the public about the operations of the council and their practices for dealing with members of the public in regard to such applications: at [66];

(10) property development and decisions made by local councils and Government were of considerable interest to local residents and the community at large. Development applications and all associated documents were prescribed to be open access information under ss 6 and 18 of the GIPA Act and Sch

1 of the Government Information (Public Access) Regulation 2009, unless there was an overriding public interest against disclosure: at [67]; and

(11) having regard to the content of the information relating to the development application of Mr Donnellan's company, the legislative obligation on an agency to publish information of that kind, and the fact that the person seeking access to the information in issue was the director of the company whose development application was the subject of the information, the public interest consideration against disclosure was not very strong. On the other hand, disclosure of information received by a local council from members of the public about a development application would enhance open, accountable fair and effective representative democratic Government decision making. Implicit from the provisions obliging an agency to make information about development applications publicly available regardless of whether an application for access had been made under the GIPA Act was that the public interest in the disclosure of information of that kind was very strong. It was difficult to see how even if the disputed information had been found to be personal information, the relevant public interest consideration against disclosure would, on balance, outweigh the strong public interest consideration in favour of disclosure: at [71]-[73].

Leda Developments Pty Ltd v Tweed Shire Council [2013] NSWADT 121 (Higgins DP)

Facts: the applicant ("Leda") was the developer of the Kings Forest and Cobaki Lakes developments within the area of the respondent council. The Minister had approved Concept Plans for both developments under the former Part 3A of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act") in August 2010 in relation to Kings Forest, and in December 2010 in relation to Cobaki Lakes. There was an application before the Department of Planning for modification of the Kings Forest Concept Plan. In February 2011 a Project Approval was granted for the carrying out of the subdivision of the Cobaki Estate. The respondent council had made a submission to the Minister in respect to the Kings Forest Concept Plan before the Minister's determination, and had made submissions to the Minister and Department in regard to the Concept Plan and Project Approval for the Cobaki Lakes development. Leda applied under the *Government Information (Public Access) Act* 2009 ("the GIPA Act") for access to communications (reports, applications, correspondence and other information) between the respondent council and specified groups of people or people with specified expertise, in relation to the two developments. In its determination of the application the council identified four items as falling within the terms of the access request: (1) a chain of emails sent during January 2010 between a person (Person A) and Mr Connell who was the Director Planning and Regulation of the council, concerning the Kings Forest development; (2) a chain of emails dated 30 January 2011 between a person (Person B) and Mr Connell and a Councillor, concerning a report from consultants; (3) a letter dated 4 April 2011 to Mr Connell from a person (Person C), attaching a submission made under the *Environment Protection and Biodiversity Conservation Act* 1999 in relation to the Cobaki Lakes development; and (4) an email dated 22 September 2011 from a person (Person D) to the Development Assessment Co-ordinator of the council, which forwarded an email sent by Person D to the Commonwealth on the issue. The council determined that the identity of the unnamed persons (ie their name and email address) was "personal information" and that disclosure of that information could reasonably be expected to reveal that information; that it had consulted with those persons in accordance with s 54 of the GIPA Act and that one person had objected to the disclosure; that it had decided to provide access even though an objection had been made; and that it was not permitted to provide access to the information sought while the review rights of the unnamed persons was pending. Leda applied for internal review. In its determination of the internal review application, the council determined that access to the personal information in the documents would be withheld in accordance with the public interest against disclosure as set out in item 3(a) of the table to s 14(2) of the GIPA Act. Leda applied for review of that determination.

Issues:

(1) whether the deleted information was "personal information" as defined in cl 4 of Sch 4 of the GIPA Act;

(2) if it was "personal information", whether the public interest consideration against disclosure in item 3(a) and (b) of the table to s 14(2) applied; and

(3) if this public interest consideration against disclosure did apply, whether, on balance, it overrode the public interest consideration in favour of disclosure.

Held: affirming the council's decision in part and setting aside and varying the decision in other respects:

(1) the name of person A, B, C and D was "personal information" as there was no evidence of those persons being an employee of a government agency, and their email address was "personal information" about those persons: at [38]. With the exception of the names and email address of the three persons who appeared to be employees of the council, the deleted names and emails address in the list of addressees in the email that was item 2 was "personal information" about those people: at [39]. The deleted names under the heading "observed by" on the first page of the attachment to the submission attached to the letter that was item 3 was "personal information" as defined; other deleted information on that page was not: at [40]. To the extent the deleted information in item (4) was the name and email address of the person to whom person D sent the email that was not "personal information" in that the person named was a Commonwealth employee: at [41];

(2) disclosure of the information found to be "personal information" could reasonably be expected to reveal that information, and if disclosed could reasonably be expected to contravene the disclosure information protection principle in s 18 of the *Privacy and Personal Information Protection Act* 1998: at [44]-[45];

(3) the council had not identified in accordance with the test in s 13 of the GIPA Act what the public interest considerations in favour of disclosure were, and had approached the issue by asking the question whether disclosure of the information would advance any public interest consideration in favour of disclosure. The approach of the applicant in identifying three public interest considerations in favour of disclosure was the correct approach. To those three, being to promote open discussion of public affairs, enhance Government accountability, and inform the public about the operation of agencies and in particular their policies and practices for dealing with members of the public, should be added the considerable public interest in favour of disclosure of government information concerning development, applications and approvals and monitoring of such developments to ensure compliance: at [47]-[49];

(4) in determining where the balance lies between the public interest consideration against disclosure and the public interest in favour of disclosure, the approach of the council, which appeared to have only considered the objections of persons A, B, C and D, was not correct. Although those views were relevant they were not conclusive. Regard had also to be had to the nature of the information in issue, the context in which it came to be held by the government agency and the reasons given by the third party objector as to why the information should not be disclosed: at [52]-[53];

(5) in relation to items 1 and 2, the public interest against disclosure of the name and email address of person A and person B, and the names and email address in the list of addressees (other than employees of the council) in item 2, outweighed the public interest consideration in favour of disclosure: at [55], [56]; and

(6) In the context of the information in item 3 and item 4, the balance as to where the public interest lies in regard to the names of person C, person D and the other named persons, differed. While person C and person D did not object to the substance of the information in their respective communication being disclosed, they objected to their name and contact details being disclosed. They did not give any reason for their objection. The information was submissions in regard to the Cobaki Lakes development; the content appeared to be based on person C and person D's specific professional knowledge and expertise on environmental issues; and as the substance of the submissions had been disclosed the public interest in the disclosure of the name of the person who prepared those submissions was very strong. The public interest consideration against disclosure of the name of person C and person D on balance did not outweigh the public interest in favour of disclosure of those names: at [59]. The public interest consideration against disclosure of the deleted address of person C and the deleted email address of person D on balance outweighed the public interest consideration in favour of disclosure: at [61].

- **Land and Environment Court of NSW**

Judicial Review

Fullerton Cove Residents Action Group Incorporated v Dart Energy Ltd (No 2) [2013] NSWLEC 38 (Pepper J)

(related decision: *Fullerton Cove Residents Action Group Incorporated v Dart Energy Ltd* [2012] NSWLEC 207 Sheahan J)

Facts: on 6 June 2008, the Minister for Mineral Resources granted Petroleum Exploration Licence number 458 ("PEL 458") to Macquarie Energy Pty Ltd under the *Petroleum (Onshore) Act* 1991 ("the PO Act") for three years, subject to conditions. The first respondent Dart Energy Ltd ("Dart") owned Macquarie Energy Pty Ltd.

On 26 September 2011, Dart submitted a Review of Environmental Factors for PEL 458 to the second respondent, the NSW Department of Trade and Investment, Regional Infrastructure and Services ("the Department"), in respect of the proposed drilling of two sets of pilot appraisal wells and production flow testing ("the pilot program"). The pilot program site was situated at Fullerton Cove and was bounded by several national parks. It contained endangered ecological communities, was adjacent to protected wetlands and was located above important aquifers.

Commonwealth environmental approval for the pilot was obtained. The Department sought further details from Dart and on 1 June 2012, approved the pilot program for 12 months, having determined that the pilot program was not likely to significantly affect the environment nor any threatened species, populations, ecological communities, or critical habitat, and therefore, that no environmental impact statement ("EIS") was required under Pt 5 of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act"). Shortly afterwards, Dart sought a variation reducing the number of drilling wells and the drilling time. The variation was approved on 17 July 2012.

On 24 August 2012, Fullerton Cove Residents Action Group Incorporated ("Fullerton") filed a summons seeking judicial review of the Department's decision. On 29 August 2012 Fullerton sought interlocutory injunctive relief. On 5 September 2012, Sheahan J granted that relief.

The matter was heard in October 2012. Fullerton alleged breaches of ss 111 and 112 of the EPA Act.

Issues:

(1) whether the Land and Environment Court ("the Court") had jurisdiction to hear a challenge to an approval granted pursuant to a condition attached to a petroleum licence issued under the PO Act;

(2) whether expert evidence was admissible in judicial review proceedings under ss 111 and 112 of the EPA Act;

(3) whether the Department had breached s 111 of the EPA Act in approving the pilot program by failing to consider certain mandatory matters, or alternatively, by failing to give "proper, genuine and realistic consideration" to those matters. The matters alleged were: the Department's environmental impact assessment guidelines for petroleum exploration ("the ESG2 Guidelines"); the groundwater impacts of the pilot program; the impact on certain threatened or vulnerable species, in particular four specified species of fauna and four specified species of flora; and the cumulative impact of the activity;

(4) whether s 112 of the EPA Act gave rise to a jurisdictional fact;

(5) when determining the question of whether s 112 gave rise to a jurisdictional fact, whether the Court ought to follow an appellate dictum, or whether the principle of judicial comity required that an earlier decision of the Court on that question be followed unless that decision was "plainly wrong"; and

(6) whether the Department had breached s 112 of the EPA Act in approving the pilot program on the basis that the Department should not have approved the program without first obtaining an EIS because the overall potential impact of the activity was assessed as "medium"; the activity was

analogous to designated development; and the impact was likely to be significant on certain specified species and considered cumulatively.

Held: amended summons dismissed and injunction of 5 September 2012 discharged:

(1) the Court had jurisdiction to hear the proceeding because it gave rise to a determination under Pt 5 of the EPA Act and was thus amenable to challenge pursuant to s 20 of the *Land and Environment Court Act* 1979 ("the Court Act"). Alternatively s 21C of the Court Act was enlivened: at [60]–[76];

(2) the Department's ESG2 Guidelines were not made under the EPA Act, in particular they were not made under cl 228 of the Environmental Planning and Assessment Regulation 2000, and therefore were not a mandatory consideration. In any event, the factors within those Guidelines had been fully considered in the approval process: at [80]–[112] and [302]–[308];

(3) whether expert evidence was admissible to determine breach of s 111 of the EPA Act was a question of statutory construction. The language of s 111 indicated that the duty to consider to the fullest extent reasonably possible all matters affecting or likely to affect the environment by the activity was a duty that must be exercised both at the examination stage and at the consideration stage. By analogy with the traditional ground of judicial review of failing to take into account a mandatory relevant consideration, the second limb, the duty to take into account, was plainly to be assessed objectively by the Court on the material before the decision-maker. With respect to the first limb, the duty to examine, the Court observed that expert or other extraneous evidence may be admissible to show what inquiries ought to have been made as a precursor to the examination exercise, and what those inquires would have revealed. However, Fullerton expressly disavowed any reliance on such a duty to inquire or examine. Therefore, no expert evidence was relevant or required to assist the Court. The question of whether the Department had breached s 111 had to be decided only on the materials before the Department: at [115]–[147];

(4) the materials before the Department disclosed that the Department gave fulsome consideration to the matters complained of, namely groundwater, the specified fauna and flora species, and the cumulative impact. The Department gave "proper, genuine and realistic consideration" to all relevant matters. The Court could not now examine the merits of that decision. There was no breach of s 111 of the EPA Act. Expert evidence having been provisionally admitted, the Court went on to determine that, even taking account of expert evidence, no breach of s 111 was disclosed: at [148]–[225];

(5) on the question of whether the principle of judicial comity directed the Court's decision-making on whether s 112 of the EPA Act gave rise to a jurisdictional fact, the Court concluded that the relevant case law of the Court concluding that s 112 gave rise to a jurisdictional fact had not disclosed the Court's reasoning, and moreover, the question had not been contested in those earlier proceedings. Thus the Court was unable to determine whether those earlier decisions of the Court were, or were not, "plainly wrong". Nor was the appellate dictum to which the Court was referred definitive. The Court concluded that the appropriate course was to construe s 112 of the EPA Act and decide for itself whether it gave rise to a jurisdictional fact: at [278]–[286];

(6) s 112 of the EPA Act gave rise to a jurisdictional fact because, in accordance with established principles, determination of whether an activity was "likely to significantly affect the environment" was a condition precedent to the exercise of the power to grant approval that was reposed in the determining authority under s 112: at [230]–[300]; and

(7) in assessing breach of s 112 of the EPA Act, the Court had to determine on all the evidence before it whether the pilot was "likely to significantly affect the environment". The ESG2 Guidelines were not a mandatory consideration and the purpose of the Guidelines was plainly not directed to the decision-making processes of the determining authority. Therefore the fact that the Guidelines designated a potential impact assessed as "medium" to be "significant", did not require that an EIS be furnished to, and considered by, the Department. In addition, the pilot program was not designated development, was not likely to significantly affect groundwater, was not likely to significantly affect the specified threatened or vulnerable species of flora and fauna, and the cumulative impact was not likely to be significant. The experts of both Dart (Dr Ambrose, Ms Ashby) and Fullerton (Mr Paull) agreed that the pilot program was not an activity that was likely to significantly affect the environment, qualified only by Mr Paull's concern about impacts resulting from catastrophic natural disasters or significant equipment

failures, but there was no evidence before the Court that any of these events would, or were likely to, eventuate. There was therefore no breach of s 112: at [302]–[330].

Rossi v Living Choice Australia Ltd [2013] NSWLEC 46 (Pain J)

Facts: Mr Rossi challenged the validity of two development consents. The first consent was granted on land owned by the First Respondent, Living Choice Australia Ltd ("Living Choice") ("the Living Choice land") by the Joint Regional Planning Panel Sydney West Region ("the JRPP") (23 September 2010) for stage 2 of a large seniors housing development (the stage 2 consent). The JRPP filed a submitting appearance. The second consent arose from a separate retaining walls development application lodged by Living Choice with Hills Shire Council ("the Council") in August 2011. Development consent initially sought up to 3m retaining walls on the northern boundary ("Rossi boundary") and part of the western boundary of the Living Choice land from the Council. Proceedings commenced in January 2012.The retaining walls consent was initially refused and then granted by the Council after amendment for curtain walls and landscaping on 2 July 2012. Mr Rossi sought declarations that both development consents are void and of no effect. Mr Rossi also sought orders restraining Living Choice from carrying out any works on the Living Choice land until development consent is obtained, and requiring Living Choice to undertake works to demolish and remove structures and remove fill within 50m of the Rossi boundary and demolish the keystone concrete block wall on the Rossi boundary and replace mature trees removed from the Rossi land.

Issues:

(1) ground 1: whether there was a failure in notification of the stage 2 DA by the Council to Mr Rossi;

(2) ground 2: whether the assessment of the stage 2 DA by the Council and determination by the JRPP was unlawful. This determined whether the Council's assessment function was amenable to judicial review proceedings. It assessed whether there was a failure to consider the State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 and the Baulkham Hills Resident DCP. It also determined whether there was a failure to consider s 79C(1)(b), (c), (e) of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act");

(3) ground 3: whether the stage 2 consent was inoperative due to the Council's failure of 12 October 2010 to notify the consent;

(4) ground 4: whether the stage 2 consent was inoperative due to the Council's failure of 6 June 2012 to notify the consent;

(5) ground 5: whether there was a breach of s 76A EPA Act on Rossi land and Living Choice land concerning tree removal and other work including the keystone concrete block wall. This required consideration of whether the keystone concrete block wall was exempt development; and

(6) ground 6: whether the retaining walls consent was invalid; and

(7) whether the Court should exercise its discretion to order the relief sought having regard to prejudice to Mr Rossi, delay in commencing proceedings, no interlocutory injunction sought, the financial and other impacts of demolishing villas on Living Choice and third parties and the extent of work done without development consent.

Held: finding that Mr Rossi had succeeded in establishing some of the grounds of challenge, and making findings relating to the exercise of discretion as to what relief the Court should grant:

(1) Mr Rossi did not succeed in ground 1 in establishing a failure in the notification of the stage 2 DA. Mr Rossi also did not establish a failure to notify the stage 2 consent in grounds 3 and 4: at [352];

(2) Mr Rossi succeeded in establishing:

(a) a failure to consider a mandatory relevant consideration under s 79C(1)(b) and (c), and s 79C(1)(a) concerning cl 32 of the Seniors SEPP and the retention of fill on the Rossi boundary in the Council's assessment and the JRPP's determination of the stage 2 DA in ground 2;

(b) a breach of s 76A of the EPA Act with the removal of tall pines on the western end of the Rossi boundary on Mr Rossi's land and Living Choice land without development consent (ground 5);

(c) a breach of s 76A of the EPA Act for work related to the keystone concrete block wall of digging a trench and backfilling on Rossi land without development consent (ground 5);

(d) the keystone concrete block wall on the Rossi boundary is not exempt development and was built without development consent (within ground 5); and

(e) the retaining walls development consent was invalid (ground 6): at [353]; and

(3) the Court would not be minded to exercise its discretion to require demolition of the curtain walls and consequently villas 206-210: at [408]. The findings that development has been carried out without development consent in several respects in relation to the Rossi boundary on both Rossi land and Living Choice land when considered in combination warrant the making of ameliorative orders by the Court: at [409]. Demolition of other work carried out without development consent and alternative landscaping may need to be considered: at [410]; and

(4) a timetable for further progress of the matter was to be discussed with the parties: at [410].

