September 2014
Volume 6 Issue 3

Land and Environment Court of NSW Judicial Newsletter

Legislation

- Statutes and Regulations

Planning:

Environmental Planning and Assessment Amendment (Fire Safety) Regulation 2014, published 18 July 2014, amends the Environmental Planning and Assessment Regulation 2000:

(a) to require a certifying authority, when carrying out certain inspections in relation to development that affects only part of an existing building, to inspect those affected parts and the egress routes from those parts;

(b) to require a certifying authority to whom an application has been made for a complying development certificate or Part 4A certificate affecting an existing building to notify the council if the certifying authority becomes aware of a significant fire safety issue with the building;

(c) to require a principal certifying authority appointed in relation to building work affecting an existing building to notify the council if the certifying authority becomes aware of a significant fire safety issue with the building;

(d) to prevent the issue of a complying development certificate for a change of building use, or for building work involving the internal alteration of an existing building, unless the building contains measures that are adequate, in the event of a fire, to facilitate the safe egress of persons from those parts of the building affected by the change of building use or the building work; and

(e) to remove a requirement that applications for complying development certificates be accompanied by a report from an accredited certifier about matters concerning fire safety.

Environmental Planning and Assessment Amendment (Redfern-Waterloo) Regulation 2014, published 12 September 2014, amends the transitional and savings provisions in Sch 6A of the *Environmental Planning and Assessment Act* 1979 to specify that projects in Redfern–Waterloo in respect of which development contributions were payable before the repeal of Part 3A of that Act continue to be subject to such contributions.

Environmental Planning and Assessment Amendment (NorthConnex) Order 2014, published 5 September 2014, modified the declaration of a project as State significant infrastructure and critical State significant infrastructure so as:

(a) to rename the project as the NorthConnex project;

(b) to specify that the project is a new road; and

(c) to update the suburbs in which the project may be carried out.

Standard Instrument (Local Environmental Plans) Amendment Order 2014, published 15 August 2014, omits the reference in cl 1.9 of the Standard Instrument – Principal Local Environmental Plan to State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 as a State environmental planning policy that does not apply to land to which a standard instrument plan applies.

Criminal:

Marine Safety (General) Amendment (Marine Pollution Penalty Notice Offences) Regulation 2014, published 22 August 2014, prescribes certain offences under the *Marine Pollution* Act 2012 and the Marine Pollution Regulation 2014 as penalty notice offences that can be dealt with under the *Marine Safety Act* 1998 (as the *Marine Pollution Act* 2012 and the Marine Pollution Regulation 2014 are marine legislation within the meaning of the *Marine Safety Act* 1998).

Water:

Water Management Amendment Act 2014, assented to on 17 September 2014:

(a) amends the *Water Management Act* 2000*:*

(i) to define the term overland flow water and confirm that overland flow water is included in the State's water rights under the principal Act;
(ii) to clarify the meanings of certain terms used in the principal Act and update certain terminology;
(iii) to make further provision with respect to harvestable rights and the matters dealt with by harvestable rights orders;
(iv) to enable a new general dealing with an access licence (called a term water allocation transfer) to be created;
(v) to make further provision with respect to the proper operation of metering equipment and the keeping of metering records, and
(vi) to make it an offence for the holder of a bore driller's licence not to ensure that the terms and conditions of the licence are not contravened or for a trainee driller under the holder's supervision to contravene the terms and conditions of the licence;
(vii) to make further provision with respect to the calculation of the balances in water allocation accounts for access licences;
(viii) to re-enact, with certain modifications, uncommenced amendments in the *Water Management Amendment Act* 2008 concerning nominated water supply works and water tagging zones;
(ix) to provide for the controlled allocation of access licences for a part of an area or water source and for the setting of the minimum price and participation fees for the acquisition of the right to apply for licences that are subject to controlled allocation;
(x) to enable the consolidation of management plans and approvals;
(xi) to enable the regulations to make provision for the conversion of actual or proposed flood water usage into floodplain access licences;
(xii) to make other amendments to streamline processes concerning licensing, approvals and the trading of water entitlements; and
(xiii) to make provision for matters of a savings or transitional nature;

(b) amends certain water sharing plans to standardise the use of the expression "worst period of low inflows" into a water source in those plans and clarify its meaning; and

(c) makes consequential amendments to certain other legislation.

The Act will commence on a date or dates to be proclaimed, other than provisions concerning the conversion of former entitlements under the *Water Act* 1912 into access licences, and Sch 2, the amendments to water sharing plans, which commenced on assent.

Water Management (EnergyAustralia) Proclamation 2014, published 5 September 2014, established EnergyAustralia NSW Pty Ltd as a major utility for the purposes of the *Water Management Act* 2000.

Water Management (General) Amendment (Miscellaneous) Regulation 2014, published 27 June 2014:

(a) provides that the water sharing planning provisions of a management plan for a water management area or water source may deal with the return or delivery of water to a water source, including the circumstances in which the water is to be returned or delivered;

(b) extends until 31 December 2014 the exemption of Anabranch Water (being the private irrigation board for the Greater Anabranch of the Darling River Private Water Supply and Irrigation Districts) from the requirement that it must not serve a notice of a proposed take-over of an existing water supply work after the expiration of 12 months after the constitution of its private irrigation district or on any person in respect of work that belongs to, or is under the control or management of, a public authority; and

(c) extends until 1 July 2015 the expiry of a transitional period during which certain entitlements for prospecting and fossicking under the *Water Act* 1912 continue to operate (and after which the entitlements convert to entitlements under the *Water Management Act* 2000).

Water Sharing Plan for the Peel Valley Regulated, Unregulated, Alluvium and Fractured Rock Water Sources Amendment Order (No 2) 2014, published 15 July 2014, amends the Water Sharing Plan for the Peel Valley Regulated, Unregulated, Alluvium and Fractured Rock Water Sharing Plan 2010 relating to share component trade, access licences and extraction volumes.

The following amendments to water sharing plans were made on 26 September 2014:

- Water Sharing Plan for the Gwydir Regulated River Water Source Amendment Order 2014 amends the Water Sharing Plan for the Gwydir Regulated River Water Source 2002
- Water Sharing Plan for the Lachlan Regulated Water Source Amendment Order 2014 amends the Water Sharing Plan for the Lachlan Regulated River Water Source 2003
- Water Sharing Plan for the Macquarie and Cudgegong Regulated Rivers Water Source Amendment Order 2014 amends the Water Sharing Plan for the Macquarie and Cudgegong Regulated Rivers Water Source 2003
- Water Sharing Plan for the NSW Border Rivers Unregulated and Alluvial Water Sources Amendment Order 2014 amends the Water Sharing Plan for the NSW Border Rivers Unregulated and Alluvial Water Sources 2012
- Water Sharing Plan for the Peel Valley Regulated, Unregulated, Alluvium and Fractured Rock Water Sources Amendment Order 2014 amends the Water Sharing Plan for the Peel Valley Regulated, Unregulated, Alluvium and Fractured Rock Water Sources 2010.

- Pollution:

Protection of the Environment Operations (General) Amendment (Fees and Penalty Notices) Regulation 2014, published 29 August 2014, amends the Protection of the Environment Operations (General) Regulation 2009 to:

(a) increase up to tenfold the penalty notice amounts payable under penalty notices in respect of certain offences under the *Protection of the Environment Operations Act* 1997 (the Act), the Protection of the Environment Operations (Clean Air) Regulation 2010 and the Protection of the Environment Operations (Noise Control) Regulation 2008;

(b) prescribe different penalty notice amounts in respect of certain penalty notice offences under the Act based on whether the enforcement officer serving the penalty notice is a class 1 enforcement officer (generally, a member of staff of a local authority) or any other class of enforcement officer;

(c) expand the penalty notice offences in relation to which members of staff of the Western Sydney Parklands Trust can be authorised to issue penalty notices to include the offence under s 143 of the Act concerning the unlawful transportation of waste;

(d) enable persons employed in the Office of Environment and Heritage to be authorised to issue penalty notices in relation to littering offences under the Act and offences under the Clean Air Regulation concerning burning in the open air or in incinerators;

(e) prescribe the administrative fee units used to calculate licence application fees, and annual licence fees, relating to waste processing (otherwise than by thermal treatment) of liquid waste or waste oil; and

(f) make other changes by way of law revision (including updating references to Departments and to the head of the Office of Environment and Heritage).

Protection of the Environment Operations (Underground Petroleum Storage Systems) Regulation 2014, published 29 August 2014, remakes with changes, the 2008 Regulation. The principal changes include the following:

(a) to enable the use of certain secondary leak detection systems;

(b) to enable environment protection plans to be kept electronically and as either a consolidated document or a collection of documents;

(c) to provide greater flexibility in the devising of loss monitoring procedures for a storage site;

(d) to include new definitions (see, in particular, the definition of *leak*) and clarify the meaning of certain existing definitions (see, in particular, the definitions of *petroleum*, *routine maintenance*, *significant modification* and *storage site*); and

(e) to clarify certain reporting requirements.

Protection of the Environment Operations (Waste) Amendment (Removal of Exemption) Regulation 2014, published 8 August 2014, removed a general exemption from the waste regulatory regime that applies to bulk agricultural crop materials or manure that is applied to land. As a result, any processed, recycled, re-used or recovered bulk agricultural crop materials or manure that is applied to land is treated as waste and subject to regulation under the Protection of the Environment Operations (Waste) Regulation 2005.

- Mining and Petroleum:

Mining Amendment (Small-Scale Title Compensation) Act 2014, assented to on 25 September 2014, amends provisions of the *Mining Act* 1992 relating to small-scale titles (being a mineral claim or an opal prospecting licence) to:

(a) regulate the compensation paid by the holders of small-scale titles over land to landholders;

(b) provide mechanisms for dealing with disputes between landholders and holders of small-scale titles or applicants for small-scale titles; and

(c) to provide for levies on small-scale titles for purposes associated with those titles and the establishment of the Small-Scale Titles Levy Fund in the Special Deposits Account.

The Act also amends the *Land and Environment Court Act* 1979 to include provision for mandatory conciliation and arbitration of proceedings relating to small-scale titles. The amendments will commence on proclamation.

Environmental Planning and Assessment Amendment (Mining and Petroleum Development) Regulation 2014, published 25 July 2014, amended the *Environmental Planning and Assessment Act* 1979 and the Environmental Planning and Assessment Regulation 2000 to make it clear that requirements relating to the gateway process for mining and petroleum development on strategic agricultural lands do not apply to certain additional pending requests for the modification of approved projects and applications for development consent or the modification of development consent.

Mining Amendment (Transitional) Regulation 2014, published 17 September 2014, amends the transitional provisions in relation to the application of s 380AA of the *Mining Act* 1992 to applications for development consent, or for the modification of a development consent, to mine for coal.

State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) Amendment 2014, published 25 July 2014, amended the maps in SEPP (Mining, Petroleum Production and Extractive Industries) 2007, and includes other transitional arrangements.

- Miscellaneous:

Rural Fires Amendment (Vegetation Clearing) Act 2014 No 32 commenced 1 August 2014. It amended the *Rural Fires Act* 1997 in relation to vegetation clearing work in certain areas and bush fire hazard reduction certificates.

Aboriginal Land Rights Regulation 2014, published 29 August 2014, remakes the Aboriginal Land Rights Regulation 2002, and contains provisions, inter alia, relating to the following:

(a) the exemption of certain land vested in Aboriginal Land Councils from the payment of specified rates and charges;

(b) the investment and disbursement of money in the Mining Royalties Account;

(c) the constitution and boundaries of Local Aboriginal Land Councils, and the election of Board members, the conduct of meetings and model rules for those Councils;

(d) the conduct of elections, holding of meetings and model rules for the New South Wales Aboriginal Land Council; and

(e) land dealings by Local Aboriginal Land Councils, including the payment of the community development levy.

Real Property Regulation 2014, published 22 August 2014, remade with some changes, the provisions of the *Real Property Regulation 2008* which was repealed on 1 September 2014.
This Regulation includes provisions relating to the lodgement of dealings, applications and caveats, including requirements relating to the form and content of certain instruments and plans.

The Subordinate Legislation (Postponement of Repeal) Order 2014 and the Subordinate Legislation (Postponement of Repeal) Order (No 2) 2014, published 29 August 2014, list the regulations whose repeal has been delayed until 1 September 2015, including:

- Community Land Development Regulation 2007
- Community Land Management Regulation 2007
- Crown Lands (Continued Tenures) Regulation 2006
- Crown Lands (General Reserves) By-law 2006
- Crown Lands Regulation 2006
- Environmentally Hazardous Chemicals Regulation 2008
- Hay Irrigation Regulation 2007
- Local Government (General) Regulation 2005
- Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2005
- Marine Parks Regulation 2009
- National Parks and Wildlife Regulation 2009
- Noxious Weeds Regulation 2008
- Pesticides Regulation2009
- Petroleum (Offshore) Regulation 2006

- Petroleum (Onshore) Regulation 2007
- Protection of the Environment Operations (General) Regulation 2009
- Protection of the Environment Operations (Noise Control) Regulation 2008
- Protection of the Environment Operations (Waste) Regulation 2005
- Swimming Pools Regulation 2008
- Wentworth Irrigation Regulation 2007

Lord Howe Island Regulation 2014, published 8 August 2014, remade, with some amendments, the Lord Howe Island Regulation 2004. The Regulation makes provision for and with respect to the following:

(a) the election of Islanders to the Lord Howe Island Board;

(b) applications for, transfers, subleases and surrenders of, and rent for, leases of land on Lord Howe Island;

(c) the licensing of tourist accommodation and other commercial undertakings;

(d) the protection of the environment on the Island, including coral and flora and fauna;

(e) the regulation of conduct in the Lord Howe Island Permanent Park Preserve;

(f) the sale and consumption of alcohol on the Island;

(g) the use of motor vehicles, vessels and moorings on the Island

(h) penalty notice offences; and

(i) other miscellaneous matters.

National Parks and Wildlife Amendment (Leases) Regulation 2014, published 1 August 2014, replaced the list of leases in relation to which the Minister for the Environment may grant head leases.

- Bills:

Protection of the Environment Legislation Amendment Bill 2014, passed by the Legislative Assembly on 10 September 2014 and introduced into the Legislative Council for concurrence, amends the *Contaminated Land Management Act* 1997 and the *Protection of the Environment Operations Act* 1997 to increase certain penalties for offences and amend the enforcement provisions of those Acts. The Bill also amends the *Protection of the Environment Administration Act* 1991 with respect to payments into the EPA Fund. The Court's Class 4 jurisdiction will be amended to include enforcement and financial dispute proceedings under the amended the *Contaminated Land Management Act* 1997.

The Bill:

(a) amends the *Contaminated Land Management Act* 1997 to:
  (i) enable the EPA to require a person to whom a management order is directed to provide financial assurance to secure or guarantee funding for or towards the carrying out of an action required by or under the order;
  (ii) enable certain court orders to be made against a convicted offender in connection with the offence against the Act that the offender committed (including an order for the payment of an additional penalty based on a monetary benefit derived by the offender);
  (iii) enable the regulations under the Act to prescribe different amounts of penalties for a penalty notice based on the number of times that an offender has been convicted of, or paid a penalty notice for, the same offence within a 5-year period; and
  (iv) provide for the liability of offenders for continuing offences and the continuing effect of notices, orders and conditions under the Act and the regulations under the Act.

(b) amends the *Protection of the Environment Operations Act* 1997 to:
  (i) enable clean-up notices to be given to owners of premises as well as occupiers;

(ii) clarify the obligations of occupiers of premises from which point source emissions or non-point source emissions occur in connection with the prevention or minimisation of such emissions;
(iii) enable certain court orders to be made in connection with offences requiring the offender to undertake restorative justice activities agreed to by the offender and to enable the EPA to accept undertakings to carry out such activities,
(iv) enable the EPA to require persons who transport waste to ensure that approved GPS tracking devices are installed, used and maintained on motor vehicles used to transport their waste,
(v) provide that an appeal against a decision to suspend or revoke a licence does not operate to stay the decision, and
(vi) remove the requirement to provide a person with a notice of intention to suspend or revoke a licence and remove certain other outdated provisions of the Act; and

(c) makes consequential amendments to the *Land and Environment Court Act* 1979 and the Protection of the Environment Operations (General) Regulation 2009.

Mine Subsidence Compensation Amendment Bill 2014 was passed by the Legislative Assembly on 10 September 2014 and introduced into the Legislative Council on 11 September 2014 for concurrence. The Bill amends the provisions of the *Mine Subsidence Compensation Act* 1961 to:

(a) amend the provisions relating to claims for preventative or mitigative expenses, including a requirement that the Mine Subsidence Board notify a claimant of its decision about a claim and give reasons;

(b) provide a right of appeal to the Land and Environment Court for a person who has made an application relating to preventative or mitigative works;

(c) increase penalties for works done or subdivision of land in a mine subsidence district without the approval of the Mine Subsidence Board; and

(d) amend the provisions for certificates of compliance.

Non-government:

Native Vegetation Amendment Bill 2014 was introduced in the Legislative Council on 29 May 2014, and seeks to amend the *Native Vegetation Act* 2003:

(a) to modify the current controls on clearing native vegetation so that they apply only to the clearing of indigenous trees;
(b) to provide that broad scale clearing of native vegetation may be carried out only if the clearing is in the social, economic and environmental interests of the region in which it is carried out rather than if it improves or maintains environmental outcomes,
(c) to ensure that the objects of the Act are pursued in order to promote the social, economic and environmental interests of the State,
(d) to reduce the penalties for unauthorised clearing of native vegetation and for certain other offences under the Act, and
(e) to make other amendments relating to the clearing of native vegetation.

- State Environmental Planning Policy [SEPP) Amendments

The SEPP (Exempt and Complying Development Codes) Amendment (Commercial and Industrial) 2014, published 18 July 2014, inter alia, removes affordable housing from the SEPP (Exempt and Complying Development Codes) 2008.
The maps in the SEPP (Sydney Growth Region Centres) 2006 have been amended by the following:

- SEPP (Sydney Region Growth Centres) Amendment (Housing Diversity) 2014, published 11 August 2014; and

- SEPP (Sydney Region Growth Centres) Amendment (Liverpool–East Leppington Precinct) 2014, published 8 August 2014.

SEPP Amendment (Newcastle City Centre) 2014, published 29 July 2014, adopted or replaced maps in the Newcastle LEP 2012.
SEPP Amendment (Wentworth Point Urban Activation Precinct) 2014, published 4 July 2014, amended or replaced maps in the Auburn LEP 2012.
SEPP (Western Sydney Employment Area) Amendment (Pipelines) 2014, published 27 June 2014, amended the SEPP (Western Sydney Employment Area) 2009 to change permitted land uses on certain land.
SEPP Amendment (Homebush Bay Area) 2014, published LW 13 June 2014, amended the Sydney REP No 24 – Homebush Bay Area, to remove the Ralph Symonds Building from the heritage list.

- On Exhibition

Proposed amendments to State Environmental Planning Policy No 65- Design Quality of Residential Flat Development (SEPP 65) and the Residential Flat Design Code (RFDC) are on exhibition until 31 October 2014. The proposal includes amendments to the range of developments to which SEPP 65 applies, and its relationship with other planning instruments and development control plans; amendments to the design quality principles, and design review panels; and renaming the RFDC the "Apartment Design Code", and amending its provisions, including new provisions for adaptive re-use and noise and pollution. The public consultation drafts and supporting documents can be accessed through this link

The EPA is seeking comments on a position paper concerning proposed amendments to the regulatory framework for railways under the *Protection of the Environment Operations Act* 1997. Submissions close 8 October 2014.

- Miscellaneous

The Australian Centre of Excellence in Local Government has released Guidelines for the Planning and Development of Child Care Facilities

The Australian Centre of Excellence for Local Government (ACELG) at UTS has published a background paper about understanding and promoting public value creation within Australian local government. The paper may be accessed here.

Court Practice and Procedure

Court Fees increased in July as a result of amendments to the Civil Procedure Regulation 2012 and the Criminal Procedure Regulation 2010.

Judgments

- United Kingdom

Coventry (t/a RDC Promotions) v Lawrence [2014] UKSC 13 (Admin); [2014] 2 W.L.R. 433; [2014] 2 All E.R. 622; [2014] 2 P. & C.R. 1 (President Lord Neuberger, Lord Mance, Lord Clarke, Lord Sumption and Lord Carnwath)

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

Facts: the appellants appealed against the decision of the Court of Appeal allowing an appeal by Mr David Coventry, Moto-Land UK Ltd, Terence Waters and James Waters ("the respondents"), and reversing the decision of the High Court granting the appellants an injunction restraining a nuisance.

In February 1975, planning permission was granted to Terence Waters for the construction of a stadium ("the Stadium") some three miles west of Mildenhall Suffolk, on agricultural land which he owned. The planning permission permitted the Stadium to be used for speedway racing and associated facilities for 10 years. Permission was renewed on a personal basis in 1985. In August 2005, the Stadium was acquired from Mr Waters by his son, James Walters. It was leased to Carl Harris, and then to David Coventry. Mr Coventry and his brother acquired the Stadium in April 2008. Up until July 1010, the Stadium was used for the permitted purpose by a company called Fen Tigers Ltd. It was then leased to Moto-Land UK Ltd in September 2003 for a period of ten years. To the rear of the stadium was a motocross track. Permission for motocross events was granted in May 1992 for a year, and renewed subject to conditions. Permanent personal planning permission was granted in 2002. About 560 metres from the Stadium and 860 metres from the motocross track was a bungalow called "Fenland".

In January 2006, Katherine Lawrence and Raymond Shields ("the appellants") purchased and moved into Fenland. They complained about the noise coming from the motocross events to the Council, who issued noise abatement notices to Mr Coventry, his brother, Moto-Land UK Ltd and Fen Tigers Ltd. They also instituted proceedings in the High Court for an injunction to restrain the nuisance, which was granted. The respondents appealed against the decision. The Court of Appeal reversed the High Court's decision, and held that the appellants had failed to establish a nuisance. The appellants appealed to the Supreme Court. The appeal raised some interesting issues concerning the interrelationship of planning permission and nuisance.

Issues:

(1) whether a defendant can establish a prescriptive right to commit what would otherwise be a nuisance by means of noise;

(2) whether a defendant to a nuisance claim can rely on the fact that the claimant "came to the nuisance";

(3) whether a defendant's actual use of their premises is relevant to the assessment of the character of the locality;

(4) whether the grant of planning permission for a particular use can affect the question of whether that use is a nuisance, and whether any other use in the locality can be taken into account in assessing the character of the locality; and

(5) the approach to be adopted by a court when deciding whether to grant an injunction restraining a nuisance, or whether to award damages instead.

Held: allowing the appeal, restoring the order of the High Court and leaving it open to the respondents to apply for the discharge of the injunction:

(1) there was no doubt that a defendant could have a prescriptive right to carry on an activity that could otherwise be a nuisance, provided there had been uninterrupted enjoyment of the right for at least 20

years: at [29], [31]. The difficulties of establishing nuisance for the entire 20 year period as well as the extent of the easement did not prevent a continuing nuisance by noise giving rise to a prescriptive right: at [36], [37]. These problems were largely practical in nature, and were mitigated by the fact that the 20 year use did not have to be continuous: at [37]. The essential question was whether the nature and degree of the activity, taken as a whole, would make a reasonable person aware that a continuous right to enjoyment was being asserted: at [142]. Interruption of this use for two out of 20 years was insufficient justification for concluding that there was no prescriptive claim: at [142]. However, the respondents failed to show that their activities during a period of 20 years amounted to a nuisance: at [143]. Thus, the respondents failed to establish a prescriptive right to create what would otherwise be a nuisance: at [143];

(2) it was no defence for a defendant sued in nuisance to argue that a claimant had come to a nuisance, although it could well be a defence, in some circumstances, for a defendant to contend that the claim should fail as it was only because the claimant had changed the use of, or built on his land, that the defendant's pre-existing activity was claimed to have become a nuisance: at [58]. In the present case, there was no question of the respondents being able to rely on the fact that the appellants came to the nuisance: at [134]. The appellants used their property, Fenland, as a residence, which was the same purpose to which it had been put ever since before the activities at the Stadium and the motocross track commenced: at [134];

(3) a defendant, faced with a contention that his activities gave rise to a nuisance, could rely on those activities as forming part of the character of locality, but only to the extent that those activities did not constitute a nuisance, and were thus lawful: at [65],[66]. Similarly, any other activity in the neighbourhood could be taken into account when assessing the character of the neighbourhood, to the extent that it did not give rise to an actionable nuisance or was otherwise unlawful: at [75];

(4) the mere fact that the activity which was said to give rise to the nuisance had the benefit of a planning permission was normally of no assistance to the defendant in a noise or other loss of amenity nuisance claim: at [94]. However, there will be occasions where the terms of a planning permission could be of some relevance in a nuisance case. While the decision whether an activity caused a nuisance was not for the planning authority but for the court, the existence and terms of the permission were not irrelevant as a matter of law, but in many cases would be of little, or even no, evidential value, and in some cases rather more: at [96];

(5) the trial judge was in error to hold that the planning permissions for the use of the stadium and the track were irrelevant for the purposes of the appellants' nuisance claim: at [135]. However, the judge's failure to take them into account did not undermine his conclusion that the respondents' activities constituted a nuisance: at [136]. The planning permissions were of limited evidential value in relation to the appropriate noise limits of the applicant's activity: at [137], [229]. This error did not justify interfering with his conclusion: at [139];

(6) the court's power to award damages in lieu of an injunction was a classic exercise of discretion, which should not, as a matter of principle, be fettered: at [120]. However, this does not prevent the courts from providing guidance so that the discretion's manner of exercise is as predictable as possible. The prima facie position is that an injunction should be granted, so the legal burden is on the defendant to show why it should not: at [121]. There were differences between the judges as to the factors to be considered in deciding whether to award damages in lieu of an injunction: at [121]-[127], [161], [167]-[169], [239]-[247]; and

(7) in the present case, the trial judge was not asked to award damages in lieu of the injunction. It was inappropriate for the appellate court to decide whether, and if so in what circumstances, damages could be recoverable in a nuisance claim: at [131]. The court should refuse the respondents permission to raise that argument but hold that they should be free to raise the argument that the injunction granted by the judge should be discharged, and damages awarded instead, under the trial judge's liberty to apply: at [151].

Secretary of State for Communities and Local Government v Hopkins Developments Ltd [2014] EWCA Civ 470 (Jackson, Beatson and Christopher Clarke LJJ)

(related decision: *Hopkins Developments Ltd v Secretary of State for Communities and Local Government* [2013] EWHC 1783 (Admin) Judge Denyer QC)

Facts: Hopkins Developments Ltd ("Hopkins") sought planning permission to construct 58 dwellings on a field at the edge of Wincanton ("the site"). The site was triangular, with a hospital on one side, and houses on another side. The Somerset District Council ("the council") refused permission, on the grounds that the proposed development was not needed in order to meet the council's target for five year housing supply; insufficient provision for public open space; loss of outlook and privacy to the detriment of existing residents whose back gardens abutted the site boundary and for users of the hospital; noise and odours from the proposed pumping station; conflicting traffic movements from the proposed access route passing through the hospital grounds; and inadequate information on impact on local educational and other facilities. Hopkins appealed to the Secretary of State, who appointed an Inspector to hold an Inquiry. Expert planning and traffic evidence was exchanged between Hopkins and the council and provided to the Inspector. The Inspector received copies of submissions on behalf of the Wincanton Town Council and the hospital, and from local residents. In June 2012 the Inspector sent a document entitled "Inspector's Notes on Inquiry Procedure" to all who were proposing to attend the Inquiry, in which she stated her opinion that on the basis of the material seen to date the Inquiry should focus principally on whether there was a need for housing in the area; and the effect of the proposal on highway safety, the safety and convenience of users of the hospital and future residents, on protected trees, and on the provision for affordable housing education and sports and other facilities. That statement was a statement under Rule 7(1) of the Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000 ("the 2000 Rules") which permitted an Inspector to provide within 10 weeks of the starting date to the appellant, the local planning authority and any statutory party "a written statement of the matters about which he particularly wishes to be informed for the purposes of his consideration of the appeal". Rule 15 of the 2000 Rules provided that the local planning authority and the appellant shall together prepare "an agreed statement of common ground" and provide that to the Secretary of State and any statutory party. Rule 16 provided that "except as otherwise provided" in the Rules the Inspector was to determine the procedure at an inquiry; and in sub-rule (2) that at the start of the inquiry the Inspector "shall identify what are, in his opinion, the main issues to be considered at the inquiry and any matters on which he requires further explanation from the persons entitled or permitted to appear". Rule 18(3) requires that if after the close of an inquiry an Pnspector proposes to take into consideration "any new evidence or any new matter of fact" which was not raised at the inquiry and which he considers to be material to the decision to notify persons entitled to appear or who had appeared at the inquiry and afford them the opportunity of making written submissions or of asking for the inquiry to be re-opened. The main parties produced a statement of common ground pursuant to Rule 15 in which they recorded agreement that the only refusal reasons remaining were the target for housing supply and the proposed access route. At the opening of the Inquiry on 3 July 2012 the Inspector stated that there were two matters remaining in contention, being whether the release of the site for development would be justified, considering whether there was a 5 year supply for housing, whether there was an overriding need to develop, and whether the proposal was in accordance with the National Planning Policy Framework ("NPPF"); and the effect of the proposal on the safe running of the hospital. That constitued a Rule 16 statement. The hearing proceeded with evidence from the witnesses who had provided proofs of evidence, and a local resident; and included a view of the site. On 29 August 2012 the Inspector dismissed the appeal. In her reasons the Inspector stated that having regard to the remaining reasons for refusal, the evidence submitted and the representations made at the inquiry she considered the main issues to be housing supply, the effect of the proposal on the character and appearance of the area ("character/appearance"), whether the site was in a sustainable location "sustainability", and the effect on highway safety and the safe running of the hospital. The Inspector concluded that the substantial shortfall in five year housing supply militated in favour of granting planning permission; her conclusions that construction of a housing estate would unacceptably detract from the tranquil and rural character of the area, that the site was not in a sustainable location given the need for car travel, and that the proposed access arrangements would cause undue risk to motorists and pedestrians militated against it.

