

# Land and Environment Court of NSW

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### Statutes and Regulations

#### Planning:

The [Environmental Planning and Assessment Amendment \(Complying Development and Fire Safety\) Regulation 2013](#), published 20 December 2013, amended the [Environmental Planning and Assessment Regulation 2000](#) to:

- (a) make it clear that prescribed conditions of development consents and complying development certificates relating to shoring and adequacy of support of premises adjoining the development extend to adjoining structures on land in a road or rail corridor;
- (b) require a certifying authority, before determining an application for a complying development certificate by issuing a certificate, to give a notice in certain circumstances containing specified information to the occupier of each dwelling within 20 metres of the development;
- (c) require a complying development certificate to be issued subject to a condition requiring payment of a contribution or levy under [s 94](#) or [94A](#) of the [Environmental Planning and Assessment Act 1979](#) if the contributions plan for the local government area requires payment of a contribution or levy for the type of development the certificate relates, to despite any provision to the contrary in that plan;
- (d) require a complying development certificate that is issued subject to a condition that a contribution or levy be paid under [s 94](#) or [94A](#) of the *Environmental Planning and Assessment Act 1979* to also be issued subject to a condition as to when the contribution or levy is to be paid;
- (e) provide for the payment of security deposits to councils as a condition of a complying development certificate in certain circumstances;
- (f) place a duty on a principal certifying authority for complying development to be satisfied that preconditions to which the certificate is subject have been met before work commences;
- (g) require a person having the benefit of a complying development certificate to include in the prescribed notice of commencement of work to be given to the council (and the principal certifying authority if that is not the council) a statement signed by or on behalf of the principal certifying authority to the effect that the preconditions to which the certificate is subject have been met;
- (h) require an application for certain complying development to be accompanied by a certificate from Roads and Maritime Services in relation to traffic generating aspects of the development;
- (i) require an application for complying development to contain certain information about the contamination status of the land concerned and be accompanied by a certificate from a qualified expert in relation to the development;

- (j) remove the requirement for a fire safety schedule where work is limited to the alteration of a hydraulic fire safety system that does not affect the fire protection of that system and there has been notice of specified action by or on behalf of a water utility in relation to the relevant premises;
- (k) require applications for certain complying development to be accompanied by a report relating to fire safety from an independent accredited certifier, except in specified circumstances;
- (l) require any such report to be provided to the relevant council if the council is not the certifying authority; and
- (m) remove obsolete provisions relating to fire link conversions.

On 22 February 2014, amendments to [State Environmental Planning Policy \(Exempt and Complying Development Codes\) 2008](#) commence. [SEPP \(Exempt and Complying Development Codes\) Amendment \(Commercial and Industrial Development and Other Matters\) 2013](#) will, *inter alia*, repeal the following SEPPs and incorporate elements of them into the 2008 SEPP:

- (a) SEPP No 4—Development Without Consent and Miscellaneous Exempt and Complying Development;
- (b) SEPP No 6—Number of Storeys in a Building;
- (c) SEPP No 22—Shops and Commercial Premises; and
- (d) SEPP No 60—Exempt and Complying Development.

The [Environmental Planning and Assessment Amendment \(Claymore Urban Renewal Project\) Order 2013](#), published 1 November 2013, amended maps for Claymore in the [Campbelltown \(Urban Area\) Local Environmental Plan 2002](#).

The [Environmental Planning and Assessment Amendment \(State Significant Infrastructure Declaration\) Order 2013](#), published 25 October 2013, declared development for the purposes of the F3–M2 project, being the motorway link between the M1 Pacific Motorway (formerly the F3 Sydney–Newcastle Expressway) at North Wahroonga and the M2 Hills Motorway at North Rocks to be State significant infrastructure and critical State significant infrastructure.

#### **Local Government:**

The [Local Government \(General\) Amendment \(Performance Management\) Regulation 2013](#), published 25 October 2013, specifies the criteria to be considered by the Minister to determine whether a performance improvement or suspension order may be made.

#### **Water:**

Schedule 8.30[4] of the [Water Management Act 2000](#), that removed the Benerambah Irrigation District Environment Protection Trust from the list of water supply authorities under the Act, commenced 1 November 2013.

[Water Sharing Plan for the Greater Metropolitan Region Groundwater Sources Amendment Order 2013](#), published 20 December 2013, amended maps in the [Water Sharing Plan for the Greater Metropolitan Region Groundwater Sources 2011](#)

[Water Sharing Plan for the Lower Gwydir Groundwater Source Amendment Order \(No 2\) 2013](#), published 20 December 2013, changed distance restrictions specified under certain circumstances between neighbouring bores in the [Water Sharing Plan for the Lower Gwydir Groundwater Source 2003](#).

[Water Sharing Plan for the Upper and Lower Namoi Groundwater Sources Amendment Order \(No 2\) 2013](#), published 20 December 2013, changed distance restrictions specified under certain

circumstances between neighbouring bores in the [Water Sharing Plan for the Upper and Lower Namoi Groundwater Sources 2003](#).

[Water Sharing Plan for the Murrumbidgee Regulated River Water Source Amendment Order \(No 2\) 2013](#), published 22 November 2013 changed rules for water allocation assignments between water sources in the [Water Sharing Plan for the Murrumbidgee Regulated Rivers Water Source 2003](#).

[Water Sharing Plan for the Barwon-Darling Unregulated and Alluvial Water Sources Amendment Order 2013](#), published 25 October 2013, amended pump and access rules for surface water in the [Water Sharing Plan for the Barwon-Darling Unregulated and Alluvial Water Sources 2012](#).

[Water Sharing Plan for the Belubula Regulated River Water Source Amendment Order 2013](#), published 25 October 2013, amended the [Water Sharing Plan for the Belubula Regulated River Water Source 2012](#), in respect of taking of uncontrolled flows under regulated river (high security) access licences and licence allocations.

[Water Sharing Plan for the Murrumbidgee Regulated River Water Source Amendment Order 2013](#), published 25 October 2013, updated interpretation of supplementary water access licences in the [Water Sharing Plan for the Murrumbidgee Regulated River Water Source 2003](#) to clarify that does not include a supplementary water "Lowbidgee" access licence.

[Water Sharing Plan for the Namoi Unregulated and Alluvial Water Sources Amendment Order 2013](#), published 25 October 2013, updated maps in the [Water Sharing Plan for the Namoi Unregulated and Alluvial Water Sources 2012](#).

#### **Mining and Petroleum:**

The [SEPP \(Mining, Petroleum Production and Extractive Industries\) 2007](#) has been amended by the following:

- [State Environmental Planning Policy \(Mining, Petroleum Production and Extractive Industries\) Amendment 2013](#), published 4 October 2013, established a gateway assessment process for certain mining and petroleum (oil and gas) development;
- [State Environmental Planning Policy \(Mining, Petroleum Production and Extractive Industries\) Amendment \(Resource Significance\) 2013](#), published 4 November 2013, requires consideration of the significance of the resource, and provides non-discretionary development standards, in determining applications for development consent; and
- [State Environmental Planning Policy \(Mining, Petroleum Production and Extractive Industries\) Amendment \(Coal Seam Gas\) 2014](#), published 28 January 2014, updates maps in the SEPP.

The [Mining and Petroleum Legislation Amendment \(Public Interest\) Act 2013](#) commenced on assent on 27 November 2013, and amends the [Mining Act 1992](#) and the [Petroleum \(Onshore\) Act 1991](#) to make the public interest a ground for certain decisions relating to mining or petroleum rights or titles.

The [Mining Amendment \(Development Consent\) Act 2013](#) commenced on assent on 13 November 2013 and amends the [Mining Act 1992](#) to provide that the Minister must not grant a mining lease over land if development consent is required for activities to be carried out under the lease unless an appropriate development consent is in force in respect of the carrying out of those activities on the land. Transitional provisions are included in Sch 6.

The [Mining Amendment \(ICAC Operations Jasper and Acacia\) Act 2014](#) commenced on assent on 31 January 2014, and amends the [Mining Act 1992](#) to cancel three specified exploration licences, and increases the penalty for the offence of failing to prepare or lodge a report in accordance with s 163C of that Act.

**Miscellaneous:**

The [Protection of the Environment Operations \(General\) Amendment \(Glebe Island\) Regulation 2013](#), published 20 December 2013, amended the [Protection of the Environment Operations \(General\) Regulation 2009](#) to exempt the operation of diesel-powered generators at the Glebe Island Expo site from compliance with specified provisions of the Act and the [Protection of the Environment Operations \(Clean Air\) Regulation 2010](#). The exemption is to apply until 1 December 2014.

The [Protection of the Environment Operations \(Clean Air\) Amendment \(Miscellaneous\) Regulation 2013](#), published 29 November 2013, amended the Protection of the [Environment Operations \(Clean Air\) Regulation 2010](#) to allow the burning of domestic waste on residential premises in the local government area of Wyong in certain circumstances, and to enable Wyong Shire Council to approve the burning of dead and dry vegetation in certain circumstances.

The [Protection of the Environment Operations \(Clean Air\) Amendment \(Prescribed Storage Tanks\) Regulation 2014](#), published 31 January 2014, amends the definition of “prescribed storage tank” in cl 68 of the [Protection of the Environment Operations \(Clean Air\) Regulation 2010](#) to postpone until 1 January 2015 the requirement that certain existing petrol service stations fit storage tanks with stage one vapour recovery equipment.

The [Liquor Amendment \(Extension of Freeze Period\) Regulation 2013](#), published 20 December 2013, extended, by 18 months, the period for restrictions on the granting of certain types of licences under the [Liquor Act 2007](#), other liquor-related authorisations and development consents in relation to premises in the Oxford Street, Darlinghurst precinct (described in Schedule 5 to the [Liquor Act 2007](#)).

The [Local Land Services Regulation 2014](#), commenced 1 January 2014, and published Schedule 9 to the [Local Land Services Act 2013](#). The regulations sets out who must pay the board rates and catchment authority contributions; defines notional carrying capacity; travelling stock reserves, public roads and stock watering places; governs elections of local board members and appoints the LEC as the Court of Disputed Returns in respect of such elections.

The [Native Vegetation Amendment \(Local Land Services\) Regulation 2013](#), published 6 December 2013, amended the [Native Vegetation Regulation 2013](#) as a consequence of the enactment of the [Local Land Services Act 2013](#) by:

- (a) replacing references to catchment management authorities (which will be abolished) with references to the statutory corporation known as Local Land Services (which will take over their functions);
- (b) replacing references to eradication orders and pest control orders under the [Rural Lands Protection Act 1998](#) (repealed 1 January 2014) with references to such orders under the [Local Land Services Act 2013](#); and
- (c) updating a reference to the *Environmental Outcomes Assessment Methodology* published by the Minister, a new edition of which will be adopted, incorporating changes made as a consequence of the abolition of catchment management authorities.

The [Strata Schemes Management Amendment \(Child Window Safety Devices\) Act 2013](#), commenced 11 December 2013. It amended the [Strata Schemes Management Act 1996](#) to require owners corporations of strata schemes, commencing 13 March 2018, to ensure that complying window safety devices to facilitate child safety are installed on strata buildings and to provide for the enforcement of that obligation.

The [Strata Schemes Management Amendment \(Child Window Safety Devices\) Regulation 2013](#), published 11 December 2013, amended the [Strata Schemes Management Regulation 2010](#) to prescribe the buildings (those containing lots used for residential purposes) and the windows within such buildings that are required to be fitted with window safety devices by the owners corporation for

the relevant strata scheme. The Regulation also sets out the specifications for the required window safety devices and requires owners who install window safety devices to notify the owners corporation within 7 days after completion of the installation.

The [Residential Tenancies Amendment \(Window Safety Devices\) Regulation 2013](#), published 13 December 2013, updated the form of the condition report in Schedule 2 to the [Residential Tenancies Regulation 2010](#) to include references to window safety devices. A condition report is required to be completed in relation to a residential tenancy agreement under the [Residential Tenancies Act 2010](#).

The [Residential \(Land Lease\) Communities Act 2013](#) was assented to on 20 November 2013 and will commence on a date or dates to be proclaimed. The Act provides for the governance and regulation of residential communities and repeals the [Residential Parks Act 1998](#).

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

The [SEPP \(Sydney Region Growth Centres\) Amendment \(Catherine Fields Precinct\) 2013](#), published 20 December 2013, updated maps of the Catherine Fields precinct.

The [SEPP \(Sydney Harbour Catchment\) Amendment \(Subdivisions in Waterways Zones\) 2013](#), published 6 December 2013, amended [Sydney Regional Environmental Plan \(Sydney Harbour Catchment\) 2005](#) relating to existing use rights.

The [SEPP \(Major Development\) Amendment \(Huntlee New Town\) 2014](#), published 31 January 2014, amended SEPP (Major Development) 2005 to insert references to additional uses.

- **On Exhibition**

The Division of Planning and Infrastructure has the following Draft Plans and Policies on exhibition:

- [State Environmental Planning Policy \(Infrastructure\) Amendment \(Sport and Recreation\) 2013](#)
- [Paper subdivisions: Exhibition of draft Environmental Planning and Assessment Amendment \(Subdivision Works\) Regulation 2013](#)
- [Draft planning circular: advice on coastal hazards](#)
- [BASIX Target Review](#)

- **Miscellaneous**

The final reports of the Independent Local Government Review Panel and Local Government Acts Taskforce are now available on the [Division of Local Government's](#) website.

The [Administrative Arrangements Order 2014](#), published 29 January 2014, and commencing 24 February 2014, abolishes the Department of Planning and Infrastructure and creates Planning and Infrastructure as an executive agency within the Department of Premier and Cabinet.

## Court Practice and Procedure

The Chief Judge has issued a [Practice Note - Class 4 Proceedings](#). The Practice Note commenced on 13 January 2014, and replaced the Practice Note – Class 4 Proceedings dated 30 April 2007.

New pages on compensation for compulsory acquisition of land are now available in the [Issues in focus](#) and [Types of cases](#) sections of the Court's website.

Schedule 5 of the [Courts and Other Legislation Amendment Act 2012](#) commenced on 1 January 2014, and amended the [Criminal Procedure Act 1986](#) relating to the payment of court fees in criminal proceedings prosecuted by certain NSW Government agencies and statutory bodies representing the Crown.

The [Criminal Procedure Amendment \(Court Fees Payable by Government Agencies\) Regulation 2013](#), published 20 December 2013, prescribes certain NSW Government agencies and statutory bodies representing the Crown that will be required to pay court fees in relation to criminal proceedings prosecuted by them. Some bodies (including Roads and Maritime Services) are prescribed only in relation to some offences that they prosecute.

## Judgments

- **United Kingdom**

### Supreme Court

***Walton v The Scottish Ministers*** [\[2012\] UKSC 44](#) (Lord Hope (Deputy President), Lords Kerr, Dyson, Reed and Carnwath)

Facts: the Scottish Ministers ("the Ministers") had promoted a regional transport policy, named the Modern Transport System ("MTS"), with the aim of resolving the issue of traffic congestion in Aberdeen. This policy outlined various transportation proposals, including the construction of a western peripheral route ("WPR"). The WPR proposal was met with much opposition, including by the organisation "Road Sense" which was chaired by Walton. After years of ongoing consultation and a public inquiry, the Ministers resolved to proceed with the WPR but decided to revise the proposal by providing for the construction of a "Fastlink" road connecting Stonehaven to the WPR. The Ministers subsequently made schemes and orders under the [Roads \(Scotland\) Act 1984](#) ("the Act"), and published environmental impact assessments under [s 20A](#) of the Act on the basis that the road network proposed fell within the scope of the Environmental Assessment Directive ("the EIA Directive"). The Ministers did not undertake any environmental impact assessments pursuant to the [Strategic Environmental Assessment Directive](#) (Directive 2001/42/EC, OJ 2001 L197/30) ("the SEA Directive") on the basis that they perceived the requirements under the SEA Directive to be inapplicable to the proposed road network.

Walton brought proceedings seeking to challenge the validity of the schemes and orders made by the Ministers. The primary contention raised by Walton was that the Fastlink element of the scheme was adopted without meeting the public consultation requirements of the SEA Directive. He sought certiorari to quash the schemes and orders made by the Ministers only insofar as they concerned the Fastlink. The Ministers maintained that there had been no breach of the consultation requirements of the SEA Directive; that, if there had been, the court should in any event decline to quash the schemes and orders; but that, if the schemes or orders are to be quashed to any extent, they must then be quashed in their entirety, as the schemes and orders were so integrated with one another that they could not operate successfully in isolation.

Issues:

- (1) whether the Ministers failed to comply with the requirements of the SEA Directive;
- (2) whether the Ministers failed to comply with common law requirements of fairness;

- (3) if the Ministers failed to comply with the requirements of the SEA Directive, whether Walton should in any event be denied a remedy; and
- (4) whether Walton was entitled to bring the application, or had the necessary standing to seek an alternative remedy.

Held: appeal dismissed:

- (1) there was no failure on the part of the Ministers to comply with the requirements of the SEA Directive as these requirements were only triggered in circumstances where a “plan or programme” was modified. In this case, the decision of the Ministers to construct the Fastlink road involved a “project” and as a result, did not require the Ministers to comply with the requirements of the SEA Directive: at [64]-[71];
- (2) there was no material before the Court which suggested, let alone established, that the Ministers were bound as a matter of fairness to hold an inquiry into Walton’s objections or that Walton had any legitimate expectation that the remit of the inquiry would encompass the economic, policy or strategic justifications for the Fastlink: at [72], [73];
- (3) **Obiter:** (per Lord Reed) with regard to remedies and the exercise of discretion, there was no requirement in the Act, or in any regulations made under it, that an SEA Directive should be carried out. The Act transferred the functions of the Secretary of State under the Act to the Ministers only insofar as they were exercisable within devolved competence. The Ministers had no power to make subordinate legislation, or to do any other act, so far as the legislation or act was incompatible with EU law. In an appropriate case, the court would have to consider the relationship between the provisions of the Act and paras 2-4 of Sch 2 to the Act. It would be necessary to consider, in particular, whether a scheme or order made by the Ministers in breach of EU law would be beyond the powers which they possessed as a roads authority, by virtue of the transfer of functions effected by the Act, and would therefore be not within the powers of the Act. If so, it would also be necessary to consider the possible interaction between the remedial provisions of the two Acts. In addition, it would be necessary to consider how the discretion conferred by para 3 of sch 2 to the Act should be exercised in that context: at [81];  
  
(per Lord Carnwath) where the court was satisfied that the applicant had been able in practice to enjoy the rights conferred by the European legislation, and where a procedural challenge would fail under domestic law because the breach caused no substantive prejudice, there was nothing in principle or authority to require the courts to adopt a different approach merely because the procedural requirement arose from a European rather than domestic source. The court would not have been disposed to accept without further argument that, in the statutory and factual context of the present case, the factors governing the exercise of the court’s discretion were materially affected by the European source of the environmental assessment regime: at [139], [140]; and
- (4) the appellant was a person aggrieved within the meaning of the legislation. The various factors which supported the appellant’s entitlement to bring the present application would also have given him standing to bring an application for judicial review if he had sought to challenge the Ministers’ decision to restrict the remit of the inquiry so that some of his objections were, as he contended, unlawfully excluded from its scope. However, such a challenge would have failed on the merits: at [83]-[88].

### England and Wales High Court

#### ***Telford and Wrekin Council v Secretary of State for Communities and Local Government and Growing Enterprises Ltd*** [\[2013\] EWHC 79 \(Admin\)](#) (Beatson LJ)

Facts: planning permission was granted by Telford and Wrekin Council (“the Council”) to Growing Enterprises Ltd for the construction of a garden centre. The planning permission issued by the Council was subject to conditions, one of which was condition 19. This condition provided, in effect, that prior to the approved garden centre being opened, details of the proposed types of products to be sold at the centre “should be submitted to and agreed in writing by the local planning authority”. Growing Enterprises also applied under [s 192](#) of the [Town and Country Planning Act 1990](#) (UK) (“the Act”) for a certificate

stating that the proposed use of the land and buildings for any purpose within Class A1 of the [Town and Country Planning \(Use Classes\) Order 1987](#) SI 1987 No 764 (as amended) (“the UCO”) was lawful. This application was refused by the Council. Growing Enterprises subsequently appealed, under [s 195](#) of the Act, against the Council’s decision not to issue the relevant certificate under s 192 of the Act. The appeal was allowed by the Secretary of State Inspector, who duly issued a certificate under s 192 of the Act.

The Council appealed to the High Court, seeking certiorari to quash the Inspector’s decision and argued, amongst other things, that the Inspector had erred in law by: adopting an irrational interpretation of condition 19; having regard to an irrelevant consideration and failing to have regard to a relevant consideration. While the Council’s appeal was ultimately dismissed, the decision of the High Court outlined a number of principles with respect to the construing of a planning permission. This summary outlines those principles, which may be generally of use in the context of environmental and planning law in New South Wales.