Compensation

Venn v Mine Subsidence Board [2013] NSWLEC 30 (Craig J)

Facts: Mr Venn sought compensation from the Mine Subsidence Board ("the Board") for damage to improvements caused by mine subsidence on his land at Colangra Point on the NSW Central Coast. These improvements included a dwelling, boatshed, jetty, boat ramp and seawall, together with access roads and paths. Underground mining occurred in the area for many years and subsidence events followed as a consequence in 1992 and 1998. The land had been declared to be such a mine subsidence district in 1966. After becoming aware of damage, an owner is to provide information to the Board within 12 months to initiate a claim. In 2010, Mr Venn submitted seven claims to the Board alleging damage to improvements as a consequence of this subsidence. In each case, the Board indicated that these claims had been determined by it in either 2002 or 2005. Consequently, the Board contended that it made no 'decision' in respect of the 2010 claims. In August 2010, Mr Venn appealed to the Court under s 12B of the *Mine Subsidence Compensation Act* 1961 ("the Act") and sought orders for compensation and remedial works on his land. The Board denied the Court had jurisdiction in this case and contended that the right to appeal was not engaged.

Issues:

(1) whether the Court had jurisdiction to determine the appeal;

(2) whether the claims against the Board were valid claims;

(3) whether the statutory requirements pertaining to the making and determining of claims were followed;

(4) whether 'decisions' by the Board were decisions engaging the right to appeal to the Court; and

(5) whether evidence established a causal connection between the damage claimed and mining subsidence.

Held: appeal dismissed:

(1) the applications to the Board were not 'claims' that potentially founded an entitlement to compensation from the Fund pursuant to s 12 of the Act: at [199];

(2) the provisions of s 12(2)(a) for the making of a claim or claims were not satisfied because they were not claims made within the prescribed time: at [199];

(3) the 'decisions' made by the Board in 2010 to decline consideration of the 'claims' then made were not 'decisions' that engaged the jurisdiction of the Court to entertain an appeal under s 12B: at [199]. The scope of appeal afforded by s 12B was limited: at [34] (see Alinta LGA Ltd v Mine Subsidence Board [2008] HCA 17; (2008) 244 ALR 276);

(4) even if the subject matter of the 2010 claims were 'claims' made conformably with s 12(2)(a), they were all claims that were the subject of decisions made by the Board not later than February 2005. The lodging of claim forms between February and June 2010 propounding what were the claims determined by the Board in 2002 and 2005, did not enliven the jurisdiction of the Court under s 12B: at [200];

(5) the Court did not have jurisdiction to entertain the present appeal: at [121]. The Court's jurisdiction was only enlivened if the appeal was commenced within 60 days of the Board's decision as to causation or the quantum of compensation payable: at [200]. The only decisions of the Board addressing either of those two matters were those made in 2002 in respect of the sewer line claim and in February 2005 in respect of the remaining claims: at [200]; and

(6) the Applicant failed to lead evidence establishing the necessary causal connection between the damage claimed and the subsidence caused by coal mining: at [201]. An inference could not be drawn that such a connection was probable in the absence of such evidence: at [201].

Criminal

AJS Hotel Management Pty Ltd v Lismore City Council [2013] NSWLEC 10 (Pain J)

Facts: the appellant was convicted in Lismore Local Court on 20 July 2012 of an offence under s 143 of the *Protection of the Environment Operations Act* 1997 ("PEO Act") of illegally dumping waste. It appealed against that conviction under s 31(1) of the *Crimes (Appeal and Review) Act* 2001. The charge related to the dumping of organic and other waste on the riverbank of the Wilson River on 19 July 2011. The appellant at the time operated a tavern in Lismore. The conviction was on the basis that the appellant, who was also the owner of the waste, caused (by instructing an employee) waste to be transported to a place that could not be used as a waste facility for that waste. The council gave late notice to the appellant that it intended to seek an alternative basis for conviction in the appeal, relying solely on s 143(1)(b) of the PEO Act that the Appellant was owner of the waste. This was not the basis of the council's case in the local court.

One matter of importance to the magistrate's conclusion of guilt was the acceptance of an employee of the appellant as an honest witness "as much as one could judge". The magistrate also stated that she had no reason to disbelieve the director of the appellant, who denied that he had given any instruction to the employee to dump rubbish. Another one of the appellant's employees who was a potentially material witness was not called by the council. The magistrate appeared to conclude that as she had accepted the employee's evidence and was satisfied that the dumped waste belonged to the tavern, that discharged the onus of proof to the criminal standard.

Issues:

(1) whether an alternative basis for the conviction not raised before the local court could be raised in the appeal; and

(2) whether the magistrate erred in finding that the appellant caused the waste to be transported.

Held: appeal upheld:

(1) if a matter could have been raised in the lower court and evidence given which may have prevented the point from succeeding it could not be raised on appeal: at [55]; and

(2) given the circumstantial evidence available, the magistrate did not err in finding that the organic waste dumped on the riverbank on or about 19 July 2011 was from the tavern: at [75]. However, the magistrate erred because reasonable doubt remained that the director gave the instruction attributed to him by the employee where the evidence of both could have been accepted: at [79]. Given the completely contradictory evidence of the director and the employee, the absence of a statement from a potentially material witness became important: at [78].

Burwood Council v Matthews [2013] NSWLEC 23 (Pepper J)

Facts: Mr Matthews was prosecuted by Burwood Council ("the council") for undertaking building works to the carport of his home without obtaining the requisite development consent under s 76A of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act"). The council issued a stop work order under s 121B of the EPA Act. Mr Matthews failed to comply with the s 121B Order and continued to undertake building work at the premises.

On 13 June 2012, the council realised that the premises were in the process of being sold by Mr Matthews, with the unlawful works having been completed. No development application had been lodged, no development consent had been granted, no construction certificate had been issued and the development was still the subject of the s 121B Order.

On 7 August 2012, the council commenced Class 5 proceedings in respect of both the unauthorised construction and the failure to comply with the s 121B Order. On 19 October 2012, Mr Matthews entered a plea of guilty in respect of both charges.

Issue:

(1) what was the appropriate penalty to impose for each charge in view of the objective circumstances and the subjective mitigating features personal to Mr Matthews.

Held: a total fine of $20,100 was imposed in respect of both offences:

(1) while the commission of the offences had not caused actual environmental harm, and perhaps even improved the amenity of the local area, it had nevertheless offended against the legislative objects and the system of planning and development control under the EPA Act: at [32]–[34];

(2) the breach of the s 121B Order was clearly deliberate. However, the evidence was equivocal regarding Mr Matthews' deliberate commission of the offence of undertaking development without consent. Mr Matthews testified that he was initially unaware that the works required consent and, moreover, that he was later advised that it was exempt development: at [24] and [36]–[40];

(3) while the maximum penalty for the commission of each offence was $1.1 million, these offences were of low objective gravity: at [35] and [45];

(4) relevant subjective considerations included Mr Matthews' early guilty plea, lack of prior criminality, good character, cooperation with the council, agreement to pay the council's legal costs of $9000 (inclusive of GST), remorse and impecuniosity. Indeed Mr Matthews gave uncontested evidence that he was on the verge of bankruptcy: at [25], [47]–[56] and [69];

(5) the totality principle was relevant to reduce the overall penalty imposed: at [64]–[65]; and

(6) the appropriate penalty was, in those circumstances, $13,400 for the charge of breaching a s 121B Order and $6,700 for the charge of undertaking development without consent: at [67].

Environment Protection Authority v Aargus Pty Ltd; Kariotoglou; Kelly [2013] NSWLEC 19 (Craig J)

Facts: the defendants pleaded guilty to charges under s 144AA of the *Protection of the Environment Operations Act* 1997("the POEO Act"). Mr Kariotoglou, a Project Manager for Aargus Pty Ltd ("Aargus"), and Mr Kelly, an Environment Manager of Aargus were employed by Aargus at the relevant time, and were charged, along with Aargus. These were the first prosecutions for offences against s 144AA of the POEO Act.

Approximately 160 tonnes of fill material was stockpiled on a property at Oakville. The stockpile was subsequently inspected by Hawkesbury City Council staff who suspected the presence of asbestos. Aargus was engaged by the landowner to provide a report on the stockpile. Mr Kariotoglou inspected the stockpile and observed two pieces of fibre cement which he removed. Mr Kariotoglou then prepared a Soil Classification Report ("the Report") stating 'no visible fibro pieces were observed…' and an Asbestos Clearance Certificate ("the Certificate") stating 'no asbestos materials were observed or are currently present within the nominated stockpile…' Mr Kelly reviewed the Report and Certificate and countersigned both documents. The offences arose from these false statements about the stockpiled material which was waste within the meaning of the POEO Act.

Issues:

(1) the seriousness of the offences with which each defendant had been charged and pleaded guilty;

(2) the penalty to be stipulated for the offences; and

(3) relevant sentencing considerations and whether the principles of totality and parity should be engaged.

Held: defendants convicted of the six charges:

(1) the offences were in the low range of objective seriousness but not at the bottom of that range: at [86]. The offences undermined the importance of waste classification and the need for persons exercising the functions of Mr Kariotoglou to be accurate when reporting to third parties on the nature of waste material: at [122]. Failures of this kind had the potential to create serious environmental harm: at [122];

(2) those responsible for classification and reporting must be aware that failure to perform those tasks in line with the requirements of the POEO Act and Protection of the Environment Operations (Waste) Regulation 2005 would attract penalties that are not trifling: at [104];

(3) totality and parity were applied when considering the circumstances of each offender and the involvement of each offender in the commission of the offences: at [115].The highest penalty was imposed on Aargus due to its prior conviction and its capacity to ensure that any report or certificate issued in its name complied with the requirements of the POEO Act: at [116] and [117]. The culpability of Mr Kelly as the reviewer was considered less than that of Mr Kariotoglou: at [118]; and

(4) Aargus was fined $30,000, ordered to publish details of the offences in a trade journal and pay half of the prosecutor's legal and investigation costs. Mr Kariotoglou was fined $9,000 and ordered to pay 30 per cent of the prosecutor's legal costs. Mr Kelly was fined $6,000 and ordered to pay 20 per cent of the prosecutor's legal costs: at [133].

Environment Protection Authority v Kitco Transport Australia Pty Ltd [2013] NSWLEC 39 (Pain J)

(related decision: *Environment Protection Authority v George Weston Foods Limited* [2013] NSWLEC 16 Pain J)

Facts: Kitco Transport Australia Pty Ltd ("Kitco") had pleaded guilty to offences under s 6(1), s 7(1) and s 9(1) of the *Dangerous Goods (Road and Rail Transport) Act* 2008 ("the Act"). Kitco had been transporting goods, including dangerous goods, interstate between George Weston Food Limited's ("GWF") warehouses. An officer of GWF requested Kitco to transport a load of GWF's products between GWF's premises. The GWF officer did not advise anyone from Kitco that the load contained dangerous goods, the presence of which triggered dangerous goods licensing requirements and loading and placarding requirements. Neither GWF's employees nor Kitco's driver affixed any placards or emergency information panels to the vehicle. Neither Kitco's driver nor the vehicle used were licensed under the *Dangerous Goods Regulation* 2009 ("the Regulation").The dangerous goods were not restrained in accordance with the Regulation. In *Environment Protection Authority v George Weston Foods Limited* [2013] NSWLEC 16 (*George Weston Foods*), an offence under s 9(1) of the Act, a penalty of $20,000 was imposed reduced from $30,000 due to various mitigating factors.

Issue:

(1) what were the appropriate sentences for these offences.

Held: Kitco was convicted of offences under s 6(1), s 7(1) and s 9(1) of the Act. For the offence under s 9(1), Kitco was fined the sum of $18,000. For the offence under s 6(1), Kitco was fined the sum of $5,000. For the offence under s 7(1), Kitco was fined the sum of $1,000:

(1) it was important to have regard to the purpose of the Act which clearly imposes a positive duty on those involved in the transportation of dangerous goods to ensure that they are transported in a safe manner: at [106];

(2) there was potential risk of significant harm: at [112];

(3) simple steps could have been taken to prevent the offence, as indicated by the steps Kitco put in place after the offence to prevent a recurrence: at [115];

(4) the objective seriousness of the offence was moderate but at the low end of the scale, given the purpose of the legislative scheme and the absence of effective procedures of Kitco considering the size and nature of its business. There was no actual risk to human health or the environment. The conduct was neither deliberate nor motivated by financial considerations. While systems were in place, these were reactive, not proactive: at [117];

(5) specific deterrence was a relevant sentencing consideration. Given the nature of Kitco's business of transportation and that Kitco had been transporting dangerous goods on a close to daily basis between GWF's warehouses for several years, it was concerning that there were no effective procedures in place to ensure compliance with the Act and Regulation: at [121];

(6) general deterrence was an important consideration: at [122]. The transportation of dangerous goods involves the handling of dangerous chemicals and the potential for their exposure to road users and emergency services personnel and sentencing for offences under the Act should consider this: at [123];

(7) the principle of parity applied given the offence in *George Weston Foods* arose from the same set of circumstances: at [131];

(8) as the three offences arose from the same set of facts, the totality principle applied so that a downward adjustment of penalty to reflect the appropriate overall criminality of the offences was necessary: at [132]; and

(9) Kitco's early guilty plea, demonstrated remorse and contrition, and its cooperation with the Environment Protection Authority were taken into account as mitigating factors: at [133]-[135].

Chief Executive, Office of Environment and Heritage v Ausgrid [2013] NSWLEC 51 (Pepper J)

Facts: Ausgrid pleaded guilty to the commission of an offence under s 86(2) of the *National Parks and Wildlife Act* 1974 ("the NPW Act") in that it harmed an Aboriginal object. The offence involved damage to a rock engraving of a footprint located at Cromer on Sydney's northern beaches. The rock engraving had been registered on the Aboriginal Heritage Information Management System in 1979.

The harm occurred during works undertaken by a contractor for the construction of a new electrical substation. It occurred because an environmental impact assessment ("EIA") prepared for, and reviewed by, Ausgrid mistakenly stated that the works were not expected to impact on any Aboriginal objects. That mistaken conclusion arose because, although Ausgrid was aware that the rock engraving was located on the southern side of Orlando Road in Cromer, the employee who reviewed the EIA believed that the excavation works for the substation would be carried out on the northern side of Orlando Road. The employee was junior and relatively inexperienced.

Issue:

(1) whether the nature and circumstances of the offence warranted that no conviction be recorded pursuant to s 10 of the *Crimes (Sentencing Procedure) Act* 1999 ("the CSP Act");

(2) if not, what was the appropriate penalty to impose in view of the increase of the maximum penalty for the offence in 2010 to $220,000; and

(3) whether, as the Office of Environment and Heritage ("OEH") submitted, the harm was sufficiently substantial so as to amount to an aggravating factor under s 21A(2)(g) of the CSP Act.

Held: Ausgrid was convicted and fined $4690. A publication order and a costs order were also ordered:

(1) in considering the extent of environmental harm, the Court took into account the important spiritual, cultural and historical significance of such Aboriginal objects generally, but noted that there was limited evidence of the specific significance of the particular engraving: at [29]–[30] and [49]–[58];

(2) the prosecutor had not discharged its burden of proving beyond reasonable doubt that the harm reached the threshold of being "substantial" so as to amount to an aggravating factor under the CSP Act. This was because of the paucity of evidence about the engraving's specific significance, the fact

that the engraving was not completely destroyed by the offence and the physical state of the object and its surrounding environment at the time of the offence. With respect to the physical state of the object, the Court noted that the rock engraving was weathered and covered in dirt and leaves, had been damaged by earlier kerb construction, tree roots were encroaching upon it, and that it was not protected by fencing or signposting. The harm was thus characterised as moderate: at [57]–[62];

(3) other relevant objective considerations included the views expressed by the Aboriginal community, the state of mind of Ausgrid, which went no higher than innocent negligence, the lack of commercial or other improper motive, the foreseeability of the harm, the fact that Ausgrid had full control over the causes, and the availability of practical measures that Ausgrid could have taken to avoid the harm, namely improved environmental assessment processes. The offence was therefore of low to moderate objective gravity: at [41]–[46] and [63]–[74];

(4) relevant subjective mitigating factors included Ausgrid's lack of prior criminality, its good corporate character, its early guilty plea, its full cooperation with OEH, and the unlikelihood of Ausgrid re-offending. In addition, Ausgrid expressed remorse and contrition by "unreservedly" apologising for the offence and the harm caused to the Indigenous community. Ausgrid's support for the Indigenous community, the significant improvements to its environmental and Aboriginal heritage assessment processes implemented by Ausgrid since the offence, and Ausgrid's agreement to pay the prosecutor's legal costs in the sum of $36,000, were also relevant considerations mitigating any penalty to be imposed. These factors operated to mitigate to a significant extent the fine that would otherwise be imposed: at [31]–[36] and [75]–[87];

(5) the sentencing decisions for offences against the former provisions of the NPW Act were generally of limited assistance in fixing a penalty in this case because of the lower maximum penalty operating at that time: at [94]–[100]; and

(6) the circumstances in which a s 10 order is appropriate are limited for environmental offences, particularly those of strict liability. In this case, it was not appropriate to record no conviction because the offence was not trivial, the innocent mistake was not a sufficent extenuating circumstance and practical measures had been readily available to Ausgrid to avoid the harm: at [101]–[109].