Hopkins applied to the High Court to have the decision quashed. The decision was quashed on the ground that the Inspector's failure to warn the parties that she was minded to rely on character/appearance and sustainability constituted a breach of natural justice. The Secretary of State appealed.

Issue:

(1) whether the Inspector had failed to comply with natural justice.

Held: upholding the appeal, and remitting the application for determination of the remaining grounds of challenge raised by Hopkins:

(1) the following principles were derived from the authorities: at [62]:

   (a) any party to a planning inquiry is entitled (i) to know the case which he has to meet and (ii) to have a reasonable opportunity to adduce evidence and make submissions in relation to that opposing case;

   (b) if there is procedural unfairness which materially prejudices a party to a planning inquiry that may be a good ground for quashing the Inspector's decision;

   (c) the 2000 Rules are designed to assist in achieving objective (i), avoiding pitfall (ii) and promoting efficiency. Nevertheless the Rules are not a complete code for achieving procedural fairness;

   (d) a rule 7 statement or a rule 16 statement identifies what the Inspector regards as the main issues at the time of his statement. Such a statement is likely to assist the parties, but it does not bind the Inspector to disregard evidence on other issues. Nor does it oblige him to give the parties regular updates about his thinking as the Inquiry proceeds;

   (e) the Inspector will consider any significant issues raised by third parties, even if those issues are not in dispute between the main parties. The main parties should therefore deal with any such issues, unless and until the Inspector expressly states that they need not do so; and

   (f) if a main party resiles from a matter agreed in the statement of common ground prepared pursuant to rule 15, the Inspector must give the other party a reasonable opportunity to deal with the new issue which has emerged;

(2) there was extensive evidence adduced by both parties on the issue of sustainability and in its closing submissions the council emphasised lack of sustainability as its first reason for resisting the appeal. The question of sustainability was clearly a live issue in the Inquiry. The fact that the Inspector had not identified that issue in her written Rule 7 statement or her oral Rule 16 statement was no more than an indication of her preliminary views, and did not remove the issue of sustainability from the arena: at [68];

(3) Hopkins had a reasonable opportunity to adduce evidence and make submissions on the topic of sustainability and there was no procedural unfairness in that respect: at [69];

(4) while the issue of character/appearance was not identified in the Rule 7 statement or the Rule 16 statement a number of parties raised that issue. Character/appearance was clearly an issue in the Inquiry even though the Inspector's preliminary opinion was that this was not a main issue, and it remained an issue which the Inspector could consider, especially when she made her site visit: at [73]. There was no procedural unfairness in relation to character/appearance: at [75]; and

(5) by Lord Justice Beatson, Lord Justice Christopher Clarke agreeing:

   (a) while it was important that inquiries focus on the main issues in dispute, it was important to remember that the main parties were not the only parties and it was not only the issues identified by the Inspector before or at the commencement of the inquiry which were relevant: at [95]; and

   (b) the two issues not identified in the Rule 7 and 16 statements as a main issue clearly emerged as significant issues as a result of the evidence of the third parties at the inquiry. A developer who does not avail himself of the opportunity to test evidence adduced about such an issue (if necessary by seeking an adjournment to adduce further evidence) or to make submissions about it could not complain of procedural unfairness if the Inspector's decision was based in whole or in

part on that issue. That conclusion followed from the fundamental nature of procedural fairness, the structure of the 2000 Rules and the approach of the authorities on planning inquiries: at [97].

Walker & Son (Hauliers) Ltd v Environment Agency [2014] EWCA Crim 100 (Simon CJ and Irwin J)

Facts: Walker & Son (Hauliers) Ltd ("Walker") appealed against its conviction under regulation 38 of the *Environmental Permitting (England and Wales) Regulations* 2007 ("the Regulations") for knowingly permitting the operation of a regulated facility without an environmental permit. Walker was the owner of a redevelopment site. The initial stage of the redevelopment involved the demolition of empty buildings. Walker contracted the demolition works to Bloom (Plant) Ltd ("Bloom"). Following the investigation of complaints from nearby residents, Bloom was found to have been using the site as an illegal waste transfer station and for the burning of waste. Neither Walker nor its employees were involved in the illegal transfer of material to the site, or in the treatment, burning or crushing of the waste. During an interview under caution, Walker's director explained that he had driven round the site and had seen fires and crushing machines but considered that these were consistent with the demolition activities. Walker was charged with offences of knowingly permitting the operation of a regulated facility without an environmental permit. At trial, Bloom and other co-defendants pleaded guilty to various offences. Walker advanced legal argument on the proper interpretation of 'knowingly permit' in reg 38(1)(a). However, the trial judge ruled in favour of the prosecution. Following this ruling Walker pleaded guilty to the charges, reserving the possibility that it might seek permission to appeal.

The appeal concerned the meaning of the words "knowingly permit". Walker argued that the prosecution had to prove two things: first, that Walker knowingly permitted the particular waste operation; and secondly, that Walker knew that the operation was not in accordance with an environmental permit. The Environment Agency argued that all that was needed to prove the offence under the 2007 Regulations was that Walker knowingly permitted a particular waste operation and that as a matter of fact the waste operation was not in accordance with an environmental permit.

Issues:

(1) whether it was necessary for the prosecution to prove that Walker knew that the operation was not in accordance with an environmental permit.

Held: dismissing the appeal:

(1) the words "knowingly" and "permit" relate to knowledge of the facts and not as to the existence and scope of the permission or conditions of a licence: at [28]. The prosecution did not have to show that a defendant knew that the matters of which it was aware were not permitted: at [28]. There were good reasons for this: there are means of checking the existence of conditions of environmental permits, and ignorance of the existence and conditions of environmental permits was not a defence to the offence: at [28];

(2) the law required Walker to ensure that what was happening was compliant with the conditions of an environmental permit: at [34]. It was no defence to say that he had been told lies: at [34]. There was no longer a defence based on the excuse of due diligence to avoid the commission of the offence: at [35]. If Walker's construction was accepted, it would in effect introduce a "due diligence defence by the backdoor": at [35]; and

(3) the trial judge was correct in his conclusion as to the proper interpretation of reg 38(1): at [36].

- United States Supreme Court

Utility Air Regulatory Group v Environmental Protection Agency 134 S. Ct. 2427 (2014) (Roberts CJ, Scalia, Kennedy, Breyer, Ginsburg, Sotomayor, Kagan, Alito and Thomas JJ)

(related decision: *Coalition for Responsible Regulation Inc v Environmental Protection Agency* 684 F 3d 102 (US Court of Appeals, D Col, 2012) (Rogers, Sentelle and Tatel JJ))

Facts: States and industry groups appealed against a decision of the District of Columbia Court of Appeals upholding the Environmental Protection Agency's ("EPA") interpretation of the *Clean Air Act* 1970 as compelling or permitting a facility's potential greenhouse gas emissions to trigger permitting requirements for stationary sources emitting greenhouse gases. The *Clean Air Act* regulates pollution generating emissions from both stationary sources, such as factories and power plants, and moving sources, such as cars, trucks and aircraft. This litigation concerned Titles I and V of the Act. Title I charges EPA with formulating national ambient air quality standards for air pollutants ("NAAQS"). NAAQS are implemented by States through State Implementation Plans. State Implementation Plans must designate areas as "attainment", "nonattainment" or "unclassifiable". They must also include permitting programs for stationary sources. Stationary sources in "attainable" or "unclassifiable" areas are subject to the Act's provisions relating to "Prevention of Significant Deterioration" ("PSD"), which require a permit to construct or modify a "major emitting facility". To qualify for a permit, the facility must not cause or contribute to the violation of any applicable air-quality standard, and it must comply with emissions limitations that reflect the "best available control technology" ("BACT"). Title V of the Act also makes it unlawful to operate any "major source" without a comprehensive operating permit. This includes any "major stationary source".

In 2007, the Court held that Title II of the Act authorised EPA to regulate greenhouse gas emissions from new motor vehicles if EPA judged that such emissions contributed to climate change (see *Massachusetts v Environmental Protection Agency* 167 L Ed 2d 248). In 2009, EPA determined that greenhouse gas emissions from new motor vehicles contributed to elevated atmospheric concentrations of greenhouse gases, and thus fostered climate change. In 2010, EPA announced that stationary sources would be subject to the PSD program and Title V on the basis of their potential to emit greenhouse gases. EPA purported to "tailor" the PSD program and Title V by adjusting the levels in the Act at which a stationary source's greenhouse gas emissions would make it subject to permitting requirements ("the Tailoring Rule"). Numerous parties, including several States, filed petitions for review in the District of Columbia Court of Appeals. The Court of Appeals dismissed some of the petitions for lack of jurisdiction and denied the remainder. The Supreme Court granted six petitions for certiorari but agreed to decide only one question; namely, whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the *Clean Air Act* for stationary sources that emit greenhouse gases.

Issues:

(1) whether a source may be subject to the PSD and Title V permitting requirements on the sole basis of the source's potential to emit greenhouse gases ("the permitting requirement issue"); and

(2) whether a source already subject to the PSD program because of its emission of conventional pollutants (an "anyway" source) may be required to limit its greenhouse gas emissions by employing BACT for greenhouse gases ("the BACT provision issue").

Held: Scalia J (Roberts CJ and Kennedy agreeing) held that EPA had impermissibly interpreted the *Clean Air Act* as compelling or permitting a facility's potential greenhouse gas emissions to trigger PSD and Title V permitting requirements. EPA's determination that "anyway" sources could be required to employ BACT for greenhouse gases was permissible. Breyer J (with whom Ginsberg, Sotomayor and Kagan JJ agreed) concurred with the BACT provision holding but dissented from the permitting requirements holding. Alito J (with whom Thomas J agreed) concurred with the permitting requirement holding, but dissented from the BACT provision holding. The Court held, by majority:

The permitting requirement issue

(1) (per Scalia J, Roberts CJ, Kennedy, Alito and Thomas JJ agreeing) the Act did not compel a greenhouse gas inclusive interpretation of the PSD and Title V triggers: at [3]. EPA regulations had

interpreted “air pollutant” in the PSD trigger and Title V as limited to regulated air pollutants, a class much narrower than “all airborne compounds”: at [3]. Those interpretations were appropriate: at [3]. It was plain that the Act did not envision an elaborate, burdensome permitting process for major emitters of steam, oxygen, or other harmless airborne substances: at [3]. There were also other places in the Act where EPA had inferred from statutory context that a generic reference to air pollutants did not encompass every substance falling within the Act-wide definition: at [3]. Taken together, these instances belied the EPA’s insistence that when interpreting the PSD and Title V requirements it was bound by the Act-wide definition of greenhouse gases: at [4]-[6];

(2) (per Scalia J, Roberts CJ, Kennedy, Alito and Thomas JJ agreeing) EPA’s interpretation was not justified as an exercise of its discretion to adopt a reasonable construction of the statute: at [7]. EPA itself had repeatedly acknowledged that applying the PSD and Title V permitting requirements to greenhouse gases would be inconsistent with, and in fact would overthrow, the Act’s structure and design: at [8]-[11]. The fact that EPA’s interpretation of the PSD and Title V triggers would place plainly excessive demands on limited government resources was alone a good reason for rejecting it; but that was not the only reason: at [12]. EPA’s interpretation was also unreasonable because it would bring about an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorisation: at [12];

(3) (per Scalia J, Roberts CJ, Kennedy, Alito and Thomas JJ agreeing) EPA could not make its interpretation reasonable by adjusting the levels at which a source’s greenhouse gas emissions would oblige it to undergo PSD and Title V permitting: at [13]. An agency has no power to “tailor” legislation to bureaucratic policy goals by rewriting unambiguous statutory terms: at [13]. Agencies exercise discretion only in cases of statutory silence or ambiguity: at [13]. It was hard to imagine a statutory term less ambiguous than the numerical thresholds at which the Act required PSD and Title V permitting: at [13]. When EPA replaced these thresholds it went well beyond the bounds of statutory authority: at [13]. Furthermore, recognising the authority claimed by EPA in the Tailoring Rule would deal a severe blow to the Constitution’s separation of powers: at [15],[16]. The power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law’s administration. It does not include a power to revise clear statutory terms: at [15],[16];

(4) (per Breyer J in dissent, Ginsberg, Sotomayor and Kagan JJ agreeing) a more sensible way to avoid the absurdity of sweeping an unworkable number of sources into the permitting programs was to imply an exception to the numeric statutory thresholds, rather than to imply a greenhouse gas exception to the phrase “any air pollutant”: at 26-27.

The BACT provision issue

(5) (per Scalia J, Roberts CJ, Kennedy, Breyer, Ginsberg, Sotomayor and Kagan JJ agreeing) EPA’s decision to require BACT for greenhouse gases emitted by sources otherwise subject to PSD review was a permissible interpretation of the Act: at [19]. The text of the BACT provision was far less open-ended than the text of the PSD and Title V triggers: at [19]. Whereas the dubious breadth of “any air pollutant” in the permitting triggers suggested a role for agency judgment in identifying the subset of pollutants covered by the particular regulatory program at issue, the more specific phrasing of the BACT provision suggested that the necessary judgment had already been made by Congress: at [19]. The wider statutory context likewise did not suggest that the BACT provision could bear a narrowing construction: at [19]. Even if the text were not clear, applying BACT to greenhouse gases was not so disastrously unworkable, and need not result in such a dramatic expansion of agency authority, as to render EPA’s interpretation unreasonable: at [19]. Nothing in the statute categorically prohibited EPA from interpreting the BACT provision to apply to greenhouse gases emitted by “anyway” sources: at [19]. However, EPA may only require an “anyway” source to comply with greenhouse gas BACT if the source emits greenhouse gases of more than minimal importance: at [19]; and

(6) (per Alito J in dissent, Thomas J agreeing) it was curious that the Court, having departed from a literal interpretation of the term “pollutant” in relation to permitting requirements, would adopt a literal interpretation of the term in relation to BACT. The Court’s conclusion that applying BACT to “anyway sources” could be done without disastrous consequences was doubtful: at 29-30.

- High Court of Australia

Honeysett v The Queen [2014] HCA 29 (French CJ, Kiefel, Bell, Gageler and Keane JJ)

(related decision: *Honeysett v The Queen* [2013] NSWCCA 135 Macfarlan JA, Campbell J and Barr AJ)

Facts: this appeal concerned the admissibility of opinion evidence of anatomical comparison (sometimes described as "body mapping") under the exception found in s 79(1) of the *Evidence Act* 1995, that if a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge. The appellant was convicted of armed robbery. At trial, the prosecution adduced evidence from an anatomist (a professor of anthropology) about physical characteristics in common between one of the robbers in closed-circuit television images and images of the appellant taken while in custody. The evidence was admitted as an item of circumstantial evidence to support a conclusion of identity. The Court of Criminal Appeal held the anatomist's evidence had been rightly admitted under s 79(1) even though the anatomist's opinion was necessarily subjective and not amenable to elaboration, or to measurement and calculation (per Macfarlan JA). In this appeal the Crown submitted the anatomist's opinion was wholly or substantially based on his specialised knowledge of anatomy, hence this appeal did not raise the issue of whether body mapping was shown at the trial to constitute an area of "specialised knowledge" and whether there is a requirement of an independent means of validation before an opinion may be found to be based on "specialised knowledge".

Issue:

(1) whether an opinion that is "necessarily subjective" and "not amenable to elaboration" or to "measurement and calculation" may be wholly or substantially based on "specialised knowledge".

Held: appeal allowed:

(1) specialised knowledge is knowledge outside that of persons who have not by training, study or experience acquired an understanding of the subject matter. The person's training, study or experience must result in the acquisition of knowledge, that is, acquaintance with facts, truths, or principles. Knowledge connotes more than subjective belief or unsupported speculation: at [23]; and

(2) the anatomist's opinion was based on his subjective impression of what he saw when he looked at the images, rather than his undoubted knowledge of anatomy: at [43]; therefore, the anatomist's evidence was not based wholly or substantially on his specialised knowledge within the meaning of s 79(1): at [46].

- Queensland Planning and Environment Court

Harris v Scenic Rim Regional Council [2014] QPEC 16 (Preston A/DCJ)

Facts: Mr and Mrs Harris ("Harris") appealed the decision of the Scenic Rim Regional Council ("the council") refusing Harris' development application for a development permit for a material change of use for outdoor sports, recreation and entertainment and camping ground of land at Innisplain, near Beaudesert. Two persons who made submissions objecting to the development elected to be joined as co-respondents to the appeal, Mr Halpin and Mr Barbagallo.

The council and co-respondents by election identified the issues on the appeal. Through the expert joint conferencing and reporting, and with changes to the proposed development, the number of issues was reduced prior to the hearing. With respect to bushfire, water quality, and acoustic and air quality, the experts were able to agree that stringent conditions of approval could ameliorate the impacts of the changed development. However, differences between the experts remained in relation to traffic engineering and town planning regarding the impact of traffic generated by the proposed development on the access road, the intersection of the access road and the highway, and the amenity of the surrounding

area. It was also contended that a decision to approve the proposed development would conflict with the relevant planning scheme and that there were not sufficient reasons to justify the decision, despite the conflict.

Prior to the hearing of the appeal, Harris changed the development application on which the council's decision was made, to reduce the intensity and scale of the proposed use. An issue was whether the change was only a minor change which the Court was able to consider. Towards the end of the hearing, Harris and the council agreed on further changes to the development. The council and Mr Barbagallo no longer opposed the grant of approval to the application. Mr Halpin continued to contend that the changed application should be refused.

Issues:

(1) whether the changes to the development application constituted a minor change within the meaning of s 350 of the *Sustainable Planning Act* ("SPA");

(2) whether the traffic caused by the development would be an unacceptable safety risk at both the intersection of Tamrookum Creek Road and Mt Lindesay Highway and along Tamrookum Creek Road itself (the traffic issues);

(3) whether the traffic generated by the proposed development (as modified) would have unacceptable amenity impacts (the town planning issue);

(4) whether the proposed conditions of approval were final, certain and enforceable;

(5) whether a decision to approve the proposed development on conditions that would satisfactorily address the various adverse impacts would conflict with the planning scheme; and

(6) whether there were sufficient grounds to justify such a decision, despite the conflict.

Held: upholding the appeal, setting aside the council's decision and replacing it with a decision to approve Harris' changed application subject to the identified conditions:

(1) the changes to the proposed development constituted a minor change: at [97]. The changes did not require the application to be referred to any additional referral agencies, change the type of development approval sought or change the type of assessment of the application: at [102]. The changes did not result in a substantially different development: at [108];

(2) the proposed development, with the number of vehicles per day capped at 20, and the undertaking of works to upgrade the access road and install regulatory and warning signage along it, would not lead to unacceptable impacts on the performance or safety of the intersection or on right turns off the Mt Lindesay Highway into Tamrookum Creek Road, or on Tamrookum Creek Road itself: at [186], [203]. In regards to the intersection, the responsible road authority, Department of Transport and Main Roads, had agreed to the initial application, which was of a greater intensity and scale than the changed application: at [182]. Neither the intersection nor the road had a record of crash incidents: at [183], [198]. The operation of the intersection and roads should be considered in light of the reasonable assumption that motorists will comply with the road rules and other road markings and signage: at [184], [201]. Furthermore, the peak traffic resulting from the development would be at different times to the usual peak traffic, and would be only during daylight hours: at [199], [200].

(3) the proposed development would not have an unacceptable impact on the amenity of the neighbourhood or its residents: at [223]. The amenity of a locality and the reasonable expectations of its residents are informed by the applicable planning instruments and the uses permitted under the planning controls: at [214], [217]. The residents must be taken to have reasonably expected that the development of a type that is permissible with consent may be approved and generate traffic on Tamrookum Creek Road that would cause amenity impacts: at [218],[219]. Community concerns about the traffic were based on the prior illegal use and the original application, both of which were of a greater scale and intensity, and were not supported by the expert traffic evidence or the responsible road authorities: at [222];

(4) the proposed conditions of approval do not offend principles of finality or certainty: at [235]-[239]. The conditions would not be impossible or extremely difficult to enforce: at [240]-[243];

(5) a decision to approve the changed application on the conditions identified would not conflict with any provisions of the relevant planning scheme: at [249], [251]. Provided that the conditions are complied with, the proposed development is of a scale, form and intensity appropriate for the locality; is consistent with the reasonable expectations of residents in the zone; is compatible with existing and adjoining rural uses; will not have any unacceptable adverse impacts; and will minimise risk, nuisance and impacts to people and property in the surrounding area: at [250]; and

(6) as there was no conflict with the planning scheme, it was not necessary to consider whether there were sufficient grounds to justify the decision despite the conflict: at [252], [253].

- NSW Court of Appeal

Burwood Council v Ralan Burwood Pty Ltd [2014] NSWCA 179 (Sackville AJA)

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

Facts: the council appealed against a decision of the Land and Environment Court ("LEC") dismissing proceedings brought by it against Ralan Burwood Pty Ltd ("Ralan") relating to a major commercial and residential development project in Burwood. The property the subject of the proceedings is the subject of Strata Plan 88309 ("the Strata Plan"), in which there are 330 lots. Ralan is the proprietor of ten lots, while the others are individually owned. The respondents to the proceedings in the LEC were Ralan, the developer of the property, and two private certifiers. The council had claimed that construction certificates issued by one of the certifiers were invalid because the design and construction of the building was inconsistent with the development consent granted by the council. The council had sought declaratory relief and orders requiring Ralan to undertake extensive rectification works. Those works relate to the façade of the building which is common property, however the works were likely to require internal access to some lots and in certain cases removal and replacement of fixtures and fittings within the lots.

Shortly prior to the hearing of the appeal Ralan filed a notice of motion seeking an order requiring the council to serve notice of the proceedings on all owners and occupiers of lots comprised in the Strata Plan. The council was subsequently given leave to file a notice of motion seeking orders that, in addition to appearing on its own behalf, it be appointed to represent the owners and occupiers of lots in the Strata Plan who support, and those who oppose, the making of the orders sought by the council.

Issues:

(1) whether the Court had jurisdiction to make a representative order notwithstanding the repeal of Uniform Civil Procedure Rules 2005 r 7.4 in 2010; and

(2) if so, whether a representative order should be made.

Held: making the representative orders:

(1) the traditional equity jurisdiction to make representative orders was not affected by the repeal of r 7.4, by virtue of s 22 of the *Supreme Court Act* 1970, or s 16 of the *Civil Procedure Act* 2005 ("CP Act"), and Part 6 of the CP Act: at [13], [18];

(2) having regard both to the principles developed by the Court of Chancery and the terms of ss 56-58 of the CP Act, it was open to the Court to make a representative order if:

  (a) the party seeking the order shows that a class of necessary parties is so numerous that it is not reasonably practicable to join them in the proceedings unless a representative order is made;

  (b) the representative party and the represented class have a common interest in the proceedings;

  (c) the proceedings raise a substantial common issue of low or fact affecting the representative party and all members of the represented group; and

  (d) it is in the interests of justice and consistent with the overriding purpose stated in s 56(1) of the CP Act that the order should be made: at [21];

(3) in the present case those requirements were satisfied. The class of necessary parties was large; unless representative orders were made there was a real risk that the council's right of appeal would be stultified; the form of orders proposed by the council described two classes of lot owners and occupiers, each of which had a common interest in the proceedings; and to the extent that identification of a substantial common issue of law or fact was necessary, that requirement was also satisfied: at [26]-[30]; and

(4) the council had made no application to join lot owners or occupiers as parties to the proceedings in the LEC. Any such application could not have been made under Part 10 of the CP Act since representative proceedings pursuant to Part 10 could only be commenced in the Supreme Court. The provisions of Part 10 did not preclude the making of representative orders at the appeal stage of the litigation: at [31].

Greenwood v Warringah Council [2014] NSWCA 205 (Ward and Leeming JJA)

(related decisions: *Greenwood v Warringah Council* [2013] NSWLEC 223 Biscoe J, *Greenwood v Warringah Council* [2013] NSWLEC 1119 Dixon C and Ritchie AC)

Facts: the applicant sought leave to appeal pursuant to s 57 of the *Land and Environment Court Act* 1979 ("the LEC Act") from the decision of the primary judge to dismiss an appeal pursuant to s 56A of the LEC Act from the decision of two Commissioners dismissing a Class 1 appeal from the respondent council's refusal of the applicant's development application for the shredding and stockpiling of green and wood materials on Crown land in Belrose. The council's contentions in the Class 1 appeal included the contention that insufficient information had been submitted for a proper and accurate assessment to be made of the development application. The reasons of the Commissioners included that in respect of a number of aspects of the assessment of the application, insufficient evidence had been provided in order that they could be satisfied that a variety of planning criteria would be met. All six "essential" matters about which the Commissioners found there was not sufficient detail were the subject of proposed deferred commencement conditions that the parties put before the Commissioners in the event that consent was granted. The primary judge dismissed the appeal from the Commissioners' decision, finding that it was reasonably open to them to take the view that the six matters were sufficient to support their conclusion that the appeal should be dismissed. The proposed grounds of appeal from the decision of the primary judge were that he had erred in law (1) in finding that the existence of without prejudice deferred commencement conditions meant that it was unnecessary for the Commissioners to give proper reasons for their decision; (2) in finding that the Commissioners were entitled to refuse development consent on the basis of a lack of detailed design for an ancillary aspect of the development; and (3) in finding that ground 2 in the s 56A appeal, that the Commissioners had erred in determining that there was insufficient information to assess the application, was answered by the finding in proposed ground of appeal (2).

Issue:

(1) whether leave to appeal should be granted.

Held: leave to appeal refused with costs:

(1) the subject matter of any appeal under s 57 of the LEC Act is the decision of the primary judge: at [15];

(2) if the decision from which the appeal is brought discloses error of law but that error is not dispositive of the decision of the primary judge, that would be a sound reason, at least in an ordinary case, to refuse leave to appeal: at [16];

(3) it was neither necessary nor appropriate for present purposes to dwell more precisely on the content of the obligations of Commissioners to give reasons when exercising Class 1 of the jurisdiction of the Land and Environment Court. There was no error, let alone error of law, in the primary judge concluding that adequate reasons had been given for the Commissioners' conclusion. On a fair reading of the reasons of the Commissioners they were deciding that there was insufficient material on a range of issues regarded by them as key to enable them to assess the proposed development: at [20];

(4) the Commissioners formed the view that the deficiencies were essential, and that was correctly apprehended by the primary judge: at [22]; and

(5) there were insufficient prospects of ultimate success to warrant a grant of leave: at [25].

Golden Mile Property Investments Pty Ltd (in liquidation) v Cudgegong Australia Pty Ltd [2014] NSWCA 224 (Beazley P)

(related decision: *Cudgegong Australia Pty Ltd v Transport for NSW* [2014] NSWLEC 19 Pain J)

Facts: in 2004 the appellant, Golden Mile Property Investment Pty Ltd (in liq), purchased land in Rouse Hill, subject to two mortgages. At that time the land was in precinct 20 within State Environmental Planning Policy (Sydney Region Growth Centre) 2006 ("SEPP 2006"), and there was a possibility that the land would be rezoned as residential land if the planning policy in SEPP 2006 was implemented. In September 2007 the appellant was placed into liquidation at the instance of the Office of State Revenue for unpaid land tax. In early 2008 payments due under the mortgages ceased. At that time the land was no longer being considered for inclusion within SEPP 2006. The mortgagee exercised its power of sale and entered into a contract with the first respondent, Cudgegong Australia Pty Ltd ("the first contract"). The first respondent had been incorporated in August 2008 for the purpose of purchasing the land from the mortgagee exercising the power of sale. Two of the three directors of the appellant became directors of the first respondent and each held a one third shareholding in the first respondent; the third director of the appellant, and the remaining one third shareholder of the first respondent, was also a creditor of the appellant. In about 2010 the land once again came under the umbrella of SEPP 2006 and was rezoned for residential housing. On 12 April 2012 the appellant was deregistered. The first contract was rescinded on 21 June 2012, and a second contract for sale was entered into on the same day ("second contract"), in order to allow the first respondent an additional 12 months to raise finance for the purchase of the land. The completion date of the second contract was 1 July 2013. On 21 September 2012 the second respondent, Transport for NSW, compulsorily acquired the land; the second contract was discharged by the act of acquisition under s 20 of the *Land Acquisition (Just Terms Compensation) Act* 1991 ("the JT Act"). Following acquisition, the second respondent issued to the mortgagee and the appellant a determination of compensation notice in the sum of $4,223,400; the mortgagee accepted $3,026,478 of that amount in exchange for a complete discharge of any interest in the land under the mortgages. The first respondent filed a claim for compensation in the Land and Environment Court pursuant to the JT Act in a sum in excess of $16 million. The liquidator of the appellant obtained an order in the Supreme Court to have the appellant's registration as a company reinstated for the purpose of asserting a claim to the surplus compensation. The appellant was joined to the proceedings in the Land and Environment Court for the purpose of determining the nature of the estate or interest of the appellant and the first respondent in the land at the acquisition date, and the amount of compensation. The first respondent sought an order that the second respondent pay an advance payment of compensation. At first instance the primary judge determined that after acquisition the first respondent, as purchaser of the land, had a relevant compensable interest and the appellant had no compensable interest, and exercised the discretion under s 68(2)(b) to order that the second respondent make an advance payment of $757,300 to the first respondent.