Relevant principles for construing a planning permission (NB: This summary incorporates the principles set out by Elias LJ in *Hulme v Secretary of State for Communities and Local Government* [\[2011\] EWCA Civ 638](#) at [13]):

- (1) as a general rule a planning permission is to be construed within the four corners of the consent itself, i.e. including the conditions in it and the express reasons for those conditions unless another document is incorporated by reference or it is necessary to resolve an ambiguity in the permission or condition: *R v Ashford DC, ex p Shepway DC* [1998] PLCR 12 at 19 (Keene J); *Carter Commercial Developments v Secretary of State* [2002] EWCA Civ. 1994 at [13] and [27] (Buxton and Arden LJJ); *Sevenoaks DC v First Secretary of State* [\[2004\] EWHC 771 \(Admin\)](#) at [24] and [38] (Sullivan J); *R (Bleaklow Industries) v. Secretary of State for Communities and Local Government* [2009] EWCA Civ. 206 at [27] (Keene LJ); *R (Midcounties Co-operative Limited) v. Wyre Forest DC* [2010] EWCA Civ. 841 at [10] (Laws LJ);
- (2) the reason for the strict approach to the use of extrinsic material is that a planning permission is a public document which runs with the land. Save where it is clear on its face that it does not purport to be complete and self-contained, it should be capable of being relied on by later landowners and members of the public reading it who may not have access to extrinsic material: *Slough Estates v Slough Borough Council* [1971] AC 958 at 962 (Lord Reid); *Carter Commercial Developments v Secretary of State* at [28] (Arden LJ); *R (Bleaklow Industries) v. Secretary of State for Communities and Local Government* [\[2009\] EWCA Civ. 206](#) at [27] (Keene LJ); *Barnett v Secretary of State* [\[2009\] EWCA Civ 476](#) at [16] - [21] (Keene LJ, approving Sullivan J at first instance); *R (Midcounties Co-operative Limited) v. Wyre Forest DC* [\[2010\] EWCA Civ. 841](#) at [10] (Laws LJ);
- (3) it follows from (2) that in construing a planning permission:
  - (a) the question is not what the parties intended but what a reasonable reader would understand was permitted by the local planning authority; and
  - (b) conditions must be clearly and expressly imposed, so that they are plain for all to read.

As well as the cases cited at (2), see *Sevenoaks DC v First Secretary of State* [2004] EWHC 771 (Admin) at [38] and [45] (Sullivan J);
- (4) conditions should be interpreted benevolently and not narrowly or strictly (see *Carter Commercial Development Ltd v Secretary of State for the Environment* [2002] EWHC 1200 (Admin) at [49], per Sullivan J) and given a common-sense meaning: see *Northampton BC v First Secretary of State* [\[2005\] EWHC 168 \(Admin\)](#) at [22] (Sullivan J);
- (5) a condition will be void for uncertainty only “if it can be given no meaning or no sensible or ascertainable meaning, and not merely because it is ambiguous or leads to absurd results”: *Fawcett Properties v Buckingham County Council* [1961] AC 636, 678 per Lord Denning. In *Hulme’s* case Elias LJ stated this was an application of the benevolent construction principle;
- (6) if there is ambiguity in a condition it has to be resolved in a common sense way, having regard to the underlying planning purpose for it as evidenced by the reasons given for its imposition: *Sevenoaks DC v First Secretary of State* [2004] EWHC 771 (Admin) per Sullivan J at [38] accepting the submission at [34];



- (7) there is no room for an implied condition in a planning permission. This principle was enunciated in *Trustees of Walton on Thames Charities v Walton and Weighbridge District Council* (1970) 21 P & C R 411 at 497 (Widgery LJ), in the following terms:

"I have never heard of an implied condition in a planning permission and I believe no such creature exists. Planning permission enures for the benefit of the land. It is not simply a matter of contract between the parties. There is no place, in my judgment, within the law relating to planning permission for an implied condition. Conditions should be express, they should be clear, they should be in the document containing the permission."

This principle also precludes implying an obligation by way of an addition to an existing condition: *Sevenoaks DC v First Secretary of State* [2004] EWHC 771 (Admin) at [45] (Sullivan J);

- (8) where planning permission containing conditions has been granted in a decision by an Inspector allowing an appeal, and a condition is ambiguous, it is possible to construe it in the context of the decision letter as a whole: *Hulme's case* at [13(a)]. Doing this does not involve impermissible "implication" from an extrinsic source, but is best described as a question of "construction": *Hulme's case* at [37]. In *Hulme's case*, Elias LJ stated (at [37]) that even "if it can be described as an implied condition it is very different in nature from that envisaged in the *Trustees of Walton case*."; and
- (9) in the context of what suffices to exclude the operation of the UCO:
- (a) a grant of planning permission for a stated use is a grant of permission only for that use, but could not, in itself, be sufficient to exclude the operation of the UCO because if it did, the operation of the UCO would be curtailed in a way which could not have been intended: *Dunoon Developments Ltd v Secretary of State for the Environment* [1992] JPL 936 at 107 (Sir Donald Nicholls V-C); and
- (b) in general, to exclude the operation of the UCO, it is necessary for the local planning authority to do so by the imposition of a condition in unequivocal terms: *Carpet Décor (Guildford) Ltd v Secretary of State for the Environment* [1981] JPL 806 at 808 (Sir Douglas Frank QC).

- **High Court of Australia**

***Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* [2013] HCA 46** (French CJ, Kiefel, Bell, Gageler and Keane JJ)

(related decisions: *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd* [2012] NSWSC 393 Bergin CJ in Eq; *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd; Expense Reduction Analysts Group Pty Limited v Armstrong Strategic Management and Marketing Pty Limited* [2012] NSWCA 430 Campbell and Macfarlan JJA, Sackville AJA)

**Facts:** in 2010 the three respondents ("the Armstrong parties") commenced proceedings against the 10 appellants ("the ERA parties") in the District Court of New South Wales. The proceedings were subsequently transferred to the Supreme Court. At all relevant times the Armstrong parties were represented by Marque Lawyers, and at the relevant time the individual appellants, and later all the ERA parties, were represented by Norton Rose Australia. On 22 July 2011 the parties were ordered to give verified general discovery. Discovery by the ERA parties involved approximately 60,000 documents. Norton Rose used an electronic database to store documents in a centralised accessible manner which included document type and description, and the person reviewing the documents coded them for relevance and privilege. Due to errors in the coding a number of privileged documents which were not intended to be listed as non-privileged were in fact listed as such. After Norton Rose served its clients' verified Lists of Documents and disks to Marque Lawyers some correspondence was exchanged between the two firms, resulting in a claim by Norton Rose that a number of documents the subject of client legal privilege had been inadvertently disclosed contrary to its clients' instructions. Marque Lawyers declined to return the documents and to give the undertaking sought by Norton Rose because of its view that any privilege attaching to the documents had been waived. The ERA parties sought injunctive and other relief. Bergin CJ in Eq found that nine of the 13 documents were disclosed inadvertently and the disks were to be returned

and replaced after removal of those nine documents. The Court of Appeal allowed an appeal on the basis that the mistakes in disclosure of documents in the discovery process would not have been obvious to a reasonable solicitor and dismissed the ERA parties' cross summons seeking leave to cross appeal with costs.

Issues:

- (1) whether the disclosure had been inadvertent and unintentional; and
- (2) whether there had been a waiver of privilege.

Held: allowing the appeal and setting aside the orders 4-10 made by the Court of Appeal, and with respect to four of the documents making a direction that the respondents deliver up all hard copies, return any computer disk containing copies, and delete all electronic copies of the four documents; dismissing the respondents' application for special leave to cross-appeal; and ordering the respondents to pay the appellants' costs of the Amended Notice of Motion, the appeal to the Court of Appeal, the applications for special leave to appeal and to cross appeal and of the appeal:

- (1) proceedings of this kind and length concerning a tangential issue should have been averted. There was no need to resort to an action in the equitable jurisdiction of the Supreme Court to obtain relief. The Court had all the powers necessary to deal with an issue relating to discovery and which required that a party be permitted to correct a mistake. Those powers existed by virtue of the Court's role in the supervision of discovery and the express powers given by [Part 6](#) of the [Civil Procedure Act 2005](#) ("the CP Act") to ensure the "just, quick and cheap resolution of the real issues in the dispute or proceedings": at [7];
- (2) a continuing intention to claim privilege was relevant to the question of whether there had been a waiver of the privilege. It was not necessary to prove a continuing intention to show that a reviewer formed an intention with respect to each document at the time it was listed. It was sufficient to prove that the ERA parties intended to maintain their claims to privilege and that the reviewers were carrying out their clients' instructions. From that point, the fact of mistake in the incorrect listing of the documents could be inferred. The finding that should have been made with respect to each of the 13 documents was that its disclosure was inadvertent and unintentional, and there had been no waiver of privilege: at [20]-[21];
- (3) although discovery is an inherently intrusive process, it is not intended that it be allowed to affect a person's entitlement to maintain the confidentiality of documents where the law allows. Where a privileged document is inadvertently disclosed, the court should ordinarily permit the correction of that mistake and order the return of the document, if the party receiving the documents refuses to do so: at [45];
- (4) the evident intention and expectation of the CP Act was that the court use the broad powers conferred in Part 6 to facilitate the overriding purpose. Parties continue to have the right to bring, pursue and defend proceedings in the court, but the conduct of those proceedings is firmly in the hands of the court. It is the duty of the parties and their lawyers to assist the court in furthering the overriding purpose: at [56]; and
- (5) the direction that the Supreme Court should promptly have made was to permit Norton Rose to amend the List of Documents together with consequential orders for the return of the disks to enable the privileged documents to be deleted. Such a direction and orders would have obviated the need to resort to the more complex questions concerning the grant of relief in the equitable jurisdiction; would have served to defuse the dispute and dissuaded the Armstrong parties from alleging waiver; and would accord with the overriding purpose and dictates of justice: at [58].

- **Federal Court of Australia**

***Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities*** [2013] FCAFC 111 (Gilmour, Foster and Barker JJ)

(related decision: *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities (No 2)* [2013] FCA 403 Besanko J)

**Facts:** on 10 October 2011, the Minister for Sustainability, Environment, Water, Population and Communities (“the Minister”) approved, subject to conditions, the expansion of the Olympic Dam copper, uranium, gold and silver mine and processing plant (including all associated infrastructure) in South Australia and the Northern Territory as a controlled action under [s 133\(1\)](#) of the [Environment Protection and Biodiversity Conservation Act 1999 \(Cth\)](#) (“the EPBC Act”). Buzzacott subsequently made applications under [s 5](#) of the [Administrative Decisions \(Judicial Review\) Act 1977 \(Cth\)](#) (“the ADJR Act”) and [s 39B](#) of the [Judiciary Act 1903 \(Cth\)](#) to quash the decision of the Minister to approve the Olympic Dam expansion project. These applications were dismissed at first instance by Besanko J. As a result, Buzzacott appealed against the decision of Besanko J to the Full Court of the Federal Court.

**Issues:**

- (1) whether the requirement in [s 134\(4\)\(a\)](#) of the EPBC Act that, in deciding whether to attach a condition to an approval, the Minister must consider “any relevant conditions that have been imposed...under a law of a State...on the taking of the action” extends to conditions under existing licences or approvals where the proposed action involves reliance on those licences or approvals;
- (2) if an affirmative answer is given to (1), whether there was a failure by the Minister to consider such conditions;
- (3) if an affirmative answer is given to (2), whether the result is invalidity of the approval; and
- (4) whether the totality of the conditions attached by the Minister to the approval of the action under s 134 of the EPBC Act rendered the approval uncertain within the meaning of s 5(2)(h) of the ADJR Act, or otherwise unauthorised by or in excess of the jurisdiction conferred by the EPBC Act.

**Held:** appeal dismissed with the appellant to pay the costs of each respondent: at [271]:

- (1) the conditions to which s 134(4)(a) of the EPBC Act refers are the conditions “imposed...on” the “action” for which approval is sought. The “action” in this case was the “alteration” of the existing Olympic Dam project, and it was this “alteration” that was the subject of referral, assessment and approval under the EPBC Act. Any conditions contained in an existing licence issued under the law of a State were not conditions that had been imposed on the taking of the “action”: at [103];
- (2) **obiter:** even if the requirement under s 134(4)(a) of the EPBC Act did extend to consideration of conditions imposed under existing licences or approvals in circumstances where the proposed action involves reliance on those licences or approvals, the proper factual inference to be drawn in the circumstances of this case was that the Minister did consider such conditions imposed under State law as if they were “relevant conditions” for the purposes of that provision: at [115];
- (3) **obiter:** even if the Minister failed to consider conditions imposed under existing licences or approvals in this case, the failure to do so was inconsequential or immaterial: at [129]; and
- (4) in circumstances where the individual conditions impugned do not disclose that the approval is uncertain or that it was beyond the power of the Minister to impose the relevant conditions (with the exception of condition 71), it was difficult to draw a conclusion from a suggested separate overall or “totality” analysis, that the conditions when read together made the approval uncertain, or that the conditions collectively were beyond the Minister’s power to impose conditions, or that the approval power remained unexercised or could possibly result in the approval of an activity not referred under the EPBC Act, or that the approval lacked finality when the conditions are collectively considered. Accordingly, this ground of challenge failed (save for condition 71, which was severed from the approval granted by the Minister): at [268].

***Northern Inland Council for the Environment Inc v Minister for the Environment*** [\[2014\] FCA 1418](#)  
(Cowdroy J)

Facts: on 11 February 2013, the Minister for the Environment (“the Minister”) approved, pursuant to [ss 130](#) and [133](#) of the [Environment Protection and Biodiversity Conservation Act 1999](#) (Cth) and subject to conditions, an application by Boggabri Coal Pty Ltd to construct and operate an extension to the Boggabri Open Cut Mine located 15km northeast of the township of Boggabri in NSW. The Northern Inland Council for the Environment Inc (“NICE”) commenced judicial review proceedings pursuant to [s 5\(1\)](#) of the [Administrative Decisions \(Judicial Review\) Act 1977](#) (Cth) and [s 39B](#) of the [Judiciary Act 1903](#) (Cth). While NICE originally challenged the Minister’s decision on five grounds of review, four of these grounds fell away either prior to or during the hearing. The only ground of review relied upon by NICE was that, in making his decision, the Minister took into account an irrelevant consideration – namely, the alleged disclosure or ‘leaking’ to the public by the NSW Government of commercially sensitive information relating to the proposed development prior to the Minister making his final decision.

Issue:

- (1) whether the Minister had had regard to an irrelevant consideration in making his decision to approve the extension of the Boggabri Open Cut Mine.

Held: dismissing the application, and reserving costs:

- (1) in order to succeed in its challenge, NICE needed to prove that the conditions were in substance affected by the Minister’s consideration of the disclosure. There was simply no suggestion in either the reasons of the Minister, the comments made on the conditions by departmental staff, or amendments to the conditions themselves that the inclusion of the new conditions were due to any leaking of commercially sensitive information by the NSW Government. The disclosure merely influenced the Minister to bring his decision to approve the project forward as he was entitled to do: at [44]-[51].

***Northern Inland Council for the Environment Inc v Minister for the Environment*** [\[2013\] FCA 1419](#)  
(Cowdroy J)

Facts: on 11 February 2013, the Minister for the Environment (“the Minister”) made a decision pursuant to [ss 130](#) and [133](#) of the [Environment Protection and Biodiversity Conservation Act 1999 \(Cth\)](#) (“the EPBC Act”) to approve an application by Aston Coal 2 Pty Ltd (“Aston Coal”) to construct and operate a new open cut mine and associated infrastructure approximately 18 km north-east of the township of Boggabri in NSW (“the Maules Creek project”). This decision was subject to an application for judicial review brought by the Northern Inland Council for the Environment Inc (“NICE”) under [s 5\(1\)](#) of the [Administrative Decisions \(Judicial Review\) Act 1977 \(Cth\)](#) and [s 39B](#) of the [Judiciary Act 1977 \(Cth\)](#). At the hearing, NICE raised five grounds of review:

- (a) the Minister took into account an irrelevant consideration, being the alleged leaking by the NSW Government of commercially sensitive information;
- (b) the Minister exercised his power to attach conditions to the approval of the Maules Creek project in such a way that some conditions were uncertain;
- (c) the Minister failed to take into account a relevant consideration, being the impact of the Maules Creek project on a species of plant, *Tylophora linearis* (“TL”);
- (d) the Minister failed to take into account a relevant consideration, being the approved conservation advice for TL as required by [s 139\(2\)](#) of the EPBC Act; and
- (e) the decision involved either an error of law, or a failure to observe procedures that were required to be observed in connection with making the decision, as the Minister failed to have regard to the approved conservation advice for TL.

Issues:

- (1) whether the Minister took into account an irrelevant consideration, being the alleged leaking by the NSW Government of commercially sensitive information;

- (2) whether the Minister exercised his power to attach conditions to the approval in such a way that some conditions were uncertain;
- (3) whether the Minister failed to take into account a relevant consideration, being the impact of the project on the TL; and
- (4) whether the Minister failed to have regard to a relevant consideration, being the approved conservation advice for TL, and thus committed an error of law or failed to observe procedures in the making of his decision.

Held: application dismissed, costs reserved:

- (1) NICE's submission that the Minister's taking into account of an irrelevant consideration – namely, the alleged disclosure by the NSW Government of commercially sensitive information – impacted upon the substance of the conditions to the approval relating to direct offsets for the project was to be rejected. The reasons for the inclusion of these conditions were, among others, to deliver an overall conservation outcome that improved or maintained the viability of the protected species impacted by the proposal and to provide the requisite level of independent verification of the condition and extent of the offsets. The alleged disclosure did not impact upon the substance of the conditions: at [26]-[31];
- (2) the offset conditions were not rendered uncertain by virtue of a failure to identify what Aston Coal should do if adequate offset areas could not be obtained. In that circumstance, the offset conditions would necessarily be breached. This could trigger a number of consequences, including the imposition of penalties as provided for by Div 2 of Part 9 of the EPBC Act. Most relevantly, however, the powers of the Minister to vary, add to or revoke the conditions, or suspend or revoke the entire approval of the project would be enlivened: at [32]-[42];
- (3) condition 32 of the project approval did not constitute mere advertence to the impact of the project on the TL species. This condition was inserted into the final decision due to the alleged discovery of TL. Moreover, the fact that this condition referred to additional matters of “national environmental significance” rather than the TL specifically and that the condition was framed *in futuro*, reflected the uncertainty with which the department treated the alleged discovery of TL. First, the departmental advice within the final decision brief provided to the Minister categorised the alleged discovery of TL as a “claim” only. Secondly, the reference to such a ‘claim’ was more widely referred to by departmental staff in their advice to the Minister as an uncertainty that was “raised in the final stages of the assessment and approval process”. Accordingly, the Minister did not fail to take into account a relevant consideration, namely the impact of the project on the TL species: at [43]-[65]; and
- (4) to succeed on either of grounds (d) and (e), NICE was required to show that s 139(2) of the EPBC Act was dependent upon a jurisdictional fact, namely satisfaction of the criterion that the project will have, or is likely to have, a significant impact on the TL species. If NICE could demonstrate that s 139(2) was dependent on such a jurisdictional fact, the Court needed to be satisfied that the project will have, or is likely to have, a significant impact on the TL species. The legislative schema provided for by the EPBC Act suggested that s 139(2) was not dependent on satisfaction of a jurisdictional fact. Accordingly, this was sufficient for the disposal of grounds (d) and (e). However, the Court noted (in obiter) that even if it was accepted that s 139(2) gave rise to a jurisdictional fact, it was not satisfied that the project was at least likely to have a significant impact on the TL species: at [66]-[90].

- **NSW Court of Criminal Appeal**

**Harris v Harrison** [2013] NSWCCA 314 (Beazley P, McCallum and Schmidt JJ)

(related decision *Harrison v Harris (No 3)* [2013] NSWLEC 140 Pepper J)

**Facts**: the applicant pleaded guilty to an offence under s 91K(1) of the *Water Management Act 2000*, being that he intentionally or recklessly interfered with disconnected metering equipment in connection with water supply work. The sentencing judge in the Land and Environment Court (“the LEC”) imposed a fine of \$28,000 plus costs, and ordered that he publish, in two rural newspapers, details of his conviction and fine (“the publication order”). The applicant initially sought a stay of the publication order pending an appeal

against sentence, to the sentencing judge, which was refused. The applicant then brought a fresh application for a stay of the order in the Court of Criminal Appeal, pending that Court's determination of his appeal.

Issues:

- (1) what was the appropriate test for the grant of a stay of an order in the LEC's summary criminal jurisdiction (other than a sentence of imprisonment); and
- (2) whether, in the circumstances, a stay should be granted of the publication order.

Held: the Court allowed the application for a stay with costs:

- (1) the correct test for granting a stay was that that the applicant must demonstrate that there is a proper basis for a stay, ie an arguable case on appeal, that is fair to all parties (*Alexander v Cambridge Credit* at 695): at [24]-[26] and [33];
- (2) relevant discretionary considerations to be taken into account in granting a stay include:
  - (a) whether the execution of the order would render the appeal of the conviction nugatory; and
  - (b) whether the applicant would suffer prejudice or damage if the stay is not granted: at [25]; and
- (3) a stay should be granted in the present circumstances because the respective arguments of the parties on their various grounds of appeal were sufficient to give rise to an arguable case on appeal: at [45]; and
- (4) in relation to discretionary considerations, if the applicant was successful on appeal, it is possible that the publication order would not be made, or its contents different, so that unless a stay of that order is granted, a significant aspect of the appeal, which challenges the making of a publication order, would have no substantive impact if the publication had already occurred: at [58].

- **NSW Court of Appeal**

***Toner Design Pty Ltd v Newcastle City Council*** [\[2013\] NSWCA 410](#) (Basten JA; Gleeson JA and Preston CJ of LEC)

(related decision: *Toner Design Pty Ltd v Newcastle City Council* [\[2012\] NSWLEC 248](#) Sheahan J)

Facts: Toner Design Pty Ltd ("Toner Design") appealed to the Land and Environment Court ("the Court") against the refusal by Newcastle City Council ("the Council") of a development application for a staged seniors living development in Newcastle. As a result of the former uses of the land as a scrap metal/recycling operation with associated petroleum storage and usage, there were contaminated soils present on the land. In order to develop the land for the purpose of the proposed seniors living development, Toner Design sought to remediate various parts of the land and undertake contaminated soil treatment works. In relation to the appeal brought before the Court, the Council sought and the Court ordered that a separate question be tried of whether or not the development application was in respect of "designated development". The primary judge determined that the development application was in respect of contaminated soil treatment works (see cl 15 of [Sch 3](#) of the [Environmental Planning and Assessment Regulation 2000](#) ("the EPA Regulation") which was nominated in Sch 3 as a category of "designated development". The primary judge further determined that the exception to classification of Toner Design's development application as designated development provided for in cl 37A of Sch 3 of the EPA Regulation was not triggered so as to exempt Toner Design's development application from being classified as designated development. The exception provided for in cl 37A was in the following terms:

- (1) Development of a kind specified in Part 1 [of Sch 3 of the EPA Regulation] is not designated development if:
  - (a) it is ancillary to other development, and
  - (b) it is not proposed to be carried out independently of that other development.