Development Appeals

820 Cawdor Road Pty Ltd v Wollondilly Shire Council [2013] NSWLEC 8 (Biscoe J)

(related decision: *Wollondilly Shire Council v 820 Cawdor Road Pty Ltd* [2012] NSWLEC 71 (Lloyd AJ))

Facts: the following separate questions were before the Court:

"Question 1: Whether development consent may be granted to the development application pursuant to clause 4.2A of (Wollondilly Local Environmental Plan 2011) WLEP 2011 notwithstanding that multi dwelling housing is prohibited in the RU1 Primary Production zone in which the land is located" and;

"Question 2: If yes to Question 1, whether power to grant development consent pursuant to clause 4.2A(4)(a) of WLEP 2011 is confined to the replacement of elements of "the existing dwelling house" such that the power to grant consent to the development application pursuant to clause 4.2A(4)(a) is confined to the replacement of the elements of the existing building described in *Wollondilly Shire Council v 820 Cawdor Road Pty Ltd* [2012] NSWLEC 71 (5 April 2012)".

The proceedings were a merits appeal in Class 1 of the Court's jurisdiction brought by the applicant from the refusal by the respondent council of a development application ("the DA") relating to work to rebuild and provide additional facilities including kitchen, toilet, and provision of water and electrical connections, for a building occupied as a dwelling on the land, which was 99.81 hectares. The land is zoned RU1 Primary Production under the WLEP 2011, and "multi dwelling housing" is prohibited in that zone under the Land Use Table. There were two other dwellings on the land, and Council submitted that consent to the DA could not be granted.

Issues:

(1) whether the development was permissible under cl 4.2A(4)(a) of the WLEP 2011; and

(2) whether cl 4.2A(4)(a) only permits consent to be granted to the DA to the extent that it proposes replacement of existing elements of the building on the land.

Held: the Court answered Question 1 "No" and Question 2 "Does not arise":

(1) the works proposed by the DA come within the extended meaning of "erection" and "erected" in cl 4.2A of WLEP 2011. The Land Use Table for which cl 2.3(1) provides is subject to cl 4.2A(4)(a). When cl 4.2A(4)(a) is read in context, it does not expand the cases in which development consent is permitted under the Land Use Table and is only a development standard for consents to development permitted by the Land Use Table in Part 2, in which cl 2 appears. Part 2 covers the field of permitted and prohibited development and Part 4 is concerned only with development standards for development permitted with consent under Part 2. The word "replace" in cl 4.2A(4)(a), and the word "replacement" in the objective in cl 4.2A(1)(b), were intended to indicate that consent cannot be given to an additional dwelling house. Clause 4.2A permits the replacement of old dwelling houses, which may not have the functionality of a modern dwelling house, with dwelling houses that do have that functionality. It follows that development consent may not be granted to the DA in the present case: at [29]-[30], [32]-[33], [36]; and

(2) clause 4.2A(4)(a) is not limited to the replacement of existing elements. The word "replace" in subclause (4), and the word "replacement" in the objective in subclause (1)(b), is intended to indicate that consent cannot be given to an additional dwelling house, not that only the same elements can be replaced. Also, cl 4.2A(4)(a) is concerned with consent to the "erection" of a dwelling house. The extended meaning of "erection of a building" in s 4(2)(b)(i) of the *Environmental Planning and Assessment Act* 1979 includes alterations, enlargement and extensions. This suggests that additional elements may be included. "Dwelling house" must be interpreted to mean a dwelling house with elements which today are regarded as characteristic of a dwelling house: at [37]-[39].

Civil Enforcement

Kogarah City Council v Armstrong Alliance Pty Ltd (No 2) [2013] NSWLEC 32 (Pepper J)

(related decisions: *Kogarah City Council v Armstrong Alliance Pty Ltd* [2011] NSWLEC 260 Preston CJ; *Armstrong Alliance Pty Ltd v Kogarah City Council* [2012] NSWLEC 1151 Brown ASC; *Armstrong Alliance v Kogarah City Council* [2012] NSWLEC 1360 Morris C)

Facts: in Class 4 proceedings Kogarah City Council ("the council") sought injunctive relief against the first respondent, Armstrong Alliance Pty Ltd ("Armstrong"), in relation to the carrying out of development at premises in Allawah that was not in accordance with the relevant development consent. The consent was for the construction of a residential apartment building granted pursuant to the Kogarah Local Environmental Plan 1998. The second respondent, Mr Lyall Dix, of Dix Gardner Pty Ltd, had issued a construction certificate for the development despite clear deviations from the terms of the consent including, for example, the construction of six units rather than the approved five. It was not disputed that the works breached the *Environmental Planning and Assessment Act* 1979 ("the EPA Act") and that consequently, Mr Dix had issued the certificate in breach of cl 145(1)(a) of the Environmental Planning and Assessment Regulation 2000. At an interlocutory hearing on 23 December 2011, Armstrong gave an undertaking conforming to the terms of a stop work order, issued to it by the council pursuant to s 121B of the EPA Act, that it would cease all construction works at the premises. The proceeding was then adjourned for a hearing date to be set.

Armstrong commenced Class 1 proceedings against the council's refusal to grant a development application and building certificate to regularise the unlawful works. That appeal was upheld in part by Morris C.

At the hearing before Pepper J, the parties agreed to orders for a declaration that the construction certificate issued by Mr Dix was invalid, a release of Armstrong from the undertaking made on 23 December 2011, and to consequential orders.

Issue:

(1) whether the Court should exercise its discretion to grant the declaratory relief sought and to make the orders agreed to by the parties.

Held: relief granted:

(1) the material before the Court disclosed an adequate evidentiary basis to enable the Court to make a declaration that the construction certificate was invalid because a comparison of the plans as approved by the council and the plans as approved by the certifier in the issuing of the construction certificate showed clear inconsistencies. These inconsistencies included: the construction of an additional unit; an additional unapproved storey and outdoor terrace; an unapproved elevator shaft; an increase in size and layout of the basement car park; the alteration of the internal layout of several apartments; and additional excavation on the second level: at [10]–[16] and [28];

(2) Armstrong was released from its undertaking of 23 December 2011 and the Court noted Armstrong's new undertaking to cease all construction works except those required by the orders of Morris C: at [19]–[21] and [28];

(3) Armstrong and Mr Dix were ordered to pay the council's costs of this proceeding: at [22]–[28]; and

(4) Armstrong was ordered not to carry out any other works unless and until a Principal Certifying Authority was appointed by the council and notified to Armstrong, a construction certificate obtained for the completion of the building works pursuant to the relevant development consents, and the conditions contemplated in Morris C's orders were satisfied: at [28].

Wollongong City Council v Kudrynski [2013] NSWLEC 4 and (No 2) [2013] NSWLEC 55 (Sheahan J)

Facts: the council brought enforcement proceedings seeking orders from the court consistent with notices and orders issued to the respondents under s 121 *Environmental Planning & Assessment Act* 1979 ('EPA Act'), to demolish or remove unauthorised work, and s 124 the *Local Government Act* 1993 ('LG Act') to remove and dispose of rubbish. Those orders had not been complied with.

Council, in issuing the notices and orders, had acted upon complaints received relating to the number of structures on the land, extensions and fences erected without consent, and the amount of rubbish accumulated and stored on the West Wollongong property. The structures, extensions and fencing, for which the respondents had not obtained development consent, were built over a period of time without providing the council the opportunity to assess their amenity impacts or safety. By letter of 15 April 2011 the respondents indicated that the structures had council approval, and that a clean up had been conducted.

When council was refused permission to inspect the premises on 22 September 2011, it obtained a search warrant and inspected on 28 September 2011. The orders made under the EPA Act and the LG Act had not been complied with.

The respondents lodged no appeals, or requests for building certificates, and made little or no response to all notices and orders. They asserted that council had approved the subject structures and that Mr Kudrynski's hobby, as a collector, did not interfere with the amenity of the neighbourhood. On behalf of his wife and himself, Mr Kudrynski cross-examined two council witnesses, one at great length, and submitted a bundle of more than 500 pages of material, but could not counter the council's evidence of the lack of legal approvals.

Issues:

(1) whether necessary building or planning approvals were obtained; and

(2) if not, whether council was entitled to have orders made by the court to enforce the orders given by the council.

Held:

(1) the respondents had failed to discharge the onus to prove building approval had been obtained: at [72];

(2) there was no evidence produced of any tacit or implied approvals: at [69]; and

(3) any clean-up undertaken by the respondents was inadequate, and it was clear from the photographic evidence that the state of the respondents' property raised valid concerns about vermin, risk to health and safety, fire danger, etc: at [78]

The parties were invited to make written submissions on costs and the court ordered that the respondents pay the Council's costs on a party-party basis, as agreed or assessed: at [23] of *(No 2)*.

Dobrohotoff v Bennic [2013] NSWLEC 61 (Pepper J)

Facts: the respondent, Ms Bennic, owned a property in Terrigal ("the property") purchased on 31 March 2011, which she rented out as short term holiday rental accommodation. It had six bedrooms, could accommodate 12 or 13 persons and was typically rented out as a whole for one to two nights or up to a week at a time. The applicants, Dr and Mrs Dobrohotoff resided, with their two children, in the house next door to the property.

The Dobrohotoffs gave evidence of a history of noisy and disruptive tenants renting the property and engaging in antisocial behaviour, including loud music, flashing lights, bucks and hens nights, offensive language, broken glass and parties extending until the morning. This significantly adversely impacted the Dobrohotoffs' amenity, caused stress and anxiety and resulted in the Dobrohotoffs vacating their house at peak times. They had complained to Gosford City Council ("the council"), but the council took no action despite apparently acknowledging that short term holiday rental of residential premises may be a prohibited use under the Gosford Planning Scheme Ordinance ("the GPSO"). The property was zoned 2(a) Residential under the GPSO. Under the draft Gosford Local Environmental Plan 2009 ("the draft LEP") it appeared that Ms Bennic's use would be permissible with development consent. However, the draft LEP was neither certain nor imminent. Frustrated by the council's inaction, the Dobrohotoffs brought these proceedings. Because Ms Bennic had listed the property for sale, the matter was expedited.

Issues:

(1) whether use of the property was for a "dwelling-house" for the purpose of the 2(a) Residential Zone;

(2) if not, whether the use of the property as short term holiday rental accommodation was prohibited;

(3) if that use of the property was prohibited, whether the Court should grant the following relief:

    (a) a declaration that, in breach of s 76B of the *Environmental Planning and Assessment Act* 1979 ("EPA Act"), Ms Bennic carried out prohibited development by that use;

    (b) an order that Ms Bennic be restrained from using the property for that purpose, including advertising, soliciting or permitting the property to be so used;

    (c) an order that, if the draft LEP came into effect permitting that use with consent, Ms Bennic be restrained from doing so without first obtaining consent; and

    (d) an order (sought by way of an amendment to the summons) that Ms Bennic notify in writing any party interested in purchasing the property of the orders above.

Held: declaration made and injunction granted but stayed until 29 June 2013:

(1) under the EPA Act, "development" includes "use of land". The use of the property was prohibited if it was not within the meaning of "dwelling-house" in item 2 of the 2(a) Residential Zone: at [22]–[32];

(2) the meaning of an EPI must be ascertained objectively, having regard to its text, context and purpose. In construing the GPSO, the zoning objectives were relevant. The draft LEP was not relevant. "Dwelling-house" was defined as "a building containing 1, but not more than 1, dwelling". The definition of "dwelling" had two limbs. The first concerned actual occupation or use as a separate domicile. The second contained a hypothetical test and was not relevant. "Domicile" was not defined. Upon the proper construction of the GPSO, the use of the property as short term holiday rental accommodation for up to a week to persons using or occupying it other than in the ordinary family or household way, did not satisfy the meaning of the term "domicile", and lacked the requisite degree of permanence of habitation or occupancy to be a "dwelling-house". Therefore, Ms Bennic's use was prohibited and constituted development without consent in breach of s 76B of the EPA Act: at [17] and [32]–[60];

(3) the declaratory relief should be granted because the current use of the property breached s 76B of the EPA Act; the breach was not merely technical and was continuing; and the making of the declaration would ensure compliance with the GPSO and the Act. There was no unreasonable delay in bringing the proceedings: at [61]–[80];

(4) the injunctive relief should be granted, but stayed to mitigate financial hardship to Ms Bennic: at [81]–[85];

(5) because the draft LEP was neither certain nor imminent, injunctive relief that was contingent on the draft LEP taking effect should not be granted: at [86]–[87]; and

(6) while arguably s 22 of the *Land and Environment Court Act* 1979 conferred the necessary power to make a notification order, without any evidence of a breach of the GPSO by prospective purchasers, or by the respondent in selling the property, it was inappropriate to make such an order: at [88]–[99].

Wollondilly Shire Council v Foxman Environmental Development Services Pty Ltd; Foxman Environmental Development Services Pty Ltd v Wollondilly Shire Council (No 5) [2013] NSWLEC 68 (Pepper J)

Facts: the applicant, Wollondilly Shire Council ("the council"), sought declaratory, injunctive and remedial relief against the respondents under s 124 of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act"), s 252 of the *Protection of the Environment Operations Act* 1997 ("the POEO Act"), and s 336 of the *Water Management Act* 2000 ("the WM Act") for breaches of those Acts arising from the unlawful deposit of a large amount of fill material, in part contaminated with asbestos and lead, on land at The Oaks ("the land") owned by Foxman Environmental Development Services Pty Ltd ("Foxman"). Foxman was the first respondent to those proceedings ("the 2010 proceedings") and also the applicant in related proceedings ("the 2011 proceedings"), heard concurrently, in which Foxman sought declaratory relief that the development at the centre of both proceedings was not "designated development" under the EPA Act. The second respondent, Mr Phillip Foxman, was the sole director of both Foxman and Botany Building Recyclers Pty Ltd ("BBR"), the third respondent, which operated a waste storage and processing facility in Banksmeadow ("the Banksmeadow Facility"). On 16 March 2009 the council had approved Foxman's development application for a residential dwelling, including fire trails, with various conditions attached ("the 2009 consent"). The fourth respondent, Mr Craig Hardy, issued a construction certificate on 7 October 2009 for the road construction on the land. The Sydney Regional Environmental Plan No 20 ("SREP 20") and the Wollondilly Local Environmental Plan 1991 ("WLEP") applied to the land and required development consent for "filling" and "land filling operations" respectively. There was no licence under the POEO Act permitting any relevant scheduled activities on the land, for example, the use of the land as a waste facility.

BBR had unsuccessfully sought an exemption from the licensing and waste levy requirements of the POEO Act from the NSW Government for fill material at the Banksmeadow Facility. Fill material comprising processed waste from the Banksmeadow Facility was imported to the land. Between 8 September 2009 and May 2010, the council inspected the land and noted various works occurring that were outside the 2009 consent and for which there was no approved construction certificate, including earthworks, fire trail construction and the importation of fill material. Testing on imported fill material found asbestos and elevated lead levels present in the material. After several warnings, the council issued a stop work order under s 121B of the EPA Act, noting that the works had been carried out unlawfully. Following sampling of the fill that revealed the presence of, in particular asbestos waste, the Environment Protection Authority issued a clean up notice and a varied clean up notice requiring Mr Foxman to cease importing material, and required him to remove the waste to a waste facility lawfully able to accept asbestos contaminated waste. None of these orders were complied with.

Issues:

(1) whether the fill material deposited onto the land was classifiable as "asbestos waste";

(2) whether the works, including additional fire trail construction, went beyond the 2009 consent and were carried out without the necessary development consent under s 76A(1)(a) of the EPA Act, having regard to the definitions of "filling" in the SREP 20 and "land filling operation" in the WLEP;

(3) whether, considering the nature of the fill comprising waste material, the respondents' use of the land was use for a "waste management facility or works" and thus "designated development" pursuant to cl 32 of Sch 3 of the Environmental Planning and Assessment Regulation 2000 ("EPA Regulations");

(4) whether the placement and movement of the material on the land had caused and was continuing to cause land and water pollution in contravention of the POEO Act;

(5) whether the works involved the carrying out of a work, and the deposition of material on, "waterfront land", and therefore required a "controlled activity" approval under the provisions of the WM Act;

(6) which Foxman entity was liable for the various breaches, if found; and

(7) whether the Court should exercise its discretion to grant the declaratory and injunctive relief sought, which included the removal of all waste fill deposited onto the land.