The appellant sought leave to appeal against the decision of the primary judge. The first respondent filed a notice of motion seeking security for costs on the appeal.

Issue:

(1) whether security for costs should be ordered.

Held: dismissing the application for security for costs, with the first respondent to pay the appellant's costs of the application:

(1) it was not in dispute that the appellant was in liquidation and had no significant assets other than its alleged compensable interest the subject of the litigation. The first respondent had discharged its onus of establishing that the appellant would be unable to pay an order for costs if unsuccessful in the litigation: at [25];

(2) on the face of the issues identified by the appellant its case was not straightforward and the appellant itself recognised that it was novel; however the first respondent did not submit that it was not maintainable: at [31]. The primary judge's order was discretionary and interlocutory, and her findings

were not finally binding on the parties so that the question whether the appellant had a relevant interest remained to be finally litigated: at [32], [33]. The appellant had made out at least an arguable case on the appeal: at [36];

(3) it was to be inferred that the directors and shareholders of the first respondent were effectively responsible for the appellant going into liquidation. The shareholders did not support the appellant in respect of its liability to pay land tax, and failed to support it thereafter as no payments were made under the mortgages: at [40], [41];

(4) while there is no prohibition on persons or entities seeking to take advantage of strategic governmental planning decisions for personal gain, nor was any adverse comment to be made in respect of such conduct, the picture painted was that of those standing behind the first respondent having chosen their personal interests over the interests of the creditors of the appellant. The directors of the first respondent had allowed the appellant to go into liquidation and then sought to take advantage of the same development proposal as had been the business interest of the appellant by negotiating the contracts for the purchase of the land. Their objection to the liquidator continuing the proceedings furthered their preference of the first respondent's interest over the appellant's: at [43];

(5) a relevant factor that may tend against an order for security is the likelihood that the order would stifle or stultify proceedings. While proof of stultification would require as a starting point a demonstration that an impecunious corporate plaintiff was unable to provide security, it was also necessary to consider the position of others who stood behind the company that might be able to satisfy the order on the plaintiff's behalf. The appellant provided no evidence that those who stood behind the company and who would benefit from the litigation, including the appellant's shareholders and creditors, were unable to meet an order, nor did it advance any information as to whether steps had been taken to source litigation funding and if so, with what success: at [49];

(6) the application for security for costs was unusual. The persons who might in usual circumstances be expected to stand behind a company in liquidation which sought to assert a claim would include the shareholders and creditors who may benefit from a successful outcome of the litigation: at [58]; and

(7) an order for security for costs would assist the shareholders of the first respondent in stifling the litigation in order to prefer their own interest over the statutory duty of the liquidator to recover the assets of the company, and the rights of the creditors of the appellant to be paid out of those assets. That amounted to a significant factor weighing against an order for security for costs: at [69].

Environment Protection Authority v Schon G Condon as liquidator for Orchard Holdings (NSW) Pty Ltd (in liq) [2014] NSWCA 149 (Bathurst CJ, McColl and Leeming JJA)

(related decision: *Environment Protection Authority v Condon* [2013] NSWSC 777 Young AJ)

Facts: this appeal concerned the calculation of the contribution payable to the appellant ("EPA") for waste received at the respondent's ("Orchard Holdings") waste facility where no records were kept. In April 2008, the EPA wrote to Orchard Holdings (by then in liquidation) that it had determined that inadequate records had been kept. The EPA subsequently lodged proof of debt for almost $50 million reflecting its calculation of a contribution to be paid – based on an estimated of all waste on the site – pursuant to s 88(2) of the *Protection of the Environment Operations Act 1997* ("the POEO Act") and cl 6 of the *Protection of the Environment Operations (Waste) Regulation 2005* ("the Regulation"). Section 88(2) of the POEO Act as at April 2008 provided (emphasis as per judgment): "The occupier of a waste facility to which this section applies is required to pay to the EPA *in respect of all waste received at the facility* such contribution as is prescribed by the regulations." Clause 6 of the Regulation prescribed the s 88(2) contribution calculation method and required the EPA to estimate the tonnes of waste. Importantly, there were textual differences between s 88(2) and cl 6. While both spoke of "waste received at" the facility, some of the subclauses of cl 6 referred to estimation of "waste at" the facility. Orchard Holding's liquidator rejected the EPA's proof of debt. The EPA appealed the liquidator's decision. The primary judge dismissed the EPA's appeal holding that the EPA's calculation was not in accordance with law since cl 6(2)(b) of the Regulation did not authorise the calculation of a contribution in respect of all waste estimated by the EPA to be on the site.

Issues: in relation to statutory construction:

(1) whether cl 6 (as authorised by s 88(2)) required the estimation of waste at (*cf* waste received at) the facility, irrespective of whether it is produced onsite or offsite, or whether this construction was beyond the scope of the Act, contrary to *Shanahan v Scott* (1957) 96 CLR 240 at 250, and inconsistent with the Act.

Held: appeal dismissed:

(1) the Regulation is to be construed as a whole and in its context: at [43];

(2) as regulations are less carefully drafted, and less keenly scrutinised, than legislation, a court ought to give less weight to relatively minor divergences in wording: at [44], [51]–[52];

(3) a construction that accords with the literal meaning of the words in cl 6 leads to anomalies, and it may be inferred that the drafter had not considered the situation where a substantial amount of the waste on the land was generated on-site: at [46]–[50], [53];

(4) references to "waste at the facility" in cl 6 should be read as shorthand for "waste received at the facility": at [54];

(5) section 88 conferred a broad regulation-making power, leaving it to the regulations to give content to the obligation, nevertheless the Regulation may not be used so as to construe, or expand, the terms of the Act: at [58]–[63];

(6) a wider construction of cl 6 would be inconsistent with the Act because it would not be an estimate in respect of all waste received at the site and because it would operate as a penalty: at [60]–[63]; and

(7) a construction that is within power should be preferred over a construction that is beyond power: at [64].

- NSW Court of Criminal Appeal

Kennedy v Chief Executive, Office of Environment and Heritage [2014] NSWCCA 107 (Ward JA, Johnson J and RS Hulme AJ)

(related decision: *Chief Executive, Office of Environment and Heritage v Kennedy* [2012] NSWLEC 159 Biscoe J)

Facts: Mr Kennedy pleaded guilty to, and was convicted of, an offence against s 12 of the *Native Vegetation Act* 2003 ("the NV Act") that between about 1 June 2009 to about 31 August 2009 inclusive he had cleared native vegetation otherwise than in accordance with a development consent or a property vegetation plan. At the sixth mention of the matter before the Land and Environment Court ("LEC") Mr Kennedy through his counsel pleaded guilty to the offence. At the time of the hearing Mr Kennedy represented himself.

The trial judge found that the area unlawfully cleared was 32.48ha, and that the vegetation cleared comprised a little more than 600 mature trees and regrowth (established since 1 January 1990); that the extent of environmental harm caused by the unlawful clearing was moderate; that there were four distinct communities comprised by the cleared woodland, and that White Box Yellow Box Blakely's Red Gum Woodland, an endangered ecological community ("EEC"), was present; that noxious animals had been virtually eradicated; that Mr Kennedy's conduct should be characterised as negligent rather than reckless; and accepted that the reasons for clearing included the commercial object of improvement of stock management. Mr Kennedy was convicted of the offence as charged and fined the sum of $40,000 and ordered to pay the prosecutor's costs. Mr Kennedy appealed pursuant to s 5AB of the *Criminal Appeal Act* 1912 from his conviction and sentence. Mr Kennedy's grounds of appeal submitted that he should not have

been convicted of the offence to which he had pleaded guilty because the native vegetation was cleared under exemptions in the NV Act; the approximately 600 trees harvested for farm use had not been illegally cleared; there was no EEC on the property; and regrowth had occurred as a natural process and hence no restoration program was required. Mr Kennedy attached several documents to his written submissions, being photographs taken on the property on 19 April 2013 (Attachment A); a letter from the NSW Farmers' Association expressing support for Mr Kennedy (Attachment B); a statement from the ecologist called by him to give evidence in the LEC hearing as "further evidence" in support of the appeal (Attachment C); a letter dated April 2013 from a consultant commenting on matters raised in the experts' reports relied upon by the prosecutor (Attachment D); a hand-drawn map of the property and comments as to the results of a regrowth count in April 2013 (Attachment E); a document headed "Final submissions" stated to have been put before the LEC dealing with the issue of incorrect areas within polygons (Attachment F); and a letter from the consultant dated April 2013 referring to the issues of polygon interpretation (Attachment G).

Issues:

(1) whether leave should be granted to rely on the material that was not before the trial judge;

(2) whether the guilty plea should be set aside;

(3) whether the conviction based on acceptance of the guilty plea was unsound; and

(4) whether the trial judge erred in the exercise of his discretion as to the imposition of sentence.

Held: dismissing the appeal from both conviction and sentence:

(1) leave was refused for the admission of the further evidence in Attachments A, B, C, D, E and G, and Attachment F was treated as a submission. Attachments C, D and G sought to revisit issues already dealt with at the hearing and it was not appropriate for fresh evidence of that kind to be adduced by way of submission when the prosecutor had not had the opportunity to test that evidence: at [59]; it was not clear why the material in Attachments A and E could not have been made available at the hearing, and in any event the presence of an EEC was relevant not to conviction but only to sentence: at [61]; Attachment B was of no weight whatever: at [62];

(2) although the trial judge made clear to Mr Kennedy the distinction between whether at the time the clearing took place he intended to use the timber for construction purposes within the time period specified for an exemption under the routine agricultural management activities ("RAMA") provisions for construction of rural infrastructure, on the one hand, and whether he had in fact used the timber within the specified time period the fact that there remained some doubt as to whether he really understood the relevance of that issue raised the question whether his guilty plea was based on a real awareness of guilt: at [71]. In circumstances where the uncertainty on Mr Kennedy's part as to what was comprised by the offence could not have altered the conclusion that, on the admitted facts, a contravention was established, there was no miscarriage of justice in the fact that the trial judge accepted the guilty plea notwithstanding the confusion on Mr Kennedy's part as to what was required to fall within the exemption for clearing for rural infrastructure: at [76];

(3) a finding of guilt, even had there been a not guilty plea, would have been inevitable: at [101]. A defence based on the cleared timber being regrowth could not have succeeded: at [82]; Mr Kennedy could not have established the RAMA defence relating to construction of rural infrastructure in the absence of evidence satisfying cl 16(2)(b) of the Native Vegetation Regulation 2005 that the clearing was carried out in conjunction with a restoration program: at [86]; the evidence did not establish that the clearing was permitted in accordance with s 11(1)(c) of the NV Act for the control of noxious animals under the *Rural Lands Protection Act* 1998: at [89]; there was no error in the trial judge concluding that there was no exemption created for the purpose of creating firebreaks: at [91]; there was no error in the trial judge not having regard to subsequent regrowth analyses when accepting the expert evidence on the issue of whether there was an EEC: at [95]; and the trial judge did not err in accepting the unchallenged expert evidence of the prosecutor's witness as to the interpretation of aerial photographs: at [99]; and

(4) on the whole, the trial judge's findings on sentence were favourable to Mr Kennedy, and no basis had been demonstrated for any conclusion that the trial judge erred in the exercise of his discretion as to the imposition of sentence consequent upon acceptance of the guilty plea and the entry of a conviction: at [110].

Rummery v Chief Executive, Office of Environment and Heritage [2014] NSWCCA 106 (Ward JA, Johnson J and RS Hulme AJ)

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

Facts: Mr Rummery pleaded guilty to, and was convicted of, an offence against s 12 of the *Native Vegetation Act* 2003 ("the NV Act") that between about 13 August 2008 and 17 August 2010 he had cleared native vegetation otherwise than in accordance with a development consent or a property vegetation plan ("PVP"). The prosecutor's summons was filed on 9 November 2011, and the particulars of the offence specified the date on which evidence of the offence first came to the attention of an authorised officer as being 12 November 2009. On 9 March 2012, at which time he had the benefit of legal representation, Mr Rummery pleaded guilty to the charge. At the hearing in the Land and Environment Court ("LEC") in October 2012 Mr Rummery represented himself. The prosecutor's case was that Mr Rummery had cleared 286ha of native vegetation during the charge period, of which 248ha had been unlawfully cleared, accepting that 38ha had been lawfully removed for the purposes of constructing rural infrastructure. Mr Rummery disputed the area of illegal clearing, maintaining that he had pleaded guilty to illegal clearing only on 48ha, and disputed the number of trees cleared, whether the vegetation was native indigenous vegetation, the age of the cleared timber, whether it had been proved that the cleared trees did not constitute regrowth, and whether there was evidence of an endangered ecological community having been present.

The trial judge found that the total area of unlawfully cleared land was 239ha. The trial judge did not accept that the 191ha remaining after the 48ha which Mr Rummery agreed he had unlawfully cleared had been lawfully cleared pursuant to the exemption for routine agricultural maintenance activities ("RAMA") necessary to remove or reduce an imminent risk of serious personal injury or damage to property in s 11(1)(i) of the NV Act.

The trial judge convicted Mr Rummery of the offence as charged and imposed a fine of $80,040 and ordered Mr Rummery to pay the prosecutor's costs. Mr Rummery appealed from both his conviction and sentence pursuant to s 5AB of the *Criminal Appeal Act* 1912. Mr Rummery sought to rely on further evidence as to the date on which evidence of the clearing first came to an authorised officer's attention, the unlikelihood or inability of Mr Rummery to have been permitted to clear the area under a PVP, and the financial impact of the fine on Mr Rummery. Mr Rummery contended that the conviction should be set aside because the proceedings were statute barred under s 42 of the NV Act which requires that proceedings be commenced within 2 years after the date on which the offence is alleged to have been committed (s 42(3)), or the date on which evidence of the alleged offence first came to the attention of an authorised officer (s 42(4)); and that the trial judge had erred in not accepting the "imminent risk" exemption, and in concluding that the charge had been proved.

Issues:

(1) whether leave should be granted to adduce fresh evidence;

(2) whether the conviction should be set aside;

(3) whether the trial judge erred in the assessment of harm caused by the unlawful clearing; and

(4) whether the trial judge had erred in consideration of Mr Rummery's capacity to pay a fine.

Held: dismissing the appeal from conviction, allowing the appeal from the sentence imposed and reducing the fine to $66,000:

(1) there was no suggestion that any of the affidavit material on which Mr Rummery now sought to rely was not served on him prior to the LEC hearing, and the additional material relating to assessment methodology and Australian Taxation Office assessment notices would reasonably have been available to Mr Rummery at the time of the hearing below: at [63]. There was at least some doubt as to whether the material produced in Court to Mr Rummery at the commencement of the hearing was reasonably available to him at the time of the LEC hearing: at [75]. The Court would have been inclined to grant leave for the admission of the material relied upon as going to the date on which evidence first

came to the attention of an authorised officer if this would be likely to have led to a different conclusion on whether the offence had been proved or as to the exercise of the discretion on sentencing. However that was not the case, and leave to admit the additional evidence sought to be relied upon in that regard, as well as the additional evidence in relation to guidelines for a PVP and a report going to the likelihood of obtaining a PVP: at [76]. The financial material was admitted on the basis that the prosecutor did not object to it: at [77];

(2) the material sought to be relied upon by Mr Rummery did not establish that the date specified in the summons (as to when evidence of the clearing first came to the attention of an authorised officer) was incorrect. That was an issue on which under s 42(5) of the NV Act Mr Rummery bore the onus: at [104]. The evidence did not support a conclusion that evidence of the unlawful clearing that was the subject of the charge had come to the attention of the relevant authorised officers before they were able to view from the air the state of the property on 12 November 2009 and compare that to the hard copy satellite image of what had been there on 13 August 2008: at [106]. Simply having the ability to access electronic data by way of a computer program was not sufficient. What had to be shown was that in some way evidence of unlawful clearing had actually come to an authorised officer's attention, and that could only be done by someone accessing or viewing data from which the possibility of such clearing became apparent: at [107];

(3) Mr Rummery had an opportunity to raise issues in relation to his prosecution when the matter was before the trial judge, and he did so, and he had conducted cross-examination of the expert witnesses and made detailed submissions to the trial judge. There was nothing to warrant a conclusion that Mr Rummery was denied procedural fairness in the sentencing hearing or that he should now be allowed leave in effect to reopen the case in order to test the prosecution evidence to see whether a limitations defence could be run: at [119];

(4) the trial judge did not err in the construction placed on the "imminent risk" exception. The trial judge did not err in concluding that there was no "imminent risk" established by reference to which part or all of the clearing was reasonably necessary: at [124], [134];

(5) there was no substance to the appeal from conviction on the grounds of identification of indigenous native vegetation, or evidence of regrowth: at [150], [164];

(6) the trial judge's conclusion as to the number of trees felled was supported by the evidence and had not been shown to be incorrect: at [173]. The trial judge's conclusion that the majority of the trees the subject of clearing were between 40 and 80 years old was not supported by the evidence. Therefore, while there was no error demonstrated in the trial judge's acceptance, for the purpose of sentencing, that the factual elements of the offence had been established to the requisite degree of proof, there was an error in one of the matters on which the trial judge relied in reaching the conclusion that there was "moderate to substantial" environmental harm caused by the clearing: at [179];

(7) there was no dispute by Mr Rummery's expert that the level of environmental harm was at least "moderate", and given the number of trees, the extent of the clearing and that the retention of younger trees is necessary for the maintenance of native vegetation, the trial judge did not err in finding that "moderate to substantial" environmental harm had been caused. Nevertheless the fact that the majority of the trees felled were younger than the trial judge considered them to be, and that Mr Rummery would (had he confined himself to clearing only regrowth) have been lawfully able to clear an unknown proportion of those trees, taken with the matters considered by the trial judge as other factors relevant to sentencing, led to the conclusion that the size of the fine should be revisited: at [184];

(8) the trial judge had plainly had regard to the economic impacts of a fine on Mr Rummery. No error had been shown in the exercise of discretion in sentencing and nor could the penalty be said to be manifestly excessive: at [197].

Director General NSW Department of Industry and Investment v Mato Investments Pty Ltd [2014] NSWCCA 132 (Bathurst CJ, Fullerton and Bellew JJ)

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

Facts: Mato Investments Pty Ltd ("Mato"), its directors Mr Bennett and Mr Creman, and an independent consultant employed by Mato as Project Manager, Mr Coomes, were charged with three offences each under the *Fisheries Management Act* 1994 ("the FM Act") relating to destruction of habitat of an endangered species of fish, a vulnerable species of fish and an endangered ecological community. All were also charged with an offence under s 125 of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act") of carrying out development contrary to a development consent in contravention of s 76A(1)(b) of the EPA Act. The charges related to removal of "snags" and woody debris from the beds and banks of the Murray River and two of its anabranches between 5-16 October 2007. The development consent was granted by Corowa Shire Council ("the council") on 29 May 2007 and included condition 16: that "no snags (large woody debris on the bank or in the water) are to be moved, relocated or removed either at the time of construction or in the future without consultation with DPI". Two notices of determination were issued, both dated 30 May 2007, one by the General Manager and the other by the council's Director of Environmental Services on behalf of the General Manager. The latter notice identified two conditions as deferred commencement conditions, and was sent to Mr Bennett and to the government authorities required to be notified under s 81(1)(c) of the EPA Act. The trial judge concluded that the actual determination of the consent authority is distinct from the notification of the determination and where the s 81 notice did not reflect the council's decision the notice was invalid so the consent did not become operational; and that there was no development consent in force and therefore no breach of condition 16 during the relevant period. The trial judge concluded that having regard to the finding that no development consent was in force, the presumption in s 220ZD(2)(b) of the FM Act that knowledge of the contravention of that Act was presumed by reason of the fact that removing the snags and woody debris constituted a contravention of condition 16 of the consent, could not apply. The trial judge concluded that the prosecutor's submission that for the purpose of s 220ZD(2)(b) it was unnecessary to establish that the consent was in force in the sense of any deferred commencement condition being satisfied was not the case as particularised, and further if a development consent was not in force regardless of whether it had been obtained there could not be a failure to comply with such a consent.

The trial judge concluded that the prosecutor had not proved beyond reasonable doubt all the necessary elements of the clearing of habitat offences, or the EPA Act charges, in relation to all of the defendants, and it followed that they were not guilty of these offences and the charges should be dismissed. The following questions were asked in a stated case under s 5AE of the *Criminal Appeal Act* 1912:

Question 1

On the facts as found, was it open to me to find that there was no development consent 'in force' with respect to the subject land during the charge period within the meaning of s 76A(1) of the Environmental Planning and Assessment Act 1979?

Question 2

Did I err in finding that I could not consider whether the element of knowledge for the purposes of s 220ZD(1) of the Fisheries Management Act 1994 was to be conclusively presumed by application of s 220ZD(2)(a) of that Act?

Question 3

On the facts as found, was I required to conclusively presume that each of Mato Investments Pty Ltd and Dzeladin Ceman knew that the land concerned was the habitat of the trout cod, silver perch and the Lower Murray EEC by reason of the operation of s 220ZD(2) of the Fisheries Management Act 1994 either pursuant to paragraph (a) or paragraph (b) of that provision?"

Held: answering the questions "Yes", "No" and "No":

(1) a consideration of the context of s 81(1) of the EPA Act and its purpose in the legislative scheme led to the conclusion that the notice of development consent must at least state accurately the critical matters required to be notified by cl 100 of the Environmental Planning and Assessment Regulation 2000. That included in particular the conditions upon which the development consent had been granted, for three reasons: first, the use of the words "must, in accordance with the regulations" suggested that strict compliance was required for the notice to be effective; second, the notice operates as a pre-condition to the consent being operative; and third, the notice was required to be given to any person who had made submissions in respect of the development and the time for appeal was set by reference to the date of the notice: at [62]-[65];

(2) the contravention of condition 16 was relied upon to establish presumed knowledge by virtue of s 220ZD(2)(b) of the FM Act, and that was the basis upon which the prosecutor conducted the case up to the time of closing addresses. The factual question as to whether the removal of debris from one of the anabranches occurred in the course of a development was not in issue in the way the case was conducted, and had reliance been placed on s 220ZD(2)(a) of the FM Act it might have been possible for evidence to be led and submissions made on the issue of whether or not development consent was in fact required for the purpose of removing debris from that creek. The trial judge considered the amendment raised additional factual matters that had not been considered; the question of allowing the amendment to the particulars was a matter which fell within her discretion and no error of discretion had been made out: at [73]-[77]; and

(3) section 220ZD(2)(b) of the FM Act was designed to deal with a situation where a development consent was in force and damage to habitat occurs as a result of acts or omissions not in compliance with its terms. Until a valid notice of determination was given the consent was not in force and s 220ZD(2)(b) of the FM Act could have no operation: at [81], [82].

Campbell v R [2014] NSWCCA 175 (Bathurst CJ, Simpson and Hidden JJ)

Facts: the appellant appealed against his conviction on the charge that he murdered his wife. The appellant and the deceased had been camping in the Royal National Park, and the deceased had been found at the bottom of a cliff. The Crown case was that the deceased had been pushed over the cliff deliberately by the appellant. There was a partial shoe print matching the deceased's shoes just over the edge of the cliff where the slope of the ground was 25.64 degrees, and small tea-trees and a number of their branches were freshly broken off at around chest height of an average person.

One of the grounds of appeal was that the trial judge had erred in admitting the evidence of Associate Professor Rodney Cross over objection. The evidence of Associate Professor Cross had been objected to on the basis that it fell outside his area of specialised knowledge. On a voir dire Associate Professor Cross gave evidence that his PhD was in the field of plasma physics, and that he had been involved in the investigation of a number of falling incidents with the NSW Police Force and the Coroner. His curriculum vitae listed a number of publications concerned with what he described as the physics of sport, and referred to a book written by him, "Evidence for Murder How Physics convicted a Killer", ("the Book") and two articles ("Fatal Falls from a height: two case studies" and "Falls from a height"). He was cross examined on his expertise in biomechanics. The trial judge ruled that Associate Professor Cross was relevantly qualified to explain to the jury the biomechanics involved in each of the scenarios as to how the deceased left the cliff, in the following respects:

(i) a slope of approximately 26 degrees conforms with the common slope for a tiled roof. It may be contrasted with a slope of 10 or 12 degrees, being the slope typical of a travelator, which has the additional safety feature of a moving handrail.

(ii) standing on one foot on a 26 degree slope at the cliff edge is consistent with a person in an upright position, applying vertical force to the ground.

(iii) the impression of the shoe at the cliff edge is consistent with a person in an upright position, applying vertical force to the ground.

(iv) it takes approximately .6 of a second for a person to fall from a vertical position to a horizontal one, assuming the application of force from behind, and assuming a normal reaction time of .2 of a second.

(v) a trip presupposes that the person is in motion.

The trial judge held that having established the matters (i) to (v) and taking into account the physical features of the site established by other evidence in the trial, Associate Professor Cross could express an opinion with respect to the various ways in which the shoeprint could have been left in the position where it was found.

Associate Professor Cross gave evidence that the deceased was upright as she went over the cliff, and he considered a range of scenarios as to how the shoeprint could have been left, including that the deceased jumped, tripped, or was pushed. He considered the two most likely scenarios were that the deceased was tripped as she was walking towards the edge of the cliff or that she was pushed. Evidence was given by Mr David Beck, a mechanical engineer and biomedical engineer, that he would rule out the scenario of the deceased having slipped and that the evidence was equally consistent with the deceased having been pushed or having tripped.

Issues:

(1) whether the trial judge had erred in admitting the evidence of Associate Professor Cross; and

(2) if so, whether this was an appropriate case to apply the proviso to s 6(1) of the *Criminal Appeal Act* 1912.

Held: dismissing the appeal:

(1) section 80(b) of the *Evidence Act* 1995 did not go so far as to make admissible opinion evidence said to be based on specialised knowledge, training or experience which in truth is evidence that is patent and known to all. Such evidence as a matter of logic would not be based on specialised skill and knowledge. Section 80(b) makes it clear that in arriving at his or her opinion based on specialised knowledge, training or experience, there could be no objection to an expert relying on matters generally known. In that way ss 79 and 80(b) of the *Evidence Act* 1995 could be read harmoniously: at [225];

(2) the matters referred to in (i), (ii) and (v) of the judgment of the trial judge were matters of commonsense and not based on any field of expertise, in particular biomechanics. Similarly the proposed evidence in (v) was a matter of basic arithmetic based on the assumed normal reaction time: at [226];

(3) the matters in (iii) and the evidence of opinion as to the ways in which the shoeprint could have been left were based on a specialised knowledge of biomechanics or more accurately biomedical engineering: at [227];

(4) Associate Professor Cross's conclusion that the deceased was upright and to have tripped would have had to have been walking at a moderate to fast pace would seem to be based on specialised knowledge in the field of biomechanics. If he had appropriate knowledge in that field he would have been entitled to give the evidence he gave based on such expertise. The fact that his process of reasoning involved the expression of opinions on matters which could be said to be matters of common knowledge did not render his evidence inadmissible: at [228];

(5) Associate Professor Cross did not suggest that his formal qualifications gave him that expertise, rather reliance was placed on his study and experience. The evidence tendered did not establish that he had acquired such specialised knowledge. His report stated that he investigated 20 cases for the NSW Police Force or Coroner, however it said nothing of what he did in those investigations or how they equipped him to give evidence in the present case. None of the publications referred to in his curriculum vitae were tendered and on their face they did not show specialised knowledge in biomechanics. The fact that he published the Book and the two articles on falls with those titles could not lead to the conclusion that he was appropriately qualified to give the evidence led from him. Neither the evidence given on the voir dire nor his evidence in chief were sufficient to establish that he had the requisite skill and experience to give the evidence he in fact gave: at [230]-[234]; and

(6) while the appellant succeeded in establishing that ground of appeal, the error in admitting the evidence of Associate Professor Cross did not give rise to such a miscarriage of justice as to render consideration of the proviso to s 6(1) of the *Criminal Appeal Act* 1912 inapplicable. Based on the evidence properly admitted at the trial the Court was satisfied beyond reasonable doubt that the appellant murdered the deceased by deliberately pushing her over the cliff: at [262], [263].