- (2) Subclause (1) does not apply to development of a kind specified in clause 29 (1)(a) [of Sch 3 of the EPA Regulation].

As the primary judge's determination was interlocutory in nature, Toner Design required the Court of Appeal to grant it leave to appeal against that determination under [s 57\(4\)\(d\)](#) of the [Land and Environment Court Act 1979](#). This leave was granted by Basten and Meagher JJA, but the scope of the appeal was limited to the construction and operation of cl 37A. Toner Design submitted that the primary judge erred on a question of law in two respects: (a) the primary judge did not address the questions posed by cl 37A(1); and (b) the primary judge erred in his construction of cl 37A(1). The Council submitted that the primary judge did not err in the two respects contended for by Toner Design.

Issues:

- (1) whether the primary judge erred on a question of law by not addressing the questions posed by cl 37A(1); and
- (2) whether the primary judge erred on a question of law by adopting an erroneous construction of cl 37A(1).

Held: appeal dismissed with the appellant to pay the respondent's costs of the appeal. Matter remitted to the Land and Environment Court in order for it to deal with the costs of the proceedings before it (Preston CJ of LEC; Gleeson JA agreeing. Basten JA agreed with these orders, but gave separate reasons):

- (1) (per Preston CJ of LEC; Gleeson JA agreeing): Toner Design did not establish that the primary judge erred on a question of law by not addressing the questions posed by cl 37A(1). First, the primary judge engaged with the actual terms of the provision, noting that the real contest in the case was whether cl 37A provided the answer to the Council's case that cl 15 was engaged by the development application. The primary judge also referred to the legislative developments surrounding the insertion of cl 37A into Sch 3 of the EPA Regulation, referring to the similarities between the use of the terms "ancillary" and "independent" development/use in cl 37A and the use of those terms in existing case law. In these circumstances, the inference should not be drawn that the primary judge failed to address the questions posed by cl 37A(1)(a) and (b). Secondly, the primary judge's findings in [53] and [57] were not only consistent with the primary judge having applied some test other than those posed by cl 37A(1), as contended for by Toner Design: at [65]-[74];
- (2) (per Preston CJ of LEC; Gleeson JA agreeing): Toner Design did not establish that the primary judge erred in his construction of cl 37A(1). First, the primary judge in [56] was not stating that he was applying the principles in *Baulkham Hills Shire Council v O'Donnell* (1990) 69 LGRA 404 ("*O'Donnell*") in substitution for the tests in cl 37A(1). On the contrary, the primary judge observed that cl 37A "reinstated and reinforced" the appropriateness of the three aspects of the principles laid down in *O'Donnell* which he specified in [56]. Secondly, the primary judge only stated that cl 37A reinstates and reinforces the three particular aspects of the principles in *O'Donnell* that he specified in [56] and no other aspects. Thirdly, the primary judge did not err either in construing the tests in cl 37A(1) as being objective in character or in applying these tests to the facts of the case: at [75]-[85]; and
- (3) (per Basten JA): A conclusion reached by a judge of the Land and Environment Court will not be open to appellate review unless it can be shown that in some way the judge misconstrued the legislative test or otherwise made a decision which was not open on the facts. As the reasons for judgment in this case did not clearly disclose the approach adopted, the former category (error in interpreting legislation) could only be capable of inference from a judgment falling into the latter category (the conclusion not being open in all the circumstances). As a matter of fact, it was open to the primary judge to hold that the contaminated soil treatment works had a purpose which was not "ancillary to" the residential development and, as a consequence, the appeal was to be dismissed: at [7], [24] and [25].

***Kudrynski v Wollongong City Council*** [\[2013\] NSWCA 461](#) (Macfarlan, Barrett and Gleeson JJA)

(related decision: *Wollongong City Council v Kudrynski* [\[2013\] NSWLEC 4](#) Sheahan J)

Facts: the council brought proceedings in the Land and Environment Court seeking orders to enforce notices and orders issued under [s 121B](#) of the [Environmental Planning and Assessment Act 1979](#) ("the

EPA Act”) requiring the Kudrynskis to demolish or remove allegedly unauthorised structures on their land, and [s 124](#) of the [Local Government Act 1993](#) requiring the Kudrynskis to remove and dispose of rubbish and refuse being stored on the land. The primary judge found in favour of the council and made the orders it sought. The Kudrynskis appealed under [s 58](#) of the [Land and Environment Court Act 1979](#).

Issues:

- (1) whether the primary judge had erred in finding that the structures the subject of the EPA Act orders were unauthorised;
- (2) whether the Kudrynskis had been taken by surprise in relation to that part of the order requiring demolition of an attached loft structure;
- (3) whether evidence, principally photographs, obtained pursuant to a search warrant issued under [s 118K](#) of the EPA Act should have been admitted; and
- (4) whether the primary judge had erred in finding that the property was unsafe or harbouring vermin.

Held: dismissing the appeal with costs:

- (1) the primary judge had not erred in finding that the structures were unauthorised: at [11], [28], [33], [35], [36], [37];
- (2) the council's summons sought an order requiring demolition of the loft structure in similar terms to the order issued on 7 April 2011, and the council officer who had given that order was cross examined about the structure; in those circumstances the Kudrynskis' suggestion that they were taken by surprise by the request for an order relating to the loft should be rejected: at [14];
- (3) the Kudrynskis had not identified any unfairness suffered which may have affected the integrity of the proceedings in the LEC even if they had not received the EPA Act order issued on 7 April 2011 until 9 May 2011: at [16];
- (4) even if there had been deficiencies in the search warrant, and even if the Kudrynskis had objected to the admission of the evidence obtained, it was not likely that the evidence would have been rejected, at least not without the Court allowing the council the opportunity to obtain evidence in substitution for it. The evidence was of significant probative value, the Kudrynskis did not dispute that the photographs taken during the search accurately depicted the state of the premises both at that time and over a lengthy period, and the Kudrynskis had not suggested that evidence to the same effect could not have been obtained on the issue of a further warrant: at [21]-[22];
- (5) no finding adverse to the credit of the council officer was made by the primary judge and the Kudrynskis on appeal were not able to identify any good reason for rejecting his evidence: at [25]; and
- (6) the Kudrynskis did not identify any arguable basis for concluding that the primary judge had erred in finding that there were serious concerns about fire risk, risks to human health and safety, and risk of invasion by and breeding of pests and vermin: at [38].

***Marroun v Roads and Maritime Services*** [\[2013\] NSWCA 358](#) (Basten and Gleeson JJA, Tobias AJA)

(related decision: *Marroun v Roads and Maritime Services* [\[2012\] NSWLEC 199](#) Sheahan J)

Facts: on 10 September 2010 the Roads and Traffic Authority of NSW (“RTA”), now known as Roads and Maritime Services, compulsorily acquired Lot 100 DP 1028926 at 304-308 Hume Highway Liverpool (“the acquired land”), owned by Michael Marroun and Kaokob Marroun. At the date of acquisition, the acquired land had a development consent granted on 15 May 2008 for the erection of a six storey commercial office building (“the Consent”). The appellants had engaged a firm of real estate agents to sell the acquired land with the benefit of the Consent on their behalf. In August 2009 the agent was approached by a Mr Kordek who purportedly offered to purchase the acquired land for the sum of \$4.2 million (“the Offer”). The appellants were happy to accept that offer, however no contract was entered into before the acquired land was resumed. The appellants appealed the statutory offer of compensation of \$1,620,765 representing market value of \$1,525,000 and disturbance in the sum of \$95,765. On 20 August 2012 the primary judge assessed \$1,270,000 as the market value of the acquired land pursuant to [s 55\(a\)](#) of the [Land Acquisition](#)



[\(Just Terms Compensation\) Act 1991](#) (“the JT Act”) and \$104,792.57 by way of disturbance pursuant to s 55(d) of the JT Act. The appellants appealed pursuant to s 57(1) of the [Land and Environment Court Act 1979](#) challenging the assessment of the market value of the acquired land.

Issues:

- (1) whether the primary judge had erred in failing to give weight to the Offer in determining the market value of the acquired land, which he had otherwise assessed on the basis of comparable sales; and
- (2) whether the primary judge had erred in not accepting the evidence of the RTA’s valuer so as to allow a 10 percent premium on the market value of the acquired land to reflect the added value thereto of the Consent.

Held: dismissing the appeal with costs:

- (1) the JT Act did not require the primary judge to give weight or any particular weight to the Offer and therefore no error of law in failing to give it weight had been demonstrated: at [54];
- (2) not only was the primary judge entitled to give no weight to the Offer but he also provided adequate reasons for coming to that determination: at [59]; and
- (3) once it was accepted that there was no analysis of comparable sales evidence to support the existence of a premium to be applied to the market value of the acquired land as a consequence of the existence of the Consent it followed, as a matter of fact, that the primary judge was entitled to conclude that no convincing argument had been advanced to support such a premium. The primary judge was not required to adopt that part of the RTA’s valuer’s evidence that the maximum value benefit associated with the Consent was 10 percent. It was clearly open to the primary judge to conclude that he was not satisfied that the Consent added to the market value of the acquired land. His findings did not disclose an error of law nor constitute conclusions without adequate reasons: at [72]-[74].

**Valuer-General of New South Wales v Pyntoe Pty Ltd** [\[2013\] NSWCA 346](#) (Macfarlan and Gleeson JJA, Tobias AJA)

(related decisions: *Pyntoe Pty Ltd v Valuer-General of NSW (No 2)* [\[2012\] NSWLEC 231](#) Craig J; *Pyntoe Pty Ltd v Valuer General of NSW* [\[2012\] NSWLEC 1201](#) Cowell AC)

Facts: the respondents objected to the valuation by the Valuer General (“VG”) of \$868,000 of their land as at the base date of 1 July 2010, and following disallowance of the objection, appealed to the Land and Environment Court under s 37 of the [Valuation of Land Act 1916](#). Acting Commissioner Cowell upheld their appeal and determined the land value at the relevant date to be \$748,250.

The respondents had previously appealed the VG’s valuation of the same land. The first appeal related to the base date of 1 July 2006, as at which date the VG placed a value of \$740,000; on appeal, the value was determined to be \$731,500. Subsequently, the VG’s valuation of the land of \$777,000 as at 1 July 2009 was reduced on appeal to \$760,000. Nearly five weeks before the hearing before Cowell AC relating to the valuation as at 1 July 2010 the respondents made a written offer to settle the proceedings on the basis that a value of \$755,000 was ascribed to the property; that amount exceeded the value of \$748,250 that was subsequently determined at the hearing. Some weeks later the *Calderbank* offer was reissued as a purported Offer of Compromise under r 20.26 of the [Uniform Civil Procedure Rules 2005](#). Neither the *Calderbank* offer nor the purported Offer of Compromise was accepted by the VG.

Craig J heard the respondents’ application for costs and ordered that the VG pay the respondents’ costs including their costs of their Notice of Motion seeking the costs order. The primary judge concluded that the combined effect of the decisions of the Court for the 2006 and 2009 base dates, success in the present appeal and the offer of settlement were circumstances rendering it fair and reasonable as required by r 3.7(2) of the [Land and Environment Court Rules 2007](#) that the VG pay the respondents’ costs of the proceedings. The VG obtained leave to appeal under s 57 of the [Land and Environment Court Act 1979](#).

Issues:

- (1) whether the primary judge had erred in taking into account the earlier appeals;

- (2) whether the primary judge had erred in his consideration of the *Calderbank* offer by failing to distinguish the position of the VG from that of other litigants; and
- (3) whether the primary judge had erred in requiring the VG to pay not simply the costs incurred after the date of the *Calderbank* offer but the costs for the whole of the 2010 proceedings.

Held: dismissing the appeal with costs:

- (1) the prior appeals were recent and related to the same parcel of land, and there was no significant change in planning controls in the period covered by the appeals, nor did the sales evidence indicate any significant change in the market in that period. It was open to the primary judge to have regard to the earlier determinations in assessing the fairness and reasonableness of ordering the VG to pay the costs of the present appeal: at [22];
- (2) that a litigant is subject to duties to others and has no personal stake in the outcome of the litigation may, depending on the circumstances, be relevant to an assessment of the factual question of whether the litigant acted reasonably or unreasonably in rejecting a *Calderbank* offer. It was not suggested that the VG's role bore in some particular way on whether he acted unreasonably in rejecting the subject *Calderbank* offer, and there was no need for the primary judge to specifically advert to that role, of which he was undoubtedly aware: at [30];
- (3) the VG had not demonstrated any error of law on the part of the primary judge in treating the *Calderbank* offer as relevant to the exercise of his discretion: at [33]; and
- (4) in ordering the VG to pay the respondents' costs for the whole of the 2010 proceedings, the primary judge had made it clear that he took into account "the combined effect" of the prior valuation determinations, success in the present valuation appeal and the *Calderbank* offer. It was permissible for the primary judge to take into account the prior valuation appeals and the rejection of the *Calderbank* offer. Relevant factors were taken into account and a decision that could not be regarded as irrational was reached: at [35].

***Gales Holdings Pty Ltd v Tweed Shire Council*** [2013] NSWCA 382 (Emmett and Leeming JJA, Sackville AJA)

(related decision: *Gales Holdings Pty Limited v Tweed Shire Council* [2011] NSWSC 1128 Bergin CJ in Eq)

Facts: Gales Holdings Pty Ltd ("Gales") owned 27ha of land, which it planned to develop into a combination of residential and retail uses. The Tweed Shire Council ("the council") had over many years constructed various drainage works including a culvert, constructed roads, and permitted various developments that caused untreated stormwater runoff to discharge directly and indirectly onto Gales' land. The runoff pooled and remained on the land for long periods of time, causing changes to the habitat and ecology of part of the land. In 1999, the Wallum froglet, a "vulnerable species" under the [Threatened Species Conservation Act 1995](#) ("the TSC Act"), was detected on the land. The number of Wallum froglets increased between 1999 and 2003. On 4 May 2004, Gales' solicitors wrote to the council alleging that the council's conduct amounted to nuisance and asking it to provide adequate drainage to stop the ponding. In 2005, Gales lodged a development application to fill the land and construct a shopping centre. In 2008, the Land and Environment Court granted a development consent subject to certain conditions, including the production of a Wallum froglet management plan and the setting aside of part of the land as a perpetual habitat for the Wallum froglet.

Gales commenced proceedings in the Supreme Court seeking a mandatory injunction requiring the council to implement a drainage scheme to abate the nuisance, and claiming damages for the cost of maintaining and monitoring the Wallum froglet population and compensation for the loss of the use of that part of the land for development. At first instance, Bergin CJ in Eq found that there was an actionable nuisance from May 2004 onwards; the claim for a mandatory injunction was dismissed, and damages awarded in the sum of \$600,000 plus 30% of the costs of treating the stormwater. Gales appealed from that part of the orders that limited the finding of nuisance to the period after 4 May 2004 and from the refusal of the primary judge to award damages for the loss allegedly sustained by reason of the ecological changes to the land brought about by stormwater inundation. The council cross-appealed from that part of the primary judge's orders

that involved the declaration of nuisance, the rejection of the availability of statutory defences under the [Civil Liability Act 2002](#) (“the CL Act”) and the [Local Government Act 1993](#) (“the LG Act”) raised to any nuisance found to exist and the awarding of damages.

Issues:

- (1) whether the primary judge had erred in her conclusions on toleration by Gales of any nuisance before 2003 or 2004;
- (2) whether the establishment of the Wallum froglet colony was reasonably foreseeable;
- (3) whether the council was guilty of nuisance;
- (4) whether the council was entitled to rely on statutory defences; and
- (5) whether the primary judge had erred in the relief ordered.

Held: allowing the appeal and the cross-appeal in part:

- (1) the council was guilty of nuisance in directing the stormwater runoff onto the land. That was an unreasonable interference with Gales’ use and enjoyment of the land, whether or not Gales intended to develop it in a way that might have obviated the nuisance by a drainage system installed as part of the development: at [165]. The stormwater runoff was channelled onto the land in greater quantities and volumes than the natural flow having regard to the terrain of the land and surrounding areas. That nuisance began before 19 October 1999 being the date six years before the commencement of the proceedings and continued after that time: at [174] (Emmett JA); [276] (Leeming JA); [284] (Sackville AJA);
  - (2) the nuisance was constituted in the actions of the council in directing the flow of stormwater runoff onto the land, and not in its failure to insist on satisfaction of conditions of other development consents or in its construction of culvert and other works. The statutory defences had no application to the actions of the council in directing the flow of stormwater runoff onto the land: at [179];
  - (3) there was no error in the primary judge’s finding that the council’s conduct had not been in good faith, so the defence in [s 733](#) of the LG Act was not available: at [189];
  - (4) the council’s actions in relation to design of the drainage system, the incapacity of a pipe it installed and the inadequacy of the culvert did not involve a failure to carry out roadwork and the defence in [s 45](#) of the CL Act was not available: at [194];
  - (5) Gales sued in nuisance, and not for breach of statutory duty, in relation to the continuing operation of the council’s stormwater drainage network, and [s 43A](#) of the CL Act had no application: at [197];
  - (6) the acts of nuisance did not fall within the “give and take” principle. While a neighbour may accept the occurrence of certain minor disturbances as a fact of life, the inundation of land as a result of an inadequate drainage system was an entirely different matter: at [201];
  - (7) the primary judge erred in treating Gales’ toleration as determinative of the issue of unreasonable interference. While toleration might properly be taken into account in determining whether an interference was unreasonable, it was neither a necessary nor a sufficient condition for a finding of unreasonable interference: at [203];
  - (8) on foreseeability:
    - (a) there was no error in the primary judge’s conclusion that the council was only liable for losses that were a foreseeable consequence of any nuisance and that the establishment of a viable population of Wallum froglets was not reasonably foreseeable in the requisite sense: at [237] (Emmett JA);
    - (b) questions of coherence did not demand a test other than reasonable foreseeability for that subset of nuisances which are intentional as opposed to negligent. Consistently with the assimilation of the tests in negligence and nuisance it would suffice for the plaintiff to establish that harm of the kind suffered was reasonably foreseeable. The kind of loss of which Gales complained was that which was occasioned by the operation of the TSC Act upon the planning regime, which had led to the need to investigate and preserve habitat for the froglet. It was not
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necessary for Gales to establish that it was reasonably foreseeable that council's nuisance would give rise to the creation of a habitat of a particular vulnerable species, but it was necessary to establish the reasonably foreseeable possibility that some vulnerable species might establish itself and so engage the provisions of the TSC Act: at [279]-[281] (Leeming JA), [284] (Sackville AJA);

- (9) in circumstances where the primary judge refused a mandatory injunction in relation to completion of a drainage scheme that would increase substantially the drainage of water and reduce the cost of developing the land, but recognised that the council may proceed with it, it was erroneous to order damages in the sum of \$600,000 for an alternative drainage scheme. It was for Gales to demonstrate that it actually incurred expense in endeavouring to mitigate the nuisance by preparing plans for the construction of the alternative drainage scheme. The appropriate course was to set aside the order for damages in the sum of \$600,000: at [266]; and
- (10) Gales was entitled to succeed in its action for nuisance from the date that is six years prior to commencement of the proceedings, and to appropriate relief in relation to that nuisance. The appropriate relief would include injunctive relief. Gales' claim for damages for diminution of the value of the land must fail as must its claim for the cost of water treatment measures because of the habitat. The orders requiring the council to pay \$600,000 and to contribute to the cost of treating stormwater should be set aside, however the head of damages relating to the 2004 drainage works should stand: at [271]-[273], [276], [284].

***Mine Subsidence Board v Jemena Ltd and Jemena Gasworks (NSW) Ltd*** [\[2013\] NSWCA 465](#) (Beazley P, Macfarlan and Meagher JJA)

(related decision: *Jemena Ltd v Mine Subsidence Board* [\[2012\] NSWSC 1509](#) Rein J)

Facts: the respondents ("Jemena") are the owners of the natural gas pipeline running from Wilton to Horsley Park which forms part of the Moomba to Sydney gas pipeline. The pipeline is within the Appin Mine Subsidence District. The Appin and West Cliff collieries are located in that district and the extraction of coal from those mines has resulted in subsidence in the vicinity of the pipeline. The pipeline was constructed in 1974, and is an "improvement" as defined in [s 4](#) of the [Mine Subsidence Compensation Act 1961](#) ("the Act"). Under [s 15](#) of the Act the approval of the Mine Subsidence Board ("the Board") was required for the erection or alteration of improvements in an area proclaimed to be a mine subsidence district. In March 2003 the Board informed Jemena that it could not identify any documented approval for the erection of the pipeline. In April 2003 Jemena applied to the Board for a certificate under s 15B(3A) with respect to the pipeline. Section 15B(3A) enables the Board to issue a certificate of compliance if satisfied that an improvement would have met the requirements of subsection (3) had the Board's approval been obtained, and that it is appropriate having regard to the circumstances of the case to do so. A further application was made in March 2005; in July 2005 the Board advised of its refusal to issue a certificate, on the basis of its belief that the issue of the certificate would mean that the entertainment and payment of a compensation claim from Jemena would not be precluded by the operation of s 15(5)(b) of the Act. Section 15(5)(b) provides that where any improvement has been erected or altered without approval, "no claim shall be entertained or payment made under this Act in respect of damage caused by subsidence to any such improvement or to any improvement upon land within any such subdivision, unless a certificate is issued under section 15B (3A) in respect of the improvement or land". Between October 2003 and October 2009 Jemena undertook preventative and mitigatory works to avoid anticipated subsidence caused damage to the pipeline, and it made claims to the Board for compensation in respect of those works in September 2004, March 2006, April 2007 and April 2010, totalling \$14,000,266. Jemena brought proceedings challenging the Board's decision that s 15(5)(b) prevented the entertainment and payment of claims under [s 12A\(1\)\(b\)](#), which enables claims to be made for payment for proper and necessary expense incurred or proposed by or on behalf of the owner of improvements in preventing or mitigating damage to those improvements that, in the opinion of the Board, the owner could reasonably have anticipated would otherwise have arisen, or could reasonably anticipate would otherwise arise, from a subsidence that has taken place, other than a subsidence due to operations carried on by the owner. Jemena also challenged the decision not to grant a certificate under s [15B\(3A\)](#).