Held: declaratory, injunctive and remedial relief granted in 2010 proceedings; 2011 summons dismissed:

(1) Mr Hardy had issued the construction certificate after works had commenced and it was therefore void and was set aside under s 109F(1A) of the EPA Act: at [62]–[63] and [310];

(2) the fill material transported from the Banksmeadow Facility to the land was contaminated with asbestos, lead and other foreign materials and thus met the definition of "waste" under the POEO Act. Moreover it was "asbestos waste" and could only be disposed of at a waste facility lawfully able to receive it. None of the fill material was exempt under the Act, because it did not fall within any of the 2008 or 2010 waste exemptions: at [191]–[225];

(3) Mr Foxman instructed Foxy's Transport Pty Ltd, of which he was sole director, to transport the fill to the land. As the directing mind and will of Foxy's and BBR, it was a rational inference that BBR, on instruction from its sole director, Mr Foxman, deliberately and intentionally allowed the waste to be taken from the Banksmeadow Facility that it operated, to the land for use as a waste facility. Similarly, it may be logically inferred that Foxman deliberately and intentionally, acting on the instructions of Mr Foxman, allowed the waste to be deposited on the land it owned, to be used as a waste facility: at [238]–[245];

(4) principles of corporate attribution and Mr Foxman's sole directorship of each company, led the Court to conclude that Foxman and BBR had also caused or permitted the fill to be transported. Thus, Mr Foxman, Foxman and BBR had each contravened s 143 of the POEO Act, which makes it an offence to transport waste to a place that cannot lawfully be used as a waste facility, or to cause or permit waste to be so transported: at [226]–[245];

(5) Mr Foxman, Foxman and BBR had each either used, or caused or permitted the land to be used, as a "waste facility" in breach of s 144 of the POEO Act, whereby any person who is the owner or occupier of any land and who uses the land, or causes or permits the land to be used, as a waste facility without lawful authority commits an offence: at [246]–[249];

(6) the characterisation of the fill material as "waste" and its volume, placement and handling on the land, led the Court to conclude that all of the unapproved waste fill material constituted land pollution under s 142A of the POEO Act. The placement of the waste on the land had also led to the pollution of two watercourses on the land in breach of s 120 of the POEO Act. Mr Foxman, Foxman and BBR had each either polluted, or caused or permitted, such land and water pollution: at [250]–[257];

(7) the works were on "waterfront land" and required "controlled activity" approval under the WM Act. No such approval was in place. The works were thus in breach of s 91E of the WM Act: at [259]–[262];

(8) breaches of s 76A(1)(a) of the EPA Act were disclosed by the carrying out of works not in accordance with the 2009 consent, including additional fire trail construction, and by the lack of consent to carry out "filling" under the SREP 20 and a "land filling operation" under the WLEP: at [263]–[266];

(9) the works constituted the use of the land for the purposes of a "waste management facility or works" as defined in the EPA Regulations, because the fill was waste and in view of the nature, extent, volume and manner of placement of the fill on the land. In this context, it was appropriate to order the removal of all of the fill because the respondents had continued throughout the proceedings to deny most of the breaches; the breaches were not merely technical; the breaches were continuing; and there was a

demonstrable purpose in terms of advancing the objects of the EPA Act and the POEO Act and thereby serving the public interest in promoting regulatory compliance: at [267]–[279];

(10) the development in respect of the land was "designated development" under the EPA Regulations because the dominant use was as a waste management facility or works and not for the use of a residential dwelling and fire trails: at [291]–[308];

(11) a declaration was made that the 2009 consent did not permit use of the land for the purpose of a "land filling operation", carrying out of "filling" works, or for the purpose of a "waste management facility or works", all of which breached s 76A(1)(a) of the EPA Act: at [274]–[279] and [310];

(12) injunctive and remedial relief was granted to restrain Foxman and Mr Foxman from carrying out or permitting such works on the land unless and until a valid consent was obtained, including orders that all of the fill material be removed and the land remediated: at [280]–[290] and [310];

(13) a declaration was made that the land could not lawfully be used as a "waste facility" under the POEO Act and injunctive relief was granted preventing that use and the transport of any further waste to the land: at [310]; and

(14) injunctive and remedial relief was granted to restrain Foxman and Mr Foxman carrying out any "controlled activity" within 40m of "waterfront land" on the land until a controlled activity approval was in force under the WMA. An order was made for specified remedial works to be undertaken: at [310].

Hume Coal Pty Ltd v Alexander (No 3) [2013] NSWLEC 58 (Sheahan J)
(related decisions: *Hume Coal Pty Ltd v Alexander* [2012] NSWLEC 267, Sheahan J; *Hume Coal Pty Ltd v Alexander (No 2)* [2012] NSWLEC 278, Craig J)

Facts: the plaintiff ("Hume Coal") held a statutory licence under the *Mining Act* 1992, which authorised prospecting in the Southern Highlands.

The plaintiff entered into an access arrangement over the property owned by Mr Koltai ("the Koltai land"). Access to the Koltai land was through a Right of Carriageway over a neighbouring property owned by the defendants ("the Alexander land"). A restrictive covenant over both the Koltai and Alexander lands ("the Keighley covenant") restricted industrial and commercial activity.

The defendants declined to agree upon an access arrangement with the plaintiff in respect of their own land, and they and others from the local community set up a blockade on the Alexander land to prevent the plaintiff from accessing the Koltai land to conduct prospecting activities.

Issues:

(1) whether an injunction should be granted under s 295 of the Mining Act to restrain the defendants and third parties on the defendants' land from preventing the plaintiff from accessing the Koltai land via the Right of Carriageway;

(2) whether the Keighley covenant over the land prevented the carrying out of prospecting; and/or prohibited Mr Koltai from allowing prospecting on his land; and/or prevented Mr Koltai from making a valid access arrangement with Hume Coal;

(3) whether prospecting operations included the movement of people, samples, equipment, waste etc, and;

(4) if so, whether a separate access arrangement was necessary between plaintiff and the defendants; and

(5) whether in exercising its discretion the Court should require Hume Coal to choose from available but less convenient, alternative access routes to the Koltai land;

Held: granting an injunction granted restraining the defendants from preventing the plaintiff from accessing the Carriageway and restraining the defendants from inviting/allowing third parties onto the land to prevent access to the Carriageway:

(1) the Keighley covenant did not prevail over the *Mining Act* licence so as to prevent prospecting: at [107];

(2) the plaintiff was under no obligation to find alternative access arrangements, as the use of the Right of Carriageway was both feasible and appropriate. Requiring an alternative arrangement, in the circumstances, would have posed practical challenges and the possibility of environmental harm: at [114];

(3) the refusal of relief would prevent the plaintiff from exercising its rights under the exploration licence and the access agreement with Mr Koltai: at [115]; and

(4) the exercise of those rights causes no harm, injustice or hardship to the defendants: at [115].

Valuation

Kemp Investments (NSW) Pty Ltd & Flaherty v Valuer-General [2013] NSWLEC 18 (Biscoe J)

Facts: these were two appeals pursuant to s 37 of the *Valuation of Land Act* 1916 ("the Act") against the Valuer-General's separate determinations of the land value of two adjacent parcels of land in common ownership. They are 98 and 100 Yarrara Road, Pennant Hills. The Court addressed the following separate questions:

"Apart from any "land improvements" within the meaning of s 4 of the *Valuation of Land Act 1916*, were all or any of the structures erected on land known as 98 Yarrara Road, Pennant Hills as they stood at 1 July 2011, "improvements" within the meaning of s 6A(1) of the *Valuation of Land Act*?" and;

"Apart from any "land improvements" within the meaning of s 4 of the *Valuation of Land Act 1916*, were all or any of the structures erected on land known as 100 Yarrara Road, Pennant Hills as they stood at 1 July 2011, "improvements" within the meaning of s 6A(1) of the *Valuation of Land Act*?"

The "structures" referred to in the questions comprise a two storey commercial building which straddles the width of both parcels and about half their depth. The appellants are the registered proprietors as tenants in common of both parcels.

Issues:

(1) whether there was a compensable encroachment;

(2) whether there was a need to obtain subdivision development consent on a notional sale of either parcel of land (given their Auto Consol status); and

(3) whether, as the lease of each shop refers to its address as 98-100 Yarrara Road, a notional sale of either parcel would have the consequence that the parties to the sale thereafter would share the rental income from the shop on that parcel.

Held: the separate question in both proceedings was answered "yes":

(1) the two parcels were in common ownership at the date of valuation and therefore there was not in fact an encroachment. If the matter was approached through the prism of a notional sale of either parcel and on the assumption that the purchaser had a compensable claim for an encroachment against the vendor, then the vendor also had a compensable claim for an encroachment against the purchaser. The claims must offset each other and would not affect value. It would not be a difficult task in a notional sale to create cross-easements and covenants to enable the owner of each parcel to enjoy and access facilities and utilities that be wholly or partly on one parcel: at [14]-[16];

(2) the mere fact of a sale of a lot in an Auto Consol does not mean that there is a subdivision of land. The value of the structures had to be determined on the basis that subdivision development consent was required, but it was not established that that consideration would outweigh the value of the building measured by reference to the net income stream to be gained by its ownership. It was likely that all the parties to the notional sale would take into account the cost of obtaining the development consent: at [19], [22]; and

(3) shop 1 was located on No 98 and shop 2 was located on No 100, and there was no reasonable doubt that upon the notional sale, the registered proprietor of No 98 would be entitled to the rental from shop 1 and the registered proprietor of No 100 would be entitled to the rental from shop 2: at [24].

Practice and Procedure and Orders

Anglican Retirement Villages, Diocese Of Sydney v Wollongong City Council [2013] NSWLEC 5 (Pain J)

Facts: Mr Kennedy wished to be joined as a party to these Class 1 proceedings which were an appeal under s 97 of the *Environmental Planning and Assessment Act* 1979 ("EPA Act") against the refusal by the council of consent for a development application relating to preliminary sub-surface contamination and archaeological investigation of a site in Bulli. The preliminary site investigation works were for the purpose of determining the development potential of the site. The development application was refused by the council on various grounds, including that the council was not satisfied that the development is consistent with the terms of approval of the approved concept plan, the statement of commitments, and modification B1 aboriginal cultural heritage of the concept plan approval. Further, pursuant to s 79C(1)(b) and (e) of the EPA Act, the council was not satisfied that the proposed works would not have an unacceptable impact on the aboriginal cultural heritage significance of the site. A conciliation conference under s 34 of the *Land and Environment Court Act* 1979 ("Court Act") was held 20 November 2012, and adjourned to 29 January 2013. The council and the applicant had reached agreement in the meantime, which would have resulted in consent orders granting development consent.

Issue:

(1) whether an order for joinder of Mr Kennedy as a party should be made in these s 97 appeal proceedings under s 39A of the Court Act, which required under s 39A(a) that Mr Kennedy demonstrate that he was able to raise an issue that should be considered in relation to the appeal but would not be likely to be sufficiently addressed if he were not joined as a party, and (b) that joinder was in the interests of justice, or in the public interest.

Held: joining Mr Kennedy as a party to the proceedings:

(1) special circumstances existed here: at [16]; and

(2) having weighed up the significance of the site in question to the local aboriginal community, the possibility that additional matters had not been brought to the Court's attention concerning the applicant's site, and the very recent agreement of the council with the applicant about development conditions which would result in a settlement of the appeal without effective consultation with the local aboriginal community represented by Mr Kennedy, it was in the interests of justice that an order be made joining Mr Kennedy as a party as second respondent: at [17].

Environment Protection Authority v Mistring [2013] NSWLEC 9 (Biscoe J)

Facts: the Court addressed the following preliminary and separate question:

"Does the Court have jurisdiction to hear and determine these proceedings, being proceedings to recover a debt created pursuant to s 105(1) of the *Protection of the Environment Operations Act* 1997 ("POEO Act") in respect of amounts unpaid and specified in a compliance costs notice dated 12 July 2011 given by the prosecutor to the respondent under s 104(2) of the POEO Act? "

The EPA submitted that the Court had jurisdiction under s 20(2)(a) of the *Land and Environment Court Act* 1979 ("LEC Act") because ss 104(2) and 105(1) of the POEO Act create a "right, obligation or duty conferred or imposed by a planning or environmental law". It therefore argued that the Court was "a court of competent jurisdiction" under s 105(1) of the POEO Act. The respondents submitted that s 20(2)(a) of the LEC Act was inapplicable because the POEO Act does not relevantly confer or impose any right in the EPA nor any obligation or duty on the respondents of the type contemplated by that provision.

Issues:

(1) whether the Land and Environment Court is "a court of competent jurisdiction" in this case;

(2) whether there is a right to receive payment and an obligation to pay under ss 104(2) and 105(1) of the POEO Act; and

(3) whether a decision that the Court is "a court of competent jurisdiction" would have wider ramifications pursuant to the other planning and environmental legislation mentioned in s 20(2) of the LEC Act.

Held: the separate question was answered "yes":

(1) a court of competent jurisdiction is a court otherwise endowed with jurisdiction to hear and determine the matter: at [9];

(2) the LEC Act does not define the terms "right, obligation, or duty" as used in s 20(2)(a) of the LEC Act. Section 20(2)(a) confers on the Court jurisdiction to enforce *any* right, obligation or duty provided only that it is conferred or imposed by a planning or environmental law or a development contract. Exercise of the power given by s 104(2) of the POEO Act to the EPA to "require" payment by notice suggests the creation of a "right" in the EPA to payment and an "obligation" on the recipient to pay. The creation of such a right and obligation is put beyond doubt by s 105(1) of the POEO Act which says that the EPA may recover any unpaid amounts specified in the notice as a "debt" in a court of competent jurisdiction. The Court had jurisdiction to hear and dispose of the matter under s 20(2)(a) of the LEC Act read with s 20(1)(e). The Supreme Court therefore did not have jurisdiction due to s 71(1) of the LEC Act: at [10]-[12], [19]; and

(3) if this decision has wider significance because of similar costs recovery provisions in other legislation, that is not a significant consideration when construing s 20(2)(a) of the LEC Act. Nor is it significant that a debt recovery jurisdiction is not conferred in specific terms. It is a matter of legislative policy or drafting preference, or both, whether to define jurisdiction specifically or generally: at [17]-[18].

Manderrah Pty Ltd v Woollahra Municipal Council [2013] NSWLEC 27 (Pain J)

Facts: the Acting Registrar joined Mr Edmonds as a party to Class 1 proceedings in relation to a development application ("the DA"), pursuant to s 39A of the *Land and Environment Court Act* 1979 ("the Court Act"). Mr Edmonds had relied primarily on s 39A(a) on the basis that hydrology and traffic would not be considered at all or not sufficiently unless Mr Edmonds was joined as a party. Mr Edmonds wished to be joined as a party so that he could place before the Court at the merits hearing the reports of Mr Grey on lack of information about potential hydrological impacts and Mr McLaren on traffic impacts in the surrounding narrow streets, and raise the issues identified therein as contentions in the case. These were said to be significant issues with potential for serious environmental/amenity consequences to Mr Edmonds and other neighbours if not properly considered by the Court. Mr Edmonds contended that it was also in the public interest to allow Mr Edmonds to participate as a party, relying on s 39A(b)(ii).

The Applicant, Manderrah Pty Ltd, filed a Notice of Motion seeking a review of that decision as provided by r 49.19 of the Uniform Civil Procedure Rules 2005.

Issue:

(1) whether the Acting Registrar's decision to join Mr Edmonds as a party pursuant to s 39A of the Court Act should be dismissed or upheld.

Held: the review of the Acting Registrar's decision to join Mr Edmonds as a party was dismissed:

(1) in relation to hydrology, Mr Grey's report was not so obviously flawed, if it was at all, that it could be discounted. It raised issues of concern about the scale of excavation required for the development, which was substantial, and its potential impacts on groundwater, and was critical of the lack of data provided by Manderrah to date to support the DA. This material would not be presented at a hearing as part of the Council's case as the Council considered conditions of development consent were sufficient to address hydrological issues. The terms of s 39A(a) were met on this issue: at [22]; and

(2) concerning traffic, the DA complied with the *State Environmental Planning Policy (Housing for Seniors or People with a Disability)* 2004 ("Seniors SEPP") parking requirements and therefore could not be refused on that basis. Mr McClaren's opinion evidence went to the desirability of considering whether the likely affluent and mobile residents of the proposed development fit the data profile on which the

Seniors SEPP traffic assessment was based. While that may be a valid concern from a traffic management analysis perspective, it was unclear what the Court could do if the DA was compliant with the Seniors SEPP requirements. The need for Mr Edmonds to be joined in relation to traffic issues was less clear in those circumstances with regard to the requirements in s 39A(a): at [23].

Strathfield Council v Australian Catholic University Limited [2013] NSWLEC 22 (Pain J)

Facts: the council sought leave to provide a defence filed in Class 4 proceedings by the Respondent, Australian Catholic University Limited ("ACU"), to the Planning Assessment Commission ("PAC"). The PAC was considering whether to approve a Part 3A concept plan from ACU that would substantially increase student numbers as part of an extensive building program proposed by ACU for the same Strathfield campus the subject of the Class 4 proceedings. The Class 4 proceedings alleged a failure by ACU to comply with development consent conditions including in relation to compliance with a cap on student numbers on the campus at any one time. The defence filed raised discretionary matters concerning monitoring of student numbers. The Class 4 proceedings have yet to be determined.

Issue:

(1) whether the Court should grant leave to the council to be released from its implied undertaking not to use the points of defence filed in court proceedings for any other purpose.

Held: leave not granted to disclose the points of defence to the PAC:

(1) special circumstances had be demonstrated and the Court should exercise its discretion in order for the implied undertaking to be lifted: at [6] and [7]. Special circumstances did not require extraordinary factors, however good reason had to be shown why, contrary to the usual position, documents produced or information obtained in one piece of litigation should be used for the advantage of another party in other litigation or for other non-litigious purposes: at [6]. While novel, the circumstances were not special: at [14];

(2) the Class 4 proceedings and the PAC process were of an entirely different nature. In the Class 4 proceedings the council was taking civil enforcement action against ACU: at [11]. The PAC was undertaking an administrative planning assessment process requiring an assessment of ACU's concept plan on its merits under the *Environmental Planning and Assessment Act* 1979. Those were fundamentally different processes and to state that alone suggested the defence should not be disclosed: at [12]; and

(3) as ACU submitted the defence would require explanation from the ACU in order to provide context to the PAC. The council appeared to wish to treat the defence as some kind of admission by ACU. That was not its purpose or effect and that was the context ACU would have to explain to the PAC: at [13]. It was not in the public interest that the PAC be provided with the points of defence: at [16].