- Supreme Court of NSW

Bailey v Director General, Department of Natural Resources [2014] NSWSC 1012 (Fullerton J)

(related decisions: *Director-General of the Department of Land and Water Conservation* [2003] NSWLEC 160 Talbot J, *Director General Department of Land and Water Conservation v Bailey* [2003] NSWCCA 361 Mason P, Hidden and Shaw JJ)

Facts: the plaintiffs, Mr Bailey and his sister, were the registered proprietors of a rural property known as Hazeldene at Boomi in northern NSW. The plaintiffs held water licences under the *Water Act* 1912 ("the Water Act") which authorised the extraction of 5880 megalitres annually from the Macintyre River for the specified purpose of irrigating no more than 972ha on Hazeldene, and which provided that two axial flow pumps were the authorised means by which water was extracted. Between 1985 and 1991 Mr Bailey arranged for the construction of two water storage units, with a combined capacity of 4600 megalitres of water, and which were filled from the irrigation channels on Hazeldene. When the Macintyre River broke its banks, floodwaters were pumped directly into the two storage units from Tarpaulin Creek or the Macintyre River floodplain. In May 2000 the plaintiffs purchased a parcel of land known as "the Strip" bordering Hazeldene, with the intention of clearing it of native vegetation and constructing a third water storage, to store water harvested from the floodplain. Between February 2000 and July 2000, 64ha of native vegetation on the Strip was cleared by contractors retained by Mr Bailey ("the first clearing event"); an additional 20.4ha was cleared in April 2002 ("the second clearing event"). The plaintiffs did not obtain development consent under Part 2 of the *Native Vegetation Conservation Act* 1997 ("NVC Act") which was then in force. The proposed third storage unit was to be constructed with levees extending 1.4km on the eastern side and 1.8km on the western side. It was common ground that the construction of the unit was a "controlled work" and required an approval under Part 8 of the Water Act, and that the plaintiffs had not lodged an application for approval to build the third unit before the first clearing event. The plaintiffs' case was that an application was made in July 2000; the defendants' case was that no complying application was made until January 2004. On 18 July 2002 the Director General of the Department of Land and Water Conservation (the first defendant) commenced proceedings against Mr Bailey for offences of clearing native vegetation, being the first and second clearing events, without development consent in contravention of s 21(2)(a) of the NVC Act. Mr Bailey relied upon legal advice obtained in April 2000 that he was exempt from the need to obtain development consent before clearing the Strip of native vegetation because the clearing was for the purpose of constructing a "farm structure", namely a "farm dam". In the Land and Environment Court Mr Bailey also relied on the exemption under s 12(f) of the NVC Act applying to clearing that is part of designated development. Talbot J held that Mr Bailey was entitled to be acquitted of both offences having discharged the burden of establishing that the clearing was for the purpose of the construction of a "farm dam" as provided for in Sch 3 to State Environmental Planning Policy 46 ("SEPP 46"); and following the decision of Bignold J in *Director-General of Land and Water Conservation v Jackson* [2003] NSWLEC 81 ("*Jackson*"), held that without a development consent, the exemption under s 12(f) was not available. Talbot acceded to a request that two questions of law be stated for the opinion of the Court of Criminal Appeal: the first, advanced by the Department, concerning whether the farm dam exemption applied where what was proposed was a water storage unit of the size and scale of the third water storage unit, and the second, advanced by Mr Bailey, relating to whether the decision in *Jackson* was correct. The Court of Criminal Appeal answered both questions in Mr Bailey's favour, finding that the interpretation given to the farm dam exemption by Talbot J was available and that Mr Bailey was entitled to rely on the exemption in s 12(f). Talbot J dismissed both summonses. Approval to build the third water storage unit under Part 8 of the Water Act was granted in December 2005, and issued in March 2006.

The plaintiffs claimed damages for the interruption to their farming business and consequential diminishment of returns from cotton yields over successive growing seasons between 2000 and 2006 by reason of what they claimed was tortious conduct of the defendants in preventing them from constructing the third water storage unit on the Strip in 2000. Separate actions for intentional interference in the plaintiffs' business by the unlawful acts of Departmental officers; negligent misrepresentations by Departmental officers; and misfeasance in public office, were pleaded in the alternative. Mr Bailey brought a separate action for malicious prosecution against the first and third defendants for the institution and maintenance of the proceedings in the Land and Environment Court. The first defendant was Director General of the Department; the second defendant, the Water Administration Ministerial Corporation was responsible for receiving and considering applications under Part of the Water Act; and the third defendant was the State of NSW, employer of a number of officers of the second defendant and of the Department who had dealings with Mr Bailey in relation to the Water Act application and under the NVC Act in relation to the investigation into the legality of clearing the Strip. Those dealings included a meeting on the property with Mr Gardner, an officer of the Department, on 19 July 2000 when a Part 8 application form was filled out.

Issues:

(1) whether there was a valid and complying application under Part 8 of the Water Act lodged on 19 July 2000;

(2) whether in addition to the first defendant who was properly named as a prosecutor, specified Departmental officers including compliance officers and a legal officer in the Legal and Compliance Branch who drafted the prosecution memorandum and submitted it to the Director General, were also prosecutors thereby exposing the third defendant to liability in the malicious prosecution claim;

(3) whether the proceedings were instituted and maintained without reasonable and probable cause and maliciously;

(4) whether the misrepresentations pleaded by the plaintiffs were made out; and

(5) whether the elements of the tort of misfeasance in public office had been established.

Held: judgment for the first, second and third defendants:

(1) Mr Bailey had no genuine belief that the Part 8 application Mr Gardner took with him when he left Hazeldene on 19 July 2000 would be processed, and there was no valid or complying application in the possession of the second defendant until 8 January 2004 when the application was finally completed, signed by both plaintiffs and lodged with the accompanying payment of the fee: at [216], [220];

(2) The legal officer's interrogation of the available evidence and its sufficiency to support a case for prosecution and her consideration of the Director of Public Prosecutions prosecution guidelines and other matters noted by her as supporting the recommendation to prosecute was the material on which the first defendant's decision was based. If Mr Bailey could establish that she acted maliciously and without reasonable and probable cause in recommending that proceedings be commenced the third defendant would be vicariously liable for her actions: at [288]. She performed no role or function as "a prosecutor" in the maintenance of the proceedings after they were initiated, and to the extent that the action for damages was based on the actions of the prosecutor in the maintenance phase of the proceedings, the first defendant was the only defendant: at [289];

(3) the content and tenor of the prosecution memorandum and the comprehensive consideration given by the legal officer to the factors in the prosecution guidelines and her evidence generally left the Court in no doubt that she honestly believed the evidence was sufficient to warrant setting the criminal law in motion and that there was no legal impediment to a conviction: at [496]. Even if were open to conclude that her consideration of the farm dam exemption was so fundamentally flawed that, viewed objectively, there was an insufficient basis for her to recommend a prosecution, the Court was not persuaded that there was any basis for a finding that she was probably actuated by malice or that any ulterior purpose was to be inferred: at [498];

(4) the material, when assessed objectively, was sufficient to support the first defendant's decision to prosecute. The first defendant had not been shown to have initiated the proceedings in the absence of reasonable or probable cause or maliciously: at [504]. The fact that Mr Bailey's case proceeded to the

Court of Criminal Appeal by way of stated case by Talbot J was not evidence of malice or demonstrative of an absence of reasonable and probable cause: at [508];

(5) none of the misrepresentations pleaded in the plaintiffs' case was made out. In any event the action was statute barred: at [525]; and

(6) the plaintiffs had failed to establish that one or more Departmental officers had actual knowledge that he was acting beyond power and that conduct would cause or be likely to cause injury to the plaintiffs, or that any officer acted with reckless indifference to the possibility of his action being beyond power and to the possibility that it would cause injury to the plaintiffs: at [539].

Note: in *Bailey v Director General, Department of Natural Resources (No 2)* [2014] NSWSC 1227, Fullerton J ordered the plaintiffs to pay the defendants' costs of the proceedings on an ordinary basis from 10 November 2006 to 13 May 2011 (when an offer of compromise was made), and on an indemnity basis on and after 14 May 2011, including all reserved costs and costs ordered to be costs in the cause, but that the costs orders made on 21 April 2011, 31 August 2011 and 17 May 2013 be undisturbed.

- Land and Environment Court of NSW

Judicial Review

Darkinjung Local Aboriginal Land Council v Wyong Coal Pty Ltd (No 2) [2014] NSWLEC 71 (Craig J)

Facts: on 18 October 2012, Wyong Coal Pty Ltd ("Wyong") lodged a development application pursuant to s 78A(1) of the *Environmental Planning and Assessment Act 1979* to develop an underground coalmine. Part of the land which was the subject of the development application was owned by Darkinjung Local Aboriginal Land Council ("Darkinjung"). Darkinjung did not give its consent to the making of the development application. Darkinjung applied to the Court, challenging the validity of the development application or, if valid, the power of the Minister to determine the application in the absence of consent by the New South Wales Aboriginal Land Council ("the State Land Council") to the making of the development application. The development for which Wyong sought consent was "public notification development" within the meaning of cl 49 of the Environmental Planning and Assessment Regulation 2000 ("the Regulation").

Issues:

(1) whether, having regard to the text of cl 49 of the Regulation, cl 49(3A) is displaced in circumstances where cl 49(2) is engaged;

(2) whether the provisions of cl 49(3) and cl 49(4) provide a context which support the displacement of cl 49(3A) in circumstances where cl 49(2) is engaged;

(3) whether, having regard to the purpose of the provisions under consideration, there is any support for the proposition that the engagement of cl 49(2) displaces the operation of cl 49(3A); and

(4) whether, in the circumstances, the consent of the State Land Council was required.

Held: declaring that the consent of the State Land Council was required in respect of the development application:

(1) the text of cl 49(3A) does not suggest that its provisions are displaced when the provisions of cl 49(2) are engaged in respect of a development application for "public notification development" or a development application made by a "public authority": at [28]. Clauses 49(3A) and 49(2) are not inconsistent provisions and can be read so that each can operate in respect of the same development application. There is no apparent reason to read the provisions of cl 49(3A) as if they had no work to do when, in such a case as the present, a development application is able to be made because the provisions of cl 49(2) lift the qualifying provision otherwise imposed by cl 49(1)(b): at [27]. The text of cl 49(3A) is not expressed to apply only where cl 49(1)(b) applies to a development application in question. Nor do the provisions of cll 49(1), 49(2) and 49(3A), read sequentially, have that consequence: at [34]. Clause 49(3A) should be construed as imposing a requirement that consent to the development application be obtained from the State Land Council, whichever "person" qualifies as an applicant for development consent under cl 49(1): at [36];

(2) nothing in the provisions of cl 49, read as a whole, supports the displacement of cl 49(3A) in circumstances where cl 49(2) is engaged. The absence of a provision displacing the operation of cl 49(3A) of the kind found in cl 49(4), as it relates to cl 49(3), provides contextual support for the construction of cl 49(3A) as earlier outlined: at [48];

(3) there is nothing in the purpose of the legislation, properly understood, that would require a construction of cl 49 and in particular cl 49(3A), differing from that which results from a close consideration of the text: at [76]; and

(4) having regard to the provisions of the *Aboriginal Land Rights Act 1983*, as amended, and cl 49(3A) of the Regulation, the requirement for the consent of the State Land Council is as significant as the requirement for land owner's consent. It is the overarching role that is given to the State Land Council, when development of land owned by a Local Aboriginal Land Council is in contemplation, which affords

such significance. Like the need for consent of the owner of land in respect of which a development application is made, so also the need for consent of the State Land Council is a core aspect of the approval process of any development, including State significant development: at [81].

Lend Lease (Millers Point) Pty Limited v Council of the City of Sydney [2014] NSWLEC 64 (Pain J)

Facts: the Applicant challenged decisions of the Respondent ("the council") to issue rates notices under the *Local Government Act* 1993 ("LG Act") in relation to the area of Barangaroo that it is developing ("the rated land"). The rated land is Crown land. The Applicant contended that the rating exemption in s 555(1)(a) of the LG Act, that land owned by the Crown, not being land held under a lease for private purposes is exempt from all rates, applied. Between July 2010 and November 2012, the Barangaroo Delivery Authority ("the BDA") granted the Applicant a series of licences: the first access licence, second access licence, C4 construction zone licence, basement construction zone licence, third access licence and the C5 construction zone licence.

Issues:

(1) whether the licences were leases as defined in the LG Act;

(2) whether the land was held by the Applicant; and

(3) whether the licences were for private or public purposes.

Held: the Applicant's summons was dismissed:

(1) the licences were leases within definition (b) of lease in the LG Act: at [63]. The LG Act definition of lease in (b) refers to "a licence, permit, permissive occupancy or authority" without the words "under the Crown Lands Act" or similar. The six licences granted over the rated land were not made explicitly or implicitly under the *Crown Lands Act* 1989 ("CL Act"). Crown land can be subject to licences other than under the CL Act. A licence, unconstrained in definition (b) of lease in the LG Act, is an instrument which has effect separate from the CL Act. There is no statutory imperative for implying into definition (b) of lease that a licence must be under the CL Act: at [56]. The statutory context when other sections in Ch 15 of the LG Act were considered, supported this approach: at [60]. Not all recipients of rates notices obtain an appeal right under s 574(1). Some entities will only have the right availed of in judicial review proceedings. The fact that appeal rights are available to holders of a licence or permit under the CL Act did not support the Applicant's construction: at [62];

(2) the Applicant held the land under a lease(s) for the purpose of s 555(1)(a): at [84]. The council's construction was in harmony with the extended definition (b) of lease in the LG Act and was preferred: at [80]; and

(3) the purpose of the licensor, the BDA, was pursuing the public purpose of facilitating development of the landmark Barangaroo site of various public and private facilities. The Applicant as the private developer entered into the six licences to undertake development of Barangaroo South and make a profit: at [138]. The three construction zone licences were for private purposes. Extensive commercial building work the subject of the project approvals specified in the licences was to be carried out. The substantial part of that work was directed to the construction of the retail, residential and commercial buildings which dominate Barangaroo South: at [147]. The works under the second and third access licences were to assist future development of the private retail, residential and commercial development the subject of the three construction zone licences: at [154]. While the first access licence was earlier in time, did not overlap with the construction zone licences and the construction contemplated under it did not occur, there was no logical basis for distinguishing the nature of the preliminary work undertaken under that licence from the preliminary work undertaken under the second and third access licences: at [155].

Regional Express Holdings Limited v Dubbo City Council (No 3) [2014] NSWLEC 87 (Pain J)

(related decisions: *Regional Express Holdings Limited v Dubbo City Council* [2013] NSWLEC 110, *Regional Express Holdings Limited v Dubbo City Council* (No 2) [2013] NSWLEC 113, Biscoe J)

Facts: Regional Express Holdings Ltd ("Rex") challenged two resolutions of Dubbo City Council ("the council") concerning the imposition of fees for security screening of passengers at Dubbo City Regional Airport ("the airport"). The first decision challenged was the resolution passed by the council at its ordinary meeting on 22 October 2012 adopting the Report of the meeting of the Dubbo City Regional Airport Working Party ("Working Party") held on the same day ("the first decision"). In the October 2012 report the Working Party recommended screening of all passengers travelling to Dubbo with the cost to be charged to Regular Public Transport ("RPT") operators and spread across all RPT passengers flying into and out of Dubbo. The second decision challenged was the resolution passed by the council at its ordinary meeting on 25 February 2013 adopting the Report of the Working Party meeting held on the same day ("the second decision"). By adopting this report, the council resolved to charge a fee for the costs of security screening at the airport to the two RPT operators which use the airport, namely Rex and QantasLink. The *Aviation Transport Security Act* 2004 (Cth) and the Aviation Transport Security Regulations 2005 (Cth) ("the Security Regulations") did not require that Rex passengers be security screened as its aircraft were below the required weight threshold of 20,000kg specified.

Issues:

(1) whether the council had power to impose a fee for service on Rex under the *Local Government Act* 1993 ("the LG Act");

(2) whether the second decision failed to comply with s 610F of the LG Act requiring public notice by a council of an intended fee;

(3) whether there was a breach of procedural fairness in relation to the first decision; and

(4) whether the decisions were unreasonable, irrational, took into account irrelevant considerations or failed to take into account relevant considerations.

Held: the further amended summons was dismissed:

(1) the council had power to charge Rex a fee under s 608(1) for the passenger security screening service: at [130]. The decision was justiciable at least to the extent that a duty to act fairly was imposed on the council in making the first decision: at [96]. The power in s 24 is wide with no explicit constraints specified in the section. This construction was supported by s 7 (objects) and s 8 (the Council's charter): at [103]. The decision to provide a sterile area, as defined in the Security Regulations, in the airport terminal which resulted in the need for screening all passengers was within the council's responsibilities as airport operator: at [105]. The service was provided to Rex's passengers not to Rex itself: at [107]-[109]. There are no constraints in s 608(2), which provides a non-exhaustive list of services for which a fee can be charged: at [116]. That one area where councils do commonly provide services, building inspections, is specifically provided for in s 608(3)-(7), including charging a fee whether the service is requested or not, did not mean that the broad power to charge a fee for a service under s 608(1) was limited to those requesting a service: at [117]. A common law right of Rex was not infringed by the council's decision to charge it a fee: at [126];

(2) the LG Act does not require the notification of an exact fee amount: at [148]-[153]. Even if the LG Act required this, it did not result in invalidity: at [154]-[158]. Section 610F was complied with: at [153];

(3) the obligation to accord procedural fairness required that Rex receive adequate notice of the meeting on 22 October 2012, disclosure of information on which a decision would be based and have sufficient opportunity to make submissions to the council on any matters it considered relevant before that meeting: at [205]. There was no practical unfairness to Rex: at [206]-[209]; and

(4) the council's decisions were not irrational or unreasonable: at [238]-[242]. No irrelevant considerations were taken into account: at [243]-[245]. There was no failure to take into account relevant considerations: at [249].

DeAngelis v Pepping [2014] NSWLEC 108 (Adamson AJ)

(related decision: *De Angelis v Wingecarribee Shire Council* [2013] NSWLEC 1148 Brown C)

Facts: the applicant challenged the validity of a local environmental plan ("the LEP") made on 28 March 2014, signed by the first respondent Mr Pepping, Group Manager Strategic & Assets of the second respondent, Wingecarribee Shire Council ("the council"), and a development control plan made on 28 March 2014 ("the DCP") that incorporated changes that had been made in the LEP. The applicant owns all the land that is the subject of the LEP ("the site"), which is at the south-eastern corner of the intersection of Bowral Street and Moss Vale Road, Bowral. The effect of the LEP was to change the permitted uses and zoning of the land from B4 Mixed Use to R3 Medium Density Residential. The site was zoned B4 under the Wingecarribee Local Environmental Plan 2010 ("the 2010 LEP"). In March 2012 the applicant applied for development consent for retail and residential development; consent was refused, and an appeal to the Land and Environment Court against that refusal was dismissed on 14 August 2013. In June 2013, after the Class 1 appeal was lodged, the council resolved to submit a planning proposal for the site to the Minister, to change the zoning from B4 Mixed Use to R3 Medium Density Residential. The planning proposal set out the proposed community consultation, being advertising in the Southern Highland News, providing details on the council's website, and notifying the same property owners contacted during the exhibition of the development application. The planning proposal was deferred until after the Class 1 proceedings. On resubmission the Minister issued a gateway determination under s 56 of the *Environmental Planning and Assessment Act 1979* ("the EPA Act") determining that the amendment to the 2010 LEP should proceed, and specifying community consultation in accordance with the Department of Planning & Infrastructure's 2013 *Guide to Preparing LEP's* ("the Guide") as a low impact proposal requiring public availability for a minimum of 14 days. Section 5.5.2 of the Guide states that the gateway determination "will specify the community consultation that must be undertaken", states that public exhibition "is generally undertaken in the following manner" including notification in a newspaper, notification on the planning authority's website, and written notification to affected and adjoining landowners, sets out six requirements for written notice, and lists the material that must be available for inspection. The council was advised that it could exercise powers delegated by the Minister in October 2012 to make the plan under s 59 of the EPA Act. On 12 December 2012 the council had resolved to accept the Minister's delegations under s 59, and delegated those functions to its general manager and to the Manager Strategic & Assets, specifying the names of the two persons nominated to perform the delegations. The council published a notice in two editions of the Southern Highland News, updated its website to record that the site was subject to a planning proposal, and published the planning proposal on the website. The applicant did not take issue with the form of the notice in the newspaper or with the documents publicly exhibited, or the material exhibited on the website save for the omission of the draft DCP from the documents exhibited. The council sent pro forma letters to 435 persons who had made submissions in respect of the applicant's proposed development of the site and to some adjoining property owners. The council file contained a copy of a letter addressed to the applicant and other members of his family; the applicant disputed that this letter was either sent or received. On 11 November 2013 the applicant made a further development application for retail and residential development on the site, including a Statement of Environmental Effects ("the Dickson SEE"), which addressed the proposed amendment to the 2010 LEP, and the relevant DCP. A second Class 1 appeal was lodged against the deemed refusal of the November 2013 development application on 23 January 2014. Mr Pepping signed the draft LEP on 27 March 2014. The LEP was published as Amendment 13 on 28 March 2014; a new DCP was also published on that date which depicted the site in the R3 zone. Amendment 13 did not include a savings provision. Mr Pepping (first respondent) and the Minister (third respondent) filed submitting appearances; the council (second respondent) was the only active respondent to the proceedings.

Issues:

(1) whether the council had complied only with what it had proposed for community consultation and had not notified the applicant;

(2) whether section 5.5.2 of the Guide was incorporated by reference into the Minister's determination of the community consultation requirements, so that notification to affected and adjoining landowners was required;

(3) whether publication of the first newspaper notice after the council's premises were open was a failure to comply with the community consultation requirements;

(4) whether failure to exhibit the draft DCP with the planning proposal and associated material meant that the exhibition was misleading;

(5) whether common law procedural fairness required that the applicant be notified;

(6) whether Mr Pepping lacked the power to sign the LEP; and

(7) whether the failure to exhibit the draft DCP publicly as required by cl 18 of the Environmental Planning and Assessment Regulation 2000 ("the Regulation") invalidated the DCP.

Held: dismissing the application, ordering the applicant to pay the second respondent's costs:

(1) the presence of the copy of the letter addressed to the applicant and the other owners of the site on the council's file was powerful evidence that it was not only prepared but sent. Further, the fact of its having been sent was recorded in a report to the council: at [80]. By the time of the exhibition of the planning proposal the applicant well and truly knew that the council intended to rezone the site as residential. At least by the time of the exhibition period he must have expected that the council would refuse the second development application since it was entirely inconsistent with the proposed re-zoning envisaged in the planning proposal. He had nothing to gain from making a submission in response to the public exhibition and no inference could be drawn that he was unaware of it from his not having done so: at [81];

(2) what the council was obliged to do to comply with the gateway determination was to comply with the six dot points of the written notice requirements, signified by the word "must", in section 5.5.2 and the three dot points which described the documents that "must" be made available for inspection. It was not obliged to comply with the three dot points under the description of how public exhibition is "generally undertaken" as long as what it actually did could be described as "public exhibition": at [92];

(3) the Minister intended to leave a measure of latitude to the council as to the way in which it would conduct a public exhibition. The council was entitled, consistent with the gateway determination, to place an advertisement in the local newspaper on the first day of exhibition: at [98];

(4) while the body of the letter sent to interested persons did not in terms specify the address at which submissions could be received, it informed the recipient where the material could be viewed and the letterhead contained the details of the council's street and post box addresses, DX number, fax number, telephone number and email address, which was ample to comply with the requirement that the notice specify the address for receipt of submissions: at [102];

(5) the published materials accurately described the changes proposed by the planning proposal: at [107]. It was not necessary for the planning proposal to address changes to be made to the DCP; s 55(2)(d) of the EPA Act required published maps to indicate the substantive effect of "the proposed instrument", not every other planning instrument that might have an effect on the site; the gateway determination did not require the DCP to be publicly exhibited; and the changes proposed in the planning proposal were independent of and not affected by changes to the DCP: at [114];

(6) the EPA Act as a matter of construction excluded common law procedural fairness. There was no basis on which the applicant could be said to be entitled to procedural fairness as to whether a savings and transitional provision would be included in the LEP: at [126]. In any event, the common law principles of procedural fairness, if applicable, had been complied with: [131];

(7) there was nothing in the change to the DCP that changed the controls applicable to the site since it was the LEP that had that effect, and there was relevantly no practical unfairness or injustice in the council not exhibiting the draft DCP: at [133];

(8) in specifying that Mr Pepping was to sign the instrument the council was appointing him as its agent to sign the document on its behalf as opposed to vesting him with any delegated power to do so: at [142]. The LEP was not invalid by reason of the circumstance that the draft was signed by Mr Pepping rather than the General Manager: at [147];

(9) had Mr Pepping not been authorised to sign the draft LEP on behalf of the council, the Court would have exercised its discretion not to grant relief on the grounds that the then General Manager would have taken the necessary steps to sign the draft instrument herself or to sub-delegate her authority to Mr Pepping. The operative act required to be made by the council *qua* delegate, namely the resolution to proceed with the making of the plan, was in fact performed by the council at its meeting on 27 November 2013: at [148];

(10) having regard to the status of a DCP and the circumstance that its amendment might amount to no more than a regularisation of a change effected by a LEP, non-compliance with the provisions of the Regulations ought not be construed as leading to invalidity: at [159]; and

(11) in any event, relief would have been declined because the contest was in substance in the arena of the LEP, not the DCP; and all the council did by making the DCP was to remove the inconsistency between the LEP which rezoned the site R3 Medium Density residential and the DCP which depicted the site as being B4 Mixed Use: at [165], [166].

Jojeni Investments Pty Ltd v Mosman Municipal Council [2014] NSWLEC 120 (Sheahan J)

Facts: in this class 4 matter, the Court was asked to characterise the nature and extent of existing use rights affecting a building at 7 Arbutus Street, Mosman.

A single dwelling house was erected on the land in the early 1900's. In 1933, the council approved its conversion into two flats and the land had been used for that purpose to date. The applicant lodged a development application ("DA") for the demolition of this structure and the erection of a residential flat building ("RFB") comprising 3 flats. A Class 1 appeal against the Council's refusal of that DA was stood over pending the outcome of this matter.

As RFBs are now prohibited in the relevant zone, the applicant's DA relied upon the existing use of the land being characterised as "flats" in general. The council argued that the existing use only to "two flats in a house", and that the proposed development was prohibited, as it would involve an impermissible change in use.

Issue:

(1) whether the existing use of the land was properly characterised as "flats" or "two flats in a house".

Held: the land had the benefit of existing use rights for "two flats in a house":

(1) the genus/species test does not apply to the characterisation of existing use arising from a development consent: at [35];

(2) only the "lawful purpose", that is, the terms and conditions stipulated in the development consent, could be relied upon by the applicant to secure existing use rights: at [39]; and

(3) approval was given for the conversion of a dwelling house into two flats. Approval was not given for '"flats" generally: at [41].

Friends of Malua Bay Inc v Perkins [2014] NSWLEC 95 (Craig J)

Facts: Friends of Malua Bay Inc ("FMB") challenged the validity of a development consent granted to Mr Perkins by Eurobodalla Shire Council ("the council") for a 30 lot subdivision of land at Malua Bay. FMB contended that when granting the consent, the council:

i) failed to determine, as required by cl 11(3) of the Eurobodalla Rural Local Environmental Plan 1987 ("LEP 1987"), that the development was consistent with the objectives of the relevant zone, being zone 10 (Urban Expansion Zone) under LEP 1987;

ii) failed to consider, as it was required to do by cl 23(2) of the LEP 1987, the consequences of carrying out the development on the pattern of land use within zone 10; and

iii) failed to have before it, as required by cl 23(3) of the LEP 1987, a statement relating to the likely environmental impact of the development.

Issues:

(1) whether the council was obliged, by cl 11(3) of LEP 1987, to form a positive opinion as to the consistency of the proposed development with the objectives of zone 10 as expressed in the development control table for that zone ("the Table") under LEP 1987;

(2) whether, on an assessment of the evidence before the Court, the carrying out of the subdivision proposed was consistent with objective (b) of the zone 10 objectives as set out in the Table;

(3) whether the council was obliged, by cl 23(2) of LEP 1987, to form a positive opinion regarding the consequences of the proposed development on the pattern of land use within the zone;

(4) whether, as required by cl 23(2) of LEP 1987, the council had considered, at the time it granted development consent, the consequences of carrying out the development on the pattern of land; and

(5) whether, as required by cl 23(3) of LEP 1987, the development application was accompanied by a statement relating to the likely impact of the development on the environment.