At first instance Rein J held that s 15(5)(b) did not prevent the entertainment and payment of Jemena's claims, and that the Board had made legal errors in its decision to refuse to issue a certificate under s 15B(3A). The Board appealed from the first of those decisions.

Issue:

- (1) whether a claim for payment under s 12A(1)(b) is one "in respect of damage caused by subsidence to any such improvement" and precluded by s 15(5)(b).

Held: dismissing the appeal with costs, finding that the primary judge was correct to conclude that s 15(5)(b) did not preclude the making of claims under s 12A(1)(b) for expense incurred in preventing or mitigating damage to improvements erected or altered in contravention of s 15 and which were not the subject of a certificate under s 15B(3A):

- (1) the construction contended for by Jemena and found by the primary judge was to be preferred. It gave effect to the natural meaning of the language used and was harmonious with other provisions of the Act: at [39];
- (2) the expression "damage caused by subsidence to any such improvement" described a particular kind of damage which was identified by its cause. It did not itself say anything as to whether that damage had occurred. A claim or payment would answer the description of being "in respect of" damage of that kind if the subject matter of the claim and payment was such damage and its detrimental consequences. For that reason, claims under 12(1), relating to damage that has already occurred, were within that description and subject to the prohibition in s 15(5)(b): at [40];
- (3) a claim brought or payment made under s 12A(1)(b) related to expense, incurred or proposed, for the purpose of preventing or mitigating damage caused by subsidence. In such a claim the significance of that damage was as something which was or was anticipated as likely to have arisen in the absence of preventative or mitigatory works. It was not however the subject matter of the claim or the justification for it, nor was the claim to be assessed by reference to the nature or consequences of such damage or payment made in recompense for them: at [41];
- (4) the Act drew a distinction between two species of claim, one relating to damage that had already occurred and the other to expense which had been incurred or was proposed. That distinction was one of substance: at [42]; and
- (5) while there remained a tension between the policy of s 15 and the construction of s 15(5)(b) as not extending to claims under s 12A(1)(b), the outcome was not such as to defeat the manifest purpose or require that the text not be given its natural meaning: at [45].

- **Land and Environment Court of NSW**

### Judicial Review

***Wiedeman v Randwick City Council*** [\[2013\] NSWLEC 159](#) (Craig J)

Facts: a neighbourhood park under Council control and management in Coogee ("the Park") was used for junior sports. That use was authorised by a development consent ("the Consent") and temporary licence under [s 108](#) of the [Crown Lands Act](#) 1989. The Consent authorised junior football training in the late afternoon and early evening on two afternoons each week during the football season. A proposal to modify the Consent and the related assessment process for the application was foreshadowed by a Mayoral Minute and a letter to residents from the General Manager. An application to modify the Consent was subsequently made pursuant to [s 96](#) of the [Environmental Planning and Assessment Act 1979](#) ("the EPA Act"), to increase the number of children able to use the park for training, line mark a section of the park, and erect removable goal posts. The Mayoral Minute and General Manager's letter stated that the s 96 application would be assessed by an independent external consultant, publicly exhibited and reported to Council for consideration and determination. The application was assessed by an external consultant, whose draft assessment report was sent to the Council's solicitors for review. The solicitors amended the consultant's draft report. The draft, as amended was provided to the consultants before being provided to

councillors for consideration. The council determined to modify the 2007 Consent in accordance with the recommendations in the assessment report. The applicant challenged the validity of the decision to modify the Consent.

Issues:

- (1) whether the decision to consent to the modification application was:
  - (a) infected by error due to apprehended bias arising from a conflict of interest, being a financial interest in retaining use of the Park when considering the cost of providing facilities at another park; or
  - (b) a denial of procedural fairness in that, having understood the modification application was to be assessed in the manner represented by the Mayoral Minute and the General Manager, the applicant was not notified of the changed process with the consequence that she was denied the opportunity to make further submissions to council about the application.

Held: summons dismissed:

- (1) it was not established that the council's determination on 12 April 2011 to modify the Consent was made in circumstances where the council had a conflict of interest: at [114];
- (2) there was no basis established upon which the fair-minded lay observer might reasonably apprehend that the council might not have brought a mind to the exercise of power appropriate to a democratically elected body: at [114]. A consideration of the estimated costs identified in the Works Report would not reasonably be seen as evidencing a conflict of interest when arriving at the decision that the Planning Committee was required to make: at [62]; and
- (3) the assessment report provided by the consultants was prepared following public exhibition of the modification application and included considerations of submissions received as a result of the notification. Amendments made by the solicitors included either correction of matters of legal consequence or stylistic matters of expression, not effecting any change to matters of planning substance. It fulfilled representations made by the General Manager and the Mayor. Consequently, there was no denial of procedural fairness to Ms Wiedeman or others: at [115].

***Manning v Bathurst Regional Council (No 2)*** [\[2013\] NSWLEC 186](#) (Pepper J)

Facts: these proceedings involved a challenge to two development consents granted under the [Environmental Planning and Assessment Act 1979](#) ("the EPA Act") by the first respondent, Bathurst Regional Council ("the council"), for the construction of a swimming pool, retaining wall and pool safety wall located at premises owned by Mr Lynch, the second respondent, and his wife. The Lynch premises were next door to those of the applicant, Mrs Bhakti Manning. Clause 2.3 of the Bathurst Regional (Interim) Development Control Plan 2011 ("the DCP") set out notification procedures. A first development application ("DA") was lodged in November 2011 for an in-ground pool, safety fence and retaining wall. The council assessed it, concluded that the development would not have "an adverse impact" pursuant to the criteria listed in cl 2.3.1 of the DCP, and approved the development without any notification. Works commenced and Mrs Manning expressed her concern at the size and nature of the development to the council. Nevertheless, on 31 January 2012 a second DA was lodged by Mr Lynch for a pool fence, pool filter cover and privacy screen and again the council decided that the development would not have a "detrimental effect" pursuant to cl 2.3.1 of the DCP and that the DA need not be notified. Mrs Manning deposed that she would have raised concerns about privacy, amenity and overshadowing if notified of the two DAs.

Issues:

- (1) whether the council had breached [s 79A\(2\)](#) of the EPA Act and cl 2.3 of the DCP by failing to notify Mrs Manning of the first and second DAs;
- (2) whether the council had applied an incorrect test in determining not to notify Mrs Manning;
- (3) whether Mrs Manning was denied procedural fairness by the failure of the council to notify her;

- (4) whether the council had failed to consider a mandatory relevant consideration in granting the consents, namely, whether or not it should notify Mrs Manning;
- (5) whether the decision not to notify Mrs Manning of the two DAs was manifestly unreasonable;
- (6) whether the consents were void for uncertainty; and
- (7) if any of the review grounds were successful, what was the appropriate remedy.

Held: both consents declared invalid, second consent set aside, second respondent restrained from acting further on the consents, second respondent ordered to demolish the development pursuant to the second consent within 60 days, and first and second respondents to pay the applicant's costs:

- (1) s 79A(2) of the EPA Act obliged the council to act in accordance with a DCP that provided for the notification of a DA. Notification of an adjoining property owner was not mandatory under cl 2.3 of the DCP. To determine if a DA would be notified, the council had to consider the criteria in cl 2.3.1 and assess them against the DA. The classification as "notified development" was discretionary insofar as it depended upon the council's evaluation of those criteria. If assessed as "notified development", the council had then to determine who, if anyone, should be notified pursuant to cl 2.3.2. Evaluating cl 2.3.1 only through a "detrimental" or "adverse" effect test amounted to an impermissible gloss on the clause. A material change to the privacy, overshadowing or amenity of another property owner did not preclude notification merely because the effect was not considered adverse: at [54]–[75];
- (2) where a development may adversely impact the views, privacy and visual amenity, or overshadow, an adjoining property owner, it is difficult to conceive of a reasonable determination that there should be no notification under cl 2.3 of the DCP. This was especially so in this case because of the uncertainty in the plans for the first DA, which meant that its impacts could not be properly assessed and because the council was unequivocally on notice of Mrs Manning's concerns by the time of the second DA. The failure to notify Mrs Manning in respect of both DAs was so unreasonable that no reasonable council could have so acted: at [1]–[8], [57] and [76]–[81];
- (3) it was unnecessary to determine the remaining grounds of review. However, the Court considered the question of uncertainty, and concluded that the first consent was uncertain because there was inadequate information on the "not to scale" hand drawn plans provided regarding the location and finished height of the pool; the height of the retaining wall; the relationship between the pool and the retaining wall; the materials to be used in construction; the location of the pool filter, pump and pool equipment; and the height of the safety fence: at [53] and [82]–[86]; and
- (4) the failure to notify Mrs Manning was in breach of cl 2.3 of the DCP and thus s 79A(2) of the EPA Act. Mrs Manning sought demolition as relief. Mr Lynch sought alternate orders pursuant to [ss 25A](#) to [25E](#) of the [Land and Environment Court Act 1979](#). However, under [s 25B](#) there is a distinction between a discrete technical breach and a breach of a mandatory consideration requirement in [s 79C](#) of the EPA Act, with the latter rarely giving rise to an order under s 25B of the LEC Act. The applicable principles militated against the availability of s 25B orders in this case. Demolition was not granted with respect to the first consent because Mr Lynch had acted on the faith of an apparently valid consent and it would cause him significant cost and hardship to demolish the entire pool. Demolition of the works under the second consent was warranted because any hardship was outweighed by the detriment to Mrs Manning: at [87]–[118].

***Terranora Group Management v Director-General of the Office of Environment & Heritage*** [\[2013\] NSWLEC 198](#) (Biscoe J)

(related decision: *Plath v Rawson* [\[2009\] NSWLEC 178](#) Preston CJ)

Facts: the applicant challenged the validity of a direction ("the Direction") to carry out work to remedy unlawful clearing of threatened species under [s 38 Native Vegetation Act 2003](#) ("the NV Act"). The applicant's contractor had cleared 1,279 plants of threatened species on the applicant's 178.75 hectare rural property ("the Land"), for which the contractor was convicted and sentenced by this Court. The Direction required the applicant to carry out extensive remedial work, comprising the clearing of all non-native vegetation and removal of stock in and fencing of a 27.34 hectare "Remediation Area" on the Land.

The Remediation Area was identified in a map attached to the Direction and comprised four remediation sub-areas. In substance, the Remediation Area was a consolidation of eighteen smaller areas on the Land where the threatened species had been unlawfully cleared. The eighteen areas had initially been identified by the decision-maker, but between 2006 and the issuing of the Direction in 2010, were consolidated through a process which included participation by the applicant. The Remediation Area ultimately adopted was that finally proposed by the applicant. Only about 14.5 per cent of the unlawfully cleared threatened plants were in the Remediation Area; thus, most of the Remediation Area was not affected by the unlawful clearing.

Issues:

- (1) whether the Direction was ultra vires because it overreached limitations on the statutory power to make it in s 38(2)(a) and (b) of the NV Act;
- (2) whether s 38(2) should be construed so that directions for remedial work made thereunder are confined to the specific locations where unlawful clearing occurs and cannot relate to other locations, such as much of the Remediation Area where no unlawful clearing occurred;
- (3) whether limitations in s 38(2) on the types of work that can be directed are:
  - (a) objective facts or objective jurisdictional facts for the Court to determine on the evidence before it; or
  - (b) are subjective for the decision-maker to assess;
- (4) if the limitations in s38(2) are subjective:
  - (a) whether the decision-maker misconstrued s 38(2);
  - (b) whether the direction was reasonably open to the decision-maker; or
  - (c) whether the direction was a reasonable and proportionate response to the unlawful clearing; and
- (5) if the limitations in s38(2) are objective, whether the applicant had shown that those facts were absent.

Held: dismissing the proceedings with costs:

- (1) as recital G of the Direction mirrored the language of s 38(2)(a) and (b), the Direction was limited to the types of work referred to in s 38(2)(a) and (b). Further, the Direction related to remediation of adverse impacts of the unlawful clearing of threatened species throughout the Land and was not limited to remediating the adverse impacts of the unlawful clearing in the Remediation Area: at [42];
- (2) the power to issue a direction to carry out specified work under s 38(1) of the NV Act was subject to the limitations as to the types of work in s 38(2): at [43];
- (3) having regard to context, text and purpose, “any damage” in s 38(2)(a) was not limited to physical impacts on a particular threatened plant viewed in isolation from the population of the threatened species of which it is part, and included any damage to the populations of threatened species on the Land: at [45];
- (4) the facts in s 38(2) were subjective facts that, on judicial review, the Court may not determine for itself: at [47]-[56];
- (5) the decision-maker did not misconstrue s38(2) in making the Direction: at [58];
- (6) the Direction was not unreasonable in the sense of satisfying the test of manifest unreasonableness: at [59]-[61];
- (7) the Direction did not offend the requirement that it be a reasonable and proportionate response to the unlawful clearing of the threatened species: at [62]-[63]; and
- (8) if the facts in s 38(2)(a) and (b) were objective, then the applicant did not establish that the facts in s 38(2)(a) did not exist: at [65].

***Tricare (Hastings) Ltd v Tweed Shire Council*** [\[2013\] NSWLEC 183](#) (Biscoe J)

Facts: these proceedings concerned the construction of a modified staged development consent (“the Consent”) granted by the Council for land at Hastings Point, for a seniors living development in four stages



under [State Environmental Planning Policy \(Seniors Living\) 2004](#). Stage 1, comprising construction of buildings and other works on certain parts of the site, had been completed. At the time the Consent was granted a caravan park occupied the site ("the Land"). The caravan park contained residential sites pursuant to long term site agreements under [Residential Parks Act 1998](#) ("the Act"). Six of the original twelve long term residential sites (sites 39, 51, 54, 58, 59 and 60) were still occupied. These residential sites had had termination notices served under [s 102](#) of the Act on the ground that the sites were to be used for a purpose other than that of residential sites. Proceedings had been brought in the Consumer Trader and Tenancy Tribunal to enforce the termination notices, and those proceedings had been stood over to enable the applicant to seek declarations in Land and Environment Court as to the construction of the development consent.

Issue:

- (1) whether, on the proper construction of the Consent, the subject residential sites were to be used for a purpose other than that of a residential site and, if so, when.

Held: making declarations that under the Consent sites 51, 54, 58, 59 and 60 were to be used for a purpose other than that of residential purpose by no later than 20 September 2016, and site 39 by the completion of Stage 2:

- (1) the Consent approved a change in the use of the Land: at [7];
- (2) under the Consent, residential site 39 on the Land was to be used for a purpose other than that of a residential site by no later than the time of issue of an occupation certificate for Stage 2 of the development: at [7];
- (3) condition 61A of the Consent required an approval to be obtained for a diminished caravan park under [s 68](#) of the [Local Government Act 1993](#) in order to make way for the seniors development: at [17];
- (4) in relation to sites 51, 54, 58, 59 and 60 ("the creek sites"), the cumulative weight of three matters, namely that the creek sites still appeared on the Stage 3 site plan whereas they did not appear on the Stage 4 site plan; the overall site plan being the overarching plan noted the creek sites as "existing mobile homes" at the end of the built development, and analysis of conditions of the development consent; was that the Consent did not contemplate vacation of the creek sites by the end of Stage 3: at [16]; and
- (5) the Consent contemplated that residential sites 51, 54, 58, 59 and 60 were to be vacated by the end of the period of the s 68 approval required by condition 61A, and incorporated that approval. The s 68 approval was obtained in September 2013 and was for a period of three years expiring on 20 September 2016, and approved long term residences on the six creek sites that were still occupied. Accordingly, under the Consent those creek sites were to cease to be used for residential purposes by 20 September 2016 at the latest: at [19].

## **Criminal**

### ***Liverpool City Council v Maller Holdings Pty Ltd* [2013] NSWLEC 154 (Pain J)**

Facts: Liverpool City Council ("the prosecutor") charged Maller Holdings Pty Ltd ("the defendant") that it carried out development at the subject property which was prohibited under the [Liverpool Local Environmental Plan 2008](#) ("LLEP 2008"). The property is in an area zoned R2 Low Density Residential Development under the LLEP 2008. The use of the property alleged to be in breach of [s 76B](#) of the [Environmental Planning and Assessment Act 1979](#) ("the EPA Act") was the carrying out of a horse transport business which is prohibited in the R2 Low Density Residential Development Zone. The elements of the offence were that: the defendant carried out development on the property (first element), the LLEP 2008 applied to the property (second element), the LLEP 2008 on its terms prohibited the carrying out of the development on the property (third element) and in engaging in that conduct, the defendant did something which it was forbidden to do by or under the EPA Act within the meaning of [s 125\(1\)](#) of that Act (fourth element). The defendant submitted that it had the benefit of historic development consents allowing use of the property as stables, which was the use of the property in the charge period.

Issues:

- (1) whether the prosecutor or the defendant bears the onus of proving that the historic consents for stables use continued in force;
- (2) whether the development consents continued in force under [s 109B](#) of the EPA Act which states that nothing in an environmental planning instrument ("EPI") prohibits or requires a further development consent to authorise development in accordance with a consent that has been granted and is in force; and
- (3) the nature of the use under the consents and permits in the charge period.

Held: finding that the first, second and third but not the fourth elements of the charge were made out, however final orders not pronounced as the prosecutor is pursuing a stated case:

- (1) the defendant bears the onus of proving that the historic consents continue in force: at [72];
- (2) the historic consents relied on by the Defendant issued under the County of Cumberland Planning Scheme Ordinance 1951 ("CCPSO") and the 1987 development consent granted under the Liverpool Planning Scheme Ordinance 1972 ("LPSO") continued in force under s 109B and under transitional provisions which applied before s 109B was introduced: at [77] - [78];
- (3) the permitted use under the historic development consents was stables, undefined in the CCPSO, and defined in the LPSO as a building or place for the receiving, maintaining, boarding or keeping of horses. None of the consents had relevant operational conditions such as defined hours of operation, limits on the length of stay of horses or limits on the mode of transport of horses to and from the premises. The concerns raised by the prosecutor about length of stay of horses, hours of operation and delivery of horses were irrelevant to the construction of the various consents: at [87];
- (4) section 76B, which states that development cannot be carried out if an EPI states that it is prohibited or cannot be carried out with or without consent, and s 109B of the EPA Act operate concurrently: at [90]. Alternatively, s 109B is considered first: at [91]; and
- (5) the first and second elements of the offence were made out: [95] - [97]. The third element of the offence was made out: [127]. As the use in the charge period was consistent with the use permitted by the stable consents at least in part, the prosecutor did not establish the fourth element of the offence: at [130] - [131].

***Newcastle Port Corporation v MS Magdalene Schiffahrtsgesellschaft MBH; Newcastle Port Corporation v Vazhnenko*** [\[2013\] NSWLEC 210](#) (Sheahan J)

Facts: two sentencing matters were determined together after the registered owner and the master of a bulk carrier pleaded guilty to charges brought under [s 8\(1\)](#) of the [Marine Pollution Act 1987](#) for the discharge of 72000L of oil or an oily mixture into the Newcastle Port in August 2012.

Issues:

- (1) the correct sentencing principles;
- (2) whether the master was entitled to a discharge without conviction under [s 10 Crimes \(Sentencing Procedure Act\) 1999](#); and
- (3) the appropriate sentence/s to be imposed after having regard to the objective and subjective elements of the matter.

Held: fining the owner \$1.8M, reduced to \$1.2M, and finding that the master was entitled to a discharge under s 10 of the *Crimes (Sentencing Procedure) Act 1999*:

- (1) the spill was properly characterised as "big", in the midpoint of the "low to mid" range and no more than 20% of the worst case: at [237], [249];
- (2) the environmental harm was substantial and significant, though was not long lasting: at [253];

- (3) the defendants had no prior criminal record, and their character was not questioned. Both had good prospects of rehabilitation and were not regarded as likely to reoffend: at [254]-[256]; and
- (4) the full discount for early pleas of guilty was afforded, as part of an overall discount of one-third on account of cooperation, genuine contrition, pre-trial payment of clean-up costs, and commitment to pay the prosecutor's costs: at [262], [265], [268] and [278].

***Newcastle Port Corporation v RN Dredging BV*** [\[2013\] NSWLEC 217](#) (Sheahan J)

Facts: the owner of a dredger pleaded guilty to a charge of discharging oil into state waters under [s 8\(1\)](#) of the [Marine Pollution Act 1987](#). The Chief Engineer left the vessel during a diesel transfer operation, causing 200 litres of diesel to be spilled into Newcastle Harbour. The Chief Engineer was, however, not charged.

Issue:

- (1) appropriate sentence to be imposed.

Held: fining the owner \$150,000:

- (1) the offence was not intentional and no environmental harm was caused. However, the spill was not insignificant as it resulted from a serious breach: at [20], [25], [28] and [30];
- (2) the owner should have had safety management procedures in place to regulate fuel transfer operations, particularly as the foreseeability of risk was clear; leaving a vessel unattended during transfer operations involved great risk of harm: at [36];
- (3) mitigating factors considered included good character, lack of prior criminal history, prospects of rehabilitation and not re-offending, remorse, assistance to the prosecutor and an early plea of guilty. Furthermore, the Court took into account that the defendant had co-operated with the investigation, paid clean-up costs, modified the vessel, and implemented a procedure to avoid future incidents of a similar nature: at [40]; and
- (4) the Court arrived at a fine of \$250,000 (2.5% of the maximum \$10,000,000), discounted by 40%, resulting in an overall fine of \$150,000: at [68]-[70].