Neale v Mine Subsidence Board [2013] NSWLEC 34 (Pain J)

Facts: Mrs Neale commenced proceedings seeking compensation from the Mine Subsidence Compensation Fund ("the Fund") in reliance on s 12B of the *Mine Subsidence Compensation Act* 1961 ("the MSC Act"). The application by Mrs Neale was a claim for rent under s 12(1)(c) and for prevention costs from damage from subsidence under s 12A(1)(b). The letter of the Mine Subsidence Board ("the Board") dated 6 September 2012 refused to consider the two claims. The Board filed a Notice of Motion seeking an order that the proceedings be dismissed for want of jurisdiction as disclosing no reasonable cause of action under r 13.4 Uniform Civil Procedure Rules 2005 (UCPR).

Issue:

(1) whether the Court had jurisdiction.

Held: proceedings dismissed for want of jurisdiction as disclosing no reasonable cause of action under r 13.4 UCPR:

(1) in *Alinta LGA Ltd v Mine Subsidence Board* [2008] HCA 17; (2008) 244 ALR 276 at [63] the High Court held that the MSC Act leaves for determination by this Court questions of causation of damage from

subsidence and quantum in claims *competently* (emphasis added) made against the Fund. A no payment outcome resulting from the Board's actions did not to give rise to a decision as to the subject matters of s 12B(a) or (b) in [64]: at [24]; and

(2) the Board through its CEO determined in relation to the prevention claim under s 12A(1)(b) that the claim was not made within time under s 12A(2)(b). The decision that the claim was time-barred under s 12A(2)(b) was a decision whether Mrs Neale's claim was competently made: at [27]. The High Court's reasoning in *Alinta* applied squarely. The Board's letter dated 6 September 2012 was not a decision from which an appeal could be made under s 12A(1)(b) for the prevention claim: at [28]. The Board considered the rent claim made under s 12(1)(c) was a reiteration of part of a claim already made. Such claims were limited by the time frame specified in cl 5 of the Mine Subsidence Compensation Regulation 2012. The decision of the Board was therefore on the competency of the claim. The reasoning in *Alinta* applied. That decision which resulted in a no payment outcome cannot be characterised as a decision as to the payment from the Fund in accordance with s 12B(b): at [29].

Waverley Council v Tovir Investments Pty Ltd (No 2) [2013] NSWLEC 21 (Biscoe J)

(related decision: *Waverley Council v Tovir Investments Pty Ltd (No 3)* [2013] NSWLEC 35 Biscoe J)

Facts: Waverley Council charged the respondents, Tovir Investments Pty Ltd ("Tovir") and Michael Rappaport, the son of the shareholders and directors of Tovir, with contempt for failing to obey consent orders of the Court restraining them from using, causing or permitting to be used, two premises in Bondi and Waverley ("the subject premises"), for the purpose of backpackers accommodation as defined in the *Waverly Council Local Environment Plan* 1996 ("the LEP"). During the hearing, Biscoe J ruled on a number of objections to the admissibility of evidence tendered by the applicant and indicated that the reasons would be published later. This judgment sets out those reasons.

Issues:

(1) whether evidence of a wider business enterprise involving three premises other than the subject premises related to the charges as particularised and was therefore permissible;

(2) whether copies of internet websites relating to the two subject premises and three non-subject premises should be excluded under the hearsay rule;

(3) whether leave should be granted pursuant to ss 50 and 192 of the *Evidence Act* 1995 to rely on a surveillance report as a summary of surveillance recorded on DVDs;

(4) whether the applicant should be required to elect between tendering the summary or the DVDs in their entirety;

(5) whether an affidavit and surveillance DVD acquired during a surveillance operation should be rejected pursuant to s 138 of the *Evidence Act* on the grounds that it was improperly or unlawfully obtained, or alternatively that the Court should reject it pursuant to s 135 of the *Evidence Act*; and

(6) whether photographs and part of a statement made by a Senior Constable relating to a search warrant executed in relation to one of the subject properties, in which he estimated resident capacity, were obtained improperly or unlawfully and should be rejected pursuant to s 138 or alternatively, s 135 of the *Evidence Act.*

Held:

(1) the wider business enterprise evidence, comprising company and title searches, an inquiry agent's surveillance of five premises (two of which were the subject premises), inquiry agent's surveillance on another date relating to two of the subject premises, and evidence from internet web pages, was admissible because, at the least, it was contextual and could not sensibly be disentangled so as to confine it to the subject premises: at [27]. In addition the evidence of the business enterprise was relevant to whether the respondents caused and permitted the use of the subject premises: at [30]. However, evidence of the use of each of the subject premises was inadmissible in the proceedings relating to the other subject premises: at [31]. A tendency rule objection also advanced by the respondents was not accepted: at [32]-[33];

(2) the hearsay objection in relation to the Bondi International House ("BIH") homepage, BIH Facebook and Bondi Share House ("Bondi Share House") websites was overruled. They were admissible under s 87(1)(a) of the *Evidence Act*. It was reasonably open to find that BIH, BSH and the respondents shared a common purpose of marketing the properties: at [34], [42]. The objection was upheld for the remaining websites. Council submissions that the evidence was also admissible as business records under s 69 of the *Evidence Act*, was not accepted on the basis that the present documents fell outside the definition: at [44]-[49]. A further objection by the respondents that the evidence be excluded under the general discretion in s 135 of the Evidence Act was overruled as none of the dangers in s 135 existed, or, if they did, the discretion under s 135 should nevertheless not be exercised: at [51];

(3) leave was granted to rely on the surveillance report as a summary, as the DVDs were estimated to contain 5-10 hours of content and it would not have been otherwise convenient to examine the DVDs. Granting the leave would shorten the hearing by a day, it was not unfair to a party or a witness, the evidence was relatively important, and taking into account the nature of the proceedings granting leave was appropriate: at [55];

(4) the proposition that the applicant be required to elect between tendering the summary or the DVDs in their entirety was rejected. It appeared fair to both parties that both the summary and the DVDs be in evidence in case any question arose as to whether the summaries accurately reflected the DVDs' content: at [55];

(4) the further surveillance evidence was obtained improperly: at [76]. A significant factor was that a search warrant was not sought in a statutory context which allowed for entry to residential premises with a search warrant. Undertaking a balancing exercise under s 138, the desirability of having the evidence admitted outweighed the undesirability of admitting the evidence. Therefore the evidence was admissible under s 138; at [79].

(5) the argument that the evidence should be nevertheless excluded under s135 was rejected: at [80]. The probative value of the evidence was substantial and the prescribed danger did not exist, nor did it substantially outweigh the probative value of the evidence: at [81]; and

(6) the power to search the premises in relation to a noise complaint for which the warrant was granted, gave the police the power to look through the premises to see what devices there may have been that emanated sound in breach of the noise abatement notice and to ascertain that they had located all persons believed to be occupiers, and may have included ascertaining whether there had been a change to the premises since the last noise abatement notice: at [92]. Photographing what the police saw was incidental to their powers. The respondents had not discharged their onus of proving the evidence was unlawfully or improperly obtained: at [93]. If this conclusion was wrong, the evidence would nevertheless have been admitted under s 138 because the desirability of admitting the evidence outweighed the undesirability of admitting the evidence: at [94].

ABD Holdings Pty Ltd v Council of the City of Sydney [2013] NSWLEC 45 (Sheahan J)

(related decision: *ABD Holdings Pty Ltd v City of Sydney Council* [2012] NSWLEC 1261 Dixon C)

Facts: approximately 6 weeks after consent orders were granted by the Court for development consent ("DC") to convert an historic building in Woolloomooloo to a commercial office and restaurant space, the applicant filed a Class 1 application under s 96(8) of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act") to modify the DC. The council brought a notice of motion to strike out the application to modify, on the grounds that it constituted an abuse of process. Central issues in the earlier proceedings, namely trading hours, on-site parking and contamination, were all covered by the consent orders, and the application for modification sought to change the parking agreement.

Issue:

(1) whether an application in the original jurisdiction of the Court under s 96(8) of the EPA Act to vary the consent subject of the consent orders was an abuse of process.

Held: the notice of motion was dismissed:

(1) the issue of parking was not determined in the earlier proceedings, as a compromise was reached: at [48]; and

(2) the onus of proving abuse of process was not discharged: at [50].

Arnold v Minister Administering the Water Management Act 2000 (No 5) [2013] NSWLEC 42 (Biscoe J)

Facts: the applicants were approximately 120 farmers from the Lower Murray River region who challenged the validity of the Minister's Water Sharing Plan for the Lower Murray Groundwater Source made in 2006 (Plan) pursuant to s 50 of the *Water Management Act* 2000, and the validity of the linked Water Management (General) Amendment (Lower Murray) Regulation 2006. The respondents were the Minister who made the Plan and the State of New South Wales.

In accordance with a direction of the Court, the applicants provided particulars to a pleading in the applicants' Points of Claim via a letter to the respondents' solicitors. One of the particulars was: "In making the Plan the Minister paid no or no sufficient regard to the existence of the continuing conjunctive use rights of the Applicants which the Second Respondent had purportedly but ineffectually cancelled on or about 1 July 2006 as part of the ASGE process, as a result of which the Minister proceeded upon a mistaken apprehension as to the fundamental factual assumption namely the water usage and usage rights of the Applicants whereby the Plan was irrational or manifestly unreasonable."

The applicants gave no indication to the respondents of the basis of the alleged ineffectual cancellation until their written opening submissions were received shortly before the hearing commenced. There it was submitted that the applicants' conjunctive water use rights were ineffectually cancelled because of non-compliance with ss 116C and 117H of the Water Act 1912, that consequently the decision of the Minister to make the Plan was irrational or manifestly unreasonable and the conjunctive use licensees had not been afforded procedural fairness. The respondents objected, inter alia that none of this had been pleaded. In reply the applicants submitted, inter alia that they were able to press the claim given that the respondents had not replied to their letter to complain that it had not been pleaded.

This was an ex tempore judgement on: (a) the objection by the respondents to the applicants raising a claim that the respondents contended was not pleaded or adequately particularised; and, (b) an objection by the applicants to the respondents raising an unpleaded discretionary defence.

Issues:

(1) whether a claim that the applicants' conjunctive water use rights were ineffectually cancelled because of non-compliance with ss 116C and 117H of the Water Act 1912 and consequential judicial review grounds were pleaded or properly particularised and whether the Court should entertain them;

(2) whether a discretionary defence raised by the respondents, that relief not be granted on the ground that it would work disproportionate injustice to third parties, was pleaded and whether the Court should entertain it.

Held:

(1) the part of the pleading relied on by the applicant was obscure and could not reasonably be construed as including the claim: at [15];

(2) the particulars included in the letter provided to the respondents was inadequate because they gave no indication of the basis for the allegation therein that the conjunctive use rights had been "ineffectually cancelled": at [16].This was not to be disregarded merely because the respondents did not reply asking what the basis was or asserting that it had not been pleaded: at [16];

(3) the applicants' claim of ineffectual cancellation of conjunctive water use rights because of non-compliance with ss 116C and 117H of the Water Act 1912 and consequential judicial review grounds were not pleaded or properly particularised and the Court declined to entertain them: at [18]; and

(4) the decision of the question whether the Court should entertain the unpleaded discretionary defence that relief not be granted on the ground that it works disproportionate injustice to third parties, and, if so, the question whether that defence should be upheld, be determined separately from and after any

other question in the present trial at a further trial in the proceedings if the applicants are adjudged to be otherwise entitled to the declaratory relief as to invalidity that they seek: at [23].

Hunter Environment Lobby v Minister for Planning and Infrastructure [2013] NSWLEC 44 (Craig J)

Facts: Hunter Environment Lobby ("the Lobby") appealed against the grant of project approval for an open cut mining operation in the Hunter Valley, pursuant to s 75L of the *Environmental Planning and Assessment Act* 1979 ("EPA Act"). A low permeability barrier had been planned at the site to address the movement of groundwater between the mine and an adjacent stream which flows into the Hunter River. The Lobby was concerned with the impact of the pit excavation on the quality and quantity of water leaving the mine. The Lobby issued a subpoena to the NSW Office of Water. That subpoena sought production of meeting minutes referenced in an internal memorandum from the Office of Water, and other memoranda referring to a low permeability barrier installed at a nearby mine, not the subject of the appeal. The former memorandum also referred to the barrier. The project applicant and second respondent, Ashton Coal Operations Pty Ltd ("Ashton Coal") filed a notice of motion seeking to set aside that subpoena. Ashton Coal submitted that the subpoena had not been issued for a legitimate forensic purpose because the design, construction and operation of the barrier were not an issue in the proceedings, and the documents were not relevant as they related to a barrier at a mine not the subject of the appeal.

Issues:

(1) whether the design, construction and operation of a low permeability barrier was an issue in the proceedings;

(2) whether the documents in the subpoena were relevant as they related to a barrier at another mine; and

(3) whether the subpoena had been issued for a legitimate forensic purpose.

Held: motion dismissed:

(1) the suitability of the low permeability barrier to address environmental impacts of the proposed mine was outlined in the applicant's contentions and was thus an issue within the substantive proceedings: at [12];

(2) the Office of Water considered the suitability of a low permeability barrier at the subject site by reference to the efficacy of the low permeability barrier at the nearby mine. The consideration given by the Office of Water to comparing the barriers was potentially relevant to an issue in these proceedings: at [15]; and

(3) there was a reasonable basis, beyond speculation, for concluding that the documents identified in the subpoena had the potential to provide material assistance to an identified issue, namely the capacity of the barrier to address groundwater flows to and from the pit site and their impact on the creek and river system: at [17]. The documents were available to be inspected by the Lobby: at [18].

Anglican Retirement Villages, Diocese of Sydney v Wollongong City Council (No 2) [2013] NSWLEC 50 (Craig J)

Facts: the Minister granted Anglican Retirement Villages ("ARV") a concept plan approval ("the Approval") under s 75O(1) of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act") for land at Sandon Point. Section 75O was part of the repealed Part 3A. The Approval was for a residential aged care facility. In November 2011, ARV lodged a development application with Wollongong City Council for 'preliminary sub-surface contamination and archaeological investigation' of the site. The industrial legacy of the site warranted drilling of bore holes to assess contamination. The development application was refused in April 2012. ARV appealed to the Court under s 97 of the EPA Act. Mr Kennedy was joined as a party to the proceedings. He opposed the grant of development consent. Mr Kennedy submitted that the 2011 development application was invalid as it was not accompanied by a report prepared by an 'appropriately qualified and practising anthropologist' said to be required by a condition of the Approval. Mr Kennedy sought summary dismissal of the proceedings.

Issues:

(1) whether Part 14 r 14.28(1)(a) and (b) or (c) of the Uniform Civil Procedure Rules 2005 ("UCPR") had application to summary dismiss an appeal brought under s 97 of the EPA Act;

(2) whether Part 13 r 13.4(1)(b) (no reasonable cause of action) or 13.4(1)(c) (proceedings an abuse of process) of the UCPR could found Mr Kennedy's motion for summary dismissal;

(3) whether s 31 of the *Land and Environment Court Act* 1979 ("the Court Act") was an appropriate source of power to dismiss the proceedings for irregularity; and

(4) whether the 2011 development application was a 'valid' development application by reason of the conditions of the Approval.

Held: amended motion dismissed:

(1) Part 14 of the UCPR had no application to proceedings brought in Class 1 of the Court's jurisdiction: at [19];

(2) his Honour found no basis upon which to found the power upon paragraph (b) of r 13.4(1) of the UCPR: at [23]. ARV had exercised a statutory right of appeal pursuant to s 97(1) of the EPA Act: at [23]. In that sense, a 'reasonable cause of action' was demonstrated;

(3) the provisions of s 31 of the Court Act are an inappropriate source of power to found the order sought: at [20]. The section addresses circumstances where the true nature of the proceedings is inappropriate to the class of the Court's jurisdiction invoked by the initiating process or by reason of the manner in which the issues raised evolve: at [21];

(4) the Court does have power to dismiss proceedings on an abuse of process. However, the detail identified in the competing statements of facts and contentions identified the fact that there was a genuinely contested issue to be determined in the proceedings: at [33]; and

(5) development consents under Part 4 or approvals under Part 3A of the EPA Act are instruments to be construed in a practical way. Applying that approach to the Approval, His Honour did not accept that the condition of the Approval relied upon by Mr Kennedy had the effect of invalidating the development application: at [46].

Lane Cove Council v Ross (No 11) [2013] NSWLEC 81 (Pepper J)

(related decisions: *Lane Cove Council v Ross (No 4)* [2012] NSWLEC 191 Pepper J; *Ross v Lane Cove Council* [2012] NSWLEC 1364 Dixon C)

Facts: this decision occurred in the context of part-heard Class 4 proceedings on a summons brought by Lane Cove Council ("the council") against Mr Raymond Ross for admitted breaches of a development consent. On 27 May 2013, the first day of the resumed hearing listed for three consecutive days, Mr Ross made an application for Pepper J to recuse herself on the grounds of actual and apprehended bias.