Held: dismissing the summons and ordering that costs be reserved:

(1) cl 11(3) required neither the formation of an opinion by the council nor satisfaction on its part that the carrying out of the development would be consistent with the zone objectives. Rather, the subclause imposed an objective requirement: at [36];

(2) the Court was satisfied that there was material before the council enabling the topics identified in paragraph (b) of the zone objectives to be considered: at [70]. The development proposed was compatible with the consideration by the Council of each of the topics within paragraph (b): at [71]. In assessing the question of consistency with zone objectives as a "jurisdictional fact", the Court found it would not have reached any different conclusion from that which it imputed to the council: at [76];

(3) the obligation imposed by cl 23(2) was one of consideration of consequences: at [85]. The formation of a "positive opinion regarding the consequences" did not accurately reflect the provisions of cl 23(2): at [88];

(4) the Court was not persuaded to infer that the council had not considered the substance of the requirement imposed by cl 23(2): at [101]. The pattern of land use and the manner in which the development application related to that pattern was addressed both directly and by necessary inference in a number of documents available to Councillors at the time at which the development application was determined: at [98]; and

(5) the Court found that the material contained in the Statement of Environmental Effects which accompanied the development application, addressed the likely environmental impact of the proposed subdivision, with emphasis upon the matters identified in cl 23(3): at [119].

Criminal

Wingecarribee Shire Council v O'Shanassy (No 5) [2014] NSWLEC 73 (Pepper J)

(related decisions: *Wingecarribee Shire Council v O'Shanassy* [2013] NSWLEC 201; *Wingecarribee Shire Council v O'Shanassy (No 2)* [2014] NSWLEC 32; *Wingecarribee Shire Council v O'Shanassy (No 3)* [2014] NSWLEC 48; *Wingecarribee Shire Council (No 4)* [2014] NSWLEC 52)

Facts: the defendant, Mr O'Shanassy, made a 'no case to answer' application at the conclusion of the prosecution's case. In the alternative, Mr O'Shanassy made an application for a *Prasad* direction dismissing the proceedings. Wingecarribee Shire Council ("the council") had charged Mr O'Shanassy with contravention of s 125(1) of the *Environmental Planning and Assessment Act 1979* ("the EPAA") in that he

allegedly breached s 76A of the EPAA by carrying out excavation works on his property without having obtained the necessary development consent. In support of his no case to answer application, Mr O'Shanassy submitted that the council had not called enough witnesses from the council and the excavation industry and that it had not proven that Mr O'Shanassy instructed the excavators to carry out the works. In support of the *Prasad* direction application, Mr O'Shanassy repeated the claim about the excavation contractors and submitted that the knowledge of the council's town planner, Mr Webb, and of Mr O'Shanassy's neighbour, Mr Lorincz, of the height of the ridge before the charge period was inadequate; that the evidence of Mr Webb failed to demonstrate beyond reasonable doubt that there was no development consent for the excavation works because it was merely an "expression of opinion" by him; and that Mr Webb was not a surveyor and could not read plans with sufficient accuracy to understand the scope of an earlier development consent granted by the council permitting Mr O'Shanassy to build his house on the property.

Issues:

(1) the no case to answer application: whether Mr O'Shanassy could lawfully be convicted on the evidence before the Court at the time of the application; and

(2) the *Prasad* direction application: whether the evidence before the Court was so tenuous and fraught that to convict upon it would be unsafe.

Held: both applications were dismissed:

(1) the council adduced sufficient evidence that, taken at its highest, demonstrated that works were carried out during the relevant time period in breach of ss 76A and 125(1) of the EPAA. This was enough to found a case to answer. The asserted failure to call additional witnesses from the council or the construction industry did not reach the requisite threshold making it impossible to convict on the totality of the council's evidence. The council relied upon witnesses from the council and called excavators who had dealt with Mr O'Shanassy at the relevant time. Their evidence was neither inherently incredible nor the product of a disorderly mind. Even if Mr O'Shanassy's submission in relation to the excavation contractors was true, it would not be material to any determination of guilt because the offence was one of strict liability: at [44]-[48]; and

(2) Mr O'Shanassy was not able to prove that the council's evidence was so tenuous and fraught that to convict upon it would be unsafe. Therefore, a *Prasad* direction was inappropriate. Mr O'Shanassy's contention that it had not been proven beyond reasonable doubt that he had instructed contractors to carry out the alleged works and that, therefore, "the Court could not be satisfied that it could safely convict" was a misstatement of the law. The council did not have to prove the elements of the offence beyond reasonable doubt. What was required for the Court to give a *Prasad* direction was a conclusion that the evidence relied upon by the council was so lacking in weight and reliability that it would be unsafe to convict upon it. None of the council's evidence could be characterised in this way. The absence of any knowledge by Mr Webb and Mr Lorincz of the height of the ridge before the charge period was immaterial having regard to the council's extensive documentary evidence in this regard. Mr Webb's assertion that there was no development consent for the alleged works was not a "matter of opinion" but a statement from a witness in his capacity as a planner engaged by the council and Mr O'Shanassy was not able to establish that Mr Webb's evidence was likely to be untruthful or unreliable. Finally, the absence of Mr Webb's knowledge of the detail of the relevant survey plans was irrelevant to whether or not the earthworks required development consent. The council's development register spoke for itself: at [49]-[54].

Environment Protection Authority v Wyanga Holdings Pty Ltd; Environment Protection Authority v Cauchi [2014] NSWLEC 68 (Craig J)

Facts: the defendants, Wyanga Holdings Pty Ltd ("Wyanga") and Joseph and Louise Cauchi, each pleaded not guilty to an offence under s 66(2) of the *Protection of the Environment Operations Act 1997* ("the POEO Act") in that, between 15 and 20 April 2012, they supplied information to the EPA that was false or misleading in a material respect. The charges against Mr and Mrs Cauchi, being directors of Wyanga, were founded upon s 169(1) of the POEO Act. On 31 January 2011, Wyanga was issued with an environment protection licence ("the licence") in respect of a hard rock quarry operated by Wyanga. Under condition

A1.2 of the licence, Wyanga was permitted to extract from the site up to a maximum of 50,000 tonnes of gravel and rock material annually. Wyanga was also required to supply to the EPA an Annual Return for the period 1 February 2011 to 31 January 2012, disclosing any non-compliance with the licence conditions. In respect of that period, Wyanga extracted approximately 96,597 tonnes of quarry materials from the quarry, in breach of condition A1.2. Mrs Cauchi forwarded to the EPA Wyanga's Annual Return in which she did not acknowledge any failure to comply with condition A1.2, despite acknowledging failure to comply with other conditions. The defendants were subsequently charged with the offence on the basis that by failing to disclose their non-compliance with condition A1.2 of the licence, they supplied information to the EPA which was misleading in a material respect. The defendant's argued that, in the circumstances, the only misleading aspect of their conduct was the certification by Mr and Mrs Cauchi that the Annual Return was correct, and that accordingly, the appropriate section under which the defendants should have been charged was s 66(4) and not s 66(2) of the POEO Act.

Issues:

(1) whether information to which s 66(2) is directed is information of the kind identified in subs (1); and

(2) whether information supplied on behalf of Wyanga to the EPA was misleading in a material respect.

Held: convicting the defendants:

(1) in order to construe s 66(2) in the manner for which the defendants contended, it would have been necessary to read into the subsection words of qualification. Those words would require that the information to which s 66(2) refers, be limited by reference to information of a kind that is related to a condition imposed pursuant to subs (1): at [30]. The text of subs 66(2) imposes no qualification upon the subject matter of the information to which it is directed: at [31]; and

(2) the Court was satisfied beyond reasonable doubt that the failure of the defendants to disclose the non-compliance with condition A1.2 was misleading in a material respect: at [34]. Having expressly identified those conditions of the licence with which Wyanga had not complied, it was misleading because Wyanga represented that it had complied with all other conditions of the licence, including condition A1.2. The degree to which the information was misleading was material both because the omission to identify non-compliance with condition A1.2 was itself material and because of the extent to which the maximum extraction limit had been exceeded: at [26].

Chief Executive, Office of Environment and Heritage v Kyluk Pty Limited (No 4) [2014] NSWLEC 74 (Pain J)

(related decisions: *Chief Executive, Office of Environment and Heritage v Kyluk Pty Limited (No 3)* [2012] NSWLEC 56, Pain J; *Kyluk Pty Ltd v Chief Executive, Office of Environment and Heritage* [2013] NSWCCA 114, (2013) 298 ALR 532, Price, McCallum and Schmidt JJ)

Facts: Kyluk Pty Limited ("the Defendant") pleaded guilty on 14 February 2012 to the offence that between about 11 June 2009 and 11 August 2009 contrary to s 118A(2) of the *National Parks and Wildlife Act* 1974 ("the NPW Act") it picked plants that were part of an endangered ecological community ("EEC"). This was the second judgment on sentence as *Chief Executive, Office of Environment and Heritage v Kyluk Pty Limited (No 3)* [2012] NSWLEC 56 ("*Kyluk (No 3)*") was the subject of a successful appeal to the Court of Criminal Appeal ("CCA") in *Kyluk Pty Ltd v Chief Executive, Office of Environment and Heritage* [2013] NSWCCA 114; (2013) 298 ALR 532 ("*Kyluk CCA*"). The matter was remitted to the Court to be dealt with in accordance with the reasons of the CCA. The Prosecutor could not rely on the expert evidence of one witness previously considered in *Kyluk (No 3)* in holding that 12.54 ha of EEC was cleared. An additional paragraph was added to the agreed facts for this rehearing which stated that the area of EEC cleared was 5 ha located within an area marked on an attached plan. The evidence of the Prosecutor was otherwise the same as in *Kyluk (No 3)*.

Issue:

(1) what was the appropriate sentence for this offence.

Held: the Defendant was convicted of the offence as charged; pursuant to s 205(1)(d) of the NPW Act the Defendant was to pay $80,000 to the Campbelltown City Council for the purposes of the project "Restoration Works at Noorumba Reserve, Gilead Project"; pursuant to s 200 of the NPW Act the Defendant must carry out restoration works at the property with a period of remediation of 15 years; and the Defendant was ordered to pay the Prosecutor's costs of this sentence hearing excluding the Prosecutor's costs in relation to *Kyluk (No 3)* as agreed or assessed:

(1) the offence was in the low range of objective gravity: at [73]. Substantial environmental harm was caused by the offence albeit less than in *Kyluk (No 3)* given the smaller area of EEC regarded as cleared. That harm is ongoing but will diminish over the next fifteen years if the regeneration of the EEC continues successfully given the estimation of up to twenty years being required for complete regeneration to occur. The offence was not committed for commercial gain: at [70]. The Prosecutor had not established on the evidence that there was a failure to make inquiries by the Defendant: at [63]. There was no evidence brought forward by the Prosecutor to establish intentional action, negligence or recklessness: at [72];

(2) there was need for specific deterrence: at [77];

(3) delay in sentence was not a relevant factor: at [88]. Legal costs incurred by the Defendant was not a relevant factor: at [89]; and

(4) a restoration order over the 5 ha cleared was warranted: at [101]. A publication order was not warranted: at [103].

Council of the City of Sydney v Trico Constructions Pty Ltd [2014] NSWLEC 75 (Sheahan J)

Facts: these interlocutory proceedings related to the defendant's preliminary disclosure obligations under the *Criminal Procedure Act* 1986 ("CPAct"). Section 247 of the CPAct prescribes a regime whereby parties to summary criminal proceedings are to make a series of disclosures, prior to hearing, in the form of "notices". These notices are to include information, such as the matters in contention, and any evidence that will be relied upon. Section 247K prescribes the information which is to be included in a defendant's "notice of the defence response". Section 247K(f) provides that the notice is to include "a copy of any report, relevant to the proceedings, that has been prepared by a person whom the defence intends to call at the hearing of the proceedings". It was this specific provision that arose for construction.

In its s 247K notice, served on 8 April 2014, the defendant acknowledged that it intended to call expert evidence, but conceded that no expert report was in existence at that time, and that a report would be provided as soon as it was prepared.

The prosecutor argued that if a defendant has disclosed an intention to rely on expert evidence, s 247K(f) requires the defendant to obtain the relevant expert report, and serve it with its s 247K notice. The prosecutor sought orders that the defendant file and serve any expert report on which it sought to rely, by a specified date. In contrast, the defendant argued that s 247K(f) imposed no positive obligation on it to obtain and serve an expert report; it simply required the service of any report in existence at the time the s 247K notice was given. As no such report was in existence, there was no obligation to serve it.

Issue:

(1) whether s 247K(f) of the CPAct requires a defendant to prepare and serve, with its s 247K notice, any expert report on which it intends to rely.

Held: finding that section 247K(f) does not require the defendant to prepare and serve, with its s 247K notice, an expert report on which it intends to rely:

(1) section 247K(f) did not say that a defendant must prepare and serve any expert report on which it may seek to rely with its s 247K(f) notice; accordingly, the prosecutor's construction sought to read too much into the words: at [24]; and

(2) when such a fundamental right as that of an accused to silence is abrogated by statute, the Court should not read the statute so expansively as to dictate how the defendant will prepare its response to

prosecution evidence, and it dictated only that parties must give proper notice to each other prior to the hearing: at [36].

Environment Protection Authority v Greater Taree City Council [2014] NSWLEC 88 (Sheahan J)

Facts: the council pleaded guilty to the pollution of waters contrary to s 120(1) of the *Protection of the Environment Operation Act 1997* ("the POEO Act").

On 6 April 2012, a leachate pipe servicing a landfill owned by the defendant ruptured, causing leachate to spill into a nearby creek system. A contractor operated the landfill under a Waste Services Contract but the council remained contractually responsible for the management of the leachate pipe system. In 2007, repairs were made to the leachate pipe. They required the pipe to be severed, but the pipe was then only rejoined with a temporary clamp. It was a failure of this temporary clamp that led to the spillage.

Apart from any monetary penalty the Court may have decided to impose, the EPA sought orders under Part 8.3 of the POEO Act, that: (a) the defendant carry out a specified project for the restoration of riparian buffers to improve the quality of local waterways (s 250(1)(c) POEO Act); and (b), that the defendant undertake specified action to publicise the offence (s 250(1)(a) POEO Act*)* The parties agreed upon the form such orders should take. At the hearing, the council undertook to pay a top-up contribution over and above any order of the Court to the nominated project to make a total of $50,000, so as to allow the project to be completed with council funds.

The parties also agreed that the defendant would pay the prosecutor's investigation and legal costs of $57,492.

Issues:

(1) the appropriate sentence to be imposed; and

(2) what order for costs should be made.

Held: the defendant was ordered (a) to contribute, in lieu of a fine, an amount of $37,500 to the agreed project, (b) to publicise the offence, and (c) pay the prosecutor's costs of $57,492:

(1) this case involved none of the aggravating factors, but several of the mitigating factors, nominated in s 21A of the *Crimes (Sentencing Procedure) Act 1999:* at [29];

(2) the sentencing function required an "instinctive synthesis" by the Court of the key objective and subjective factors of the particular case: at [28];

(3) the relevant objective circumstances included: the high maximum penalty, the transient nature of the harm caused, and the low level of foreseeability of the leachate pipe rupturing: at [30] – [33];

(4) the relevant subjective circumstances included: the lack of any deliberate or planned failure on the defendant's part; its exemplary criminal record; the unlikelihood of it re-offending; the early guilty plea; assistance provided to the authorities; the remedial operational response of council; and the defendant's demonstrated contrition and remorse: at [34]; and

(5) specific deterrence was not called for in this case, although general deterrence was a relevant consideration: at [35] –[36].

Environment Protection Authority v Orica Australia Pty Ltd (the Nitric Acid Air Lift Incident) [2014] NSWLEC 103 (Pepper J)

Facts: the defendant, Orica Australia Pty Ltd ("Orica"), pleaded guilty to nine offences which the Environment Protection Authority ("the EPA") prosecuted in seven separate proceedings. The proceedings were heard together but each was the subject of a separate judgment. This first and principal judgment considered in full the questions of legal principle that were common to all seven matters. The principal judgment concerned the determination of the appropriate sentence for one offence of pollution of waters contrary to s 120(1) of the *Protection of the Environment Operations Act 1997* ("the POEO Act ") and one offence of breach of a licence condition under Orica's Environment Protection Licence Number 828 in

breach of s 64(1) of the POEO Act. Orica operated three nitric aid plants, one ammonia plant and two ammonia nitrate plants at its Kooragang Island site for the purpose of manufacturing ammonium nitrate, primarily for use in the mining industry. The offences the subject of these proceedings were commissioned as a result of the failure of a pipe in an "Air Lift" at the nitric acid plant, leading to the release of approximately 6 to 12 tonnes of nitric acid into the Hunter River and into groundwater.

Issues:

(1) whether had Orica committed a breach of public trust;

(2) what was the environmental harm occasioned by the Incident;

(3) whether the *De Simoni* principle (*R v De Simoni* (1981) 147 CLR 383) operated to prevent the Court's consideration of Orica's state of mind for the purposes of sentencing;

(4) how should the totality principle be applied; and

(5) what was the appropriate sentence to be imposed having regard to the objective and subjective elements of the offences.

Held: Orica was penalised $73,500 for the pollution offence and $31,500 for the breach of licence offence, to be directed towards an environmental recovery project. Investigation and legal costs were ordered, along with a publication order:

(1) there was no breach of public trust by Orica in relation to the breach of licence offence because there was no warrant for a gloss being put on the legislative scheme created by the POEO Act such that licence holders could be said to be in a position of public trust or privilege that is necessarily broken if the privilege is abused: at [106]-[111];

(2) the environmental harm caused by the commission of the offences was at the lower end of the spectrum because there was no evidence of actual environmental harm to aquatic life, any potential environmental harm was expected to be insignificant, and several measures were taken by Orica that reduced the environmental harm caused by the Incident: at [120]-[126];

(3) both offences were of strict liability, but Orica's state of mind when committing the offences was a relevant consideration with regard to sentence because a strict liability offence committed intentionally, negligently or recklessly will be objectively more serious than one committed accidentally. The Court accepted that the *De Simoni* principle prevented it from considering whether Orica acted negligently in committing the s 120 offence by reason of the more serious offence contained in s 116 of the POEO Act. However, the principle had no practical application to a breach of s 64(1) because there was no "more serious offence" than that with which Orica was charged. It was therefore open to the Court to consider whether Orica's state of mind in the commission of this offence was negligent. The EPA failed to establish that the offence was committed negligently, as the Air Lift was subject to adequate maintenance, inspection and risk assessment, which did not reveal the risk of pipe failure: at [127]-[149];

(4) Orica argued that the totality principle should apply not only within each pollution incident but also across all seven incidents, because all offences arose out of Orica's operations. The Court found that it was appropriate to apply the totality principle within these proceedings, however, the Court did not accept that the totality principle applied across all seven incidents, as they were discrete incidents that occurred on separate occasions over a period of more than one year; did not reflect a continuing course of conduct; bore no commonality of fact; and involved different species of plant or equipment failure and the release of different chemical pollutants: at [230]-[249];

(5) the offences were classified towards the lower to middle range of seriousness based on the objective circumstances. Orica did not commit the offences for financial gain, but the harm was foreseeable, there were practical measures available to Orica to prevent the environmental harm, and Orica had control over the causes of the harm at all times: at [151]-[167]; and

(6) in terms of subjective factors, Orica's sentence was aggravated by the fact that it had previous environmental criminal history, but there were also factors that operated to mitigate Orica's sentence to a reasonable degree, such as its co-operation with authorities, the entry of an early guilty plea, demonstrated remorse, and an agreement to pay the prosecutor's costs: at [169]-[211].

Environment Protection Authority v Orica Australia Pty Ltd (the Evaporator Incident) [2014] NSWLEC 104 (Pepper J)

(related decision: *Environment Protection Authority v Orica Australia Pty Ltd (the Nitric Acid Air Lift Incident)* [2014] NSWLEC 103 Pepper J)

Facts: the defendant, Orica Australia Pty Ltd ("Orica"), was charged with a breach of its Environment Protection Licence Number 828 in contravention of s 64(1) of the *Protection of the Environment Operations Act 1997* ("POEO Act") by failing to carry out licensed activities in a competent manner. The offence occurred as a result of the failure of a pressure relief valve in the ammonium nitrate plant's evaporator, and the subsequent overheating of the evaporator, resulting in a visible white plume of ammonium nitrate being emitted into the atmosphere. As a result of the emission of ammonium nitrate particles, three employees at the Mayfield Wharf in Newcastle experienced eye and throat irritation, headaches and coughing. This judgment concerned the determination of the appropriate sentence for the breach of s 64(1).

Issues:

(1) what was the environmental harm caused by the offence; and

(2) what was the appropriate penalty to be imposed based on the objective and subjective circumstances of the offence.

Held: Orica was penalised $122,500 to be directed towards an environmental recovery project. Investigation and legal costs were also ordered, along with the making of a publication order:

(1) the environmental harm caused by the offences was low to moderate. Ammonium nitrate is an environmental pollutant and is known to have adverse health impacts on the human respiratory and cardiovascular systems. But the short exposure of the three employees meant their risk of adverse health impacts was very low. Similarly, the environmental impacts were low as a result of the short exposure time. The Court was not presented with any evidence that demonstrated that the workers suffered from a loss of amenity or quality of life: at [99]-[118];

(2) the Court concluded that the offence should be classified in the mid range of seriousness based on the objective circumstances. It was clear that Orica's documentation, record keeping, training and Management of Change procedures in relation to the pressure valve were inadequate. This inadequacy, and the number of practical measures Orica was able to take after the Incident and could have readily taken before the Incident, indicated that the offence was committed negligently. It was also foreseeable that failings in the maintenance regime of the pressure valve could cause it to become blocked thereby causing the overheating of the evaporator. Finally, the Incident caused actual harm to human health and potential for harm: at [119]-[136]; and

(3) the Court resolved that the subjective circumstances, including Orica's good character and demonstrated remorse, operated to mitigate to a reasonable degree the penalty that would otherwise be imposed by the Court and a 30% discount was considered appropriate: at [139]-[148].

Environment Protection Authority v Orica Australia Pty Ltd (the Jackhammer Incident) [2014] NSWLEC 105 (Pepper J)

(related decision: *Environment Protection Authority v Orica Australia Pty Ltd (the Nitric Acid Air Lift Incident)* [2014] NSWLEC 103 Pepper J)

Facts: the defendant, Orica Australia Pty Ltd ("Orica"), was charged with a breach of its Environment Protection Licence Number 828 in contravention of s 64(1) of the *Protection of the Environment Operations Act 1997* ("the POEO Act") by failing to carry out licensed activities in a competent manner. The offence occurred when a worker carrying out maintenance work at Orica's Kooragang Island premises ruptured a pipe containing ammonia with a jackhammer, causing the emission of ammonia into the atmosphere. As a result of the release of ammonia, a contractor working at the premises experienced a stinging sensation in his eyes and some residents of the nearby town of Stockton noticed the odour of ammonia. This judgment concerned the appropriate sentence for the breach of s 64(1).

Issues:

(1) what was the environmental harm occasioned by the Incident;

(2) whether the offence contained the aggravating circumstance of disregard for public safety pursuant to s 21A(2)(i) of the *Crimes (Sentencing Procedure) Act 1999*; and

(3) what were the relevant objective and subjective circumstances of the offence that would affect the penalty.

Held: Orica was penalised $87,500 to be directed towards an environmental recovery project. Investigation and legal costs were also ordered, along with a publication order:

(1) the commission of the offence caused moderate environmental harm. While ammonia is a hazardous substance and is toxic to humans and aquatic organisms depending on concentration, the actual human harm from this Incident was of limited scope and of short-term nature. However, there was the potential for serious harm: at [76]-[86];

(2) the Court concluded that the offence should be classified as moderately serious based on the objective circumstances. The failures that led to the Jackhammer Incident were the result of Orica's negligence. There was an inadequate Job Safety and Environmental Risk Analysis in place; Orica ought to have known the location of the pipe before work permits were issued; there was inadequate training of personnel; inadequate record-keeping; inadequate use of existing technology; and inadequate use of Orica's Safety, Health and Environment Management System. The risk of harm by Orica's failure to competently carry out the excavation as part of its licensed activities was also foreseeable. It was noted that once the ammonia was released, Orica acted promptly and responsibly to avoid any further harm: at [87]-[103];

(3) disregard for public safety was not an inherent characteristic of the offence in s 64(1) of the POEO Act and the EPA had not established beyond reasonable doubt that the offence was committed without regard for public safety. While Orica was negligent in committing the offence, it had nevertheless undertaken a risk assessment of the activity giving rise to the commission of the offence and had instituted some measures to avoid damage to the pipe by excavation works: at [107]-[111]; and

(4) the subjective circumstances, such as Orica's agreement to pay the EPA's costs and its low likelihood of re-offending, operated to mitigate to a reasonable degree the penalty that would otherwise be imposed by the Court and a 30% discount was considered appropriate: at [112]-[119].

Environment Protection Authority v Orica Australia Pty Ltd (the Hexavalent Chromium Incident) [2014] NSWLEC 106 (Pepper J)

(related decision: *Environment Protection Authority v Orica Australia Pty Ltd (the Nitric Acid Air Lift Incident)* [2014] NSWLEC 103 Pepper J)

Facts: the defendant, Orica Australia Pty Ltd ("Orica"), was charged with two offences in these proceedings. One consisted of a breach of Orica's Environment Protection Licence No 828 in contravention of s 64(1) of the *Protection of the Environment Operations Act 1997* ("the POEO Act") by failing to operate its Ammonia Plant in a proper and efficient manner, and one involved a breach of s 148(2) of the POEO Act by failing to report a pollution incident as soon as practicable to the Environment Protection Authority ("the EPA"). The offences occurred when sodium chromate, containing hexavalent chromium, was released into the atmosphere during start-up procedures at the Ammonia Plant at Orica's Kooragang Island premises ("the KI premises"). This resulted in the fall of "yellow rain" over the nearby residential suburb of Stockton over the following days. The delay in notification was 14 hours and occurred when Orica's Environment Manager went home to sleep having been awake for 24 hours, and forgot to notify the EPA as she intended to until the next day. This judgment concerned the appropriate sentence for both offences.

Issues:

(1) what was the environmental harm occasioned by the Incident;

(2) whether the failure to report offence was committed without regard for public safety;

(3) what was the role of the totality principle in these proceedings; and

(4) what were the relevant objective and subjective circumstances of the offence that would affect the penalty.

Held: Orica was penalised $175,000 for the breach of licence offence and $36,750 for the failure to report offence, to be directed towards an environmental recovery project. Investigation and legal costs were also ordered, along with a publication order:

(1) the Incident caused moderate to serious environmental harm, with an emphasis on the latter. Although the exposure of workers and residents to hexavalent chromium was too small to cause adverse health effects and the likelihood of actual harm in the future was remote, the commission of the offences nevertheless had the potential to cause both environmental harm and serious harm to human safety, particularly given the potentially deleterious effects of exposure to hexavalent chromium. The Court also took into account the distressing effect the Incident had on the workers at the KI premises and the residents of Stockton affected by the discharge: at [152]-[167];

(2) there was insufficient evidence to establish that the failure to report offence was committed without regard for public safety. Orica had demonstrated concern for the public by their actions in the immediate aftermath of the Incident and the delay in notification was no more than 14 hours, for which the environment manager gave a fulsome explanation: at [207]-[211];

(3) the Court accepted that the two offences comprising the Incident arose out of the same continuity of conduct and thus that the totality principle applied. Therefore, a discount of 25% on the breach of licence offence was applied to reflect this principle: at [245];

(4) the Court found the breach of licence offence to be of moderate to serious gravity and the failure to report offence to be of moderate gravity, based on the objective circumstances. Both offences were committed negligently. The breach of licence offence was the result of deficient operating procedures and practice. The failure to report offence revealed that Orica was not aware of its legal reporting requirements or its own policies. Many practical measures could have been taken prior to the Incident to prevent its occurrence. However, the fact that Orica's personnel acted quickly to mitigate the further discharge of hexavalent chromium was also taken into account: at [169]-[204]; and

(5) the Court resolved that the subjective circumstances, including Orica's demonstration of remorse and early guilty plea, operated to mitigate to a reasonable degree the penalty that would otherwise be imposed by the Court and a 30% discount, applicable to both offences, was considered appropriate. The Court held that the substantial clean-up costs that Orica had incurred in response to the Incident would not be taken into account to mitigate the penalty imposed, because such consideration would be in contravention of the polluter-pays principle, an aspect of ecologically sustainable development that is enshrined in the objects the POEO Act: at [212]-[229].

Environment Protection Authority v Orica Australia Pty Ltd (the Ammonia Incident) [2014] NSWLEC 107 (Pepper J)

(related decision: *Environment Protection Authority v Orica Australia Pty Ltd (the Nitric Acid Air Lift Incident)* [2014] NSWLEC 103)

Facts: the defendant, Orica Australia Pty Ltd ("Orica"), was charged with a breach of its Environment Protection Licence Number 828 in contravention of s 64(1) of the *Protection of the Environment Operations Act 1997* ("the POEO Act") by failing to carry out licensed activities in a competent manner. The shutdown of two nitric acid plants and two ammonium nitrate plants due to a power outage at Orica's Kooragang Island premises led to only one nitric acid plant being in operation and being able to draw ammonia that was being shipped to the premises. This increased the pressure into an ammonia feed tank, resulting in ammonia passing through pressure safety valves into a vent stack and into the atmosphere on six occasions over the course of one day. Alarms in place, which were normally activated when the pressure within the ammonia feed tank reached above the normal range, were not triggered as they were disabled. As a result of the Incident, two workers at Mayfield East Rail Line went to hospital and another experienced adverse health effects. Three workers at Mayfield No 4 Wharf and two workers at the Kooragang No 2 Wharf smelt the ammonia, leading some to cough, feel short of breath and suffer headaches. This judgment concerned the appropriate sentence for the breach of s 64(1).