***Director-General, Department of Planning and Infrastructure v Aston Coal 2 Pty Ltd*** [\[2013\] NSWLEC 188](#) (Craig J)

Facts: the defendant pleaded guilty to two offences against [s 125](#) of the [Environmental Planning and Assessment Act 1979](#) ("the EPA Act") for failing to disclose a reportable political donation by a director of the defendant, as required by [s 147\(3\)](#) of the EPA Act. The defendant lodged a Major Project Approval for coalmining under Part 3A of the EPA Act. A Disclosure Statement accompanying the application indicated 'nil' reportable political donations. Investor presentations, annual reports and statements to the Australian Stock Exchange established that project approval was critical to the defendant's business plan for coal production and that directors of the defendant were offered share incentive options, exercisable upon 'first coal' production. Following lodgement of the major project application, two directors of the defendant made donations of \$4,250 and \$5,000 respectively, to a political party. At the date of the donations, the directors were likely to obtain a financial gain if the project was approved. The defendant was required by the EPA Act to disclose a donation made by a person with a financial interest in the application. In correspondence with the Department of Planning, the defendant maintained that no reportable donations required disclosure. The Minister had delegated his functions to the Planning Assessment Commission ("PAC") which granted approval for the project in October 2013.

Issues:

- (1) the objective gravity of the offence and whether the purpose of the legislation had been undermined;
- (2) the subjective circumstances relevant to the offence; and
- (3) the appropriate penalty to be imposed for the offence.

**Held:** convicting the defendant of the charges, fining it \$10,000 for each offence and ordering it to pay the prosecutor's costs:

- (1) the obligation of s 147(6) is that disclosures will be made following a donation in order to minimise any perception of undue influence in respect of an undetermined planning application: at [45]. Delegation of the Minister's functions to the PAC diminished the perception of undue influence: at [55];
- (2) failure to disclose the donations made by the directors, when they were likely to obtain a financial gain if the application was carried out, had the potential to undermine the objects which s 147 was enacted to achieve: at [57]. The provision of documents from which the probability of donations had been made, together with the fact that this information was available to the Director-General months prior to the application being determined, indicated that the extent to which the objects of the legislative provision were undermined was relatively low: at [57];
- (3) the defendant was not ignorant of the requirement to comply with s 147. The Disclosure Statement attached to the Major Project Application, with its reference to, and explanation of, s 147, were signed by the defendant's then General Manager: at [61]. The defendant was part of a corporate group with significant assets which ought to have utilised those significant resources to seek advice upon compliance with statutory reporting obligations: at [61];
- (4) by reference to the maximum penalty for the offences (\$22,000, or 12 months imprisonment, or both), the extent to which the purpose of s 147 was undermined and the defendant's state of mind when committing the offences, the objective gravity of the offence was in the mid-range of seriousness: at [69];
- (5) the defendant expressed remorse for the offence by implementing a Political Donations Policy prohibiting companies in the group from making donations to political parties, and requiring directors to notify the Company Secretary within three days from making a personal donation: at [83]-[84]; and
- (6) section 147 strikes at the fact of an undeclared donation because it is the appearance of influence of public officials responsible for planning decisions that arises from such donations and which damages public confidence in the planning and environmental assessment system: at [87].

***Chief Executive of the Office of Environment and Heritage v Bombala Investments Pty Ltd*** [2013] NSWLEC 185 (Craig J)

**Facts:** Bombala Investments Pty Ltd ("Bombala") pleaded guilty to two offences under [s 118D\(4\)](#) of the [National Parks and Wildlife Act 1974](#) ("NPW Act") in that it damaged habitat of two threatened species. Bombala owned a large vegetated parcel of land at Forster adjacent to an urban area. On 10 February 2011, the defendant was required by the Rural Fire Service ("RFS") to carry out bushfire hazard reduction works by clearing vegetation on a portion its land adjacent to a commercial building. A Bush Fire Hazard Reduction Certificate ("the Certificate") was issued to Bombala under [s 100G](#) of the [Rural Fires Act 1997](#). A letter accompanying the Certificate indicated that an environmental assessment in relation to the required work had been carried out by the RFS. The work was required to be completed within one month. On 24 February 2011, Council officers attended the property and observed Mr Lani and a contractor clearing vegetation. When questioned, Mr Lani told the officers the works were being completed as requested by the RFS. The area being cleared was outside of and exceeded the area required to be cleared by the RFS. Mr Lani was told the clearing was unlawful and work immediately ceased.

**Issues:**

- (1) the seriousness of the offences with which the defendant had been charged;
- (2) relevant sentencing considerations; and
- (3) the penalty to be imposed for committing the offences.

**Held:** convicting the defendant of the two charges, imposing fines of \$10,500 for the offence of causing damage to habitat of the Squirrel Glider, and \$21,000 for the offence of causing damage to the habitat of the Trailing Woodruff, and making publication and remediation orders:

- (1) Bombala caused harm to habitat of the Squirrel Glider. This harm included reduction of vegetation for future foraging by the local population; reduction of potential future den sites and increasing competition among local Squirrel Gliders for limited foraging resources within the area. Harm to the Squirrel Glider's habitat was objectively serious: at [64];
- (2) Bombala caused harm to the habitat of Trailing Woodruff. This harm involved clearing and removal of vegetation comprising part of the plant's habitat, the spreading and re-levelling of soil on top of the understory of that habitat, and potential damage to any Trailing Woodruff plant in the path of clearing. The harm to the habitat of the Trailing Woodruff was objectively serious: at [70];
- (3) pursuant to s 118D(4) of the NPW Act, Bombala was "conclusively presumed" to know that the habitat damaged was the habitat of threatened species. The clearing did not conform with approval under [Pt 5 of the \*Environmental Planning and Assessment Act 1979\*](#) being the Certificate: at [23];
- (4) the harm caused to the habitat of the Squirrel Glider was at the lower end of the scale of seriousness whereas the harm caused to the habitat of Trailing Woodruff was in the middle range of seriousness: at [75]; and
- (5) the risk of harm was foreseeable, however advice given by the RFS to Mr Lani in relation to the vegetation to be cleared influenced Bombala's actions. Ambiguities in the Certificate and in the explanation of it by the RFS explained, but did not excuse, Bombala's failure to take mitigating measures to prevent environmental harm. Bombala mistakenly thought the vegetation cleared was covered by the "authority" for that clearing work by the Certificate: at [82].

***Kogarah City Council v Man Ho Wong*** [\[2013\] NSWLEC 187](#) (Craig J)

**Facts:** the defendant pleaded guilty to four charges under [s 143](#) of the [Protection of the Environment Operations Act 1997](#) ("the POEO Act"). The defendant transported cartons of broken fibrous cement sheeting to four separate suburban streets where he left the cartons adjacent to the roadway. The defendant had been made aware that waste building material would not be collected as part of the local council's household clean-up collection service. When the cartons were discovered by the council, the fibrous cement sheeting was found to contain chrysotile and amosite asbestos. The defendant denied being aware that the sheeting contained any form of asbestos.

**Issues:**

- (1) the extent and foreseeability of harm caused or likely to be caused;
- (2) the relevance of the state of mind of the defendant; and
- (3) the penalty to be imposed for committing the offences.

**Held:** convicting the defendant of the four charges, fining him a total of \$20,000 or \$5,000 for each of the four charges, and ordering him to pay the prosecutor's investigation and clean-up costs in the sum of \$3,080 as well as the prosecutor's legal costs in the agreed amount of \$14,000:

- (1) the potential for harm had to be recognised in the penalty imposed on the defendant even if he was not aware of the existence of asbestos in the material that he placed around the streets in the Hurstville area: at [22];
- (2) the transporting and depositing of the material in the manner undertaken by the defendant carried with it an obvious foreseeability of potential harm in that members of the public could be exposed to that material, particularly given that the defendant had no objective basis on which to believe that the cartons left by him would be collected: at [23]; and
- (3) the defendant knew that depositing of cartons containing broken fibrous cement cladding in the street was contrary to law. That knowledge increased the seriousness of the offence: at [26].

***Burwood Council v Doueih*** [\[2013\] NSWLEC 196](#) (Pain J)

Facts: Mr Doueih pleaded guilty to one offence committed contrary to s 125(1) of the [Environmental Planning and Assessment Act 1979](#) ("the EPA Act"). The charge related to Mr Doueih's failure to comply from 8 June 2012 to 24 October 2012 with a development consent granted by the council for a certain number of additional boarding house rooms, contrary to [s 76A\(1\)](#) of the EPA Act. Mr Doueih built four more rooms than was approved. Mr Doueih is the Deputy Mayor of Burwood Council, and was elected as a Councillor on Burwood Council in September 2012. Prior to that time he served as a Councillor between 1995 and 2000.

Issue:

(1) the appropriate sentence for Mr Doueih for carrying out development without development consent.

Held: Mr Doueih was convicted of the offence as charged, fined the sum of \$43,000 and to pay the council's costs:

- (1) the offence was of moderate objective seriousness: at [30]. Objective circumstances that were considered included the nature of the offence within the statutory scheme (at [10]), the maximum penalty (at [11]) and the objective harmfulness in that environmental harm was caused (at [13]). Mr Doueih's state of mind was considered in assessing the objective gravity of the offence (at [14]), which was held as deliberate (at [17]) but not calculated to mislead (at [18]). Given the positions held by Mr Doueih in the past and after September 2012 as a councillor elected to the prosecuting council, Mr Doueih would or ought to have known the gravity of his actions and that his actions were not legal: at [16]. Committing the offence for financial gain (at [21]) was considered an aggravating factor (at [23]). An abuse of position or trust as an aggravating factor was not made out: at [24]. General deterrence was relevant (at [25]) whilst specific deterrence was not (at [27]). By admitting the offence Mr Doueih had admitted that he acted deliberately. Deliberate contraventions of the EPA Act should be denounced: at [29]; and
- (2) subjective circumstances that were considered to be relevant were the early guilty plea (at [32]) whilst contrition and remorse were not demonstrated beyond the early guilty plea alone (at [33]). Mr Doueih was of good character: at [34] – [35]. No other cases were directly comparable for the purposes of evenhandedness: at [37].

***Environment Protection Authority v M A Roche Group Pty Ltd; Environment Protection Authority v Roche*** [\[2013\] NSWLEC 191](#) (Pain J)

Facts: M A Roche Group Pty Ltd pleaded guilty to two charges of polluting waters in contravention of [s 120\(1\)](#) of the [Protection of the Environment Operations Act 1997](#) ("the POEO Act"). Two discharges of turbid water occurred into Herons Creek from a collapsed wall of a pit. The individual defendant, Mark Roche, pleaded guilty to a charge of wilfully obstructing an authorised officer in the exercise of the authorised officer's powers under Ch 7 of the of the POEO Act, contrary to [s 211\(3\)](#) of the POEO Act, between 15 October 2012 and 8 November 2012. Mr Roche committed this offence by attempting to avoid the EPA interviewing an employee.

Issues:

- (1) the appropriate sentences for the pollute waters offences; and
- (2) the appropriate sentence for the offence of obstruction of an authorised officer.

Held: the corporate defendant was convicted of the offences charged, the penalty for the first pollute waters offence was \$15,000 and for the second pollute waters offence was \$7,000, a publication order was made, the prosecutor's costs and investigation costs were also ordered. Mr Roche was convicted of the offence charged, fined \$5,000 and ordered to pay the prosecutor's costs:

- (1) the pollute waters incidents were objectively of low level seriousness: at [49]. The incidents were likely to cause environmental harm. The harm and likely harm was for a limited time and in a limited geographical area. The extent of environmental harm was low: at [21]. There were measures that could have been taken to prevent the first incident: at [25]. Given the close proximity of the second incident to

the first and Mr Roche's oral evidence about the difficulty of pumping out water to enable repairs of the wall given the forecast of rain, the extent to which practical measures could have been taken to avoid this is less clear: at [26]. The defendant's efforts made after the two incidents to prevent further recurrences were taken into account: at [27]. The repair to the section of wall which failed in 2010 to hold water had to be adequate for the task and its performance was a matter which should have been regularly checked. The harm caused by the escape of polluted water was foreseeable for the first incident and inevitably, given its close proximity in time, also for the second incident: at [36]. The defendant had complete control over the operation of the premises: at [37]. Both incidents were accidental and the defendant gained no advantage, financial or otherwise from their commission: at [38]. General deterrence and specific deterrence, retribution and denunciation were relevant: at [46]-[48];

- (2) relevant subjective factors concerning the pollute waters offences included the early guilty plea (at [50]), assistance provided to law enforcement authorities (at [51]) and the expression of remorse: at [52]. None of the cases discussed were of great assistance in setting penalty: at [60]. [Section 6](#) of the [Fines Act 1996](#) was applied because the evidence suggested that the defendant had a limited ability to pay a fine: at [61]. The principle of totality applied: at [62]; and
- (3) the offence of wilfully obstructing an authorised officer in the exercise of the authorised officer's powers under Ch 7 of the POEO Act was objectively serious. While the action was deliberate on Mr Roche's part, there was no impact on the investigation carried out by the EPA. He admitted to his mistake during the investigation: at [91]. General deterrence was considered relevant given the importance of the statutory scheme whilst specific deterrence was not relevant: at [87]. Subjective factors that were weighed up included the early guilty plea, no previous convictions and assistance provided to law enforcement officers: at [94]. Mr Roche was of good character and unlikely to re-offend, and s 6 of the *Fines Act* was applied: at [95].

***Chief Executive of the Office of Environment and Heritage v Humphries*** [\[2013\] NSWLEC 213](#)  
(Preston CJ)

Facts: the defendant pleaded guilty to a charge of clearing native vegetation without first applying for and obtaining development consent or a property vegetation plan, contrary to [s 12](#) of the [Native Vegetation Act 2003](#) ("the Act"). The clearing occurred within two areas (together comprising 89 hectares) on his agricultural property "Jackson" near Moree, between about 1 February 2006 and 30 January 2011.

The clearing was reported to the Office of Environment & Heritage ("OEH") in March 2011 by persons in the area. OEH officers carried out inspections of the property in April and July 2011, and on 1 February 2013, Mr Humphries voluntarily submitted to an interview with OEH officers.

Issue:

- (1) what was the appropriate penalty to impose in view of the objective circumstances and the subjective factors relevant to Mr Humphries.

Held: a fine of \$67,500 was imposed, and the defendant was ordered to pay the prosecutor's costs for the proceedings in the agreed sum of \$34,000:

- (1) the nature of the offence; maximum penalty; medium level of environmental harm; state of mind of the defendant in deliberately and intentionally committing the offence; failure to take practical measures to prevent environmental harm and the defendant's control over the causes of harm to the environment, led to the conclusion that the offence was of medium objective gravity: at [19]-[20], [30], [40], [44] and [46]-[49];
- (2) relevant subjective considerations included the defendant's lack of criminality, early guilty plea, evidence of prior good character, evidence of contrition and remorse, and assistance to authorities: at [51]-[53] and [57]-[60];
- (3) the penalty imposed on the defendant should operate to deter other persons from committing similar offences of clearing of native vegetation illegally, however there was no need for specific deterrence: at [69] and

- (4) the appropriate penalty was a fine of \$90,000, to which a discount of 25% was applied for the utilitarian value of the plea of guilty. This resulted in a fine of \$67,500, which was within the defendants means to pay: at [70]-[75].

***Connell v Santos NSW Pty Limited*** [2014] NSWLEC 1 (Preston CJ)

Facts: the defendant, Santos NSW Pty Limited (“Santos NSW”), pleaded guilty to four charges of committing offences under [s 136A\(1\)](#) of the [Petroleum \(Onshore\) Act 1991](#) (“the Act”) in that it, without reasonable excuse, failed to comply with conditions of a petroleum title. From 2004, a company known as Eastern Star Gas Limited (“ESG”), now known as Santos NSW, undertook drilling and exploration activities under Petroleum Exploration Licence 238, and from 30 October 2007, under Petroleum Assessment Lease 2 (“PAL2”). The grant of PAL2 was subject to conditions imposed pursuant to [s 23\(1\)](#) of the Act.

The first charge concerned failing to report a spill event which occurred on or about 25 June 2011, breaching condition 4 of PAL2. The second, third and fourth charges involved a failure to comply with condition 3 of PAL2, by lodging an environmental management report (“EMR”) that did not accurately report against compliance in given periods.

Issue:

- (1) what was the appropriate penalty to impose for each charge in view of the objective circumstances and the subjective factors relevant to Santos NSW.

Held: fines totalling \$52,500 were imposed, and the defendant was ordered to pay the prosecutor’s costs for all four proceedings in the agreed sum of \$110,000:

- (1) the nature of the offences; maximum penalty; low degree of harm to the environment; state of mind of the defendant in deliberately or intentionally committing the first offence but not the other three; lack of evidence to establish the reasons for committing the offence and the defendant’s efforts to control or mitigate environmental harm, led to the conclusion that all four offences fell at the lower end of the scale of seriousness, although the offence forming the basis of the first charge was regarded as more objectively serious than the other three offences: at [113];
- (2) relevant subjective considerations included Santos NSW’s early guilty plea, lack of prior criminality concerning environmental offences, evidence of contrition and remorse, and assistance to authorities: at [121], [123], [127] and [145];
- (3) the totality principle was not applied, as the offences involved different obligations and conduct: at [153]-[154];
- (4) the penalty imposed on the defendant should serve as a deterrent to operators in the coal seam gas industry to ensure that they comply with conditions of petroleum title, however there was no need for individual deterrence: at [159]-[160]; and
- (5) the appropriate fines totalled \$75,000, to which a discount of 25% was applied for the utilitarian value of the plea of guilty, and a discount of 5% for the assistance provided by the defendant to the authorities. This resulted in fines totalling \$52,500: at [172]-[176].

### **Aboriginal Land Claims**

***New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (Nelson Bay)*** [2013] NSWLEC 148 (Pain J)

Facts: Worimi Local Aboriginal Land Council and New South Wales Aboriginal Land Council (“the Applicants”) appealed against the Minister’s refusal of an Aboriginal Land Claim (“ALC 19559”) in relation to land at Nelson Bay. A permissive occupancy was held over the claimed land for the purposes of “Bee & Poultry Farm & Garden”, commencing 1 January 1987 and continuing to the present. At the time the permissive occupancy was granted the land was the subject of reservation for future public requirements.



The National Parks and Wildlife Service (“NPWS”) granted an annual licence to Mr and Mrs Rakus to cultivate Christmas Bush on the claimed land on 18 December 1991 until 19 November 1996.

Issues:

- (1) whether the permissive occupancy granted over the claimed land was lawful; and
- (2) whether the evidence supported an opinion being held at the appropriate Government level at the material date that the claimed land was likely to be needed for residential purposes.

Held: the application was dismissed:

- (1) the granting of the permissive occupancy was not lawful because it was not permissible under the restraint created by the reservation. Bee keeping, poultry farm and gardening are activities for private purposes. The current public purpose of the reservation restrained such grants: at [115]. The categorisation of the permissive occupancy for the purpose of maintenance was rejected: at [119]. The grant of the permissive occupancy was not ancillary to, incidental to or in furtherance of the reservation of the land for future public requirements because the purpose is private in nature and therefore not permissible given the restraint of the reservation: at [123]. The Minister's alternative argument that private law principles developed in the context of contract law should be applied to the consideration of the permissive occupancy was rejected: at [127]; and
- (2) the evidence gave rise to the inference that the opinion that the claimed land was likely to be needed for residential land was held by relevant officers in the Department at the date of claim. The exception in s 36(1)(b1) applied and the land was not claimable Crown land: at [273]. The *Carltona* principle applied to the carrying out of Ministerial functions by departmental officers based on recognition of the necessity for those powers and functions to be carried out by departmental officers: at [247].

## Development Appeals

### ***Community Association DP 270253 v Woollahra Municipal Council*** [\[2013\] NSWLEC 184](#) (Pain J)

Facts: in 2001 development consent was granted for a large multi-building residential development known as Babworth Estate in Darling Point. Conditions of consent required pedestrian access stairway on a finger of land between a public road and the council's foreshore building line on Double Bay to be built on private land. The conditions also required a public positive covenant to be created over the access stairway. Part of the stairway was constructed on part of the private land in 2005. Ultimately access to the public was prevented by locked gate. The council issued an order in 2012 to the Community Association DP 270253 (“the Community Association”) under [s 121B](#) of the [Environmental Planning and Assessment Act 1979](#) (“the EPA Act”) requiring compliance with the conditions of development consent. The Community Association appealed against the terms of the order issued in 2012, as enabled by [s 121ZK](#) of the EPA Act.

Issues:

- (1) to what part of the land did the public positive covenant relate;
- (2) whether the conditions requiring construction of the foreshore access stairway and the creation of the public positive covenant were beyond power for the council to impose given [s 80A\(1\)\(a\)](#) of the EPA Act and that the second (must fairly and reasonably relate to the proposed development) and third (must not be unreasonable) *Newbury District Council v Secretary of State for the Environment* [\[1981\] AC 578](#) tests had to be satisfied; and
- (3) whether the conditions requiring construction of the foreshore access stairway and the creation of the public positive covenant were manifestly unreasonable.

Held: the order issued under s 121B of the EPA Act was revoked:

- (1) the council's interpretation of the area of the public positive covenant was correct: at [78];
- (2) the conditions requiring construction of the foreshore access stairway and the creation of the public positive covenant were beyond power for the council to impose because there was no nexus between

the Babworth Estate development and the requirement to create a public positive covenant over the land zoned Local Open Space Reservation as required by s 80A(1)(a) and the second test in *Newbury*. The requirement to provide suitable pedestrian access to the foreshore land for the public also did not satisfy the requirement in s 80A(1)(a) and the second test in *Newbury*. A need for the provision of public access to the foreshore did not arise directly or indirectly from the development of the Babworth Estate: at [96]; and

- (3) the conditions requiring construction of the foreshore access stairway and the creation of the public positive covenant were unreasonable in the *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 sense and therefore the third *Newbury* test was not satisfied: at [105]. The conditions imposed an unreasonable burden on the Community Association in relation to management of the public on the foreshore land and the management of the behaviour of members of the public was not addressed at all in the conditions: at [102], [103].