Mr Ross relied on a number of events and matters said to demonstrate the perception of bias including: her Honour's apparent extreme hostility towards Mr Ross because he appeared late for a mention; orders made against him when he did not appear; an alleged agreement between the Court, the council and Mr Ross, to adjourn part of the substantive hearing to allow a s 96 modification application; orders made in *Ross (No 4)* which Mr Ross said he had only consented to "without admission" and on the basis that no costs order would be made against him; adverse findings made in *Ross (No 4)* which coloured all proceedings thereafter; an allegedly sarcastic remark concerning Mr Ross' legal experience made by her Honour; a similar remark made by Dixon C in the related Class 1 proceedings suggestive of collusion; the setting of a timetable for the final hearing despite his non-appearance; her Honour's alleged failure on 22 May 2013, when deciding Mr Ross' notice of motion to vacate the hearing, to acknowledge any wrongdoing of the council; an unrealistic timetable for filing documents made on that day; and a statement by his barrister that her Honour had already made up her mind. For the actual bias ground, Mr Ross relied on comments allegedly made by a council officer, Mr Mason, stating that the council had "friends" in the Court or knew her Honour personally, and an alleged campaign of harassment of Mr Ross by the council. Mr Mason denied the allegations in an affidavit and in cross-examination.

Issues:

(1) whether her Honour should recuse herself on the basis of either actual or apprehended bias.

Held: application for recusal dismissed with costs:

(1) the test for apprehended bias is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question. It is a two step test requiring, first, identification of what it is said might lead a judge to decide a case other than on its legal and factual merits and, second, articulation of the logical connection between the matter and the feared deviation: at [10]–[12];

(2) Mr Ross described matters relevant to the first element, but did not articulate any logical connection between those matters and the feared deviation from deciding his case on the merits: at [13];

(3) the matters raised did not satisfy the apprehended bias test because: remonstrating with Mr Ross for being late, being absent, or failing to comply with timetables on several occasions, was no more than proper case management, allowing for the fact that Mr Ross is a litigant in person; the evidence disclosed that Mr Ross' consent was clearly unqualified, save as to costs; even if wrong findings of fact had been made in *Ross (No 4)*, that could not equate to bias; there was no agreement of the kind alleged, and even if there had been, this could not objectively cause an apprehension of bias; the selective transcript excerpts from *Ross (No 4)* did not satisfy the objective test for apprehended bias; there had been no collusion between Dixon C and her Honour; Mr Ross' failure to appear on 20 March 2013 was his own fault; the recusal application was brought very late and, tellingly, no allegation of bias was raised when the matter was before the Court on 22 May 2013: at [14]; and

(4) the actual bias claim was also dismissed because: Mr Mason denied he had friends in the Court or that he knew any sitting judges or commissioners; Mr Mason was not known to her Honour; there was no objective proof of any campaign of harassment of Mr Ross by council officers nor of the alleged conversations and her Honour was unaware of any alleged comments made by council officers: at [15]–[20].

Contempt

Environment Protection Authority v Hanna [2013] NSWLEC 41 (Pain J)

(related decision: *Environment Protection Authority v Hanna* [2010] NSWLEC 254 Craig J)

Facts: the Environment Protection Authority ("EPA") commenced proceedings in 2010 seeking orders to restrain Mr Hanna from transporting waste to a place that could not lawfully be used as a waste facility for that waste. On 21 March 2011, Craig J made an order by consent that Mr Hanna be restrained from transporting building or excavation waste, comprising any of the following: clay, soil, brick, concrete, glass, tiles, timber or asbestos, to any place for which no development consent under the *Environmental Planning and Assessment Act* 1979 or environment protection licence under the *Protection of the Environment Operations Act* 1997 ("POEO Act") is held when such consent or licence is required for the receipt of that waste. Mr Hanna pleaded guilty to a charge that in breach of the order, he transported and deposited eight loads of waste containing asbestos fragments to a property at Picnic Point when there was no environmental protection licence held for the receipt of that waste at those premises and such a licence was required to receive that waste. Mr Hanna has numerous prior convictions for illegally transporting waste to a place that could not lawfully receive that waste contrary to s 143 of the POEO Act. Mr Hanna has not paid the fines or other costs related to his offending, and has entered into a payment plan with the State Debt Recovery Office to discharge a number, but not all, of the fines and other costs Under the payment plan, Mr Hanna has been paying $300 per month since September 2011 towards part of his outstanding debt, and the payments are scheduled to continue until 2072.

Issue:

(1) what was the appropriate sentence for contempt of an order of the Court.

Held: Mr Hanna was found guilty of the charge of contempt of the Court for failing to comply with the order made by Craig J in these proceedings. Mr Hanna was punished by committal to prison for three months which sentence was suspended for three months on condition that he enter into a good behaviour bond:

(1) given the contumacious nature of the contempt, the absence of any attempt to purge the contempt, Mr Hanna's lengthy record for similar offences of illegal transportation of waste, and allowing a reduction for the utilitarian value of his early plea of guilty, a term of imprisonment of three months was imposed. As this is the first occasion on which Mr Hanna had faced a gaol term for any offence and for contempt of court in particular, and accepting the submissions of his counsel about Mr Hanna's personal circumstances including that he was the sole financial support for his family, that sentence is suspended for the same period on condition that Mr Hanna enter into a good behaviour bond, as provided for in s 12(1)(b) of the *Crimes (Sentencing Procedure) Act* 1999: at [84].

Waverley Council v Tovir Investments Pty Ltd (No 3) [2013] NSWLEC 35 (Biscoe J)

(related decision: *Waverley Council v Tovir Investments Pty Ltd (No 2)* [2013] NSWLEC 21 Biscoe J)

Facts: in 2011 the Court made consent orders in relation to two premises: 6 Kent Street, Waverley and 34 Imperial Avenue, Bondi ("the subject properties"), both owned by Tovir Investments Pty Limited ("Tovir"). The consent orders restrained the respondents, Tovir and Michael Rappaport, the son of the shareholders and directors of Tovir, from using, causing or permitting to be used, the premises for the purposes of "backpackers accommodation" or for the purposes of a "boarding house", as defined in the *Waverley Local Environmental Plan* 1996 ("the LEP").

Waverley Council ("the council") charged Tovir with contempt for failing to obey the consent orders. Tovir was charged with causing and permitting the premises to be used for the purpose of backpackers accommodation as defined in the LEP. Mr Rappaport was charged with causing them to be used for that purpose.

Issues:

(1) whether there the subject properties had been used as backpackers accommodation as defined in the LEP during the respective charge periods;

(2) whether there Tovir was guilty of civil contempt by causing and permitting the subject premises to be used for the purpose of backpackers accommodation as defined in the LEP; and

(3) whether Mr Rappaport was guilty of civil contempt by causing the subject premises to be used for the purpose of backpackers accommodation as defined in the LEP.

Held: adjudging the respondents guilty of contempt as charged, ordering the respondents to pay costs to date and listing the matter for sentencing hearing at a later date:

(1) paragraph (a) in the LEP definition of "backpackers accommodation", which related to shared facilities, was an element of the definition but not an essential element: at [21];

(2) paragraphs (b) and (c) in the LEP definition of "backpackers accommodation" were essential to the extent that the building had to provide shared and temporary accommodation as a general rule, i.e. more often than not: at [21];

(3) the proper construction of the definition of "temporary accommodation" was that in fact the premises provide accommodation for no more than two months, as opposed to persons being prohibited from staying for longer than two months: at [22];

(4) in both criminal and civil contempt cases the charges have to be proved beyond reasonable doubt, at [23];

(5) the general criminal trial right to silence rule applies in a trial of civil contempt and not the general civil hearing rule in *Jones v Dunkel*: at [24];

(6) the meaning of the expressions "causing" and "permitting" which were used in the orders and alleged in the charges, was to be determined by construing the orders:

(a) "causing" means an act or omission of a respondent, so connected with the use of the premises for the purpose of backpackers accommodation that, as a matter of ordinary common sense and

experience, it should be regarded as the cause of it. The "but for" test may be a useful aid but not determinative: at [13]; and

(b) "permit" means "intentionally allow" with no requirement of intention to commit a breach of the order: at [14]. Power or capacity to stop the other's misconduct and knowledge are also elements of the definition of "permit": at [14];

(7) the conduct of a person may be attributed to a corporation because the person is the directing mind and will or because he is a servant or agent for whom the company is vicariously liable: at [160];

(8) a rule of attribution counts as a corporation's actions, the actions of its agents or servants, of whatever level, whose work involves compliance with court orders on the corporations behalf. A corporation disobeys a court order and is in contempt by the deliberate act of its agents or servants whilst acting in the course of their employment, regardless of whether the act was authorised or even expressly forbidden by the corporation, or was done through carelessness, neglect or dereliction of duty, or even was done reasonably on legal advice. If an order against a corporation can be complied with only if a servant or agent is prevented from exercising his authority, it is the duty of the corporation to at once withdraw that authority, and if it fails to do take all possible steps to do so and such a person acts contrary to the terms of the order, it will be in contempt. By imposing responsibility on those whom a corporation can reasonably be expected to influence or control, a corporation is induced to keep itself up to the mark and the administration of justice is protected: at [161];

(9) from the totality of the evidence, including for each subject property: foreign languages and accents of people associated with the premises; traveller's vehicles; turnover of occupants and transience of occupation; seasonal variation in the number occupants; luggage, bags and backpacks; bins and waste; mattresses and bedding; and parties, it was beyond reasonable doubt that both subject premises had been used for the purpose of backpackers accommodation as defined in the LEP and that this had occurred during the charge period: at [89] and [129];

(10) a combination of evidence including: admissions made by Mr Rappaport; evidence of Mr Rappaport collecting rent and driving a bus owned by Tovir between subject premises to transport occupants, luggage, mattresses and other items; and contact details of Mr Rappaport on websites promoting the subject premises, led to a conclusion that it was beyond reasonable doubt that Mr Rappaport managed the premises on behalf of Tovir and thereby caused them to be used for the purposes of backpackers accommodation as defined in the LEP: at [143]; and

(11) evidence including, but not limited to: the nature of Tovir as a small family company whose directors and shareholders were the parents of Mr Rappaport, and with whom Mr Rappaport lived during the charge period; Tovir's ownership of the subject premises; Mr Rappaport's regular collection of rent and Tovir's receipt of rental income; Mr Rappaport's intense, daily management of the premises; Mr Rappaport's presence at the property with his parents; and other evidence including correspondence between Tovir's lawyers and the council, led to a finding that the conduct of both Thomas and Vivian Rappaport as directors and Mr Rappaport as a property manager of Tovir could be attributed to Tovir, and that the combination of their attributed conduct led to a conclusion that it was beyond reasonable doubt that Tovir caused and permitted the premises to be used for the unlawful purpose as charged: at [163].

Queanbeyan City Council v Sun (No 2) [2013] NSWLEC 64 (Biscoe J)

(related decision: *Queanbeyan City Council v Sun* [2013] NSWLEC 6 Biscoe J)

Facts: the respondent had been found guilty of civil contempt for disobeying two orders made by the Court to carry out works. The respondent was before the Court for sentencing.

Issues:

(1) whether the *Crimes (Sentencing Procedure) Act* 1999 and *Fines Act* 1996 apply to sentencing for civil contempts and, if not, whether they should apply by analogy; and

(2) the appropriate sentence.

Held: the *Crimes (Sentencing Procedure) Act* 1999 does not apply directly to sentencing for civil contempt, however its sentencing factors apply by analogy: [17];

(1) the *Fines Act* 1996 does not apply to a civil contempt, however independently of the *Fines Act*, it is appropriate to consider whether a civil contemnor has the means to pay: [45];

(2) the respondent is fined the sum of $20,000, apportioned equally for the two breaches: [37] and [50];

(3) the respondent is fined the further sum of $10,000 per calendar month commencing in July 2013, so long as the respondent is in breach of the orders. The said sum is apportioned equally to each breach: [50]. This order is discharged when the respondent has complied with the orders: [50]; and

(5) the respondent is to pay the applicant's costs on an indemnity basis: [49] and [50].

Pittwater Council v Martoriati [2013] NSWLEC 84 (Preston CJ)

(related decision: Pittwater Council v Martoriati [2012] NSWLEC 131 Preston CJ)

Facts: on 23 May 2012 the Court made declarations that Mr Martoriati had carried out development on land owned by him in Newport in breach of s 76A of the *Environmental Planning and Assessment Act* 1979 and had also failed to comply with an order issued by Pittwater Council ("the council") under s 124 of the *Local Government Act* 1993. The Court made orders that Mr Martoriati vacate the premises (order 3); undertake interlocutory remedial works (order 4); undertake final remedial works (orders 5 and 6); and remove spoil which Mr Martoriati had placed on the neighbouring property (order 7). The council charged Mr Martoriati with contempt of court in that he had failed to comply with orders 4(a)(ii), (iii), (iv), 4(b)(i), (iii), 4(d) and 7(a) and (b) made on 23 May 2012. Mr Martoriati pleaded guilty to each of the eight contempt charges. The council and Mr Martoriati agreed that the appropriate sanction was a fine and not sequestration of Mr Martoriati's property, and agreed on most of the specified orders that should be undertaken to purge the contempt. The remaining disagreement concerned removal of fill Mr Martoriati had placed on his property to the north of a retaining wall, and on the neighbouring property. The council sought for the fill on both properties to be removed within 14 days; Mr Martoriati sought to defer removing the fill from both properties until the final retaining wall was constructed so as to be able to use the fill in the construction of that retaining wall. The parties agreed that Mr Martoriati should pay the council's costs of the contempt proceedings on an indemnity basis.

Issue:

(1) what orders should be made by way of punishment for the contempt and purging the contempt.

Held: finding the defendant guilty of contempt of court; fining him the sum of $10,000 payable within 28 days and a sum of $2,000 per calendar month so long as the orders were not complied with; making orders for specified actions to purge the contempt in relation to order 4; extending time for compliance with orders 5, 6 and 7; and ordering the defendant to pay the council's costs of the contempt proceedings on an indemnity basis:

(1) it was inappropriate to re-open the issue of the risk of the retaining wall and placed fill on Mr Martoriati's property, which was determined by the previous judgment and orders. The retaining wall and placed fill on Mr Martoriati's property should be removed and the time frame of 14 days was appropriate: at [17];

(2) on a best case scenario the process of preparing a design of the final retaining wall, having it approved by the Court, ordering the parts for the retaining wall, and constructing it, would take about three and a half months. Given the history of the matter to date it was far more likely that there would be delays and the retaining wall would not be constructed until some later time. That meant that the neighbour would continue to have unwanted fill on her property, with the concomitant inconveniences, for longer than a further three and a half months: at [19];

(3) the appropriate course to follow in relation to the timing of removal of the fill from the neighbour's property was to link that decision to the timing for carrying out of all of the permanent works, including the retaining wall: at [20];

(4) the time for compliance with orders 5 and 6, which concerned the permanent works, should be extended to the date of the hearing of Mr Martoriati's application to vary the orders which would be on 4

July 2013: at [21]. The date for removal of the fill from the neighbour's property should be extended to the same date, recognising that that date might be extended if Mr Martoriati's application to vary the orders of 23 May 2013 was upheld: at [22];

(5) the parties' agreed orders were appropriate in the circumstances. In particular Mr Martoriati was in breach of the Court's orders in the respects charged; such breach was wilful in many instances; and Mr Martoriati was aware of the Court's orders but chose not to comply: at [24]; and

(6) in the circumstances of the case it was appropriate that the council be compensated for bringing the contempt proceedings by an order for costs on an indemnity basis: at [26].

Objector Appeals

Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited [2013] NSWLEC 48 (Preston CJ)

Facts: Warkworth Mining Limited ("Warkworth") operated Warkworth mine, an existing open cut coal mine located a few kilometres north east of the village of Bulga in the Hunter Valley. Warkworth was one of several coal mines in the area, others including Mount Thorley, Bulga, Wambo and Hunter Valley Operations South. Mining at Warkworth commenced in 1981, with existing mining operations conducted under a development consent issued by the Minister for Planning in May 2003 ("the 2003 development consent") under Part 4 of the *Environmental Planning and Assessment Act 1979* ("the EPA Act"). The development conditions permitted coal mining in a specified area until 2021. The 2003 development consent was subject to numerous conditions requiring conservation of native vegetation and landforms in designated non-disturbance and habitat management areas, which were located to the north, west and south west of the Warkworth mine. Since 2003, an increase in coal prices had the effect of making it economic to mine coal in areas that were previously considered uneconomic to mine, including the designated non-disturbance and habitat management areas. Accordingly, in 2010, Warkworth lodged a major project application for approval under the then in force Part 3A of the EPA Act to extend the Warkworth mine ("the Project") spatially to the west and south west, and temporally until 2031 to mine the underlying coal reserve. This extension of the mine would have necessitated several physical actions, including: clearing of approximately 766 ha of four types of endangered ecological communities ("EECs") (Warkworth Sands Woodland, Hunter Lowland Redgum Forest, Central Hunter Grey Box-Ironbark Woodland and Central Hunter Ironbark – Spotted Gum – Grey Box Forest); removal of Saddleback Ridge, a significant local landform separating the Warkworth mine from the village of Bulga; and emplacement of overburden from the Warkworth mine at the Mount Thorley mine immediately adjoining to the south. On 3 February 2012, the Minister for Planning and Infrastructure, by his delegate the Planning Assessment Commission of NSW ("the PAC"), conditionally approved Warkworth's project application for the Project under the former s 75J of the EPA Act. The conditions imposed on the Project included a requirement for Warkworth to provide biodiversity offsets to compensate for the impacts of the Project on biological diversity, including on EECs. Many local residents of Bulga village and the surrounding countryside opposed the Project. Through the Bulga Milbrodale Progress Association Inc ("the Association"), many of these residents made submissions objecting to the Project. In response to approval of the Project, the Association exercised their legal right under s 75L(3) of the EPA Act to appeal the Minister's decision to the Land and Environment Court ("the Court"). As this matter was being heard in Class 1 of the Court's jurisdiction, the role of the Court on the appeal was to hear de novo and determine, on the merits, whether the Project should be approved or disapproved.