Issues:

(1) what was the environmental harm occasioned by the Incident;

(2) whether the offence was committed without regard to public safety; and

(3) what was the appropriate sentence to be imposed based on the objective and subjective circumstances of the commission of the offence.

Held: Orica was penalised $175,000 to be directed towards an environmental recovery project. Investigation and legal costs were also imposed, along with a publication order:

(1) the environmental harm was moderate to serious, in that it included serious human health impacts which constituted an aggravating factor under s 21A(2)(g) of the *Crimes (Sentencing Procedure) Act 1999*. Ammonia is a hazardous substance and a Dangerous Good and is toxic to humans and aquatic organisms, depending on concentration. The symptoms suffered by the workers were significant and distressing. The health risks caused by the commission of the offence, although transitory, were nonetheless serious and impacted upon a number of people in the vicinity: at [85]-[95];

(2) the offence was not committed without any regard to public safety. First, Orica did not know that the alarms were disabled at the time. Second, the ammonia feed tank was operating under abnormal conditions not recognised by plant supervisors and operators. Third, an operating procedure, albeit inadequate, was in place during the drawing of ammonia. The operators had been trained to check if the alarms had been disabled. Fourth, a risk assessment had been undertaken in relation to the ammonia venting. The Court therefore rejected the application of this aggravating factor: at [113]-[116];

(3) the Court concluded that the offence was of moderate to serious gravity based on the objective circumstances. The Court readily found that the failures that led to the Ammonia Incident were the result of Orica's negligence. The alarm management was inadequate, as was the trip protection, the operational procedures, risk assessment and the monitoring of the feed tanks. Additionally, the significance of the abnormal operating conditions appeared not to have been recognised by Orica as there existed no operating procedures to deal with the scenario. The release of ammonia through the pressure safety valves was a reasonably foreseeable consequence of disabling and failing to re-enable alarms and failing to establish adequate procedures to monitor the pressure in the ammonia feed tank. In addition to the measures that Orica took to avoid the release of ammonia, there were other actions that Orica could have taken to prevent the Incident from occurring: at [96]-[110]; and

(4) the Court resolved that the subjective circumstances, including Orica's demonstration of remorse and good corporate character, operated to mitigate to a reasonable degree the penalty that would otherwise be imposed by the Court and a 30% discount was considered appropriate: at [117]-[126].

Environment Protection Authority v Orica Australia Pty Ltd (the Ammonium Nitrate Solution Spill Incident) [2014] NSWLEC 109 (Pepper J)

(related decisions: *Environment Protection Authority v Orica Australia Pty Ltd (the Nitric Acid Air Lift Incident)* [2014] NSWLEC 103)

Facts: the defendant, Orica Australia Pty Ltd ("Orica"), was charged with a breach of its Environment Protection Licence Number 828 in contravention of s 64(1) of the *Protection of the Environment Operations Act 1997* ("the POEO Act") by failing to carry out licensed activities in a competent manner. The offence occurred as a result of overflow of weak ammonium nitrate solution ("WANS") from containment systems at Orica's Kooragang Island premises. As a result of the offence, about 17.4m³ of WANS overflowed and soaked into the ground surrounding the WANS filtration plant. This judgment concerned the appropriate sentence for the breach of s 64(1).

Issues:

(1) what was the environmental harm occasioned by the Incident;

(2) whether the offence was committed without regard for public safety; and

(3) what was the appropriate sentence to be imposed based on the objective and subjective circumstances of the commission of the offence.

Held: Orica was penalised $35,000 to be directed towards an environmental recovery project. Investigation and legal costs were also imposed, along with a publication order:

(1) while it was likely that the WANS released by the Incident percolated into the subsurface of the ground and reached the groundwater, any environmental harm was anticipated to be insignificant having regard to the nature of the substance and the industrialised nature of the locality. It was not in dispute that the chemicals would probably disperse laterally and vertically, reducing their concentration before reaching the Hunter River: at [83]-[86];

(2) the Court concluded that the offence should be classified towards the lower range of seriousness based on the objective circumstances. Orica was negligent in the commission of the offence, the evidence of various hazard studies that had been undertaken prior to the Incident demonstrated that the harm was foreseeable, and practical measures were available to Orica before the Incident to avoid or mitigate the harm. The Court also accepted, however, that once the Incident was brought to Orica's attention, it acted promptly and competently to ameliorate any further potential harm by the overflow: at [87]-[100];

(3) the offence was not committed without regard for public safety. Orica had undertaken hazard analyses and put in place some prevention procedures. That these measures proved to be inadequate did not warrant a conclusion that the offence was committed with the aggravating circumstance of a disregard for public safety: at [103]-[105];

(4) the subjective circumstances, including an early guilty plea and agreement to pay the prosecutor's costs, operated to mitigate to a reasonable degree the penalty that would otherwise be imposed by the Court and a 30% discount was considered appropriate: at [101]-[113].

Environment Protection Authority v Orica Australia Pty Ltd (the Botany Mercury Incident) [2014] NSWLEC 110 (Pepper J)

(related decisions: *Environment Protection Authority v Orica Australia Pty Ltd (the Nitric Acid Air Lift Incident)* [2014] NSWLEC 103)

Facts: the defendant, Orica Australia Pty Ltd ("Orica"), was charged with a breach of its Environment Protection Licence Number 2148 ("Licence 2148") in contravention of s 64(1) of the *Protection of the Environment Operations Act 1997* ("the POEO Act") by failing to carry out licensed activities in a competent manner. The offence occurred when louvres were left open at Orica's Former ChlorAlkali Plant Mercury Remediation Project ("the FCAP Remediation Project") at Botany Industrial Park, leading to release of mercury vapours into the environment. The failure to ensure the louvres were closed and/or airtight occurred at a time when there was no emissions control system at the Project's Temporary Emissions Control Enclosure ("TECE"). This judgment concerned the appropriate sentence for the breach of s 64(1).

Issues:

(1) what was the environmental harm occasioned by the Incident; and

(2) what was the appropriate sentence to be imposed based on the objective and subjective circumstances of the commission of the offence.

Held: Orica was penalised $35,000 to be directed towards an environmental recovery project. Investigation and legal costs were also imposed, along with a publication order:

(1) no actual, or even likely, environmental harm was occasioned by the Incident. The Incident did have the potential to cause environmental harm, as mercury is a poison with high toxicity to humans in sufficient concentrations and over prolonged periods of exposure. But, in light of the negligible levels of mercury released and the steps taken by Orica in the aftermath of the Incident to minimise environment harm, the potential environmental harm was very low: at [84]-[101];

(2) the offence was of low objective gravity based on the objective circumstances of its commission. Orica's breach of a condition of Licence 2148 was negligent. The fact that the TECE's purpose was to control mercury emissions, and that Orica had developed Standard Operating Procedures that acknowledged the risk of mercury release in the circumstances that occurred during the Incident, demonstrated that the harm had been foreseen, and was therefore foreseeable. Practical measures

had been taken by Orica to prevent the release of mercury vapour prior to the Incident but further measures could have been taken, none of which were costly or difficult to implement. The Court noted that a private contractor, Thiess Services Pty Ltd ("Thiess"), designed and constructed the TECE, and that Thiess was responsible for its initial operation, but held that Orica had overall responsibility for the FCAP Remediation Project and ultimately had control over the causes of the Incident and thus the offence: at [102]-[123]; and

(3) the subjective circumstances, including extensive community consultation and support programs that demonstrated Orica's good corporate character, and improvements to the TECE that reduced the likelihood of re-offending, operated to mitigate to a reasonable degree the penalty that would otherwise be imposed by the Court. A 30% discount was considered appropriate: at [126]-[137].

Environment Protection Authority v Big Island Mining Pty Ltd [2014] NSWLEC 131 (Pain J)

Facts: Big Island Pty Limited ("the Defendant") pleaded guilty to three charges that it polluted waters in breach of s 120 of the *Protection of the Environment Operations Act* 1997 ("the POEO Act") at or near Majors Creek NSW. The Defendant operates the Dargues Gold Mine located at Majors Creek Road, Majors Creek. The Defendant entered into an agreement with a contractor to complete the contract works including inter alia the excavation and construction of the boxcut, access road, tailings storage facility and associated works. Offence 1 concerned a discharge of sediment-entrained runoff water from the area of the box cut into Spring Creek during the first of the two rain events on 23-25 February 2013. Offence 2 and offence 3 concerned discharge of sediment-entrained runoff water from the area of the box cut and from the site access road into Spring Creek during the second of the two rain events on 28 February-1 March 2013.

Issue:

(1) the appropriate sentence for these offences (extent of liability of defendant for actions of contractor).

Held: the Defendant was convicted of the offences as charged; pursuant to s 250(1)(e) of the POEO Act the Defendant was to pay $103,000 (head sentence of $120,000 for offence 1 reduced by 35 per cent to $78,000, $15,000 for offence 2 and $10,000 for offence 3) to the Upper Deua Catchment Landcare Group Inc for the purposes of the Riparian health works in and around Araluen Creek; pursuant to s 250(1)(a) of the POEO Act a publication order was made; the Defendant was to pay the Prosecutor's professional costs of $70,000 and the Defendant was to pay the Prosecutor's investigation costs of $23,000:

(1) the objective seriousness of the offences fell within the low to medium range of objective seriousness (at [86]). Environmental harm was low (at [46]-[52]). There were practical measures that could have been taken to minimise harm (at [63]-[69]). The harm was foreseeable (at [70]-[71]). The Defendant sought to rely on warranty of performance terms in contract with contractor skilled in sedimentation control work. The Defendant remained liable for overall supervision of the site. There was a failure by the Defendant to adequately supervise the contractor (at [77]-[81]). The works conducted by the Defendant in between the rain events were inadequate but were a neutral factor in setting penalty: at [82]-[84];

(2) various mitigating factors were considered, including the early guilty plea, co-operation with the Prosecutor, no prior convictions, and contrition and remorse: at [87]-[94];

(3) there was a need for specific deterrence: at [98]; and

(4) the totality principle was applied: at [110].

Alramon Pty Limited v City of Ryde Council [2014] NSWLEC 100 (Sheahan J)

Facts: the appellant pleaded guilty to two charges brought in the Local Court under s 125(1) of the *Environmental Planning and Assessment Act 1979* ("EPA Act"), namely, carrying out development without consent, contrary to s 76A(1)(a) of the EPA Act, and failing to comply with a stop work order ("SWO") issued under s 121B of that Act. The appellant was fined $35,000 for the s 76A offence, and $60,000 for failing to comply with the SWO. These proceedings dealt with a class 6 appeal against the severity of both fines.

The works the subject of both charges were alterations and additions made to a dwelling house owned by the appellant, and occupied by one its directors and his young family. The unlawful works were undertaken between 18 December 2012 and late February 2013, and included extensive demolition, an extension at the rear of the house, and the construction of three bedrooms, and a rumpus room with an accompanying balcony at first floor level. Following complaints from neighbours, council officers inspected the property and served a SWO on the appellant on 15 January 2012. Work continued after this date so as to secure the offending works, this work being the subject of the second charge.

The appellant was successful in a Class 1 appeal against the council's refusal of a Building Certificate Application made in respect of the works, entitling the appellant to retain the works, though in a significantly modified form.

The appellant claimed that the sentencing magistrate erred in two primary respects: first, that the principle of totality was not considered, and second, that the sentence offended the principle of even-handedness, in that, the combined effect of the fines was too severe, having regard to the pattern of sentencing for comparable offences.

Issues:

(1) whether the magistrate erred in failing to apply the principle of totality; and

(2) whether the fines imposed were appropriate in light of the pattern of sentencing for comparable offences.

Held: the defendant's appeal was dismissed and the penalties imposed by the Local Court confirmed:

(1) the totality principle requires that, where a defendant is sentenced for two or more offences arising out of the same course of conduct, a sentencing judge must evaluate "the overall criminality of all the offences" and determine whether the total sentence for all the offences requires downward adjustment, so as to arrive at a penalty appropriately reflecting the criminality of the conduct: at [57];

(2) the appellant's conduct showed an "ongoing deliberate disregard of the law"; accordingly, the fines imposed appropriately reflected the criminality of the defendant's conduct, and did not offend the principle of totality: at [75] – [76]; and

(3) having considered comparable cases, and in light of the fact that the penalties represented only a very small percentage of the maximum applicable to each offence, the fines imposed did not offend the principle of even-handedness: at [71].

Aboriginal Land Claims

New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (Newcastle Post Office Claim) [2014] NSWLEC 72 (Pepper J)

Facts: an Aboriginal land claim was made over the site of the former Newcastle post office which has been sitting derelict in the centre of Newcastle's central business district for thirteen years. Australia Post had not occupied the building since 2001 and the land was sold to a private investor in August 2003. The investor's development plans for the building never eventuated and the post office fell into a state of disrepair and decay. In 2010, the respondent, the Minister Administering the Crown Lands Act ("the Minister") bought the building back from the investor, with the intention of repairing the damage and putting the building to use by way of an unspecified private/public partnership. The purchase was not the subject of a Crown land declaration by way of gazette pursuant to s 138 of the *Crown Lands Act 1989* ("the CL Act"). In June 2011, the applicant, the New South Wales Aboriginal Land Council ("the ALC"), lodged an Aboriginal land claim over the land on behalf of the Awabakal Local Aboriginal Land Council. The Minister for Primary Industries refused the land claim in August 2011. The ALC appealed the decision.

Issues:

(1) whether, as at the date of the claim, the land was claimable Crown land within the meaning of s 36(1)(a) of the *Aboriginal Land Rights Act 1983* ("ALR Act"):

(a) whether it could be lawfully sold or leased under the CLA even though a s 138 declaration had not been made;

(b) whether it was "lawfully used and occupied"; and

(c) whether it was "needed or likely to be needed for an essential public purpose".

Held: appeal upheld, and orders made for transfer of the land and that each party pay its own costs:

(1) the subject land was claimable Crown land:

(a) a declaration under s 138 was not necessary for the land to be sold or leased. The Court distinguished *Gandangara Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (1997) 41 NSWLR 459, in which it was held that gazettal was necessary for Crown land to be sold or leased in the context of s 25A of the now-repealed *Crown Lands Consolidation Act 1913* ("CLC Act"). This was because s 25A of the CLC Act was directed to whether the Minister could declare that the land "may be *dealt with*...as Crown land", whereas s 138 of the CL Act was directed to whether the Minister could "declare the land *to be* Crown land" upon gazettal. When read in context, the purpose of s 138(1) was to permit land that was not vested in the Crown to be dealt with under the CL Act, which did not apply in the present case, because the subject land was Crown land. To construe s 138 as if it included the words "(but not vested in the Crown)" would be to render otiose the definition of Crown lands in s 3 of the CL Act. If it was the intention of the legislature that s 138(1) meant that land acquired and vested in the Crown did not become Crown land until it was declared to be so by gazette, it is likely that Parliament would have said so. The logical corollary of the Minister's power to make a declaration that the land was Crown land was not that the Minister must make such a declaration before it could be dealt with as Crown land: at [132]-[152];

(b) the claimed land was not lawfully used or occupied. The abstract notion of purchasing the land in order to return it to public ownership for some future unspecified use was not enough. The Minister had no specific purpose for the land in mind. Administrative or preparatory steps away from the claimed land, such as negotiations with the University of Newcastle, did not constitute use or occupation. The visits of various contractors on to the land did not constitute use either, as these activities were transitory in nature and were not recurring physical acts amounting to actual use or possession of the land: at [170]-[182]; and

(c) the land was not needed or likely to be needed for an essential public purpose. The evidence established that the proposed uses of the land were for private, not public purposes; that is, retail or hospitality uses. To the extent that the Minister was contemplating possible public or community uses in the future, these were too remote and speculative to be relevant. This is not to say that public purposes may not be served by private interests. They may. Where private activity is providing essential public infrastructure then the requisite nexus may be obvious, but that was not the case in these proceedings. The Minister's desire to retain the land for the broad purposes of community, urban, regional, tourism, and in particular, heritage, purposes, did not elevate these aims such that they demonstrated relevant need in the sense of being a requirement for an essential public purpose: at [207]-[218].

New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (Boggabri) [2014] NSWLEC 58 (Craig J)

Facts: on 6 November 2008, the New South Wales Aboriginal Land Council ("the Land Council") lodged an Aboriginal Land Claim ("the claim") with the Minister pursuant to s 36(2) of the *Aboriginal Land Rights Act 1983* ("the ALR Act") in respect of land located on the outskirts of Boggabri in north-western New South Wales ("the land"). In 2011, the Minister refused the claim. The Land Council appealed against that refusal. At the date of the claim, the land was dedicated as a common to which the Commons Management Act 1989 ("the CM Act") applied. The registered proprietor of the land under the Real Property Act 1900 ("the RP Act") was "the State of New South Wales". Prior to the date of the claim, the Minister purported to grant

a grazing licence in respect of the land ("the Crown Land Licence") under s 34 of the *Crown Lands Act 1989*. At hearing, it was accepted that the Crown Land Licence was invalid. Prior to the claim, the Minister had also granted an interim grazing licence under the provisions of the CM Act for a term of up to 6 months ("Interim Licence"). The provisions of the Interim Licence replicated almost all of the provisions of the Crown Land Licence. The Interim Licence was alleged to be the operative and valid licence at the date of the claim.

Issues:

(1) whether the land was vested in the common trust appointed under the CM Act and not in the State or in Her Majesty;

(2) whether the Interim Licence was, at the date of the claim, valid and operative;

(3) whether the administrator of the Boggabri Common Trust ("the Trust") had knowledge of and consented to the use of the claimed land for the grazing of cattle;

(4) whether the land was lawfully used or occupied, having regard to the knowledge and consent of the administrator of the Trust; and

(5) whether a determination as to the invalidity of the Interim Licence was open to collateral challenge in an appeal under s 36(6) of the ALR Act.

Held: allowing the appeal and ordering the transfer of the claimed land:

(1) the statutory vesting or holding of an estate in fee simple in the Trust pursuant to s 14(1) of the CM Act did not impinge upon the underlying title to the land which remained vested in Her Majesty: at [52]. For the purposes of s 36(1) of the ALR Act, the land was, at the date of the claim, vested in Her Majesty: at [53];

(2) as the grant of the Interim Licence did not comply with the provisions of s 22 of the CM Act, the Interim Licence was a transaction into which the administrator of the Trust was not empowered to enter, with the consequence that the transaction was void: at [122]. Section 32 of the Interpretation Act 1987 did not operate to preserve the Interim Licence as a valid transaction under the CM Act: at [135];

(3) although the use and occupation of the land had occurred with the knowledge of the administrator of the Trust, it could not be accepted that the administrator had the power to consent to the occupation of the land. In managing the affairs of the Trust, the functions able to be performed by the administrator did not extend beyond those available to the Trust: at [142]. Given that the title held by a common trust is "[f]or the purposes of this Act" (s 14), it could not be accepted that the power to consent to occupation of the common for grazing is one available otherwise than in accordance with either s 16 or s 22: at [143];

(4) any occupation of the land could not qualify as a lawful use and occupation in the sense required to disqualify the land as being claimable Crown land under the ALR Act: at [151]. It could not have been the intention of the legislature that occupation of land on such a tenuous basis, being land vested in Her Majesty, could defeat a claim provided for in legislation (the ALR Act) described as being beneficial and remedial: at [151]; and

(5) the provisions of s 36 of the ALR Act pertaining to land claims and appeals to the Court make apparent that collateral challenge is available in the course of determining an appeal under the section: at [172]. The validity of the Interim Licence was essential to a decision as to whether the occupation of the land was legally authorised. As such, it was an issue that could be decided by the Court in the course of determining the appeal: at [169].

Native Vegetation

Turnbull v Director-General, Office of Environment & Heritage [2014] NSWLEC 84 (Preston CJ)

Facts: the owners of two rural properties at Croppa Creek, some 60 km north-east of Moree, appealed against decisions of the Director-General of the Office of Environment and Heritage ("OEH") to give the owners directions under s 38 of the *Native Vegetation Act* 2003 ("the NVAct") to repair damage caused by, and rehabilitate land affected by, clearing of native vegetation on their properties. Grant Turnbull owns the property named "Colorado". Cory and Donna Turnbull own the adjacent property immediately to the south of "Colorado", named "Strathdoon".

Between about 1 November 2011 and 18 January 2012, Ian Turnbull, the father of Grant Turnbull and the grandfather of Cory Turnbull, and another man engaged by Ian Turnbull, cleared native vegetation on both "Colorado" and "Strathdoon". In separate proceedings, OEH prosecuted Ian Turnbull for the clearing which was in contravention of s 12 of the NVAct. The aggregate of the areas within which native vegetation was cleared was about 421 ha on "Colorado" and about 73 ha on "Strathdoon". Amongst the native vegetation cleared were four tree species, and native groundcover species. The native vegetation cleared comprised three identified vegetation communities and areas of unidentified vegetation. Following the clearing, the land was ploughed, herbicide was applied and commercial crops were sown. The crops were harvested in late spring of 2012. This process was repeated in 2013 and 2014.

On 16 April 2013, Mr Celebrezze, as the authorised delegate of the Director-General, gave a direction under s 38 of the NVAct to Grant Turnbull, and Cory and Donna Turnbull to repair damage caused by the clearing, and rehabilitate land affected by the clearing. The remedial work required included: exclusion of stock from the remediation areas; weed, exotic species, commercial crop and non-native plant management; assisted revegetation; direct planting; records and reporting. The Turnbulls appealed the decisions under s 39 of the NVAct.

Issues:

(1) whether there was power under s 38 of the NVAct to make directions for remedial work on land other than land subject to clearing;

(2) if there were to be power, as a matter of fact, what were the appropriate locations of remedial work;

(3) the nature of the areas required to be remediated (such as the vegetation communities);

(4) the areal extent of the remedial work required; and

(5) the specifications for remedial work required.

Held: upholding the appeal, revoking the directions for remedial work made by the Director-General and making new directions for remedial work (Attachments B.1 and B.2):

(1) the text, context and purpose of s 38 of the NVAct did not limit the land on which remedial work may be directed to only the cleared land: at [29]. The reference in s 38(1)(b) to adverse effects on or "in the vicinity of the land" indicated that a direction could be given to carry out remedial work on land other than the cleared land: at [32]. Section 38(2)(c) expressly permitted the giving of a direction to ensure that land would not be damaged or detrimentally affected by clearing: at [33]. Section 38(2)(b) also referred to work to rehabilitate "any land affected" by the clearing: at [34]. This could include land in the vicinity of the land cleared: at [34]. The concept of causation in s 38(2)(a) was wide enough to embrace damage occurring on other land in the vicinity of the land cleared: at [35]. Furthermore, restricting s 38 to only the cleared land would be contrary to the purpose of the section to remediate damage caused by clearing of native vegetation: at [36];

(2) this construction also accorded with that of Biscoe J in *Terranora Group Management Pty Ltd v Director-General Office of Environment & Heritage* [2013] NSWLEC 198: at [41];

(3) whether it was appropriate to direct remedial work to be carried out on other land depended on the facts and circumstances of the individual case: at [43]. Natural regeneration within the cleared areas required to be remediated was uncertain and unlikely to be successful: at [46]. The sums involved for regenerating these areas would also be very large: at [50]. It was inappropriate for the location of the

remedial work to be only and wholly in the cleared areas specified as remediation areas in the Director-General's directions: at [52]. It was therefore necessary to consider whether other locations should be selected for the remedial work: at [52]. The high priority offset areas identified by the experts were likely to provide the greatest conservation gain to offset the conservation loss caused by the clearing: at [78]. These areas should be supplemented by inclusion of parts of the potential other offset areas, high priority remediation areas, and potential or disputed remediation areas so as to improve the configuration and area, and connectivity between vegetated areas: at [79];

(4) it was necessary for each of the three vegetation communities in the cleared areas to be represented in the remediation areas, in proportions similar to those in the cleared areas: at [89]. This provided an approximation of "like for like" offsetting, rather than an exact replica: at [91];

(5) it was disproportionate to require the offset areas to be of the same aggregate size as the cleared areas: at [106]. The conservation loss caused by the clearing of the native could be offset by requiring remediation of a lesser sized aggregate area provided the offset areas were appropriately located and shaped, comprised similar vegetation communities to those cleared, and had potential for measurable conservation gain of similar magnitude to the conservation loss: at [106]. The remediation areas earlier described met these criteria: at [107]; and

(6) the specifications for the remedial work were determined as follows:

(a) *period of the remedial work direction*: a period of 15 years was appropriate: at [112];

(b) *fencing and stock management*: the direction should specify the outcomes (such as stock are to be excluded from remediation areas) but allow the landholders to develop solutions and responses to achieve that outcome (including by not grazing stock or by erecting a fence if stock are to be grazed): at [118], [119]. Provided outcomes are prescribed, it was unnecessary to prescribe detailed specifications for the fencing: at [119]. It was also inappropriate to allow grazing by livestock if the properties were drought declared: at [121];

(c) *weed, exotic species, commercial crop and non-native plant management*: the terms of the Director-General's revised direction generally better achieved the objective of management of exotic species: at [128]. The methods of control of African boxthorn and commercial crops in the Director-General's revised direction were appropriate: at [130], [131]. The applicants' provision that weed control minimise impact on native vegetation was appropriate: at [132];

(d) *fire management*: the applicants' provision that the remediation areas be protected from wildfires was appropriate: at [134];

(e) *assisted regeneration*: the methods of ground preparation for assisted regeneration proposed in the applicants' revised directions were suitable: at [139]. It was appropriate to specify a density performance standard of 100 live stems on average per hectare: at [143]. It was not appropriate to include performance standards fixing a minimum number of trees on each property or a minimum number of plants of specified species per hectare: at [143], [144];

(f) *direct planting*: it was appropriate to specify as the trigger for requiring direct planting the failure to achieve the density performance standard of 100 live stems on average per hectare: at [146]. A period of one year after the requirement for direct planting is triggered was sufficient to undertake the work: at [147]. Provided the applicants are required to achieve the outcomes of direct planting set out in the direction, it was not necessary to prescribe precise post-planting care requirements: at [148], [149]. It was preferable not to mandate ripping in the remedial work direction, but to allow the applicants to choose the appropriate method of ground preparation: at [151]. Replacement of dead trees or stems should occur within 100 days of the landholders becoming aware of the requirement: at [152]. This timeframe could be extended in the event of drought declaration or unavailability of seedlings: at [152];

(g) *thinning*: it was appropriate for thinning of native vegetation in the remediation areas to be prohibited: at [153];

(h) *records*: the applicants' additional requirement that the record of required work within the remediation area include any ground preparation was appropriate: at [154];

(i) *reporting*: there should be both an initial works report and subsequent monitoring reports: at [156]. The monitoring reports should be used as part of a process of adaptive management so as to: describe the work carried out and measures implemented to comply with all requirements of the remedial direction; report on the effectiveness of such work; and where there has been non-compliance, report on action taken to improve the effectiveness of such work or measures: at [158]; and

(j) *property vegetation plan*: it was not necessary to include in the remedial direction a provision requiring the landholders to submit a draft PVP: at [161]. The obligations on the landholders to carry out remedial work have legal effect by force of the remedial work directions: at [161]. They did not need approval of a PVP containing the same requirements to have legal force and effect: at [161]. The content of the draft PVP was largely unknown, and there was no certainty that the PVP would be approved: at [162], [163]. Furthermore, the applicants had not proposed the registration of any approved PVP for their properties: at [164]. Finally, as the landowners had a right to submit a draft PVP in any case, it was not necessary for a remedial work direction to require them to do so: at [165].

Development Appeals

Barca v Wollondilly Shire Council [2014] NSWLEC 118 (Pepper J)

Facts: the third respondent, Sell and Parker Pty Ltd ("Sell and Parker"), made an application for the determination of two preliminary separate questions in Class 1 proceedings. The applicant, Rosaria Maria and Mimma Barca ("Barca"), had submitted an application to the Director-General of Planning for Director-General's Requirements for Environmental Assessment ("DGRs") for the construction of a resource recovery and waste management facility, a designated development project. DGRs were issued in response to the application and Barca then submitted a development application ("the DA") along with an environmental impact statement ("the original EIS") to the first respondent, Wollondilly Shire Council ("the council"), for determination. The council forwarded the DA and original EIS to a number of external agencies, including the NSW Roads and Maritime Services ("RMS") and the Environmental Protection Authority ("EPA") and exhibited them in the area ("the first exhibition"). Submissions from the EPA and private sector agencies resulted in Barca submitting an amended EIS to the council containing the additional information that the EPA had requested. Mr Grant Rokobauer, an officer of the council who had carriage of the DA, decided that the differences between the original EIS and the amended EIS were "minor only" and therefore, that there was no requirement for re-exhibition under s 79(6) of the *Environmental Planning and Assessment Act 1979* ("the EPA Act"). Thus Mr Rokobauer decided to inform only those persons who had made submissions relating to issues raised by the EPA that the amended EIS had been received by the council ("the second exhibition"). Sell and Parker subsequently issued an objection to the council, raising issues with respect to, among other things, the notification process. Mr Rokobauer also sent additional information concerning access to the proposed works by the RMS to be sent to landowners adjoining or affected by a new roundabout proposed as part of the development. Neither notice of, nor the information itself, were provided to any other person or publicly exhibited ("the third exhibition"). The council determined to refuse the DA because it was not accompanied by the consent of the owners of the adjoining property. Barca commenced proceedings in the Court appealing the refusal of the DA by the council. Two further iterations of the EIS were filed with the Court leading up to the hearing. The Court listed two separate questions for preliminary determination before the commencement of the hearing.