### Civil Enforcement

***Burwood Council v Ralan Burwood Pty Ltd*** [2013] NSWLEC 173 (Sheahan J)

**Facts:** Burwood Council ("the council") commenced civil enforcement proceedings, pursuant to s 123 of the *Environmental Planning & Assessment Act 1979* ("the EPA Act"), in relation to the external appearance of the development at 1-3 Railway Parade, Burwood. By its initial summons council sought multiple declarations, orders and restraining orders against the developer of the site, Ralan Burwood Pty Ltd ("Ralan"), the original private certifier for the development, Lyall Dix, and the certifier chosen by Ralan to replace Dix, John Morgan.

Much of the relief sought by the council fell away during the proceedings, and after judgment was reserved. Ultimately, the council challenged the development on the grounds that the 6 Construction Certificates ("CC") issued by Dix were void and of no effect, and that four of those CCs depicted a building that was "inconsistent with" that depicted in the development consent. Rather than the demolition of the development, the council sought remediation works to improve the external appearance. Ralan submitted that it was not in breach of the EPA Act, and that its contractors had built the project strictly in accordance with valid CCs.

**Issues:**

- (1) whether Ralan was in breach of the EPA Act;
- (2) if Ralan were not in breach of the EPA Act, whether there were restrictions upon parties against whom orders could be made;
- (3) whether the principles of vicarious responsibility applied;
- (4) whether the CCs issued were valid; and
- (5) whether in the exercise of discretion orders should be made.

**Held:** dismissing the third Further Amended Summons: at [346]:

- (1) the council was an appropriate applicant for the relief sought: at [244]-[245], [333];
- (2) Ralan was not in breach of the EPA Act. The mere making of money from ownership of land did not amount to use or development of that land. Ralan had played a passive role in the development, and the Court was not satisfied that Ralan had any intent to contravene the Act. Ralan was not involved in, nor in control of, any contravention of the EPA Act: at [279], [281]-[282];
- (3) for orders to have been made against Ralan for any breach by others e.g. architects or builders, there must have been clear instructions from Ralan, and/or control exercised by Ralan, and the actions must have been taken in the furtherance of the company's interests: at [288];
- (4) Ralan was not found to be vicariously responsible for any breach by the private certifier, as on the evidence before the Court, Ralan gave no clear instructions in relation to the alleged breaches, control

had not been exercised by Ralan, and there was no evidence of any action having been taken in the furtherance of Ralan's interests: at [289];

- (5) the fundamental aspects of the development remained in place after the CCs had been issued: at [329];
- (6) the challenged CCs were valid: at [330];
- (7) those engaged by or on behalf of Ralan were entitled to rely upon the CCs, and the evidence suggested that the development was built to a satisfactory standard. There was no evidence that Ralan or its contractors had strayed beyond the CCs: at [331]; and
- (8) the exercise of discretion need not be considered as the council had failed to establish any entitlement to relief, but the case in favour of its being exercised in Ralan's favour was quite strong: at [339].

***Save Little Manly Beach Foreshore Inc v Manly Council (No 2)*** [\[2013\] NSWLEC 156](#) (Biscoe J)

(related decision: *Save Little Beach Manly Foreshore Incorporated v Manly Council* [\[2013\] NSWLEC 155](#) Biscoe J)

Facts: the applicant brought proceedings to restrain the sale by the Council of land at No 34 and No 36 Stuart Street, Manly, on the basis that under the [Local Government Act 1993](#) ("LG Act") the land was classified as community land, which council had no power to sell. No 34 was acquired by council prior to 1 July 1993 and No 36 was acquired by Council after 1 July 1993. The LG Act provided for different classification of land depending on whether the land was acquired by a Council before or after 1 July 1993. The classification by resolution of land vested in a Council as at 1 July 1993 was governed by the transitional provisions of the LG Act in cl 6 of Sch 7, while the classification by resolution of land acquired by a council *after* 1 July 1993 was governed by [s 31](#) of the Act. Council had no power to sell land classified as community land, but did have power to sell land classified as operational land. The applicant argued that council resolutions in 1994 and 1998 respectively reclassifying No 34 and No 36 as operational land were ineffective.

Issues:

- (1) whether the 1994 and 1998 council resolutions were effective in reclassifying the land as operational land;
- (2) whether a 2008 resolution classifying No 36 as community land was effective; and
- (3) whether, for any other reason submitted by the respondent, the 1994 and 1998 resolutions should be upheld.

Held: declaring the land to be classified as community land under the LG Act, restraining the council from selling, exchanging or otherwise disposing of the land so long as it was classified as community land under the LG Act, declaring the land at 36 Stuart Street to be subject to a trust for a public purpose, and ordering the council to pay the applicant's costs:

- (1) as at 1 July 1993 No 34 was already vested in the council and was zoned as open space. Accordingly it was taken to have been classified as community land as at that date under cl 6(2)(d). There was no power to reclassify by resolution such land as operational land: at [40];
- (2) even if there was power to reclassify No 34 by resolution, the 1994 resolution did not meet advance public notice requirements and was therefore ineffective: at [49];
- (3) the 2008 Council resolution classifying No 36 as community land was effective and No 36 could only be reclassified as operational land through a local environmental plan: at [54]-[55]; and
- (4) the earlier 1998 resolution purporting to reclassify No 36 as operational land was ineffectual because: (a) advance public notice of the 1998 resolution was not given in accordance with [s 34\(2\)](#), and (b) a trust for a public purpose of open space existed over No 36 and the 1998 resolution was inconsistent with this trust: at [56]-[82].

***Lismore City Council v Hamshaw*** [2013] NSWLEC 204 (Craig J)

Facts: in conformity with [s 22B](#) of the [Swimming Pools Act 1992](#) (“the SP Act”), a development compliance officer employed by the applicant attended the respondent’s property to inspect her swimming pool. As a result of the observations made by the officer upon inspection, the respondent was given a draft direction requiring her to erect fencing around her swimming pool consistent with the requirements of Australian Standard 1926.1-2012 and Australian Standard 1926.1-2007. The draft direction was not responded to by the respondent, who then received a direction pursuant to [s 23](#) of the SP Act requiring the undertaking of certain work within 30 days. Following this, the officer inspected the property on two separate occasions. He observed that the required work had not been performed and that more work was required. The respondent was given a further direction under s 23 of the SP Act. Compliance was required within 14 days. Two further inspections were carried out by the officer, who observed on these occasions that the work had not been completed. As a consequence the applicant sought mandatory orders against the first respondent requiring the erection of fencing around the swimming pool, consistent with the requirements of the SP Act.

Issue:

(1) whether [s 7](#) or [s 8](#) of the SP Act applied.

Held: orders made requiring the respondent to comply with the provisions of s 7 of the SP Act and the standards for fencing called up by s 7(1)(b), namely Australian Standard 1926.1-2012, and ordering the respondent to pay the council’s costs of the proceedings:

- (1) the failure of the first respondent to observe the requirements of ss 7 and 8 of the SP Act which require the owner of a swimming pool to provide child-resistant barriers, constituted a breach of the SP Act: at [32]; and
- (2) the failure of the first respondent to comply with the requirements of the directions given to her by the applicant pursuant to s 23 of the SP Act constituted a breach of the SP Act: at [32].

### **Compulsory Acquisition**

***George D Angus Pty Limited v Health Administration Corporation*** [2013] NSWLEC 212 (Preston CJ)

Facts: on 22 July 2011, the Health Administration Corporation (“HAC”) compulsorily acquired the land known as 10 Yabtree Street, Wagga Wagga (“the Yabtree St land”). The registered owner of the estate in fee simple was Benantra Pty Ltd (“Benantra”). The sole director and shareholder of that company was Mrs Wendy Angus, the wife of Dr George Angus. Another company, George D Angus Pty Ltd (“GDA”), occupied the land. The sole director of GDA was Dr Angus, with Dr Angus and Mrs Angus holding 50% of the shares in GDA each. GDA provided gynaecological and obstetric services from its premises on the Yabtree St land through Dr Angus. The Yabtree St land was advantageously located in physical proximity to the public Wagga Wagga Base Hospital (“the base hospital”) and Calvary Hospital. This allowed Dr Angus to walk to each hospital to attend obstetric patients within five minutes, and was said to be an attribute of the land of special advantage to Dr Angus. After the Yabtree St land was compulsorily acquired, GDA leased premises at 90 Peter Street, Wagga Wagga (“the Peter St land”). GDA relocated its practice from the Yabtree St land to the Peter St land on 23 September 2011, incurring financial costs in connection with this relocation. The location of the Peter St land was physically more distant from the base hospital and Calvary Hospital than the location of the Yabtree St land. Dr Angus considered that the travel time (by car) from the Peter St land would be greater than five minutes, increasing the risk for the obstetric patients to a level that he deemed unacceptable. Dr Angus therefore ceased providing obstetric services for GDA from the Peter St land, instead restricting himself to providing gynaecological services only. This caused a decline in the income and profitability of GDA’s business. GDA, through Dr Angus, provided gynaecological services at the Peter St premises from 23 September 2011 (after the practice was relocated) until 14 June 2013 (when GDA closed the practice). On 5 July 2013, GDA relocated its practice from the Peter St land to new premises in Newcastle, where GDA, through Dr Angus, commenced practising obstetrics. Financial costs were again incurred in connection with this relocation. GDA also contended that its future income and profitability from providing only obstetric services in Newcastle would

be less than what it would have earned if it had been able to continue the practice of providing both gynaecological and obstetric services at the Yabtree St land.

After rejecting HAC's offer of \$287,815 for compensation for disturbance losses, GDA lodged an objection to this amount of compensation with the Land and Environment Court ("the Court") under [s 66\(1\)](#) of the [Land Acquisition \(Just Terms Compensation\) Act 1991](#) ("the JT Act"). GDA contended that the amount of compensation to which it was entitled should be assessed having regard only to losses attributable to disturbance under [s 55\(d\)](#) of the Act. The claimed losses generally fell into two categories: (a) financial costs in connection with GDA's relocation of its practice, first, from the Yabtree St land to the Peter St land (agreed by the parties to be \$16,129.22) and, secondly, from the Peter St land to Newcastle (\$19,721.00) (within [s 59\(c\)](#) of the Act); and (b) loss of income or profit from GDA's business at, first, the Peter St land and, secondly, Newcastle, compared to income or profit GDA would have earned at the Yabtree St land (within [s 59\(f\)](#) of the Act). By contrast, HAC submitted that: the nature of GDA's interest in the land was a leasehold interest, determinable on one month's notice, which affected the amount of compensation to which GDA was entitled; GDA was only entitled to financial costs reasonably incurred in connection with the relocation of its practice from the Yabtree St land to the Peter St land; and GDA was not entitled to further relocation costs from the Peter St land to Newcastle (as not being within [s 59\(c\)](#) of the Act) or the claimed loss of income or profit of GDA (as not being within [s 59\(f\)](#) of the Act).

Issues:

- (1) whether the nature of GDA's interest in the Yabtree St land affected the amount of compensation to which GDA was entitled;
- (2) whether GDA was entitled to compensation for relocation costs under [s 59\(c\)](#) of the Act in respect of the first relocation from the Yabtree St land to the Peter St land; and the second relocation from the Peter St land to Newcastle; and
- (3) whether GDA was entitled to compensation for loss of income or profit from GDA's business at the Peter St land; and Newcastle.

Held: GDA was entitled to an aggregated amount of compensation which incorporated, first, the financial costs reasonably incurred in connection with the first relocation of GDA from the Yabtree St land to the Peter St land of \$16,129.22 (plus interest to the date of judgment on this sum) (under [s 59\(c\)](#) of the Act) and, secondly, the financial costs reasonably incurred, relating to the actual use of the land, as a direct and natural consequence of the acquisition of \$1,539,688 (plus interest to the date of judgment on this sum) (under [s 59\(f\)](#) of the Act): at [199], [200]. HAC ordered to pay GDA's costs of the proceedings: [202]:

- (1) there was an express tenancy agreement between the landowner Benantra and the tenant GDA whereby GDA was given exclusive possession of the Yabtree St land to conduct its medical practice, subject to GDA paying rent (in the sum later agreed between the parties to the tenancy agreement) to Benantra for an indefinite period, being for as long as GDA wished to conduct its practice on the land. The tenancy was in the nature of a statutory tenancy at will under [s 127](#) of the [Conveyancing Act 1919](#) and satisfied the definition of an "interest in land" in [s 4](#) of the Act. This meant that GDA's entitlement to compensation for the extinguishment of its interest in the Yabtree St land crystallised at the time that land was compulsorily acquired by HCA: at [111]-[130];
- (2) it was accepted by HAC that GDA was entitled to compensation under [s 59\(c\)](#) of the Act for those financial costs GDA reasonably incurred in connection with the first relocation from the Yabtree St land to the Peter St land (totalling \$16,129.22). However, the financial costs associated with second relocation from the Peter St land to Newcastle were held to not be reasonably incurred under [s 59\(c\)](#) of the Act. Amongst other reasons, the costs associated with the second relocation were not reasonably incurred because: GDA opted to move to a competitive market where it had no patient base and would have needed to establish a medical practice from scratch; and, on the evidence, GDA would not even try to earn any income from gynaecological services in Newcastle for the remainder of Dr Angus' working life: at [131]-[159], [181]-[191]; and
- (3) the loss of income or profit from GDA's business suffered at the Peter St land were considered to be financial costs reasonably incurred, relating to the actual use of the land, as a direct and natural consequence of the acquisition for the purposes of [s 59\(f\)](#) of the Act. GDA did not act unreasonably in not itself purchasing alternative premises from which it could conduct its medical practice as it only had

a leasehold interest in the Yabtree St land. There was no evidence to suggest that there were any premises available for lease in the hospital precinct (within five minutes' drive of Calvary Hospital). Further, it was not unreasonable for GDA to not lease rooms at the Calvary Hospital in circumstances where that hospital restricted certain medical procedures on religious grounds. It was also reasonable for GDA to cease providing obstetric services from the Peter St premises on the basis that Dr Angus considered the risk to patient and baby to be unacceptable as he could not guarantee to reach his patients at Calvary Hospital within five minutes, and that there was a lack of an obstetric registrar, other obstetricians and highly trained midwives who could provide backup in emergency situations where he took longer than five minutes to attend. While it was reasonable for GDA to incur losses by remaining at the Peter St land and continuing to provide only gynaecological and not obstetric services, there was a temporal limit (in this case two years) after which the incurring of such losses could not be regarded as being reasonable. While GDA's decision to relocate its practice from the Peter St land was generally reasonable, the decision to relocate to Newcastle specifically, and incur losses as a result, was not reasonable. As with the relocation costs associated with the move to Newcastle, the losses that GDA would have suffered as a result of its decision to relocate its practice to Newcastle and only offer obstetrics would not have been reasonably incurred because: GDA opted to move to a competitive market where it had no patient base and would have needed to establish a medical practice from scratch; and, on the evidence, GDA would not even try to earn any income from gynaecological services in Newcastle for the remainder of Dr Angus' working life. Such losses could also not be regarded as a direct and natural consequence of the acquisition of the Yabtree St land: at [157]-[191].

***Tempe Recreation Reserve Trust v Sydney Water Corporation*** [\[2013\] NSWLEC 221](#) (Biscoe J)

Facts: this was a claim for determination of compensation payable to a Reserve Trust under [s 106A](#) of the [Crown Lands Act 1989](#) in respect of the compulsory acquisition of easements over a reserve. There had been no previous judicial consideration of s 106A since it was introduced in 2001. Under s 106A(4)(a) the Crown is taken to be the holder in fee simple of the land acquired or over which the easement is vested, and in this case the Crown had already been compensated for the acquisition of that interest. The applicant Reserve Trust claimed about \$5 million. The respondent contended that only an agreed sum of \$6,000 for disturbance was payable. The applicant's claim largely depended upon an interpretation of the terms of the easements which allowed permanent works such as a large pipeline to be built above the surface so as to result in a substantial physical and visual barrier across the reserve except for a few metres at one end. The respondent disputed that interpretation.

Issues:

- (1) what was the proper construction of the easements; and
- (2) what is the proper construction and application of s 106A(3)(b) and (c).

Held: assessing compensation in the sum of \$106,000:

- (1) a registered easement is construed by reference to its registered terms and (with minor exceptions) not by reference to extrinsic material. The inquiry is as to what the dominant owner could possibly do in the exercise of its rights. Evidence of the dominant owner's actions, intentions and expectations are irrelevant to the construction issue: at [41]-[44];
- (2) the applicant's construction of the easement was rejected. The easements did not permit permanent works such as a large pipeline to be built above the surface so as to result in a substantial physical and visual barrier. Therefore, the applicant's claim largely collapsed: at [55];
- (3) the applicant's residual claim (apart from agreed disturbance costs) was limited to very minor existing and potential future loss of public open space and future temporary disruption while works were constructed or maintenance or repairs carried out. The residual claim fell under s 106A(3)(b), which applies to an easement, as loss attributable to the reduction in public benefit from any loss of public open space that arises from the acquisition of the land. Assessing compensation under s 106A(3)(b) was incapable of mathematical precision in this case, and the best analogy was possibly damages in

other areas of the law. The residual claim was assessed at \$100,000. Agreed disturbance costs of \$6,000 were added to arrive at total compensation of \$106,000: at [69]; and

- (4) if the applicant's interpretation of the easements had been accepted, it would have also had a severance claim under s 106A(3)(c). "Severance" related to the disuniting of land taken by compulsory process from the owner's remaining land, its division into separate parcels. Whether that has occurred is a question of fact and degree and is not necessarily dependent upon intervention of a separate legal title: at [70]-[71].

***Marrickville Council v Sydney Water Corporation*** [\[2013\] NSWLEC 222](#) (Biscoe J)

Facts: this was a claim for determination of compensation for the compulsory acquisition of easements over open space land under the [Land Acquisition \(Just Terms Compensation\) Act 1991](#). The easements were utilised to construct a large water supply pipeline from the desalination plant at Kurnell. Council claimed compensation of \$2,589,460. The respondent contended that the compensation payable was \$471,700.

Issues:

- (1) whether assessment of market value, on the piecemeal approach, should be by reference to the area of the land affected by the easements, or to the larger lot of which it was part;
- (2) whether residential sales should be considered as comparables and, if so, whether a discount should be applied for their underlying residential zoning;
- (3) what adjustments should be applied to the comparable sales to reflect the features of the acquired land; and
- (4) what should the compensation be for injurious affection to adjoining land.

Held: determining compensation in the sum of \$1,634,000:

- (1) on the piecemeal approach adopted by the applicant's valuer, he was correct to assess market value by reference to the area of the land affected by the easements, not to the larger lot of which it was part. The latter would be likely to be valued at a lower rate per square metre than the former on account of its larger size: at [9];
- (2) the rate per square metre to be applied was to be determined from analysis and adjustment of comparable sales, which comprised nearby residential sales and sale of an easement for the same infrastructure purpose. As this local government area was deficient in public open space, and the council was prepared to buy residential land at residential values for open space purposes and had paid residential rates to purchase two properties with an underlying residential zoning for public open space purposes, no discount should be applied to the comparable residential sales merely because the acquired land was zoned for open space: at [16];
- (3) there should be adjustments for other factors to reflect the features of the acquired land: at [17]; and
- (4) compensation was required for injurious affection to adjoining land, which was 100 percent diminished in value: at [60].

### **Practice and Procedure and Orders**

***Australian Catholic University v Minister for Planning and Infrastructure*** [\[2013\] NSWLEC 174](#)  
(Pepper J)

Facts: by notice of motion, Strathfield Municipal Council ("the council"), sought leave to be joined to Class 1 proceedings as the second respondent pursuant to [r 6.24\(1\)](#) of the [Uniform Civil Procedure Rules 2005](#) ("the UCPR"), or alternatively to be independently represented in the proceedings by way of a 'Double Bay Marina order' pursuant to [s 38\(2\)](#) of the [Land and Environment Court Act 1979](#) ("the LEC Act"). The proceedings concerned an appeal by the Australian Catholic University ("ACU") with respect to a concept plan application by the ACU for an expansion of its Strathfield Campus. The Minister had referred the

concept plan application to the Planning and Assessment Commission ("PAC") for determination. The PAC had approved some, but not all, aspects of the plan. The PAC rejected certain construction elements as well as any increase in student and staff numbers and permitted hours of operation. The council had received a number of complaints from local residents relating to on-street parking and traffic safety issues in streets surrounding the Strathfield Campus arising from students parking in local streets and had commenced Class 4 proceedings against the ACU. These were stood over pending the Class 1 outcome.

Issues:

- (1) whether the council should be joined to the proceedings pursuant to r 6.24(1) of the UCPR; and
- (2) if not, whether the council should participate in the appeal by way of a *Double Bay Marina* order.