Issues:

(1) whether the Project should be approved or disapproved, having regard to the merits of the Project, and balancing the relevant economic, social and environmental factors associated with the Project.

Held: appeal upheld. The major project application to carry out the Warkworth Extension Project was disapproved, which effectively meant that mining operations at Warkworth would, in the future, need to be restricted to those operations approved under the 2003 development consent:

(1) the process of decision-making under s 75J of the EPA Act involves four steps: first, the identification of relevant matters to be considered when making a decision to approve or disapprove a proposed project; secondly, engaging in fact finding for each relevant matter; thirdly, determination of how much weight is to be attributed to each relevant matter in making a decision; and finally, the undertaking of a qualitative assessment involving intuitive synthesis, weighting and balancing of all the relevant matters to arrive at a managerial decision: at [36];

(2) the Project would be likely to have significant adverse impacts on EECs, particularly Warkworth Sands Woodland and Central Hunter Grey Box-Ironbark Woodland, and key habitats of fauna species, if it was approved. Those impacts would be of such a magnitude as to require consideration of the measures proposed to avoid, mitigate and offset the impacts in order to determine the acceptability of the Project: at [146]. Warkworth did not propose to undertake measures available to avoid the significant adverse impacts of the Project on EECs and habitats of fauna, with the result being that there would have been no reduction in the scale and intensity of those impacts: at [169]. The mitigation measures proposed by Warkworth, whilst worthwhile, did not mitigate to any great extent the significant residual impacts of the Project on EECs: at [182]. Warkworth's offsets package of direct offset measures and other compensatory measures did not adequately compensate for the significant adverse impacts that the Project would have on the extant EECs in the disturbance area. The significant adverse impacts on EECs and key habitats of fauna species constituted a fundamental matter to be considered in the decision-making process, to which significant weight was assigned: at [255];

(3) at the noise levels proposed in the draft approval conditions, the noise impacts of the Project on the residents of Bulga, including the impact of the noise source on receivers, taking account of annoying noise characteristics and the effect of meteorological conditions, the Project's impacts would be significant, intrusive, and reduce amenity. The noise mitigation strategies proposed in the approval conditions were not likely to reduce noise levels to the project-specific noise levels recommended by the INP or to levels that would have had acceptable impacts on the residents. The significant residual impacts of the Project were unacceptable, taking into account social and economic factors. Moreover, the extensive noise control at receivers, being mitigation treatment and acquisition of properties in Bulga, would be likely to cause social impacts. The combination of noise criteria for the Warkworth and Mount Thorley mines in the proposed approval conditions was of doubtful legal validity, but in any event would likely be difficult to monitor and/or enforce compliance. As a consequence, no confident conclusion could be drawn that the noise impacts of the Project would be acceptable: at [385]. The combination of air quality criteria for the Project also made it difficult to evaluate compliance or reach a confident conclusion about the acceptability of air quality impacts: at [403];

(4) while the Project could have some positive social impacts, especially in the form of continuing employment in the local and broader community, it also could have several significant negative social impacts. Such negative social impacts included adverse impacts from noise and dust, visual impacts, and adverse impacts arising from a change in the composition of the Bulga community. Those impacts needed to be taken into account when considering all of the relevant factors in determining whether the Project should be approved or disapproved: at [445];

(5) the economic analyses (Input-Output Analysis and Benefit Cost Analysis) provided on behalf of Warkworth suffered from various limitations. The results of the economic analyses were of limited value to the Court (i.e. the decision-maker) in deciding whether it could reach a state of satisfaction as to the nature and extent of impacts, in considering each and all of the relevant matters, the weight to be assigned to each of those matters, and the balancing of all of those matters, to determine whether the Project should be approved or disapproved: at [496]; and

(6) in balancing all of the relevant matters, the preferable decision iwa to disapprove the carrying out of the Project. While the Project would have produced substantial economic benefits and positive social impacts in the broader area and region, these factors were outweighed by the significant and unacceptable impacts the Project would have on biological diversity, including EECs, noise impacts and social impacts: at [497]-[499].

Section 56A Appeals

Forgall Pty Limited v Chief Executive of the Office of Environment and Heritage (No 2) [2013] NSWLEC 36 (Pain J)

(related decisions: *Forgall Pty Limited v Chief Executive Officer of the Office of Environment and Heritage* [2012] NSWLEC 1219 Brown ASC; *Forgall Pty Limited v Chief Executive Of The Office Of Environment and Heritage* [2013] NSWLEC 11 Pain J)

Facts: this was an appeal pursuant to s 56A of the *Land and Environment Court Act* 1979 from the decision of a Commissioner in relation to a remediation notice issued under the *Native Vegetation Act* 2003 ("the NV Act") requiring work to be undertaken on the appellant's property. The notice referred to several areas on the property, known in the proceedings as areas A - G. At the hearing before the Commissioner concessions were made in relation to areas A-F leaving only the scope of any remediation order in relation to those areas in issue. An agreement was recorded in the Commissioner's judgment in relation to area G that native vegetation had been cleared in specified periods and at issue was whether the clearing was lawful. The Commissioner made findings in relation to both s 38(1)(a) and (1)(b), holding that he was satisfied that native vegetation had been cleared in contravention of the NV Act and, separately, that the clearing was likely to cause an adverse effect on the environment. The Commissioner's decision was vitiated only if there was demonstrated error concerning questions of law in relation to both subsections 1(a) and 1(b) given the "or" in between these subsections.

Issue:

(1) whether the appeal against the Commissioner's decision should be upheld or dismissed given that the appellant was bound by its conduct before the Commissioner and only questions of law could be raised.

Held: appeal dismissed:

(1) given that concessions were made by the appellant in relation to areas A - F at the hearing before the Commissioner that native vegetation was cleared, the grounds of appeal could arise only in relation to area G: at [8];

(2) the appellant's agent wished to raise the carrying out of routine agricultural maintenance activities on other areas of the property beyond area G but there was no reference to any of these matters in the judgment because of the concession recorded and these could not be considered: at [8]; and

(3) any questions of law in the appeal had to be limited to area G in the context raised before the Commissioner. This conclusion meant that at least one ground of appeal raised could not be pressed: at [8];

(4) the grounds of appeal otherwise concerned findings of fact by the Commissioner and could not be considered: at [11], [14], [15] and [19]; and

(5) given that there was no challenge to the finding of the Commissioner concerning s 38(1)(b), the decision was not vitiated even if the appeal grounds in relation to s 38(1)(a) had been successful: at [19].

Defence Housing Australia v Randwick City Council [2013] NSWLEC 59 (Pain J)

(related decision: *Defence Housing Australia v Randwick City Council* [2012] NSWLEC 1181 Dixon C and Fakes C)

Facts: Defence Housing Australia (DHA) brought an appeal under s 56A of the *Land and Environment Court Act* 1979 (the Court Act) from the decision of two Commissioners in *Defence Housing Australia v Randwick City Council* [2012] NSWLEC 1181. The parties agreed before the Commisioners that the DA in question was a "Crown development application" ("Crown DA"). The Commissioners held that they did not have jurisdiction to hear DHA's appeal as the DA was a Crown DA in respect of which there was no right of

appeal under s 97(1) *Environmental Planning and Assessment Act* 1979 (the EPA Act). By letter DHA requested the Regional Panels Secretariat to refer the DA to the Sydney East Joint Regional Planning Panel for determination as a Crown DA as provided by s 89 of the EPA Act. By letter the Regional Panels Secretariat notified DHA that it had not accepted the referral because the Panel did not have jurisdiction. The letter advised that, having obtained the advice of the Crown Solicitor's Office, it was of the view that the DA was not a Crown DA.

Issues:

(1) whether in this s 56A appeal DHA could change its stated position at the Class 1 hearing before the Commissioners and now argue that its application was not a Crown DA but was in fact a usual DA; and

(2) whether the Court erred in holding that the DA was a "Crown development application" for the purposes of s 88 of the EPA Act.

Held: the appeal was upheld and the matter remitted to Commissioners for final determination of merit matters, if any:

(1) the unusual circumstances before the Court amounted to exceptional circumstances suggesting that it was in the interests of justice that DHA be allowed to change its position to submit that it was not pursuing a Crown DA in this s 56A appeal. While this was contrary to a fundamental position of DHA before the Commissioners, subsequent events with the refusal by the Panel to accept the DA mean that DHA has no obvious means of pursuing this DA under the EPA Act. It was a question that goes to the Court's jurisdiction to determine the merits of the DA and that fact can be taken into account in exercising discretion: at [29]; and

(2) construction of the particular statutory regime was determinative of whether DHA's DA was a Crown DA for the purposes of Div 4 of Pt 4 of the EPA Act. Section 6 of the EPA Act states that the Act binds the Crown in all its capacities. There is no definition of Crown in s 4. The issue is whether "the Crown" in s 88 of the EPA Act means the Crown in right of NSW, as the Crown is defined in the Interpretation Act: at [54]. Whether or not s 88(2) is an exhaustive definition of the Crown, it applies only to the Crown in Div 4 Pt 4. Section 88(2) explicitly states that it is concerned (only) with the Crown in Div 4. Section 88(2)(a) and (b) are not drafted to exhaustively define the Crown given the references to "include" and "does not include". Persons identified as the Crown in cl 226 of the Environmental Planning and Assessment Regulation 2000 do not include DHA for the reasons given in [57]. No regulation has been made which excludes a capacity of the Crown from the operation of Div 4. Section 88(2) does not govern the meaning of Crown generally in the EPA Act. Section 6 does not inform any definition of Crown in s 88. The Court did not accept the Council's submissions in [51] that a contrary intention in relation to the application of the Interpretation Act is identified in s 88(2)(a) because a wide range of persons could be included as the Crown in right of NSW; amd

(3) while the Council submitted that contrary intention could be implied, the statutory regime does not give rise to such an inference. The EPA Act can continue to operate effectively if the Crown means the Crown in right of NSW in Div 4. DHA is otherwise bound by the terms of the EPA Act by virtue of s 6: at [64].

Commissioner Decisions

SHCAG Pty Ltd v The Minister for Planning and Infrastructure and Boral Cement Limited [2012] NSWLEC 1032 (O'Neill C and Adam AC)

Facts: an objector appealed under s 75L of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act") against the determination by the New South Wales Minister for Planning and Infrastructure ("the Minister") to grant consent, by his delegate the Planning Assessment Commission ("PAC"), to the continuing operation of the Berrima Colliery.

The major project application, the subject of the appeal, was subject to Part 3A of the EPA Act as in force immediately before its repeal on 1 October 2011 and as modified by Schedule 6A to the EPA Act.

Issues:

(1) whether the impact of the proposal on groundwater levels had been adequately identified or modelled and consequently, whether the risk of environmental harm was uncertain and not adequately mitigated; and

(2) whether the proposal would adversely impact on the health of the Wingecarribee River by discharging pollutants in the water discharged from the mine, which may be harmful to the aquatic life which relies upon the river.

Held: upholding the appeal, concluding that there was inadequate information with which to determine the impact of the proposal on groundwater and river water quality and that on the merits the major project application should be refused:

(1) as the historically mined components were required to be dewatered to provide access to the new areas of coal mining, the dewatering of the aquifer over the whole of the mine workings and its impacts were relevant, and consideration was not limited to the extension to the underground mining of coal: at [54];

(2) the Water Management Plan was in a draft state and could not be categorised as an adaptive management regime and consequently, there was a lack of data to support an assessment of the impacts of the proposal on ground and surface water, which left unresolved major and fundamental issues associated with the proposal that could not be deferred for later resolution through a condition of consent: at [92];

(3) the precautionary principle was activated, as the risk of significant environmental harm remained uncertain and was not mitigated by an adaptive management regime: at [94]; and

(4) the impact of the proposed haulage route along Medway Road on the amenity of the residents of Medway was sufficiently detrimental to warrant refusal: at [61].

Rose Bay Marina Pty Ltd v Woollahra Municipal Council [2013] NSWLEC 1046 (Moore SC and Adam AC)

(related decisions: *Addenbrooke Pty Ltd v Woollahra Municipal Council* [2008] NSWLEC 190; *Addenbrooke Pty Ltd v Woollahra Municipal Council (No.2)* [2009] NSWLEC 134, Biscoe J)

Facts: the Rose Bay Marina was constructed in the south-west corner of Rose Bay pursuant to a development consent granted by the Court in *Addenbrooke Pty Ltd v Woollahra Municipal Council (No.2)* which had deleted the most eastern of the then proposed three arms. The marina operator applied for consent to permit the third, rejected, eastern arm in a modified design, which included alteration to the orientation of the arm; limitations on the heights of vessels able to be berthed at the arm; and a shortening of the length of the arm. The application also proposed the addition of a number of new berths to the west of the western arm in the southern corner of the existing marina. A number of commercial swing moorings in Rose Bay operated by the Rose Bay Marina were proposed to be surrendered whilst a smaller number were proposed to be relocated. The overall proposed outcome would have been no net increase in the number of vessels accommodated by the marina – although the types of vessels would necessarily change. The Sydney East Joint Regional Planning Panel refused consent, primarily on the basis of the unacceptable visual impact that the proposed eastern arm would have when viewed from the shore. Two members of the Joint Regional Planning Panel also expressed the opinion that there was no further acceptable scope for increases in commercial marina development in Rose Bay. The marina operator appealed the Panel's rejection to the Court and the decision of the Panel was defended by Woollahra Council. The Sydney Harbour Association, a body that had been a respondent in the two earlier proceedings (although under a different name), also participated as a respondent as the Association had been an objector to this designated development proposal.

Issues:

(1) what was the appropriate basis upon which to assess the visual impact on views from the public domain of such a development proposal; and

(2) was this development acceptable when so assessed.

Held: finding that the visual impact of the proposed eastern arm was unacceptable when viewed to the north from the Rose Bay Promenade and rejecting this aspect of the proposed development; finding that there were no reasons why the proposed additional berths in the south-western corner of the existing marina should not be approved subject to conditions including provisions to ensure that there was appropriate clearance around that corner for human powered watercraft; and finding it was appropriate for the Court to establish (and this judgment published) a planning principle on what should be the process undertaken for assessing the acceptability or otherwise of the impact of a proposed development on views from the public domain:

(1) although the decision of the Joint Regional Planning Panel to reject a specific development was appropriate, it was neither appropriate nor necessary to make any sweeping comments about the future potential for marina development in Rose Bay. Any future application would need to be dealt with on the merits of a specific proposal: at [15] – [18];

(2) a planning principle for assessment of the impact of proposed developments on views from the public domain had been adopted through the collegiate process followed by the Court for the establishment of planning principles to provide guidance for such assessment processes: at [39] – [59];

(3) specifically, within that planning principle, the proposition that had been advanced in this application that a nominal eye height of 1.6 m or above should be adopted for assessment of view impacts was rejected. Views from the public domain are those to be enjoyed by the whole population including the very young and those enjoying such views from a seated position (whether by choice or as a consequence of physical disability): at [46];

(4) the analytic stage proposed in the planning principle does not mandate derivation of any formal assessment matrix: at [50];

(5) the views of those approaching the proposed eastern arm from the west would be compromised in the ability to see the foreshores of Vaucluse but this was a lesser impact not warranting refusal in its own right: at [70] – [75] and [103];

(6) views from locations where the proposed eastern arm was generally to the north would be unacceptably impacted both because of the obstruction of the long-distance view to the Manly foreshore and the changed nature of the new foreground view replacing the pleasant and dynamic view of swing moorings with the static and regimented view of the proposed eastern arm and its berthed boats: at [76] – [78] and [104] – [110];

(7) views for those approaching from the east along the Promenade would not be significantly compromised: at [79] and [102];

(8) there was no impact on the heritage values of the Rose Bay Promenade, specifically, that was not encompassed by the more general view impact considerations: at [121] – [124];

(9) although there was some inconvenience to rowers, kayakers and Dragon Boat crews if the eastern arm were to be constructed, such inconvenience was minor and could not contribute to refusal of the eastern arm: at [125] – [128];

(10) the proposed additional berths to be added to the western arm at its southern end did not have any adverse visual impact: at [117];

(11) the most southern of these proposed berths, however, did not afford sufficient clearance for human propelled watercraft between those berths and the closest adjacent swing mooring operated by the Point Piper Marina: at [128] – [132];

(12) as the Rose Bay Marina and the Point Piper Marina were in common ownership, this clearance question could be resolved by relocation of the relevant Point Piper Marina swing mooring or, unless and until that occurred, a prohibition on use of the two most southern of the additional berths proposed for the western arm: at [133] – [134];

(13) the offer by the Rose Bay Marina to remove one of two pontoons to increase clearance in the channel between the marina arms and the shore facilities was appropriate and should be incorporated in the conditions of consent approving the additional berths on the western side of the western arm: at [130]; and

(14)consideration was given as to whether any modification to the proposed eastern arm could be imposed pursuant to the "amber light" approach regularly adopted by the Court in merit hearings but there were no such appropriate changes that could be imposed within the scope of the present application that would permit approval to be given to an eastern arm: at [135] – [136].

Cardno Pty Ltd v Campbelltown City Council [2013] NSWLEC 1056 (O'Neill 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 existing commercial premises as a retail liquor outlet. The council refused the application because the proposal, although permissible under the *Campbelltown (Urban Area) Local Environment Plan* 2002, would result in unacceptable social impacts in the locality, because the site was an inappropriate location for a retail liquor outlet.