Issues:

(1) whether the DA had been exhibited as required by s 79 of the EPA Act; and

(2) whether the Court had jurisdiction to determine the DA as amended otherwise than by way of refusal.

Held: determining that the DA had not been exhibited as required by s 79 of the EPA Act, and that the Court has jurisdiction to hear and determine the appeal:

(1) the second and third exhibitions did not conform with the requirements of s 79 of the EPA Act. The effect of s 79(1) and (6) of the EPA Act is that if an original development application (which includes the material accompanying it) has been exhibited in conformity with s 79(1) and is later amended, the consent authority may dispense with the further exhibition of the amended application if the consent authority is of the opinion that the amended application differs "only in minor respects from the original application". Otherwise, the amended development application must be re-exhibited in accordance with s 79(1). Mr Rokobauer's evidence in relation to his decision to dispense with exhibition of the amended EIS was problematic in two fundamental respects. First, the views expressed by Mr Rokobauer represented no more than his personal opinion and not those of the council, because the council had not delegated their functions to him. Second, even if the views expressed by Mr Rokobauer were those of the council, it was not reasonably open to the council to conclude that the amended EIS differed from the original EIS in "only minor" respects. There were material deficiencies in the original EIS that were sought to be addressed in the amended EIS. In addition, Barca altered access arrangements to the development, and information concerning the changes and their consequential impact on traffic was submitted with the amended EIS. These changes were not "only minor" in character. Also, neither version of the amended EIS was exhibited for 30 days, written notice was not provided to all persons required to be notified by s 79(1)(b) and notice was not published in any newspaper as required by s 79(1)(d) of the EPA Act: at [47]-[54];

(2) the legal effect of non-compliance with the notification requirements in s 79 of the EPA Act was that the council's determination of the DA was invalid: at [55]-[61];

(3) while the council's determination was invalid, the same could not be said of the DA itself, which was, at the time the council made its determination, defective but not ineffective or invalid. The defective DA lodged with the council lawfully engaged the provisions of s 97(1)(b) of the EPA Act because the application was ultimately deemed to have been refused by the operation of s 82(1) of that Act. The council's determination being invalid, it was no determination at all and it had to follow that the jurisdiction of the Court to entertain an appeal under s 97(1)(a) of the EPA Act was not enlivened at the time the appeal was commenced, because Barca never received notice of "the determination of that application" pursuant to that provision: at [79]-[83]; and

(4) however, the Court did have jurisdiction to hear the appeal under s 97(1)(b) of the EPA Act insofar as there had, by reason of the invalidity of the determination by the council and the subsequent effluxion of time under s 82(1) of the EPA Act, been a deemed refusal by the council of the DA. That is, because an invalid determination is no determination at all, there was no binding decision by the council that precluded an alternative possible jurisdictional basis for the proceedings under s 97(1) of the EPA Act: at [84]-[102].

Hrsto v Canterbury City Council (No 2) [2014] NSWLEC 121 (Sheahan J)

(related decision: *Hrsto v Canterbury City Council* [2013] NSWLEC 195 Biscoe J)

Facts: the applicants brought a class 1 appeal against the council's refusal of their development application ("DA") to demolish all existing structures and build a 5-6 storey mixed use development comprising 224 residential apartments, communal facilities, basement car parking, and some ground floor retail/commercial spaces. These proceedings dealt with a question, set aside for separate determination by Biscoe J:

Whether the development application seeks consent for "residential accommodation" which cannot be characterised as "shop top housing" and is therefore prohibited on land within Zone B2 Local Centre pursuant to the provisions of the Canterbury Local Environmental Plan 2012 ["the LEP"].

The DA comprised five separate buildings. Of these, three had a mix of retail and residential units on the ground floor, and the remaining two exclusively contained residential units.

"Shop – top housing" is defined in the dictionary of the LEP as "one or more dwellings located above ground floor retail premises or business premises". Shop – top housing is permitted with consent in the B2 zone.

The council submitted that the proposed residential units on the ground floor were not "shop-top housing" as defined, as they were not "above" commercial/business premises. They were, therefore, "residential

accommodation", and the whole development therefore was prohibited. The applicants submitted that provided at least one residential unit existed above "commercial/business premises", the remaining residential units were brought under the definition of "shop-top housing", regardless of the fact that they were not located above any commercial/retail premises.

Issue:

(1) whether the proposed ground floor residential units were "residential accommodation" which could not be characterised as "shop-top housing" for the purposes of the LEP.

Held: answering the separate question "Yes":

(1) to qualify as "shop-top housing" the relevant part of the building must be truly "above" the relevant retail or commercial parts: at [56];

(2) the offending residential elements of the proposal were fundamental to it, could not be subsumed in to the "shop-top housing" element, and were not ancillary or subservient to the permissible development: at [59]; and

(3) the offending elements constituted a substantial proportion of the project, and, therefore, so infected the whole proposal that it was prohibited: at [61].

EPS Constructions Pty Ltd v Holroyd City Council (No 2) [2014] NSWLEC 126 (Sheahan J)

(related decision: *EPS Constructions Pty Ltd v Holroyd City Council* [2013] NSWLEC 224 Biscoe J)

Facts: the applicant brought a class 1 appeal against council's refusal of its development application ('DA') for the construction of a three/four storey building, at 1 – 7 Elvina St, Greystanes. The building is proposed to comprise 8 residential apartments, and two retail units, located on the ground floor. This judgment dealt with two questions in that appeal, set aside for separate determination by Biscoe J.

The Court was asked to determine (a) whether the proposed development was prohibited under the Holroyd LEP ('HLEP'), and (b) if the development was not prohibited, whether Division 1 of the State Environmental Planning Policy (Affordable Rental Housing) 2009 ('the SEPP') applies to it. At the hearing, the council conceded that the development was not prohibited, leaving only the second question to be determined.

Clause 10(1)(a) of the SEPP provided "This Division [division 1] applies to development for the purpose of dual occupancies, multi dwelling housing or residential flat building ['RFB'] if the development concerned is permitted with consent under another environmental planning instrument". Division 1 provides favourable building standards for developments to which it applies, including a number of 'cannot refuse' clauses. "RFB" was defined in the SEPP as "a building containing 3 or more dwellings, but does not include an attached dwelling or multi dwelling housing".

The council submitted that as the proposed development contained a commercial component, it was not a RFB, and, therefore, Division 1 of the SEPP did not apply to it. The council relied on Samuels JA's decision in *Botany Municipal Council v Feneck* ("*Feneck*") (1987) 61 LGRA 299. There, His Honour held that the word "containing" in the definition of dwelling-house, meant "only containing". By analogy, it was argued that the operation of the word "containing" in the definition of RFB meant that a RFB must contain only residential apartments.

The applicant submitted that this did not preclude the residential component of the development being characterised as a RFB for the purposes of the SEPP. It was argued that the construction in *Feneck* is not of universal application, and that each instrument must be interpreted in its own context. The applicant also submitted that the extended definition of the word "building", in s 4 of the *Environmental Planning and Assessment Act 1979,* to include "part of a building", dictates that that part of the building which contains residential apartments is itself a building, therefore satisfying the Council's construction, as that part only contains residential apartments.

Issue:

(1) whether the proposed building is a RFB for the purposes of the SEPP, and, therefore, Division 1 applies to it.

Held: Division 1 of the SEPP applies to the proposed development:

(1) statutory instruments such as SEPPs, are to be interpreted in accordance with the general principles of statutory construction, requiring consideration of the language, context, policy, intention and purpose of all their provisions: at [87];

(2) the context in which the word "containing" appears in the definition of "RFB", in both the SEPP and HLEP, suggests that the *Feneck* construction not be applied to it: at [91];

(3) sections 6 and 11 of the *Interpretation Act 1987* dictate that the extended definition of building should be applied unless the subject matter or context in which it appears suggest that it should not be: at [93]; and

(4) the word "building" in the SEPP should be given its extended meaning, because there is nothing in the context or subject matter which otherwise dictates: at [100].

Objector Appeals

Hunter Environment Lobby Inc v Minister for Planning and Infrastructure (No 2) [2014] NSWLEC 129 (Pain J)

(related decisions: *Hunter Environment Lobby Inc v Minister for Planning and Infrastructure* [2013] NSWLEC 44 Craig J; *Hunter Environment Lobby Inc v Minister for Planning and Infrastructure (No 3)* [2014] NSWLEC 130 Pain J)

Facts: the Minister for Planning and Infrastructure through his delegate the Planning Assessment Commission ("PAC") approved the South-East Open-Cut coal mine project ("the SEOC project") subject to conditions. The project application was made by Ashton Coal Operations Pty Ltd ("Ashton"). This was an appeal against the approval by an objector, the Hunter Environment Lobby Inc, which sought an order that the major project application be refused on several merit grounds.

Issues:

(1) whether the SEOC project would have a significant impact on Aboriginal cultural heritage;

(2) whether the SEOC project would have an adverse impact on the potential for sustained agricultural production on the SEOC project site;

(3) whether the SEOC project failed to address medium to long term risks to landscape functionality including water quantity, water quality and land quality; and whether the SEOC project failed to adequately protect the health of the Hunter River and associated tributaries downstream of the SEOC project site concerning water licensing and the Hunter River Salinity Trading Scheme ("HRSTS");

(4) whether the SEOC project would have a significant impact on the health and wellbeing of the residents of Camberwell and other residents in the vicinity of the SEOC project site and to air quality impacts;

(5) whether noise and dust conditions and mitigation strategies under the project approval would result in unacceptable social impacts;

(6) whether the SEOC project would result in significant social, environmental and economic costs that were not adequately addressed by the project;

(7) whether the Court should be slow to grant approval due to the need to acquire some of the land on which the SEOC project was to be carried out by reason of the uncertainty this would cause landowners; and

(8) whether the actual or potential environmental harm of the SEOC project, and the consequential economic and social harm, outweighed the social and economic benefits of the SEOC project.

Held: conditional approval possible, and adjourning for determination of conditions (at [530]):

(1) the Aboriginal Archaeological Assessment was too narrow an assessment of Aboriginal cultural heritage: at [87]-[92]. Wider aspects of Aboriginal cultural heritage were recorded in the consultation process: at [93]-[95]. After consideration of expert evidence on Aboriginal cultural heritage the Court found the SEOC project would not have a significant impact on an area of significant Aboriginal cultural heritage and the proposed conditions of approval were adequate: at [97]-[110];

(2) there would be minimal loss of functionality of agricultural land: at [127]-[131];

(3) groundwater impacts were adequately addressed: at [182]-[192];

(4) potential impacts of salinity were adequately addressed through the proposed low permeability barrier (at [206]-[209]), the final void for saline water (at [210]-[213]) and the HRSTS (at [214]-[222]). Impacts on the water licensing regime would be acceptable: at [250]-[258];

(5) the air quality modelling was adequate. The experts did not identify any more exceedences of the EPA Approved Methods for the Modelling and Assessment of Air Pollutants in NSW 2005 in Camberwell village but identified additional exceedences at certain rural properties: at [353]-[361]. There would not be unacceptable air quality health impacts in Camberwell village: at [362]-[378];

(6) the issue of private land ownership was not determinative of the application: at [385]-[387];

(7) some economic benefit had been established: at [460]-[471]; and

(8) the potential impact on air quality on identified rural properties resulted in conditions for voluntary acquisition and other measures by Ashton. These conditions were adequate subject to appropriate management of economic impacts on these properties: at [513]-[516], [527].

Compulsory Acquisition

Jameson v Rail Corporation New South Wales [2014] NSWLEC 83 (Pain J)

Facts: the Respondent compulsorily acquired part of the Applicant's land for a public purpose as part of the South Sydney Freight Line project. The Applicant appealed against the amount of compensation determined by the Valuer-General as provided for in s 66(2) of the *Land Acquisition (Just Terms Compensation) Act* 1991 ("the JT Act"). The parent parcel was a large older style industrial property near Campbelltown railway station at 10 Farrow Road, Campbelltown occupied by a tenant manufacturing roof trusses. The Respondent acquired a strip of land approximately 12.5m deep of 1,104.40 sqm across the entire front of the Applicant's land. As a result the industrial building on the Applicant's land has no set back from the street with the front wall on the boundary with the Respondent's land after acquisition. A parcel of land owned by Campbelltown Council ("the council") adjacent to the residue land was used by the Applicant's tenant for a period of time for temporary car parking pursuant to a works and access agreement between the tenant, the council and the Australian Rail Track Corporation ("ARTC") ("licence agreement"). The cost of that arrangement was borne by the ARTC. There was no current agreement to use the council land. The financial cost sought under s 59(f) was a licence fee to be paid to the council for the car parking area formally the subject of the licence agreement.

Issues:

(1) the market value of the acquired land;

(2) whether injurious affection was payable; and

(3) whether s 59(f) of the JT Act applied so that certain disturbance amounts could be claimed.

Held: the compensation payable to the Applicant under the JT Act was determined at $402,752.55:

(1) two different approaches in the before scenario were considered by the Court, firstly the value of the existing industrial use as a leased industrial investment and, secondly, its potential use for a residential development. Because the valuers determined to adopt a piecemeal summation approach in the course of the hearing the before valuation approach became less relevant: at [87];

(2) in valuing the parent parcel as a leased industrial investment in the before no separate rent for hardstand was allowed: at [93]. In valuing the parent parcel as a potential redevelopment site in the before a size adjustment was warranted (at [101]-[102]) but no adjustment was made for zoning or proximity to the station: at [103];

(3) comparing the value of the acquired land as a leased industrial investment of $3,410,000 with its value as a potential redevelopment site of $3,564,875 indicated that the improvements had no value in valuation methodology terms: at [105];

(4) the piecemeal approach was adopted by the Court for the after value so that the market value of the land acquired was $262,295. Based on the before value of the land of $3,565,000 as a residential redevelopment site (the highest and best use) less the value of the land taken of $262,295 the after value of the residue land was $3,302,705: at [106]-[107];

(5) as the building had nil value there could be no injurious affection in relation to factors affecting the building: at [108]. Two per cent injurious affection was awarded for the affect on the land of rail noise and two per cent for the visual impact on any future building on the land: at [110]; and

(6) the Applicant's claim under s 59(f) was not reasonable given that there was no obligation to provide on-site parking placed on the Applicant under the lease with the tenant (at [130]) and the use was not the Applicant's use: at [131]. Further, there had been no change in rent as a result of the acquisition. No causal connection between the acquisition of land and the financial cost being incurred was established: at [132]. The licence agreement with the ARTC relied on by the Applicant related to the implementation of the public purpose and could not provide support for the Applicant's claim under s 59(f): at [134].

TMG Developments Pty Ltd v Roads and Maritime Services [2014] NSWLEC 177 (Biscoe J)

Facts: this was a claim for compensation for the partial compulsory acquisition of the applicant's ("TMG") 99-year leasehold interest, with about 78 years remaining ("Headlease"), in the Manly Wharf complex on Sydney Harbour. The public purpose of the acquisition was to place all Harbour commuter wharves in public ownership. Post acquisition, the Manly Wharf complex had three components: a large covered passenger ferry terminal (Lot 2 "Terminal"); a smaller uncovered passenger ferry pier (Lot 3 "Eastern Pier"); and a large retail centre (Lot 1 "Retail Centre"). The respondent acquiring authority and headlessor ("RMS") acquired Lots 2 and 3 (essentially the Terminal and Eastern Pier), with TMG retaining its interest in the Retail Centre. TMG generated income from ferry operators from subletting and licensing the Terminal ("Terminal Sublease" and "SFF Licence") and Eastern Pier ("MFF Licence"). However, the Terminal and Eastern Pier had a high cost burden since the Headlease required TMG to maintain and repair the Manly Wharf complex. The parties used the valuation approach of capitalisation of net income in the before and after acquisition scenarios. TMG contended for a market value of $50.2 million and special value and disturbance. RMS's competing valuation was $2.5 million, or $3.5 million on RMS's construction of cl 3.29 of the Headlease. This construction gave Sydney Ferries free use of the Terminal beyond the expiry of the Terminal Sublease (meaning the capitalisation rate would only be applied to the shorter balance of Terminal Sublease, which expired in 2041, rather than the balance of the Headlease).

Issues: the ultimate issue was the value of TMG's Headlease interest in Lots 2 and 3. The main sub issues included:

(1) whether cl 3.29 of the Headlease allowed Sydney Ferries free use of the Terminal for its ferry operations beyond the expiry of the Terminal Sublease;

(2) whether the Terminal Sublease annual market rental as at the 2011 date for rent review, which did not proceed because of the proposal to carry out the public purpose of the acquisition, should be assessed using a comparable transactions method using the SFF and MFF Licences with appropriate adjustments (as TMG contended), or a depreciated replacement cost method ("DRC method") with assessment of land and improvements and fair rate of return (as RMS contended);

(3) assessment of Headlease gross income, outgoings, and capitalisation; and

(4) whether a dual rate capitalisation, to allow for a sinking fund adjustment, should be used (as TMG contended).

Held: compensation determined at $15,324,830:

(1) clause 3.29 of the Headlease could only operate where Sydney Ferries had a sublease (or similar) and RMS's construction could not be accepted: at [73];

(2) as to the rent review clause in the Terminal Sublease, discussion of explicit and implicit instructions therein: at [82]; discussion of distinction between hypothetical willing lessor and lessee and actual lessor and lessee: at [84];

(3) disregard of lessee's goodwill as required by rent review clause did not require disregard of goodwill attributable to location, and consequently did not require disregard of patronage of Sydney Ferries: at [111]-[114]

(4) the differences between the SFF and MFF Licences and the Terminal Sublease were insufficient to preclude reliance on the former as comparables: at [128]. The hypothetical parties negotiating for the 2011 Terminal Sublease market rent would have taken the SFF and MFF Licences into account as comparable transactions with adjustments. There would have been no automatic default to the accounting based DRC methodology. Adoption of the DRC method to the complete exclusion of market evidence was a last resort: at [143], [175];

(5) there would have been some value attributed to Terminal retail potential: at [252];

(6) maintenance and repair costs should be annualised rather than capitalised since they detract from income generating capacity: at [259]. However, 5-year upfront maintenance and repair costs should be deducted from capital value: at [261]. "Lessor's Improvements" as defined only covered the specified 1987 assets that formed part of the original demise: at [283]. Any Lessor's Improvements not in existence as at the relevant date of enquiry must still be included in the assessment of the base rent: [286]. The 1987 depreciation factor should be applied to agreed current replacement costs: at [287]. It was realistic to adopt the land value determined in 2006 by an independent valuer as neither party's valuer's residual land value analysis could be accepted: at [296]; and

(7) the balance of the term of the acquired Headlease interest at the acquisition date could be regarded as a wasting asset and a dual rate capitalisation was preferable: at [325], [328]. The Terminal Sublease involved difficult construction issues and unclear maintenance and cost obligations that contributed elements of risk that needed to be offset against the security of income by increasing the capitalisation rate in the before scenario: at [375]. The Retail Centre capitalisation rate required an upward adjustment in the after scenario to reflect a loss control over retail development in the Terminal: at [376].

Practice and Procedure

Allandale Blue Metal Pty Limited v Roads and Maritime Services (No 4) [2014] NSWLEC 102 (Pain J)

(related decisions: *Allandale Blue Metal Pty Ltd and Quarry Products (Newcastle) Pty Ltd v Roads and Maritime Services* [2011] NSWLEC 242 Biscoe J; *Quarry Products (Newcastle) Pty Ltd and Allandale Blue Metal Pty Limited v Roads and Maritime Services (No 2)* [2012] NSWLEC 32 Sheahan J; *Quarry Products (Newcastle) Pty Limited and Allandale Blue Metal Pty Limited v Roads and Maritime Services (No 3)* [2012] NSWLEC 57 Sheahan J; *Allandale Blue Metal Pty Ltd v Roads and Maritime Services* [2013] NSWCA 103; (2013) 195 LGERA 182 Macfarlan, Meagher and Ward JJA)

Facts: the Applicant Allandale Blue Metal Pty Limited ("ABM") sought compensation under the *Land Acquisition (Just Terms Compensation) Act* 1991 ("JT Act") for the compulsory acquisition by the respondent, Roads and Maritime Services ("RMS"), for part of the land owned by ABM. An andesite quarry is on the residue land. In *Allandale Blue Metal Pty Ltd and Quarry Products (Newcastle) Pty Ltd v Roads and Maritime Services* [2011] NSWLEC 242 Biscoe J ordered that a separate question be determined prior to the substantive hearing whether a development consent granted by Cessnock City Council in 1979 for

quarry only permitted quarrying within the area of the circle labelled "proposed quarrying area" on the Indicative Plan for the development application. In *Quarry Products (Newcastle) Pty Ltd and Allandale Blue Metal Pty Limited v Roads and Maritime Services (No 3)* [2012] NSWLEC 57 Sheahan J answered "yes" to this question. The decisions of Biscoe J and Sheahan J were appealed by ABM to the Court of Appeal which dismissed the appeals (*Allandale Blue Metal Pty Ltd v Roads and Maritime Services* [2013] NSWCA 103; (2013) 195 LGERA 182 ("*Allandale CA*"). At the outset of the twelve day substantive hearing on Wednesday 16 July 2014, ABM objected to specified paragraphs in the points of defence ("POD") served on Friday 11 July 2014 by RMS in response to the amended points of claim. The disputed paragraphs referred inter alia to breaches of conditions of consent and alleged that the conduct of the quarry use was in a manner or for a purpose contrary to law. The effect of those paragraphs was to allege for the first time in the proceedings that the development consent granted in 1979 was not lawfully commenced and therefore lapsed.

Issue:

(1) whether the objection by ABM to specified paragraphs of RMS's POD should be upheld.

Held: ABM's objection was upheld, RMS was not permitted to rely on specified paragraphs of the POD:

(1) appropriate case management required in s 57 and s 61 of the *Civil Procedure Act* 2005 was to ensure the orderly and fair conduct of proceedings: at [12];

(2) reliance by RMS on the Class 3 Practice Note did not mean that another party could be effectively ambushed in the manner attempted in this case. That the Practice Note assumes that pleadings will be generally consistent with the evidence filed is one of the reasons why such a procedure has been adopted by the Court. If a party wishes to identify a case which is legally and factually at odds with the approach taken earlier in proceedings, including in this case in relation to a separate question of law intended to resolve finally between the parties the scope of the development consent, this must be done much earlier in the proceedings. Sufficient time to enable the other party to understand and respond to the new and different issues raised is essential: at [13]; and

(3) RMS's submission that it is not incumbent on a party to identify its final case until it pleads must be weighed up by a party and its legal representatives in the context of particular proceedings and whether the approach of one party is fair in all the circumstances to another party. That obligation applies to a party and its legal representatives over and above any requirement to comply with a practice note issued by the Court: at [15].

Malesev v Strati [2014] NSWLEC 91 (Craig J)

Facts: in the substantive proceedings brought under Class 4 for judicial review, Mr Malesev sought an order, among others, declaring that the decision by Sutherland Shire Council ("the council") to grant development consent for the erection of a new dwelling was invalid. As r 59.9(2) of the Uniform Civil Procedure Rules 2005 ("UCPR") allowed, Mr Malesev served the council with a notice requiring it to provide both a copy of the decision to grant development consent and a statement of reasons for that decision ("the Notice"). On that same date, a direction was made, by consent, requiring the council to provide a response to the Notice. The council did not provide a response. The matter was subsequently listed to determine whether the council should be directed to provide Mr Malesev with a copy of the documents that were the subject of the Notice.

Issues:

(1) whether the provisions of Pt 59 of the UCPR should be interpreted as requiring a council, whose decision is challenged in judicial review proceedings, to produce a copy of the decision under challenge and the reasons for that decision only if that council takes the position of a protagonist in the proceedings;

(2) whether there were any cogent reasons advanced by the council as to why it should not have been required to produce the documents sought by Mr Malesev; and

(3) whether there were any cogent reasons advanced by the council as to why it should not have been made to obey the direction of the Court, requiring the council to respond to the Notice.

Held: ordering that the council provide to Mr Malesev and Mr Strati a copy of the decision determining the development application and a statement of reasons for that decision and ordering the council to pay Mr Malasev's costs in respect of the application:

(1) the provisions of Pt 59 could not be interpreted as requiring a council, whose decision is challenged in judicial review proceedings, to produce a copy of the decision under challenge and the reasons for that decision only if that council takes the position of a protagonist in the proceedings. So to construe the provision would be to deny the beneficial effect that r 59.9 has in assisting the resolution of a dispute as to the lawfulness of a decision by a public authority. Denial of reasons when a public authority files a submitting appearance would work an injustice both to the applicant seeking to challenge the decision and any party having an interest in sustaining the validity of the decision: at [16];

(2) the council advanced no cogent reason as to why it should not be required to produce a copy of its decision to grant development consent, nor be required to produce a statement of reasons for that decision: at [25]; and

(3) the council advanced no cogent reason as to why the order made by the Court, requiring compliance with the Notice, did not have to be obeyed by the council: at [25]. The council was in default of the Court order to which it had consented. The obligation to comply with the substance of that order remained until it was set aside by further order and that did not occur: at [11].

Gold and Copper Resources Pty Limited v Newcrest Mining Limited [2014] NSWLEC 148 (Biscoe J)

(related decisions: *Gold and Copper Resources v Minister for Resources and Energy* [2013] NSWLEC 66 Pain J, *Gold And Copper Resources Pty Ltd v Hon Chris Hartcher MP, Minister for Resources and Energy, Special Minister (No 2)* [2014] NSWLEC 30 Pain J)

Facts: there were two motions before the Court in this judicial review proceeding, in the Court's Class 8 mining jurisdiction, challenging the validity of a renewal of a mining exploration licence. First, a motion by the first respondent ("Newcrest") supported by the second respondent ("Minister") to summarily dismiss/stay the proceeding on the basis of issue estoppel or Anshun estoppel, or abuse of process. Alternatively, security for costs was sought, with Newcrest, but not the Minister, seeking an order that costs may be assessed forthwith. Secondly, a motion by the applicant ("GCR") seeking an order pursuant to r 59.9(4) of the Uniform Civil Procedure Rules 2005 that the Minister provide the other parties with a copy of the renewal decision and a statement of reasons for the decision as required by GCR's notice served under r 59.9 simultaneously with service of the summons. On the eve of the hearing of the first motion, GCR conceded that the paragraphs of its summons that specified its sole ground of judicial review (a "no valid application" point relating to changes made to the renewal application form after it had been submitted by the first respondent) should be struck out on the basis of issue estoppel or Anshun estoppel. It was the same point that GCR sought to raise late and unsuccessfully in an earlier first proceeding, where the Court rejected GCR's application to amend (*Gold and Copper Resources v Minister for Resources and Energy* [2013] NSWLEC 66 ("first proceeding")). The "no application point" was also the same point determined against GCR in a related second proceeding (*Gold And Copper Resources Pty Ltd v Hon Chris Hartcher MP, Minister for Resources and Energy, Special Minister (No 2)* [2014] NSWLEC 30 ("second proceeding")). However, GCR submitted that the proceedings ought not be dismissed while its notice pursuant to r 59.9 remained unanswered.

Issues:

(1) whether the first and/or second proceedings gave rise to an issue estoppel, Anshun estoppel, or abuse of process;

(2) whether the Court has power to make a r 59.9(4) order without a properly commenced judicial review proceeding;

(3) whether the current proceeding had not been properly commenced and was an abuse of process because under r 59.4(c) the summons had to state the grounds on which relief was sought and the only ground stated was barred by an issue estoppel or an Anshun estoppel; and

(4) whether the respondent's costs may be assessed forthwith.