Held: Strathfield Municipal Council joined as second respondent to the proceedings:

- (1) the discretionary power contained in r 6.24 of the UCPR is broad and joinder is not limited to circumstances where it is necessary for the determination of all matters in dispute in a proceedings. The question is whether any order made would directly affect a third person's rights or liabilities. If so, that person should be joined. Regard should be had to the overriding purpose in [s 56](#) of the [Civil Procedure Act 2005](#): at [32]–[38];
- (2) the council was an entity that ought to have been joined as a party and whose joinder was necessary pursuant to r 6.24(1) of the UCPR. First, the council was vested in fee simple as the owner of all of the public roads within the local government area of Strathfield and its ability to control and manage its roads would be directly impacted by the terms of any approval granted by the Court. One of the major contentions concerned traffic and parking impacts. In addition, the ACU's application proposed a Green Travel Plan to ameliorate the impacts of an increase in student numbers. This would, if effected, require at least some works by the council. These matters directly affected the council's legal rights and interests. Second, only the council had the statutory power to implement a resident parking scheme, which was a possible outcome of the Court's determination. Third, bulk, scale and height issues were raised by the appeal and the council was the best placed contradictor with respect to local amenity concerns. Fourth, any overlap in the evidence of the council and the Minister would be minimal. Fifth, the council had acted promptly in making the application and no evidence had been filed yet in the appeal. Sixth, the Minister consented to the joinder motion. Finally, joinder of the council would facilitate the just, quick and cheap resolution of the dispute by providing an appropriate contradictor on the local traffic, parking and amenity concerns and one who was best placed to ventilate the concerns of resident objectors: at [12] and [39]–[62]; and
- (3) although not necessary to decide this question, the Court would also have permitted the council to participate in the appeal by making a *Double Bay Marina* order: at [12] and [63].

***Tenstat Pty Ltd v Valuer-General*** [\[2013\] NSWLEC 171](#) (Craig J)

Facts: the Valuer-General determined the value of a parcel of land at Yennora to be \$27,500,000. Both the owner of the land, Tenstat Pty Ltd, and the lessee of the land, Woolworths Limited objected to that determination. Dissatisfied with the determination of their objections, both parties appealed to the Court pursuant to [s 37](#) of the [Valuation of Land Act 1916](#) 1916. The matters were heard together although no formal order was made to consolidate the proceedings. A single judgment was delivered by the Acting Commissioner who heard the appeals. He upheld the lessee's appeal (\$25,000,000 contended) and dismissed the landowner's appeal (\$36,000,000 contended). The land value was determined to be \$25,000,000. The landowner appealed under [s 56A](#) of the [Land and Environment Court Act 1979](#) 1979. There was no appeal against the order upholding the lessee's appeal and determining the land value of \$25,000,000. As there was potential for conflicting judgments of the Court, the parties were required to address the utility of the owner's 56A appeal.

Issues:

- (1) whether the appeal had utility;
- (2) whether there was a basis for permanent stay or summary dismissal of s 56A appeal; and



(3) whether Woolworths, as lessee, ought be joined as a respondent to the landowner's appeal

Held: ordering that the appeal may proceed:

- (1) there was utility in allowing the appeal by the landowner pursuant to s 56A to proceed to hearing: at [37];
- (2) consolidation of proceedings before the Commissioner was unnecessary to give full effect to any different determination of land value that may be made as a consequence of success in the appeal: at [36];
- (3) the entitlement of a party to exercise the right of appeal afforded by s 56A was not lightly to be denied: at [23]. To allow the unsuccessful party in one of the proceedings heard concurrently to exercise a statutory right of appeal, would not bring the administration of justice into disrepute: at [27];
- (4) institution of the s 56A appeal by the landowner was not an abuse of process: at [25]; and
- (5) the lessee was potentially affected by the outcome of the appeal and must be afforded procedural fairness before determining the appeal. It should therefore be joined as a respondent to the appeal pursuant to [r 50.5\(3\)](#) of the [Uniform Civil Procedure Rules 2005](#) 2005: at [40].

***Wingecarribee Shire Council v O'Shanassy*** [\[2013\] NSWLEC 201](#) (Pepper J)

Facts: the defendant, Mr Paul O'Shanassy, was charged with committing an offence pursuant to [s 125\(1\)](#) of the [Environmental Planning and Assessment Act 1979](#), of carrying out development without the requisite development consent in contravention of [s 76A\(1\)\(a\)](#) of that Act. The prosecutor, Wingecarribee Shire Council ("the council"), sought leave to supplement its notice of prosecution case under [s 247E](#) of the [Criminal Procedure Act 1986](#) ("the CP Act"), by adding three affidavits to the list of affidavits to be relied upon by it. Each of the three deponents had already affirmed affidavits which were previously filed in accordance with orders made pursuant to the disclosure regime under Pt 5 Div 2A of the CP Act. The application was opposed by Mr O'Shanassy on the basis that the affidavits totalled 325 pages, a 50 % increase in the council's evidence, and the content of the affidavits neither responded to objections nor corrected mistaken assertions in the earlier affidavits of the three deponents. Additional evidence regarding the escalation of costs was rejected. Mr O'Shanassy also argued that he would be prejudiced if the evidence was permitted to be relied upon by the council because he had made concessions in his defence response notice under [s 247K](#) of the CP Act.

Issues:

- (1) whether leave should be granted to the prosecutor to supplement its notice of prosecution case.

Held: leave granted to the prosecutor to file the three supplementary affidavits:

- (1) the purposes of the case management provisions in Pt 5 Div 2A of the CP Act were to reduce delays in proceedings by requiring certain disclosures, thereby facilitating a focus on the real issues in dispute, and to enable the court to undertake case management where appropriate: at [25];
- (2) the council's supplementary evidence appeared to be substantial in content and volume. However, two of the affidavits merely clarified and corrected the deponents' original evidence. The third affidavit went beyond the deponent's original affidavit and provided more than minor correction or clarification. It was material that should have been in the first s 247E notice. No explanation was provided by the council as to why this evidence had not been included. While the council's frank admission of oversight from the bar table was noted, an explanation provided to the Court in that form was unsatisfactory: at [26]–[27];
- (3) the procedural history of the case showed, first, that no hearing date had yet been fixed for the matter and, second, that there had been protracted preparation of the matter, predominately attributable to the dilatory conduct of Mr O'Shanassy. In particular, Mr O'Shanassy had benefited from multiple extensions in time to file his s 247K notice of defence response under Pt 5 Div 2A of the CP Act, and further delay in serving an expert report that should have been included in that notice: at [8]–[18];

- (4) it was inadequate for counsel for Mr O'Shanassy to argue from the bar table, absent any evidence in proper form permitting the council to test such statements, that concessions had been made in the s 247K defence response notice which would not otherwise have been made, so that it would be prejudicial to grant leave. While it was true that the council was to some degree taking advantage of Mr O'Shanassy's disclosure to supplement its case, it was not doing so because its earlier evidence was grossly deficient and it was not acting in bad faith. Its ability to supplement its case was a product of the statutory scheme enacted in Pt 5 Div 2A of the CP Act. On the question of costs, there was nothing precluding Mr O'Shanassy from seeking the costs occasioned by this application from the trial judge at the appropriate time. Finally, although the council's explanation for the need to supplement its evidence was unsatisfactory, this was not determinative: at [28]–[32]; and
- (5) in circumstances where the hearing date was not yet fixed, no real irremediable prejudice would be suffered by Mr O'Shanassy, and where the evidence was relevant and probative, the appropriate exercise of the Court's discretion was to grant leave for the supplementary evidence to be relied upon: at [33]–[36].

***Rogers v Clarence Valley Council*** [2013] NSWLEC 194 (Pepper J)

Facts: this matter involved a challenge in Class 2 of the Court's jurisdiction by the applicant, Ms Sally Rogers, to a noise prevention notice issued by the respondent, Clarence Valley Council ("the council"), under s 96 of the [Protection of the Environment Operations Act 1997](#) ("the POEO Act"). The notice had been issued by the council due to complaints by neighbours about the noise generated from barking dogs housed by Ms Rogers on her property at an animal shelter known as Happy Paws Haven ("Happy Paws"). The appeal focused on whether the noise was above acceptable limits under the POEO Act.

Following a site visit and part-hearing of the matter, the Court made orders requiring mediation. The mediation resulted in lengthy consent orders, whereby the parties agreed to submit to a process in which the Court would appoint two independent experts, an acoustic expert and an animal management behaviour expert, to draft a noise management plan ("NMP"). The parties agreed to be bound by the findings and recommendations of the experts. The NMP was completed and made 24 recommendations, including various noise abatement measures that would result in the dog population of Happy Paws being considerably reduced. One recommendation required Ms Rogers to keep a maximum of four dogs as her personal pets, which was made in ignorance of an ambiguity contained in earlier orders of the Court about whether the NMP should cover her personal pets.

The consent orders also required the parties to agree on timeframes for their implementation. When this was not achieved, the matter came back before the Court, at which time Ms Rogers raised concerns about the reduction in her personal pet numbers and asserted that she would never have agreed to the consent orders if she had understood that this was to be required. Meanwhile, she had taken steps towards implementing the other recommendations. Ms Rogers also complained that the required level of consultation between the two Court appointed experts giving rise to the NMP had not occurred. The Court agreed and made orders requiring additional consultation between the two experts and the production of supplementary reports, including an Amended Noise Management Plan ("ANMP"). These orders were not made by consent because Ms Rogers would not agree to be bound by any ANMP and did not accept that the number of dogs she kept as pets could be limited. The ANMP made 22 recommendations. The Court ordered the parties to file draft orders for implementing either the original consent orders and the NMP or the ANMP. The council complied, but Ms Rogers only filed submissions, raising new complaints about the noise criteria in and claiming that special circumstances were required before the lawful operation of Happy Paws could be restricted and that, in any case, the noise emitted was not offensive under the POEO Act.

Issues:

- (1) whether the consent orders and the NMP or ANMP should be enforced by the Court, subject to Court determined timeframes and clarification about the application of the orders with respect to Ms Rogers' personal pets.

Held: orders made for the implementation of the ANMP:

- (1) Ms Rogers' complaints could not be sustained because: appropriate noise standards and relevant information had been included in the revised reports; there was no requirement for "special circumstances" imposed by the consent orders or the POEO Act; neither the Court nor the experts were asked by the parties to determine whether the noise generated by the dogs at Happy Paws was "offensive"; and no one had contested the lawfulness of the Happy Paws consent: at [49]–[51]; and
- (2) the principle of the finality of litigation was the guiding concern. The parties were bound by the terms of the consent orders and thus the ANMP, with the exception of the recommendation concerning Ms Rogers' personal pets. It had not been the intention of the Court to extend the original consent orders to her personal pets. The complaint that the experts had not properly consulted prior to the NMP had been rectified and a comparison of the NMP and the ANMP revealed that most of the other recommendations were the same. Some latitude was afforded to Ms Rogers, however, with respect to the time for compliance: at [56]–[64].

***Horton v Palerang Council*** [\[2013\] NSWLEC 200](#) (Craig J)

(related decisions: *Horton v Palerang Council (No 2)* [\[2012\] NSWLEC 229](#) Craig J, *Horton v Palerang Council* [\[2013\] NSWLEC 102](#) Biscoe J)

Facts: the council sought by motion an order that Class 3 proceedings filed by Mr Horton be struck out on the basis that no reasonable cause of action was disclosed (r 13.4(1) of the [Uniform Civil Procedure Rules 2005](#)). By his application, Mr Horton sought orders that the council "be found guilty of fraud" and that it pay exemplary damages of \$150,000. The statutory foundation for Mr Horton's Class 3 application was said to be s 574 of the [Local Government Act 1993](#) ("LG Act") which gave him the right to appeal to the Court against the levying of a rate on the ground that the land, or at least part of it, was not rateable. In his submissions, Mr Horton acknowledged that his land was rateable land.

Issues:

- (1) whether a reasonable cause of action or proper basis for appeal were disclosed;
- (2) whether allegations of fraud were sufficiently particular or specific; and
- (3) whether it was fair and reasonable to order costs.

Held: proceedings dismissed, ordering Mr Horton to pay the council's costs:

- (1) the purported reliance upon s 574 of the LG Act by Mr Horton was a further and inappropriate attempt by him to agitate the taking of accounts for rates levied and payments made to the Council over a number of years: at [16];
- (2) there was no evidence that the land was not rateable or rateable to the particular rate that had been levied upon it: at [17];
- (3) Mr Horton had failed to identify the basis upon which he asserted fraud on behalf of the council: at [17]–[18]; and
- (4) no reasonable cause of action or basis for appeal was disclosed: at [19].

***Pittwater Council v Brown Brothers Waste Contractors Pty Limited (No 2)*** [\[2013\] NSWLEC 219](#) (Pepper J)

(related decisions: *Pittwater Council v Brown Brothers Waste Contractors Pty Limited* [\[2009\] NSWLEC 50](#) Lloyd J; *Pittwater Council v Brown Brothers Waste Contractors Pty Limited (No 2)* [\[2009\] NSWLEC 210](#) Pepper J; *Pittwater Council v Brown Brothers Waste Contractors Pty Ltd (No 3)* [\[2012\] NSWLEC 66](#) Pepper J)

Facts: the respondents sought leave of the Court to withdraw their plea of guilty to a charge of contempt of court, made on 21 October 2011. The contempt charge was in relation to a failure to comply with consent orders signed by the parties on 9 August 2007 ("the 2007 Orders"). Order 1 of the 2007 Orders restrained

the first respondent from using the rear of their property as a waste management facility by storing demolition waste. In the 2013 proceedings, the respondents claimed that the 2007 Orders, in particular order 1, properly construed by reference to a development consent granted by the council in 1995 (“the 1995 development consent”), in fact allowed them to undertake the activity that was said to have given rise to the breach and thus the contempt. They claimed that they pleaded guilty to the charge in 2011 as the result of erroneous legal advice, that is, that they were not made aware that the 1995 development consent and thus the 2007 Orders may have allowed non-putrescible demolition waste on the property.

Issue:

- (1) whether this case fell into one of the relevant categories where it was appropriate to allow the plea of guilty to be withdrawn because the person who entered the guilty plea was not at the time “in possession of all of the facts and did not entertain a genuine consciousness of guilt” by reason of imprudent and inappropriate legal advice given to him or her by their legal representatives.

Held: leave to withdraw pleas of guilty refused:

- (1) the case did not fall into one of the relevant categories for withdrawing a guilty plea as the respondents had a genuine consciousness of guilt and there were no circumstances affecting the integrity of the pleas because:
  - (a) at the time the pleas were entered, the respondents had made a deliberate and informed choice to plead guilty: at [146]; and
  - (b) the legal advice that the respondents received was not incorrect because the 2007 Orders, properly construed, did not permit the storage of non-putrescible waste. Although the 1995 development consent probably allowed for the storage of non-putrescible demolition waste, breach of the development consent was not the subject of the contempt charge, the 2007 Orders were. The 2007 Orders clearly prohibited “the storage...of any waste or things” other than trucks and empty waste containers: at [127]-[128]; and
- (2) granting leave to withdraw the guilty plea would impermissibly impinge upon the principle of the finality of litigation in circumstances where the acts which gave rise to the 2011 proceedings were, in part, the same acts that resulted in convictions for contempt for breach of the same Order in 2009 (“the 2009 contempt decision”). To permit the change of plea would undermine the correctness of the 2009 contempt decision and would also erode public confidence in the administration of justice: at [125] and [139]-[143].

***Jacfin Pty Ltd v Transgrid*** [2013] NSWLEC 180 (Craig J)

Facts: in the course of proceedings for the determination of compensation pursuant to the [Land Acquisition \(Just Terms Compensation\) Act 1991](#) (“JT Act”), Transgrid sought, by motion, the production of correspondence, diary notes and minutes of meetings between Jacfin and its consultants in relation to development on the acquired land that preceded the submission of a concept plan approval application to the Minister for that land; such approval having been given prior to acquisition by Transgrid. There was a dispute between the planning consultants for both parties as to the highest and best use of the land at the date of acquisition. Disagreement was directed to the suitability of the design and layout of development that was the subject of the Minister’s concept plan approval. That issue founded the request for production of the documents.

Issues:

- (1) whether the documents were relevant to determining market value under [s 56](#) of the JT Act;
- (2) whether weight ought be given to Ministerial approvals for development on the land; and
- (3) whether consultants’ advice as to the suitable means of developing land was relevant.

Held: notice of motion dismissed, there being no reasonable basis beyond speculation to show that the documents would materially assist on a fact in issue:

- (1) when determining market value, the Court considers advice given to a hypothetical purchaser as to the highest and best use of the land at the date of acquisition. Whether the approved development was to be implemented immediately, in the future, or at all cannot relevantly be informed by private correspondence between Jacfin and its consultants prior to lodging the concept plan application, or in the period between the approval and the acquisition: at [25]. Jacfin's motivation was irrelevant to determining the highest and best use of the land: at [25];
- (2) when determining the highest and best use of the land, the weight to be given to Ministerial approvals could not be addressed by reference to correspondence between an applicant seeking those approvals and its consultants in preparing the application: at [29];
- (3) upon becoming aware that a public authority proposed to acquire land at some time in the future, a landowner was not legally prohibited from seeking to propose to develop that land: at [35]; and
- (4) the staging of the development was said to be an important issue in the proceedings, however correspondence between Jacfin and its engineer did not address that issue. There could only be speculation as to advice given. Documents passing between the engineer, other consultants and Jacfin did not meet the threshold test of documents being relevant to a fact in issue: at [31]. The documents could only be relevant to credit which was not a valid basis for production: at [28].

## Costs

### ***Defence Housing Australia v Randwick City Council (No 3)*** [\[2013\] NSWLEC 179](#) (Pain J)

(related decision: *Defence Housing Australia v Randwick City Council* [\[2013\] NSWLEC 59](#) Pain J)

Facts: in *Defence Housing Australia v Randwick City Council* [\[2012\] NSWLEC 1181](#) two Commissioners dismissed a Class 1 appeal brought by Defence Housing Australia ("DHA") on the basis that the Court lacked jurisdiction under [s 97\(1\)](#) of the [Environmental Planning and Assessment Act 1979](#) ("EPA Act") because the development application ("DA") was a Crown DA. In an appeal under [s 56A](#) of the [Land and Environment Court Act 1979](#) DHA submitted the DA was not a Crown DA. The Court accepted that in the exercise of its discretion this position could be put, albeit contrary to the position submitted in the merits appeal before the Commissioners. The Court determined that the DA was not a Crown DA and the appeal was within the Court's jurisdiction in *Defence Housing Australia v Randwick City Council* [\[2013\] NSWLEC 59](#). DHA sought its costs of the s 56A appeal on the basis that it was successful on the question of law. The Council opposed such an order and sought its costs of the s 56A appeal.

#### Issue:

- (1) whether it was fair and reasonable in the circumstances to order costs under [r 3.7](#) of the [Land and Environment Court Rules 2007](#).

Held: each party should pay its own costs of the s 56A appeal and its costs of the costs applications:

- (1) while the result of the s 56A appeal was that DHA was successful on a point of law which was determinative of the proceedings, all of the circumstances of the appeal needed to be considered. That there was a reversal of position on a matter that was fundamental to whether the Court had jurisdiction was a highly material matter to whether costs ought be awarded in DHA's favour. DHA should not have an award of costs made in its favour: at [16]; and
- (2) the history of the matter did not suggest disentitling conduct by DHA sufficient to justify an award of costs in the Council's favour: at [20].

***Perilya Broken Hill Limited v Valuer-General (No 3)*** [\[2013\] NSWLEC 215](#) (Biscoe J)

(related decisions: *Perilya Broken Hill Ltd v Valuer-General* [\[2012\] NSWLEC 235](#) Lloyd AJ, *Valuer-General v Perilya Broken Hill Ltd* [\[2013\] NSWCA 265](#) Emmett and Leeming JJA, Preston CJ of LEC)

**Facts:** the Court of Appeal upheld an appeal by the Valuer-General (“VG”) against the Land and Environment Court’s determination of the land value of a mine owned by Perilya Broken Hill Ltd (“Perilya”), and remitted the matter for redetermination. Thereafter the progress of the proceedings was delayed for months to accommodate the VG’s wish to pursue a contested motion for determination of a preliminary question. On the last working day before the motion was to be heard the VG notified Perilya that it would abandon the motion in favour of a different course. The Court was not informed of this until the motion was called on for hearing. The VG agreed to pay Perilya’s costs of the motion on the ordinary basis. Perilya sought its costs on an indemnity basis.

**Issue:**

(1) whether the VG should be ordered to pay Perilya’s costs on an indemnity basis or on the ordinary basis.

**Held:** ordering the VG to pay Perilya’s costs on an indemnity basis:

- (1) the discretion to depart from the ordinary basis for costs requires some evidence of unreasonable conduct, which need not rise as high as vexation or ethical or moral delinquency. That is because ordinary costs remain the norm although they provide an inadequate indemnity: at [20];
- (2) if costs of an abandoned motion are awarded it is usually on the ordinary basis. The Court should generally be cautious about discouraging, by an indemnity costs order, abandonment of a motion where the moving party perceives a better course: at [22]; and
- (3) the VG’s conduct had been neither vexatious nor delinquent in any way when viewed in the context of its good intentions in deciding to take a different course. Nevertheless, on balance when the history of the proceedings was taken into account, the VG’s conduct had an element of unreasonableness such that it would be unfair for Perilya to be out of pocket, as it would be if costs were awarded on the ordinary basis. It was fair to order the VG to pay the indemnity costs, which should be understood as serving a compensatory and not a punitive purpose in this case: at [22].

**Section 56A Appeals*****SJ Connelly CPP Pty Ltd v Byron Shire Council*** [\[2014\] NSWLEC 2](#) (Pepper J)

(related decision: *S J Connelly CPP Pty Ltd v Byron Shire Council* [\[2012\] NSWLEC 1324](#) Dixon C)

**Facts:** the initial proceedings in this court related to contributions imposed by the respondent on the appellant as a condition to a development consent, pursuant to [s 94](#) of the [Environmental Planning and Assessment Act 1979](#) (“the EPA Act”). The contributions were imposed to meet public amenities costs associated with the appellant’s development of a backpackers hostel on the former Byron Shire Council premises. The appellant brought proceedings in the LEC, claiming that the contributions were excessive. Dixon C upheld the appeal and amended the amount payable by the appellant, but the appellant remained unhappy with the outcome because it regarded payment of any contributions to be unreasonable. The appellant appealed Dixon C’s decision under [s 56A](#) of the [Land and Environment Court Act 1979](#) (“the LEC Act”).