Issues:

(1) whether the impact of the proposal would increase the potential for alcohol-related incidents in the vicinity of the nearby the skate park, which was an alcohol free zone and a popular meeting place for children, youths and families, and would be likely to increase the potential for secondary supply of alcohol to minors;

(2) whether the proposal would exacerbate anti-social behaviour in the socio-economically disadvantaged suburb of Claymore, as the site was located adjacent to the walking route between Claymore and Leumeah Railway Station;

(3) whether the proposal would result in alcohol being consumed on the premises of fast food restaurants as the proposal was located within a fast food restaurant 'hub'; and

(4) whether the proposal was an inappropriate location as it was directly adjacent to the Ibis Budget Hotel, which was used by the NSW Family and Community Services for emergency accommodation.

Held: dismissing the appeal, concluding that the proposal would result in an unacceptable adverse social impact in the locality and that on the merits the application should be refused:

(1) the central issue in the proceedings was whether the proposal would have an unacceptable adverse social impact in the locality, pursuant to s 79C(1)(b) of the EPA Act: at [34];

(2) the Campbelltown local government area ("LGA") is comprised of a high proportion of disadvantaged areas when compared to greater Sydney, and includes a number of medium to high crime density 'hotspots' for domestic violence and non-domestic violence assaults. There had been a disproportionate increase in retail liquor outlets in the Campbelltown LGA when compared to the increase in the population. As research had shown that disadvantaged communities are exposed to substantially higher numbers of retail liquor outlets, where alcohol is sold cheaply, and they experience significantly higher rates of alcohol-related harm, it was a reasonable conclusion that an additional retail liquor outlet in the Campbelltown LGA was likely to have an adverse social impact in terms of alcohol-related harm in the Campbelltown community: at [39];

(3) the proposal would be patronised by the socio-economically disadvantaged residents of Claymore as it was located among the fast food outlets they currently patronise and the temptation of purchasing take away alcohol along with take away food would be significant. As alcohol-related harm had a clear socio-economic gradient, where levels of harm were greater among people who are relatively socially disadvantaged and the relationship between increased availability and increased alcohol-related harm was indisputable, it followed that the addition of a retail liquor outlet among the fast food restaurants would lead to an increase in consumption of alcohol by the socially and economically disadvantaged persons of Claymore and this would further disadvantage them and result in an adverse social impact in the locality: at [41];

(4) the visibility and proximity of the proposal to the skate park made it a temptation for adults to purchase alcohol and consume it in the vicinity of the skate park and this might jeopardise the success of the skate park as a safe, free and constructive place of entertainment for young people. The council had

clearly demonstrated their intention that alcohol was not to be consumed in the vicinity of the skate park by making it and the streets around it an alcohol free zone: at [43]; and

(5) it was inappropriate to locate a retail liquor outlet directly in front of a hotel used for emergency accommodation for vulnerable people who were experiencing highly stressful circumstances: at [44].

Lightning Ridge Miners Association Limited v Slack-Smith [2013] NSWLEC 1063 (Moore SC)

Facts: in 1996, the Lightning Ridge Miners Association Ltd ("the Association") constructed an artesian bore on Muttabun, a grazing property south west of Lightning Ridge. Mr and Mrs Slack Smith own Muttabun. The bore was constructed on a Mineral Claim that had been owned by Mr Slack Smith's company Blue Fame P/L but had been transferred to the Association for the purpose of the bore. Mineral Claims are renewable annually. At the time, Mr Slack Smith and the Association had executed a deed setting out the rights and obligations of each of them relating to the bore. In 2010, the Association lodged an application for a Mining Lease over the Mineral Claim land as such a lease can give long term tenure in lieu of annual renewal. Mr and Mrs Slack Smith objected to the granting of the proposed lease on the basis that clearing at the western edge of the proposed lease area adjacent to a fence line was a "significant improvement" and their consent was required pursuant to s 62(1)(c) of the *Mining Act* 1992 ("the Act"). Consent was only required if the clearing at the western edge of the proposed lease area was a "significant improvement" at the time of granting the Mineral Claim and was also now still a "significant improvement". The Association applied pursuant to s 62(6A) of the Act for a determination from the Court of the status of this clearing.

Issues:

(1) whether the clearing at the western edge of the proposed lease area was a "significant improvement" at the time of granting the Mineral Claim in May 1996; and
(2) and if so, whether it now was still a "significant improvement".

Held: determining that the cleared area was not a "significant improvement" for the purposes of s 62(1)(c) of the Act, and ordering the respondents to pay the applicant's costs:

(1) matters relating to the general lease assessment process or any possible impacts on the deed between Mr Slack Smith and the Association could not fall within the scope of these proceedings: at [21]–[23];
(2) it was appropriate to adopt Mr Slack Smith's evidence concerning the state of the clearing as a graded and well-maintained firebreak as at May 1996 for the purpose of assessing the current status of the cleared area without resolving the stark conflict of evidence on this point: at [26]–[34];
(3) on the basis of Mr Slack Smith's evidence, the clearing at the western edge of the proposed lease area was a "significant improvement" at the time of granting the Mineral Claim: at [35];
(4) well maintained firebreaks protect properties such as Muttabun, generally, and also can perform a specific and valuable role to protect fencing assets: at [60]–[63];
(5) however, the evidence from the site inspection and Mr Slack Smith was that the clearing at the western edge of the proposed lease area was not relied upon as a firebreak, a nearby access track was adopted for this purpose: at [64];
(6) the proper description of the current state of the clearing at the western edge of the proposed lease area was a "rough bush track" – adopting the description given by the Association's Secretary/Manager: at [65];
(7) as such, it could not now be regarded as a "significant improvement": at [66];
(8) as Commissioners of the Court sitting in Class 8 mining matters were given a delegation by the Chief Judge pursuant to s 42 of the *Land and Environment Court Act* 1979, they had the full costs ordering power under the *Civil Procedure Act* 2005 and the Uniform Civil Procedure Rules 2005: at [68] to [70]; and
(9) as costs ordinarily follow the event, the respondents were to pay the applicant's costs as agreed or assed unless the respondents notified within 14 days that they wished to contend for some other order: at [71].

McLucas & anor v Invocare Australia Pty Ltd; Holborow v Invocare Australia Pty Ltd; Dungey v Invocare Australia Pty Ltd; McEwan v Invocare Australia Pty Ltd; Ziesig & anor v Invocare Australia Pty Ltd [2013] NSWLEC 1054 (Moore SC and Fakes C)

Facts: Wollongong City Council gave development consent in 1993 to the commencement of a cemetery and associated facilities on a large plot of land at Kanahooka toward the southern end of the council's area. The cemetery land is zoned Special Purposes 1 – Cemetery under Wollongong Local Environmental Plan 2009 ("the LEP"). One of the conditions of consent was that, in anticipation of future urban development along the site's northern boundary, barrier plantings of she-oaks were to be established to provide visual screening from the cemetery and its activities. In about 2003, a large community title residential development took place in stages along that boundary. By this time, the trees were some 7 m in height. By 2012, the trees were established, in an almost continuous belt, some 15 m or so high. Five applications were made pursuant to the *Trees (Disputes Between Neighbours) Act* 2006 ("the Trees Act") seeking orders for removal of sections of the vegetated belt adjacent to each residential property involved. The residential properties involved were not in a single cluster. The applications were made under both Part 2 (damage and/or injury) and Part 2A (high hedges) of the Trees Act on various bases. Those under Part 2 related to property damage and/or risk of injury by various adjacent trees as a collection of individual plants. The elements of the applications under Part 2A related to the relevant trees as integral elements of a hedge, in combination, blocking sunlight to the windows of dwellings thus reducing their amenity. One aspect of the risk of injury claim was that the blocking of sunlight by the vegetated belt promoted the growth of mould and slime on paved areas thus creating a risk of injury.

Issues:

(1) whether the Special Purposes 1 – Cemetery zone was one to which the Trees Act applied; and

(2) if so, what was the outcome of a merit assessment of each of the five applications considered separately.

Held: dismissing the applications on the basis that there was no jurisdiction, and on the merits:

(1) the applicants and the respondent agreed that the Trees Act applied to the Special Purposes 1 – Cemetery zone with the respondents citing two cases that it said, by analogy, should lead to the conclusion that the zone was for urban purposes: at [19]–[25];

(2) there were a number of zones in the land use table in the LEP that satisfied the provisions of the jurisdictional tests relating to zoning in the Trees Act: at [26], [27];

(3) there were also zones in the land use table that would satisfy the test of whether or not they were for urban purposes but did not fit within the specifically enumerated zones in either of the Parts in the Trees Act nor were they equivalent to any of those zones. As a consequence, despite the agreement of the parties that the Court had jurisdiction to determine each of the applications, there was, in reality, no satisfaction of the jurisdictional tests relating to zoning and thus each of the applications required to be dismissed: at [28] - [30];

(4) against the possibility that this jurisdictional finding might be incorrect, it was nonetheless appropriate to make merit determinations with respect to each of the applications: at [29];

(5) with respect to risk of injury caused by tree failure, whilst it was accepted that the fears of the residents were honestly and genuinely held, such fears did not provide any basis for ordering the removal of any tree unless there was some rational basis for concluding that what was feared would eventuate and that was not the position with respect to these applications: at [36];

(6) with respect to the question of blocking of sunlight leading to a build up of mould and slime and thus a trip and fall risk, an extension of the Tree Dispute Principle in *Barker v Kyriakidis* [2007] NSWLEC 292 was desirable to establish that, for those with a benefit, aesthetic and environmental, of trees in an urban setting, ordinary maintenance requirements should include the expectation of prevention of the build up of mould and slime of the type about which complaint was made (although no example was actually shown) should be expected: at [87], [88];

(7) all the claims made under Part 2 of the Trees Act were dismissed as either not satisfying the preliminary jurisdictional tests in s 10 (2) or on discretionary grounds based on *Barker*: at [89] - [91];

(8) all of the claims under Part 2A of the Trees Act failed as the trees were in existence or/and of a significant height at the time each of the applicants took up residence so that they either ought to have known or had actual knowledge of the extent of overshadowing from the trees: at [52] - [58], [114] - [122];

(9) in any event, with respect to the overshadowing claims, there was an absence of adequate information (such as shadow diagrams) to demonstrate the extent of the overshadowing in order to assess whether there was any severe obstruction to sunlight to any window as required by the Trees Act or any ability to identify which trees, out of a densely planted hedge, as might have caused such overshadowing if such overshadowing had been validly established: at [109], [110]; and

(10) on the merits, on either additional jurisdictional grounds or on discretionary bases, all of the applications warranted dismissal: at [124].

Al Maha Pty Ltd v Marrickville Council [2013] NSWLEC 1072 (Tuor C)

Facts: the applicant appealed under s 97 of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act") against the deemed refusal of a development application seeking consent to demolish existing industrial buildings and erect a mixed use commercial residential development on a site in Alice Street Newtown. The site adjoined residential development on all sides, ranging in height from one to four storeys. The original development application was lodged with Marrickville Council ("council") on 18 June 2011, and included buildings along each street frontage and internal to the site forming a central courtyard on the western part of the site and a "pocket park" on the eastern part of the site. The height of buildings ranged from 3 to 6 storeys with 206 dwellings and a floor space ratio ("FSR") of 2.334:1 (19,366.7sqm) and parking for 163 cars.The Joint Regional Planning Panel ("JRPP") was the consent authority. The JRPP considered a report in relation to the application at its meeting of 21 November 2012 and resolved to defer its determination to allow the applicant to prepare amended plans that reduced the FSR of the development, however, the applicant lodged an appeal under s 97 of the EPA Act against the deemed refusal of the application and was granted leave to rely on amended plans. The plans sought to address the changes recommended by the JRPP.

On the first day of the hearing, the applicant proposed further changes to address the contentions of council in relation to FSR and the number of storeys of the development. The changes included an additional driveway entrance to provide access to the upper level car park, converting the Level 6 units to be a "mezzanine" for the units below, and internal changes to both levels. The number of units was reduced to 174 and the FSR to 2.036:1 (16,894.43sqm). The unit mix was amended and the number of car spaces increased to 176.

The site was within Zone B4 - Mixed Use under *Marrickville Local Environmental Plan 2011* ("MLEP"). Residential accommodation, other than certain types such as dwelling houses and shop top housing, was prohibited in the zone. However, cl 2.5 of MLEP permits additional uses for particular land as specified in Schedule 1 despite anything to the contrary in the land use table or other provisions of the Plan. The site was included in Schedule 1 and development for the purpose of residential accommodation was permitted with consent, but only as part of a mixed use development.

MLEP contains development standards relevant to the application, in particular, cl 4.3 - Height of Buildings and cl 4.4 - Floor Space Ratio (FSR). The maximum height permissible on the site was 20m and the maximum FSR was 1.85:1. The proposal complied with the height control but exceeded the FSR control. Clause 4.6 of MLEP permits exceptions to development standards in MLEP in certain circumstances.

The site is within the Camdenville Precinct under Part 9.15 of *Marrickville Development Control Plan 2011* ("MDCP"). It describes the existing (9.14.1) and desired future character (9.14.2) sought for the Camdenville Precinct and provides specific planning controls for the site (9.14.5.1) (Masterplan). The controls include the number of storeys for buildings on the site, which range from two storeys (three overall) to five storeys.

On 1 March 2013, the provisions of the *Environmental Planning and Assessment Amendment Act* 2012 ("Amending Act") relating to development control plans came into force. Section 74C (5) provides:

> *A provision of a development control plan (whenever made) has no effect to the extent that:*
> *(a) it is the same or substantially the same as a provision of an environmental planning instrument applying to the same land, or*
> *(b) it is inconsistent or incompatible with a provision of any instrument.*

Issues:

(1) whether number of storeys control in MDCP had no effect because it was inconsistent or incompatible with the height control in MLEP;

(2) whether a secondary car park driveway was acceptable;

(3) whether the upper level of the Alice Street building was a storey or a "mezzanine" as defined under MLEP; and

(4) whether the non compliance of the development with the FSR standard met the requirements of cl 4.6 of MLEP.

Held: directing the filing of amended plans and conditions incorporating changes to the development application, including the deletion of the secondary driveway and provision of disabled access from the pocket park:

(1) applying the transitional provisions in cl 143 of Sch 6 to the EPA Act, the amendments made by Sch 1 [1] - [2] and [5] of the Amending Act did not apply to the determination of the application, and consistent with the decision in *Zhang v Canterbury Council* [2001] NSWCA 167, MDCP remained the focal point for consideration of the application: at [24] - [25];

(2) the amendment made by Sch 1 [3] of the Amending Act to s 74C(5) was relevant to the consideration of the application: at [26];

(3) the number of storeys control in MDCP was not the same or substantially the same or inconsistent or incompatible as the height control measured in metres in MLEP. The number or storeys and the number of metres both dealt with aspects of height, but the DCP control provided more detail on how the maximum height may be distributed on the site to achieve the objectives of the height control, particularly the desired future character set out in the Masterplan in MDCP: at [31] - [33];

(4) the secondary driveway should be deleted: at [41] – [44];

(5) whether the upper level of the Alice Street building was a "mezzanine" or a "storey", the building bulk was consistent with the envelope and desired future character for the site established by the Masterplan in MDCP: at [63] – [64];

(6) under cl 4.6(4)(a) of MLEP, consent must not be granted unless the Court is satisfied of two matters. Firstly, that the applicant's written request has adequately addressed the matters required to be demonstrated in subclause (3). Secondly, that the proposed development would be in the public interest because it is consistent with the objectives of the FSR standard and the objectives for development within the B4 zone: at [56];

(7) the proposal was in the public interest because it was consistent with the objectives of the FSR standard in cl 4.4 of MLEP and the satisfaction required before consent is granted by c 4.6(4)(a)(ii) was achieved: at [57] - [69];

(8) the proposal was in the public interest because it was consistent with the objectives of the B4 zone in MLEP and the satisfaction required before consent is granted by c 4.6(4)(a)(ii) was achieved: at [70] - [71];

(9) cl 4.6(3)(a) of MLEP uses the same language as *State Environmental Planning Policy No 1 – Development Standards* ("SEPP 1"). *Wehbe v Pittwater Council* [2007] NSWLEC 827 at [42] - [43] is relevant to establishing that compliance with the standard is unreasonable or unnecessary, namely whether, despite the non compliance, the proposal meets the objectives of the standard: at [74] to [75];

(10) the term "environmental planning grounds" in cl 4.6(3)(b) was broad and encompassed wide environmental planning grounds, beyond the absence of environmental harm or impacts. It was likely to be informed by the objectives of cl 4.6 of MLEP which involved a consideration of similar matters to those in the aims and objects set out in cl 3 of SEPP 1: at [76]-[79];

(11) as required by cl 4.6(4)(a)(i) of MLEP, the applicant's written request had adequately addressed the matters required to be demonstrated by cl 4.6(3): at [80]; and

(12) while the Court had the power to assume the Director General's concurrence required under cl 4.6(4)(b) of MLEP, consistent with the decision in *Wehbe,* the matters in cl 4.6(5) "are still relevant when the Court is considering exercising its power": at [81]-[82].

COURT NEWS:

Dr Jeffrey Kildea has been appointed as an Acting Commissioner of the Court from 20 March 2013. Dr Kildea has expertise in Aboriginal land rights and Aboriginal Claims.

Building works are being carried out at 225 Macquarie Street Sydney, including refurbishment of the facade and building an additional level. As a result it will not be possible to hold all LEC hearings in the Court building. From 26 March 2013, cases that cannot be heard at 225 Macquarie Street will be heard in the Industrial Relations Commission Building at 47 Bridge Street Sydney. Parties are requested to carefully check the court list each day to ensure they know the correct location of their hearing.