**Issues:**

- (1) whether any of the grounds of appeal set out by the appellant contained an error of law and therefore whether they were actually appealable under s 56A of the LEC Act;
- (2) whether the Commissioner “mistook and therefore ignored the mandated statutory enquiry” contained within s 94(6) of the EPA Act as to whether the appellant had contributed a “material public benefit” by retaining the heritage council building, which was necessary to take into consideration in calculating the contributions;

- (3) whether the Commissioner wrongly misapplied *Meriton Apartments Pty Ltd v Council of the City of Sydney* [2011] NSWCA 17; (2011) 80 NSWLR 156 when she chose not to take account of council's previous use of the building in order to determine the net demand for public amenities for the purposes of s 94(1) of the EPA Act and whether she failed to give adequate reasons for her decision;
- (4) whether the Commissioner failed to give adequate reasons in relation to contributions for civic and urban improvements;
- (5) whether the Commissioner failed to give adequate reasons in relation to contributions for cycleways; and
- (6) whether the Commissioner misapplied *Meriton* in her decision to allow contributions for cycleways and roads, insofar as that case stands for the proposition that pursuant to s 94(1) of the EPA Act, the need for a contribution levied by the consent authority must be generated by the development before it.

Held: appeal upheld and proceedings remitted to the Commissioner for redetermination:

- (1) an inquiry that involves a mixed question of law and fact can be a question of law and this case should be characterised as such (at [27]);
- (2) the Commissioner undertook the statutory enquiry she was obliged to undertake under s 94(6) when she found that the retention of the heritage building by the appellant did not constitute a "material public benefit" for the purposes of that section. The Commissioner "considered the heritage item in the context of the development, had regard to the evidence of [the appellant]'s heritage expert and found that its retention was not a material public benefit for the purposes of s 94(6)" (at [38]). This was because:
  - (a) the appellant retained the private use of the council building and therefore there was no "public benefit of an enduring nature" (at [45] and [47]–[48]); and
  - (b) the council buildings were retained because of the planning controls requiring it to be retained, and not because of anything done by the appellant (at [45] and [47]);
- (3) the Commissioner was correct to find that *Meriton* did not stand for any general principle that the historical peak workforce must be considered in determining future need for public amenities near the site. This was a matter to be determined on the facts and circumstances of any particular site. If anything, the decision of the Court of Appeal in *Meriton* suggested that the historical enquiry demanded by s 94(1) was no more than an examination of the actual or deemed workforce at the time of the development application (at [59]). The Commissioner gave adequate reasons for concluding that she did not need to go back to the council use of the site (at [56]), namely, because she disagreed, as a matter of law, with the appellant's analysis of the decision in *Meriton* (at [56]);
- (4) the Commissioner erred by failing to give adequate reasons with respect to contributions for civic and urban improvements. She did not adequately identify her reason for finding the nexus between the development and the contributions, nor did she explain why she preferred the evidence of one expert over the other, in relation to an appropriate payable contribution for these items (at [98]–[102]);
- (5) the Commissioner's reasons plainly disclosed why she found a nexus between the proposed development and the need for extended cycleways, however, it was not clear on what basis she found that one particular expert's opinion, and his payable contribution, was reasonable (at [108]–[112]); and
- (6) the Commissioner did not misapply *Meriton* in her decision to allow contributions for cycleways and roads. *Meriton* was not, given its confined *ratio decidendi*, authority for the proposition that works could not be carried forward into another contributions plan (at [121]).

***Boral Cement Pty Ltd v SHCAG Pty Ltd; Minister for Planning and Infrastructure v SHCAG Pty Ltd***  
[2013] NSWLEC 203 (Pain J)

(related decision: *SHCAG Pty Ltd v Minister for Planning and Infrastructure and Boral Cement Limited*  
[2013] NSWLEC 1032 O'Neill C and Adam AC)

Facts: a third party objector appeal was upheld by two commissioners, refusing consent for the continued operation of the Berrima colliery. The commissioners refused consent on the basis of traffic, noise and dust impacts on residents and unacceptable impacts on groundwater and surface water quality. Two s 56A appeals were brought, by Boral Cement Pty Ltd (“Boral”) and the Minister for Planning and Infrastructure (“the Minister”).

Issues:

- (1) whether there was a failure to accord procedural fairness concerning objector evidence on traffic, noise and dust impacts; and
- (2) whether there was a failure by the commissioners to consider the cases of the Minister and Boral focussing on groundwater, surface water, stygofauna and subsurface groundwater dependent ecosystems as articulated in multiple grounds of appeal.

Held: the appeal was upheld and an exclusionary remitter ordered:

- (1) there was a denial of procedural fairness because the case was decided without giving notice to the parties during the hearing or before delivering judgment that objector evidence concerning traffic, noise and dust impacts would be determinative: at [35] – [41]; and
- (2) there was a failure to consider the appellants’ cases focussing on groundwater, surface water, stygofauna and subsurface groundwater dependent ecosystems by the commissioners as articulated in multiple grounds of appeal (at [93] – [94]). The commissioners did not consider the appellants’ cases but focussed only on SHCAG’s case which was that the draft water management plan was not an adaptive management regime and the project should be refused. There was a failure to exercise jurisdiction: at [85]; and
- (3) there was an obligation on the commissioners to make findings on the issues identified by the parties where these were material to the Court’s consideration. In a merits appeal of considerable complexity, such as this matter, commissioners generally undertake a multifaceted evaluation of a proposal guided by the parties’ statements of facts and contentions. In the absence of agreement from the appellants that the water management plan issue was determinative, the commissioners had a duty to identify and make findings about the issues which potentially impacted on their conclusion that it was: at [93].

***Sertari Pty Limited v Quakers Hill SPV Pty Ltd*** [\[2013\] NSWLEC 208](#) (Pain J)

(related decisions: *Quakers Hill SPV Pty Limited v Blacktown City Council and Sertari Pty Ltd* [\[2013\] NSWLEC 1133](#), Dixon C, *Nirimba Developments Pty Limited v Blacktown CC and Anor* [\[2006\] NSWLEC 739](#), Bly C, *Nirimba Developments Pty Limited v Blacktown City Council and Anor* [\[2008\] NSWLEC 1229](#) Murrell C)

Facts: Quakers Hill SPV Pty Limited (“Quakers Hill”) has the benefit of a right of way over part of Sertari Pty Ltd’s (“Sertari”) land. Development consent for a residential flat building on Quakers Hill’s land was given by Bly C in 2006 with a deferred commencement condition. In 2008 Murrell C granted consent for use of the right of way subject to conditions including a deferred commencement condition requiring the preparation of a pedestrian management plan (“PMP”) with certain characteristics. Murrell C’s judgment attached figure 2 which identified two alternative pedestrian routes including on railway land outside the right of way.

Dixon C upheld an appeal concerning a PMP which had been submitted by Quakers Hill to Blacktown City Council (“the council”), and ordered that the application seeking the council’s satisfaction of deferred commencement condition Part A condition 3 of the development consent be approved. The PMP approved by Dixon C allows pedestrian traffic on the right of way. Sertari appealed.

Issues:

- (1) whether the PMP approved by Dixon C was beyond jurisdiction of the Court to approve because it did not accord with the pedestrian access arrangements approved by Murrell C; and



- (2) whether the consent granted by Murrell C was ambiguous and therefore whether it was necessary to incorporate expressly or by inference the development application (“DA”) or Murrell C’s judgment including figure 2.

Held: appeal dismissed and costs reserved:

- (1) the importance of the issue on appeal of the incorporation of the DA arose explicitly for the first time in oral submissions at the commencement of the appeal hearing. The submission was allowed to be made in the appeal as the submission was made somewhat faintly below: at [17];
- (2) the consent granted by Murrell C was not ambiguous: at [35]. The finding that the consent was not ambiguous provided limited scope for additional documents to be incorporated where these were not expressly referred to in the consent: at [36];
- (3) there was no basis for the express incorporation of the DA into the consent simply because it was referred to in order 2 made by Murrell C. A document referred to in a consent can be expressly incorporated into it but the mere reference to a document such as a DA is usually not sufficient to constitute express incorporation for this purpose: at [38]; and
- (4) the argument that the judgment of Murrell C formed part of the consent granted in the orders and conditions, was novel. There is no express reference to the judgment and/or figure 2 in the development consent. No authority on precisely these facts was cited to support this argument: at [40]. A judgment of a court contains reasons for a decision being reached, here the decision to grant a development consent. There was no automatic inclusion of a judgment as part of any order made by any court. The reasons in the judgment were not the development consent. Reasons are provided so that the parties are aware of the basis for a decision and are necessary to afford procedural fairness to the parties. That there are procedures for the formal recording of judgments and orders under the Uniform Civil Procedure Rules 2005 does not render the judgment part of the orders made by a court: at [41].

***Greenwood v Warringah Council*** [2013] NSWLEC 223 (Biscoe J)

(related decisions: *Greenwood v Warringah Council* [2012] NSVLEC 152 Sheahan J, *Greenwood v Warringah Council* [2013] NSWLEC 1119 Dixon C and Ritchie AC)

Facts: this was an appeal under s 56A of the [Land and Environment Court Act 1979](#) against the refusal of development consent by two Commissioners. As such, the appeal was limited to questions of law. In order to grant consent, it was necessary for the Commissioners to be satisfied that the development application was consistent with the desired future character (“DFC”) described in a locality statement in a local environmental plan. The Commissioners were not satisfied that it was consistent as there was insufficient detail in evidence about essential matters, and also decided that the lack of detail precluded the proper assessment of the likely impacts of the development under s 79C(1)(b) and the suitability of the site for development under s 79C(1)(c) of the [Environmental Planning and Assessment Act 1979](#).

Issues: whether the Commissioners:

- (1) failed to give reasons for the decision;
- (2) made findings of fact without evidence to support them;
- (3) misdirected themselves as to the correct test in the locality statement; and
- (4) failed to determine a significant contested issue.

Held: dismissing the appeal:

- (1) as to the duty to give reasons: at [23]:
  - (a) a judge or commissioner has an obligation to provide reasons for the judgment;
  - (b) the extent and content of reasons depends upon the particular case under consideration and the matters in issue. Reference should be made to important or critical evidence;

- (c) it is not sufficient for a Commissioner to only set out the Commissioner's subjective thought process in coming to a decision: a Commissioner is bound to address the principal contested issues joined between the parties;
  - (d) Commissioners have no less onerous a duty to give reasons than judges;
  - (e) a failure to provide reasons or inadequate reasons is generally assumed to be an error of law; and
  - (f) there are three fundamental elements of an adequate statement of reasons:
    - (i) reference should be made to the relevant evidence. There is no need to refer it in detail, especially in circumstances where it is clear that the evidence has been considered. However, where certain evidence is important or critical to the proper determination of the matter and it is not referred to, an appellate court may infer that it was overlooked or not considered. Where conflicting evidence of a significant nature is given, the existence of both sets of evidence should be referred to;
    - (ii) any material findings of fact and any conclusions or ultimate findings of fact reached should be set out. Where one set of evidence is accepted over a conflicting set of significant evidence, the findings should be set out as to how one is accepted over the other;
    - (iii) reasons should be provided for making the relevant findings of facts and conclusions in applying the law to the facts found;
- (2) as to the first two issues, the deferred commencement conditions proposed in the amended development application were important in their resolution. It was reasonably open to the Commissioners to take the view that certain essential matters were insufficiently detailed in the information before them, and that further details should be provided as indicated in the deferred commencement conditions in order for them to be satisfied as to consistency with the DFC, the likely impacts and the suitability of the site for development. It was unnecessary to go beyond their finding in relation to an acoustic bund that its details had yet to be determined, that the Commissioners were unclear about its details, and that to overcome the problem the applicant accepted a deferred commencement condition containing details: at [31]-[33];
- (3) as to the third issue, the Commissioners did not misdirect themselves as to the correct test in the locality statement: at [37]; and
- (4) as to the fourth issue, since the Commissioners were not satisfied that the development was consistent with the DFC and therefore they had no power to grant consent, the issue to which the appellant referred was irrelevant to the outcome and did not need to be considered. Also, the references to that issue before the Commissioners were fleeting and it was not referred to in closing submissions before the Commissioners: at [40].

### Commissioner Decisions

#### ***Khoury v Holroyd Council*** [\[2013\] NSWLEC 1236](#) (Fakes C)

**Facts:** on 23 May 2013 Holroyd Council issued Mr Khoury with an Order under [s 121B](#) of the [Environmental Planning and Assessment Act 1979](#) ("the EPA Act") to cease the use of premises in South Wentworthville as an unauthorised boarding house. The reasons for the Order were that the premises were approved as an attached dual occupancy but were being used as a boarding house having been internally modified as ten self-contained units, for which no approval had been sought or granted. In addition, there was much non-compliance with the Building Code of Australia ("BCA"), particularly in regards to fire safety, which constituted a life-threatening hazard to the occupants. Mr Khoury appealed under [s 121ZK](#) of the EPA Act but put on no evidence as to why the Order should be revoked.

Mr Khoury represented himself at the hearing and immediately sought to have the matter heard before a Judge and adjourned for a period of three months to enable him to seek legal advice and prepare his case. In the alternative, he sought to 'withdraw' from the matter. The Council opposed both applications. Mr

Khoury was advised that he needed to substantiate his request for an adjournment; his options as to discontinuing the appeal and the effect on the Order; and that if the adjournment were not granted and he withdrew, the matter would be heard in his absence. Mr Khoury left the Court and the matter proceeded in his absence.

Issues:

- (1) whether an adjournment was justified and whether Mr Khoury was afforded procedural fairness; and
- (2) whether the Order should be confirmed or revoked.

Held: confirming the terms of the Order and requiring compliance within 60 days of service of a sealed copy of the orders on the applicant:

- (1) Mr Khoury had five months since the filing of his Class 1 application to prepare his case. There was no evidence to indicate any involvement of any lawyer on his behalf. Mr Khoury filed no Notice of Motion to vacate the hearing date or to modify the Registrar's directions in any way. At the hearing Mr Khoury produced no evidence as to why the matter should be adjourned or discontinued. To grant an adjournment at this late stage would not facilitate the just, quick and cheap resolution of the real issues in the proceedings brought by Mr Khoury himself: at [37];
- (2) indicative plans of the internal layout of the dwelling, interviews with tenants, Mr Khoury's bank statements, and a Boarding House Registration form signed by Mr Khoury confirmed that the premises were being used as a boarding house for which no consent had been sought or approved: at [72];
- (3) the layout and internal configuration of the dwelling were consistent with the definitions of "boarding house" in [Holroyd Local Environmental Plan 2013](#) and "boarding premises" in [State Environmental Planning Policy \(Affordable Rental Housing\) 2009](#), and it also met the requirements of a Class 3 building in the BCA: at [74], [75];
- (4) the uncontested evidence indicated that the construction practice, configuration and building elements used in constructing the sole occupancy units, associated passageways and stairways constituted a life-threatening hazard to occupants, particularly in regards to fire safety: at [77];
- (5) as the owner of the building and the person gaining financial benefit from the use of the premises as a boarding house, Mr Khoury was in breach of [s 76A\(1\)\(a\)](#) of the EPA Act and was the appropriate person to whom the 121B order should be made: at [78]; and
- (6) the Order should not be revoked. Given the number and type of non-compliances with the BCA, there was a risk to the health and safety of residents and tenants of, and visitors to, the premises: at [82].

***Coorey v Municipality of Hunters Hill*** [\[2013\] NSWLEC 1187](#) (Moore SC, Sullivan AC)

Facts: the applicant appealed under [s 97](#) of the [Environmental Planning and Assessment Act 1979](#) 1979 against the refusal of development consent for what was described as additions and/or alterations to a mid 19th-century stone cottage in Hunters Hill. The cottage had had additions and alterations made to it in the mid-1970s, and had been somewhat modified from its original form prior to those 1970s additions and alterations. It was not clear whether some elements shown in the only early photograph, one taken in the early 1940s, were original or not. The proposed changes involved the removal of the 1970s modifications and their replacement with new structures in a slightly different location and having a significantly different form than those earlier additions. The cottage is a listed heritage item pursuant to the Local Environmental Plan applying at the time the development application was made to the Council and in the recently made replacement Local Environmental Plan. During the course of the proceedings, the question arose as to whether or not that for which development consent was sought could properly be characterised as additions or alterations in light of the test set out in the planning principle in *Edgar Allan Planning Pty Limited v Woollahra Municipal Council* [\[2006\] NSWLEC 790](#). In these proceedings, different setback controls applied depending on how the characterisation question was answered.

After conferencing between the parties' heritage experts, only two minor merit issues remained unresolved, which were (i) whether the existing dormer window in the southern roof plane of the sandstone cottage should be retained (although in a redesigned format); and (ii) whether there should be removal of the

existing vegetation and replanting in the Council's kerbside nature strip along the northern boundary of the site.

Issues:

- (1) whether the planning principle in *Edgar Allan Planning* should be revisited and replaced with a process based planning principle; and
- (2) whether development consent should be granted.

Held: upholding the appeal with minor design changes:

- (1) the dormer window and reinstatement of the southern roof plane would provide significant enhancement of the viewing of the heritage item from the nearby public street: at [32] and [33];
- (2) removal of the southern dormer was a critical element in rendering the overall proposal acceptable: at [34];
- (3) removal of the existing vegetation in the Council nature strip with an appropriate replanting would provide adequate screening of the proposed extensions whilst enhancing the view corridor of a neighbouring property to the north and thus the vegetation removal and replanting was to be required: at [43];
- (4) the prescriptive planning principle in *Edgar Allan Planning* was no longer appropriate and should be replaced with a process-based principle: at [55];
- (5) the first element of the new principle is to enquire why is it necessary to determine whether an application should be characterised as additions and/or alterations or as an application to build an entirely new structure: at [56];
- (6) having answered that enquiry, the characterisation process is to be qualitative as well as quantitative with the new principle suggesting a number of questions that might arise on each of these aspects (with the questions to be posed having regard to the purpose for which the enquiry was being made): at [59] and [60]; and
- (7) the replacement principle does not set an exhaustive list of questions as the enquiry to be made will vary according to the facts and circumstances arising on each occasion: at [62].

***Bookrill Pty Ltd v Parramatta City Council*** [\[2013\] NSWLEC 1202](#) (Moore SC)

Facts: Palmer Lane is a cul-de-sac at the northern end of the Parramatta Central Business District. Since approximately the early 1960s, Parramatta City Council had identified the need for a turning circle to be constructed at what was the existing dead end head of Palmer Lane. That required incorporation of land from the surrounding properties at the head of the lane, which included 21 Sorrell Street. Contact between the council and the owners of that property had been occurring since the mid-1980s concerning a possibility of incorporating approximately 70 m<sup>2</sup> of that property into the turning circle. In 2006, a mixed-use development was approved for the site and no condition was attached to that development consent relating to land required for the Palmer Lane turning circle. In 2010, a new development consent was granted by the council to the then owners, Bookrill Pty Ltd ("Bookrill") for a mixed-use development that included 21 Sorrell Street but also included two adjacent properties with frontages to Victoria Street. The conditions of development consent included condition 117, which required that a cul-de-sac section identified on the approved architectural plan "shall be dedicated in benefit of Council" to be part of the Palmer Lane road reserve. Following the grant of consent, the beneficial owners of the land sold the site to the ultimate developer, retaining any rights to compensation for the transfer of land for the turning circle at the head of Palmer Lane. In July 2012, agreement was reached on a transfer value of \$435,000. In August 2012, council's in house lawyer advised that no compensation was payable as the condition of development consent required dedication and that that dedication was to be at no cost to the council. Bookrill lodged a modification application under [s 96](#) of the [Environmental Planning and Assessment Act 1979](#) ("the EPA Act") to add the words "including payment of compensation calculated pursuant to the [Land Acquisition \(Just Terms Compensation\) Act 1991](#)" to condition 117 of the development consent. Bookrill appealed against the deemed refusal of the modification application.

Issues:

- (1) whether condition 117 created a right to compensation;
- (2) if it did, whether it was appropriate to add the words that were proposed to be added;
- (3) if it did not, whether there was power to modify an otherwise invalid condition of consent;
- (4) if there was a broad power to modify, whether it necessary that the modification be for a planning purpose;
- (5) if there was power and the proposed modification was permissible, whether the development as modified would be substantially the same development as the development for which original consent was granted; and
- (6) if modification was permissible in the terms sought, whether the modification, as a matter of discretion, should be approved.

Held: dismissing the appeal:

- (1) a proper understanding of the use of the word “dedicate” in the contested condition did not create a right to compensation: at [53] - [57];
- (2) if incorrect in this conclusion, there were two discretionary reasons for not approving the proposed change:
  - (a) it was inappropriate in Class 1 proceedings to provide what would be, in effect, declaratory relief: at [61]- [63]; and
  - (b) the risk of creating a right by accident (if wrong in the conclusion in (1)), made it inappropriate to do so: at [64];
- (3) preferring the approach of Bignold J in *Valiant Timber and Hardware Company Pty Limited v Blacktown City Council* [2005] NSWLEC 747; (2003) 144 LGERA 33 over the earlier contrary decision of Pain J in *Lean Lakenby and Heywood Liverpool Pty Limited v Baulkham Hills Shire Council* [2003] NSWLEC 406, there was power to modify an otherwise invalid condition of consent: at [78] - [86];
- (4) the proposed modification, however, would not be for a planning purpose but would solely be for a commercial benefit to the applicant, and did not satisfy the first of the tests in *Newbury District Council v the Secretary of State for the Environment* [1981] AC 578: at [96];
- (5) inserting an entirely new condition in the terms sought would not result in a development substantially the same as the development for which consent was originally granted and would thus contravene s 96(1A)(b) of the EPA Act: at [108] - [115]; and
- (6) if incorrect in (5), there was not a proper evidentiary basis, on a merit assessment, to do so: at [118] - [120].

**Court News**

Ms Anne Deal, Associate to Justice Sheahan, is retiring on 5 February 2014. Ms Alison Ludewig will take on the role of Associate on a full time basis.