Held: orders at [54] including r 59.9(4) order, and GCR to pay the respondents' costs of the proceeding to 17 September 2014:

(1) there was an issue estoppel arising from the first proceeding because it was essential to the Court's decision that the renewal application lodged by Newcrest remained a valid application at the decision date: at [21];

(2) there was an issue estoppel arising from the second proceeding, even though the licence in question was a different licence, because the point of law (statutory construction) sought to be raised in the current proceeding was identical. Newcrest could not enforce this estoppel because it was not a party to the second proceeding but the Minister was a party to the second proceeding and could enforce it: at [22];

(3) there was an Anshun estoppel arising from the first proceeding because it was unreasonable for GCR, exercising due diligence, not to raise the "no valid application" point there. Also, there would be a risk of conflicting judgements: at [24];

(4) an Anshun estoppel arose despite GCR having sought to raise the "no valid application" point in the first proceeding (unsuccessfully): at [25];

(5) the summons did not state a ground that was itself manifestly hopeless, however it was barred by an issue estoppel: at [46];

(6) this issue estoppel arising from the first proceeding did not satisfy the general criteria for an abuse of process because the point was not determined in the first proceeding, rather it was subject to a refusal of leave to amend: at [46];

(7) while the issue estoppel arising from the second proceeding did satisfy the general criteria for an abuse of process, it was the subject of a pending appeal. Hence, it was perhaps inappropriate to characterise the "no valid application" ground in the summons as an abuse of process: at [46];

(8) the Court's discretion to make a r 59.9(4) order is not limited where the content of a summons is deficient in terms of r 59.4: at [48]. However, where no ground or only a manifestly hopeless ground is stated in the summons, and there are no other significant circumstances, it is unlikely that the Court would exercise its discretion at all: at [49];

(9) the Court had power to make an order under r 59.9(4) in this case and the respondents did not submit that the discretion to make an order should not be exercised. The power of the Minister to make the challenged decision was conditional upon him having the mental state of satisfaction prescribed by s 114(6) of the Mining Act 1992. Disclosure of the Minister's reasons was an important mechanism, and might be the only mechanism, for ascertaining whether the Minister had the prescribed state of satisfaction. In the circumstances, the Court would exercise the discretion to make the order: at [50];

(10) given that GCR had not yet identified a ground of judicial review other than the one barred by the estoppel, GCR should be ordered to pay the respondent's costs of proceedings to date: at [52]; and

(11) GCR's delay in grappling with the estoppel issues was mitigated by other (including personal) circumstances such that an unusual order that the respondent's costs may be assessed forthwith was not appropriate: at [52].

Costs

Rossi v Living Choice Australia Ltd (No 6) **[2014] NSWLEC 116** (Pain J)

(related decisions: *Rossi v Living Choice Australia Ltd t/as Living Choice & Ors* [2012] NSWLEC 112 Pepper J, *Rossi v Living Choice Australia Limited t/as Living Choice (No 2)* [2012] NSWLEC 144 Pepper J,

Rossi v Living Choice Australia Ltd (No 3) [2013] NSWLEC 46 Pain J, *Rossi v Living Choice Australia Ltd (No 4)* [2013] NSWLEC 136 Pain J, *Rossi v Living Choice Australia Ltd (No 5)* [2013] NSWLEC 197 Pain J)

Facts: the Joint Regional Planning Panel Sydney West Region ("JRPP") gave development consent for a large multiple residence State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 ("Seniors SEPP") development on land adjoining the Applicant's property. The JRPP relied upon the assessment of the proposed development provided by Hills Shire Council ("the council") when it determined to grant consent. Mr Rossi challenged the validity of the development consent, and was successful on part of the judicial review grounds of challenge; no declaration of invalidity of the consent was made. A related challenge was successfully made to a consent given by the council concerning boundary treatment ("the retaining walls consent") and that was declared to be invalid. Civil enforcement proceedings against Living Choice Australia Ltd ("the Developer") for work done on the boundary were also included in the proceedings and the Applicant was successful in relation to this part of the proceedings.

This judgment concerned the exercise of discretion to award costs following complex judicial review and civil enforcement proceedings.

Issues:

(1) what events informed costs, particularly given the Applicant was not successful on various issues and did not obtain substantive declaratory relief in relation to the Seniors SEPP development consent challenged;

(2) whether the council was liable for costs as well as the Developer; and

(3) whether the JRPP as the consent authority was liable for some costs given that it filed an early submitting appearance.

Held:

(1) costs awarded to the Applicant for those parts of the proceedings where the Applicant was successful, namely the retaining walls consent (at [75]) and in relation to civil enforcement: at [77]. Partial costs awarded to the Applicant in relation to the Seniors SEPP development consent challenge: at [74); and

(2) partial costs awarded to the Applicant in relation to the Seniors SEPP development consent payable by all three respondents namely the JRPP, the council and the Developer. The JRPP should be liable as its decision to give consent resulted in the litigation: at [93]. The council should also be liable given the failure in its assessment process led in part to the failure to assess a mandatory relevant consideration: at [91].

Injunctions

Chief Executive of the Office of Environment and Heritage v Turnbull (No 2) [2014] NSWLEC 155 (Pepper J)

(related decisions: *Chief Executive of the Office of Environment and Heritage v Turnbull* [2014] NSWLEC 153 Pepper J, *Turnbull v Director-General, Office of Environment and Heritage* [2014] NSWLEC 84 Preston J, *Turnbull v Director-General, Office of Environment and Heritage (No 2)* [2014] NSWLEC 112 Preston J, *Chief Executive of the Office of Environment and Heritage, Department of Premier and Cabinet v Turnbull* [2014] NSWLEC 150 Sheahan J)

Facts: the respondent, Mr Grant Turnbull, is the owner of a property known as "Colorado" near Moree. Mr Turnbull's father, Mr Ian Turnbull, had previously been convicted of illegal clearing of native vegetation on Colorado (and another property) in contravention of s 12 of the *Native Vegetation Act 2003* ("the NV Act") between 2011 and 2012 (*Chief Executive of the Office of Environment and Heritage, Department of Premier and Cabinet v Turnbull* [2014] NSWLEC 150). In separate proceedings, Mr Grant Turnbull, as the owner of Colorado, was issued with remedial directions by Preston J in July 2014 in response to the unlawful clearing (*Turnbull v Director-General, Office of Environment and Heritage (No 2)* [2014] NSWLEC 112). In issuing these directions, Preston J marked out on a map, attached to the judgment, those parts of

the property on which the remedial work would need to be carried out. The area over which the final remedial directions were made was the subject of an earlier decision on 25 June 2014 to which draft directions and a draft map indicating the area to be remediated were attached (*Turnbull v Director-General Office of Environment and Heritage* [2014] NSWLEC 84). Thus as at 25 June 2014, Mr Turnbull was on notice of the land to be the subject of remediation directions.

The Office of Environment and Heritage ("OEH") subsequently commenced separate Class 4 proceedings in August 2014, in response to further alleged unlawful clearing carried out by Mr Grant Turnbull between June 2012 and January 2013. There was evidence that between the draft remediation orders and the final remediation orders being issued by Preston J, Mr Turnbull cleared native vegetation in the areas the Court set aside to be remediated. One area of the clearing had been planted with a cereal crop.

On 19 September 2014, OEH brought an application for interlocutory relief in relation to further unlawful clearing of native vegetation from January 2013 onwards on Colorado. The relief sought an injunction against Mr Turnbull preventing him from continuing to unlawfully clear on the basis that there was very little native vegetation left on the property and that further clearing would undermine the efficacy of any remediation directions the OEH could seek by way of final orders. At the first hearing of the interlocutory application on 19 September 2014, the Court restrained Mr Turnbull from carrying out clearing of native vegetation contrary to the NV Act until the remainder of the application was heard (*Chief Executive of the Office of Environment and Heritage v Turnbull* [2014] NSWLEC 153). At the further hearing of the application for interlocutory relief, OEH sought an order that Mr Turnbull be prevented from disturbing the soil on Colorado by any means involving human or mechanical intervention, planting, tending or cultivating any commercial crop, using herbicides or grazing by stock.

Issues:

(1) whether there was a serious question to be tried, in particular, whether OEH was required to prove that none of the defences or exemptions in the NV Act were available to Mr Turnbull in order to demonstrate that he had contravened the NV Act;

(2) whether the balance of convenience favoured the granting of the injunctive relief:

a. whether further interlocutory orders were necessary in circumstances where an injunction had already been imposed by the Court and earlier remedial directions applied to certain parts of Colorado;

b. whether the inchoate nature of the relief sought in the summons would inhibit Mr Turnbull's access to the land to a disproportionate extent;

c. whether the presence of a crop on part of the land prevented the imposition of the injunctive relief in that area, in circumstances where OEH had known about the clearing since April 2014 and had delayed commencing the Class 4 proceedings and bringing the injunction application;

d. where OEH had not proffered an undertaking as to damages; and

e. whether the terms of the relief sought in the interlocutory application were too broad.

Held: the injunctive relief was granted and the matter was set down for an expedited hearing:

(1) there was a serious question to be tried as the unchallenged evidence of OEH demonstrated that clearing of native vegetation had been carried out by Mr Turnbull in contravention of s 12 of the NV Act and contrary to the Court's earlier remedial directions. The OEH did not have to prove that none of the defences or exemptions under the NV Act applied. To do so constituted a reversal of the onus of proof for which there was no statutory support in the NV Act and no authority: at [42]-[48];

(2) the balance of convenience favoured the granting of the injunctive relief:

a. in the face of evidence that further unlawful clearing had occurred contrary to the earlier remedial directions made by Preston J, the Court rejected Mr Turnbull's submission that an interlocutory order above and beyond the initial injunction was unnecessary: at [50];

b. Mr Turnbull's submission regarding the indeterminate nature of the relief sought in the summons was misconceived inasmuch as it conflated the relief sought in the interlocutory

application with whatever final relief was to be ordered by the Court should OEH be successful in the Class 4 proceedings: at [52]-[53];

c. because OEH had significantly delayed in filing the summons and bringing the injunction application, the balance of convenience did not favour an immediate injunction being granted over the land which had been cropped. An injunction should, however, apply to that area as soon as the crop had been harvested in order to minimise the harmful effects of the herbicide required to cultivate the crop and to facilitate the rehabilitation of the cropped land in the future: at [54], [58] and [61];

d. OEH had not given an undertaking as to damages but this was not fatal to the application as it had plainly brought the proceedings in the public interest. The prevention of the unlawful clearing, the protection of native vegetation, and the encouragement of the revegetation of land that had been illegally cleared, were fundamental matters of public importance. This was all the more acute in the context of the long history of clearing of native vegetation on Colorado where the cumulative effects of the clearing were severe. These circumstances, and the fact that Mr Turnbull had cleared areas earlier set aside for remediation, meant that less weight was given to OEH's failure to give an undertaking: at [55]-[57]; and

e. the Court agreed that the relief sought was too broad and ordered OEH to amend the terms of the relief to allow for activities like walking or driving across the land: at [63]-[64].

Section 56A Appeals

Mike George Planning Pty Ltd v Woollahra Municipal Council (No 3) [2014] NSWLEC 123 (Pepper J)

(related decision: *Mike George Planning Pty Ltd v Woollahra Municipal Council* [2012] NSWLEC 1357 O'Neill C)

Facts: the applicant appealed pursuant to s 56A of the *Land and Environment Court Act 1979* against a decision of a Commissioner dismissing a Class 1 appeal and refusing its development application to change a studio over a communal garage to an apartment ("the DA"). A development consent issued for the property in 1998 was conditional on the premises not being used for residential purposes at any time ("the 1998 consent"). At the hearing before the Commissioner, the respondent, Woollahra Municipal Council ("the council") provided draft conditions of consent to the Court, one of which, G.2, related to upgrades required for the building to be compliant with fire safety requirements in the Building Code of Australia ("BCA"). The Commissioner refused to grant consent to the DA on the basis that consent was required from the Owners Corporation because the obligation to comply with fire safety provisions would require work to be carried out to common areas. In the event that she was wrong, the Commissioner went on to find that, on its merits the development would have a detrimental impact on the residents of the building at the adjoining property and the internal amenity of the proposed dwelling. In making this finding, she rejected the planning evidence of both experts that because the development would be on the applicant's property, the change of use would not result in intensification of the use of the site. She also made findings that the development had the potential to have unacceptable noise impacts on the neighbours to the property and on the inside of the development building.

Issues:

(1) whether the Commissioner erred in finding that the DA required the consent of the Owners Corporation;

(2) whether the Commissioner erred in finding that the development was for a "dwelling" resulting in intensification of use of the property; and

(3) whether the Commissioner denied the applicant procedural fairness by making findings with respect to internal or external noise or in failing to canvas the issue of noise with the parties.

Held: the appeal was dismissed:

(1) by reason of the change of use from a studio to a dwelling, the Commissioner was legally obliged to consider whether fire safety requirements had been complied with under s 79C(1)(a)(iv) of the *Environmental Planning and Assessment Act 1979* ("the EPA Act") and cl 93 of the *Environmental Planning and Assessment Regulation 2000* ("the EPA Regulation"). Having made the finding of fact that building works were required on the property to ensure compliance with the BCA, the Commissioner correctly determined that it was appropriate to impose condition G.2 and that it ought to form part of any consent granted by her to the DA. Once this was accepted, cl 49(1)(b) of the EPA Regulation mandated that the Owners Corporation consent to the making of the DA. It did not, and therefore, the Commissioner correctly decided that she did not have jurisdiction to determine the DA: at [39]-[49];

(2) there could be little contest that the use proposed in the DA was for a "dwelling" as defined in the *Woollahra Local Environment Plan 1995* ("the LEP"). What was envisaged by the DA was a one bedroom apartment with kitchen, bathroom and laundry facilities - all of the indicia of a "dwelling". Although the Commissioner disagreed with planning experts in relation to the intensification of the use of the site, she, as the consent authority in a Class 1 merits appeal, was entitled to do so: at [56]-[68]; and

(3) it was an unassailable fact that the issue of the impact of noise on the internal amenity of any occupant of the proposed apartment was brought to the attention of the applicant, and moreover, that there was ample evidence permitting the Commissioner to make the findings she did in relation to internal noise. However, in relation to external noise impacts, there was a lack of procedural fairness in the Commissioner's expert findings. The contention was not raised in the council's Statement of Facts and Contentions and it was not an issue joined between the parties in the proceedings below. The issue was not raised before the Commissioner and at no point did she advert to it. The Commissioner ought to have put the applicant on notice that the external noise potentially generated by the proposed use of the property was a matter that she would take into consideration in determining the DA, in order to afford it the opportunity of commenting on it: at [87]; and

(4) however, the above finding did not result in success for the applicant because the Commissioner had already correctly decided that she did not have jurisdiction to determine the DA in the absence of the Owners Corporation's consent: at [83]-[89].

Universal Property Group Pty Ltd v Blacktown City Council (No 2) [2014] NSWLEC 115 (Sheahan J)

(related decision: *Universal Property Group Pty Ltd v Blacktown City Council* [2013] NSWLEC 1231 Hussey C)

Facts: the applicant appealed under s 56A of the *Land and Environment Court Act* 1979 against the refusal of an appeal against the council's refusal of a development application for a medium density development comprising 102 dwellings, and associated uses, open space, parking and private internal roads.

The primary reason for refusal was the Commissioner's concern with the design of the internal roads, particularly, its proposed operation as a "shared-zone", with vehicles and pedestrians sharing the same space. At the hearing, the parties' respective experts agreed that the design of the internal roads was acceptable, and that the DA should be approved, subject to conditions.

The applicant relied on three grounds of appeal. First, that it was denied procedural fairness, by reason of the Commissioner's determination of the matter on an issue which was not in dispute between the parties, and was not raised with them. Second, that the Commissioner failed to give reasons for rejecting the evidence of the parties' experts. Finally, the Commissioner incorrectly applied cl 6.13 of the applicable development control plan ("DCP"), which concerned road widths, substituting his own criteria for that required by the DCP, thereby failing to take into account a mandatory relevant consideration.

Issues:

(1) whether the applicant was afforded procedural fairness;

(2) whether the Commissioner erred by failing to give adequate reasons; and

(3) whether the Commissioner erred by failing to properly consider cl 6.13 of the DCP.

Held: appeal dismissed:

(1) the Commissioner could take into account matters beyond the scope of those identified or argued between the parties, but procedural fairness required that they be given notice of those additional matters, and afforded an opportunity to be heard upon them: at [66];

(2) the Commissioner had made his concerns known to the parties, and clearly indicated that they were not satisfied. He, therefore, afforded the applicant procedural fairness: at [89] – [92];

(3) judicial reasons need not be necessarily lengthy or elaborate. The scope of the reasons given depends on the circumstances of each case, and no mechanical formula could be given in determining what reasons are required: at [101];

(4) the Commissioner was not required specifically to spell out his rejection of the expert evidence when such rejection and the reasoning behind it was implicit in the judgment: at [107]; and

(5) cl 6.13 of the DCP did not specify any controls for developments of the size proposed. It expressly permitted the Commissioner to determine the appropriate width of any road in light of the volume of traffic it was assessed it would carry. That was the process the Commissioner undertook. He, therefore, did not err in this respect: at [116] – [124].

H & J Standen Pty Ltd v Minister for Planning and Infrastructure [2014] NSWLEC 113 (Craig J)
(related decision: *H & J Standen Pty Ltd v Minister for Planning and Infrastructure and Sutherland Shire Council* [2012] NSWLEC 1365 Moore SC and O'Neill C)

Facts: H & J Standen Pty Ltd ("the Applicant") submitted a major project application to extend a marina which it operated at Dolans Bay. That application, made under the now repealed provisions of Pt 3A of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act"), was refused on the basis that the expansion of the marina would result in an overdevelopment which would have alienated a large section of public open domain. The Applicant appealed to the Court pursuant to s 75K(2) of the EPA Act. The appeal was heard by two Commissioners of the Court, including the Senior Commissioner. They did so in a hearing that extended over five days, at the conclusion of which an oral judgment was delivered by the Senior Commissioner. That judgment was subsequently published. The Applicant appealed against the Commissioners' decision pursuant to s 56A of the *Land and Environment Court Act* 1979 ("the Court Act").

Issues:

(1) whether the reasons for the decision were inadequate in the sense that only the Senior Commissioner provided reasons for the order dismissing the appeal;

(2) whether the Commissioners failed to take into account the potential public benefits from the availability of boat fuelling activities at the marina as well as the proposed pump-out facilities for effluent water;

(3) whether the Applicant was denied the opportunity to address the competing public benefit issue upon which the decision of the Commissioners ultimately turned, and was therefore denied procedural fairness; and

(4) whether the Commissioners failed to discharge their functions according to law.

Held: dismissing the appeal and ordering that the Applicant pay the first respondent's costs:

(1) although the second Commissioner did not speak when the oral judgment was delivered, it was clear the second Commissioner manifested agreement in the reasons for the judgment delivered orally: at [35]. That judgment was replete with use of the plural pronouns "we" and "us" and the possessive adjective "our". Both Commissioners sat to hear the proceedings and both Commissioners put their signature to the judgment when reduced to writing: at [36] and [39]. The judgment was clearly framed to reflect the decision of both Commissioners, that is, as a joint judgment: at [37];

(2) as the purpose of considering the availability of fuel sales from the marina was to address "the public benefit balance", the Commissioners' observations were essentially directed to the weight given to that facility when considering that balance: at [52]. The consideration by the Commissioners of the pump-out facility was a further reflection of the neutral weighting impact which that aspect of the project

application had upon the public benefit issue: at [54]. A consideration directed to weight was not susceptible to challenge for legal error: at [55];

(3) the Applicant was not denied the opportunity to address the competing public benefit issues upon which the decision of the Commissioners ultimately turned: at [99]. The evidence, submissions and observations from the bench made it clear that the Court was considering the question as to whether there was a public benefit in permitting the alienation of the waterway which outweighed any detriment that might arise as a consequence of approval: at [95]. The Commissioners were not obliged to provide a "running commentary" on what they thought of the evidence as it evolved: at [81]; and

(4) in deciding the case, the Commissioners were required to undertake a balancing exercise. The evidence before the Commissioners rendered it reasonable to attribute greater weight to the benefit afforded to ferry users than the weight to be attributed to the benefit derived by those boat owners who would be afforded the opportunity to moor boats at the extended marina. It was an evaluative exercise and conclusion that was rationally open to the Commissioners: at [111].

Site Plus Pty Ltd v Wollongong City Council [2014] NSWLEC 125 (Craig J)

(related decision: *Site Plus Pty Limited v Wollongong City Council* [2011] NSWLEC 1371 Brown C)

Facts: Site Plus Pty Ltd ("Site Plus") sought development consent to operate a resource recovery facility. That application was refused. Site Plus appealed to the Court against that refusal, pursuant to s 97(1) of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act"). That appeal was dismissed. Site Plus appealed from the Commissioner's decision pursuant to s 56A of the *Land and Environment Court Act* 1979 ("the Court Act").

Issues:

(1) whether the Commissioner erred on a question of law when characterising the access road in question as use for the purpose of a resource recovery facility;

(2) whether the Commissioner's determination involved a question of law because there was a misapplication of the facts to the relevant law;

(3) whether the Commissioner's decision miscarried by reason of the council's failure to conduct itself as a model litigant; and

(4) whether the manner in which the council conducted its case caused a miscarriage of justice.

Held: dismissing the appeal and ordering that Site Plus pay the council's costs:

(1) the Court did not accept that characterisation, involving a mixed question of fact and law, necessarily gave rise to a determination on a question of law within the meaning of s 56A(1). Most issues involve a combination of facts and law but that circumstance, does not, of itself, convert a decision on a question of fact into one of law: at [47];

(2) the findings that Site Plus submitted should have been made by the Commissioner were not so much directed to error of law but rather to disagreement with the conclusion expressed by the Commissioner: at [46]. The Court did not find any decision of the Commissioner on a question of law directed to permissibility that engaged the provisions of s 56A(1) of the Court Act: at [70];

(3) in contending that the Commissioner's decision miscarried as a result of the council's failure to adhere to its obligations as a model litigant, Site Plus did not identify a decision of the Commissioner on a question of law: at [75]. The obligations imposed upon a model litigant are directed to the manner in which that litigant should behave procedurally, rather than directed to the creation of a legal obligation: at [101]. In any event, Site Plus failed to demonstrate that the council, by not volunteering the production of certain "material", had failed to conduct itself as a model litigant: at [143]; and

(4) the manner in which the council conducted its case in supporting the issues agitated by the second respondent was not shown to have caused the decision of the Commissioner to miscarry. In the course of the hearing, Site Plus had made forensic decisions as to the manner in which it conducted its case and was bound by those decisions. No error on any question of law that was determined by the Commissioner was demonstrated: at [142].

Norm Fletcher and Associates Pty Limited v Strathfield Municipal Council [2014] NSWLEC 157 (Pepper J)

(related decision: *Norm Fletcher and Associates Pty Ltd v Strathfield Municipal Council* [2013] NSWLEC 1118 Pearson C)

Facts: Camden Lodge is a heritage listed bungalow which suffered significant fire damage in 2012. The building was uninsured. The fire prompted the respondent, Strathfield Municipal Council ("the council"), to write to the owner recommending the placement of tarpaulins over the remaining roof structure to protect the building. The council also issued a Notice of Proposed Order requiring the owners to repair and make structural alterations to the building. The advice was not acted upon. The Lodge remained uninsured. The applicant, Norm Fletcher Associates Pty Limited ("Norm Fletcher"), submitted a development application to the council for demolition of the Lodge, which the council refused. When Norm Fletcher appealed the council's decision to the Court, it was dismissed by a Commissioner. Norm Fletcher appealed the Commissioner's decision pursuant to s 56A of the *Land and Environment Court Act 1979*. In her decision, the Commissioner found that the financial burden of repairing the damage was not unreasonable such that the demolition should be approved ("the central question"). During the course of the hearing, the evidence of the council's heritage expert, Mr Logan, changed a number of times in relation to the estimated cost of reconstruction of the Lodge, from $800,000-$900,000, to $1 million, to $2 million. His change of position was criticised by Norm Fletcher during the hearing before the Commissioner and on appeal.

Issue:

(1) whether the Commissioner erred in law by failing to give reasons or make findings for preferring the evidence of Mr Logan over that of Mr Staas (Norm Fletcher's heritage expert) on the central question before her at the hearing; and

(2) whether the Commissioner's finding that the total cost of the repair and reconstruction work was not, in the context of the continuing heritage significance of the dwelling, an unreasonable burden or impost on the owner, was irrational, illogical and manifestly unreasonable in the *Wednesbury* sense.

Held: appeal dismissed:

(1) there was no failure to give reasons by the Commissioner. This was because:
   a. first, she had considered the evidence of the two witnesses and had acknowledged that there were deficiencies in Mr Logan's evidence and determined that the deficiencies were immaterial because it was not necessary to quantify the amount potentially available to defray the cost of repair and reconstruction. She gave reasons for this conclusion: at [51]-[52];
   b. second, she took into account the quantum of the cost of the repairs and reconstruction and found that although they would be "considerable", they would not impose an unreasonable burden on the owner in all the circumstances. She was not required to quantify what those costs were likely to be, nor was it necessary for her to explain why she preferred the evidence of one expert over the other. It was sufficient, given the principal contested issue, for her to acknowledge that the restoration costs were likely to be significant and to then turn her mind to the question of whether or not they were reasonable, which she did: at [53];
   c. third, the principal contested issue between the parties was not to accurately determine how much the restoration costs were likely to be, but whether the repair and reconstruction costs would pose an unreasonable burden on the present owner of the Lodge. The Commissioner found, having regard to all of the factors to be weighed in the balancing exercise that she was required to undertake, that it would not. As the consent authority in a Class 1 merits appeal she was entitled to make this finding, which was open to her on the evidence: at [54];
   d. fourth, she did not resile from her conclusion even accepting Norm Fletcher's case at its highest. That is to say, even accepting the evidence that the total cost of the repairs would be approximately $1.7 million and that the sale of part of the Lodge would defray little of the cost. It was her opinion that given the heritage significance of the Lodge, this cost was not an unreasonable burden on the owner: at [55]-[56]; and

(2) there was nothing irrational, illogical or manifestly unreasonable about the Commissioner's decision. The focus of the her decision was not purely quantitative, but was qualitative, concerning a balancing

exercise that had regard to the public interest of the retention of Camden Lodge as a heritage item, and the neglect of the present owner as a contributing factor in the considerable cost of restoration and repair. The Commissioner's judgment was replete with reasons for her finding in relation to the burden of the cost of the repairs, which were articulated rationally, logically and reasonably. Neither the outcome nor the process of the Commissioner's decision was demonstrative of unreasonableness in the relevant sense: at [67].

Commissioner Decisions

Bettar v Council of the City of Sydney [2014] NSWLEC 1070 (O'Neill C)

Facts: the applicants appealed under s 97(1) of the *Environmental Planning and Assessment Act 1979* ("the EPA Act") against the refusal by the Council of the City of Sydney to grant consent to a four and five storey residential flat building. The site was located in an area zoned for mixed uses. There was an existing hotel on the site, to be demolished and townhouses to be retained.

Issues:

(1) whether the proposal was excessive in height as it exceeded the 15 metre maximum height development standard;

(2) whether the applicant's version of the maximum building height was correct as it took the ground level to be the floor level of the basement of the existing hotel building to be demolished;

(3) whether the proposal should have included common open space;

(4) whether the location of the ground floor retail area below the footpath level was acceptable;

(5) whether an awning should have been provided on the two street facades;

(6) whether the existing driveway entry to the townhouses could be used by the proposal for garbage collection, as the existing driveway entry was more than 10 metres from the proposed residential waste room; and

(7) whether vertical ducting should have been provided for the retail tenancy so that it may be used as a food and drink premises in the future.

Held: upholding the appeal and granting consent:

(1) the contravention of the maximum height development standard was acceptable as the experts agreed that the exceedance did not create any additional amenity impacts on adjoining development and the views of the upper level from the public domain were acceptable: at [49];

(2) where the existing building occupied the entire site, it was relevant to consider the objectives of the building height development standard in determining the existing ground level: at [37]; and the existing ground level was determined by taking the level of the footpath adjacent to the site as this level bore a relationship to the context and the overall topography that included the site and remained relevant once the existing building was demolished: at [41];

(3) it was acceptable for the proposal to exclude a common open space area as the proposal provided 75% of the apartments with a generous area of private open space and there was ample public open space in the vicinity of the proposal: at [53];

(4) it was acceptable for the commercial tenancy floor level to be 1.2 metres below the level of the footpath, as the basement level below the commercial tenancy matched the basement level of the existing townhouses, there was level access to the commercial tenancy from the side street, the traffic noise would have discouraged a future tenant from opening up the street facade had it been level with the footpath and the ceiling height was generous and well above eye level when viewed from the footpath: at [56];

(5) there was no justification for requiring a continuous awning around the street front elevations as the site was not part of a retail strip: at [60]; and

(6) there was on grade access to the residential waste room from the driveway entry to the townhouses and given the small footprint of the proposal, it was reasonable to make use of the existing basement access on the site and it was a convenient and satisfactory arrangement for the disposal of residential waste: at [65]; and

(7) the use and fitout of the commercial tenancy would be the subject of a future development application and if the commercial tenancy was unsuitable for use as a food and drink premises, this was a commercial consideration that was the prerogative of the applicant: at [66].

Elachi v Shoalhaven City Council [2014] NSWLEC 1126 (Fakes C)

Facts: the applicant lodged a development application to construct a two storey dwelling, garage, pool and ancillary structures on a site that comprises three uncleared, residual residential lots created in 1923 as part of "Callala Beach Village". The lots are located in the central section of what is now predominantly an intact 10 hectare foreshore council reserve containing Bangalay Sand Forest of the Sydney Basin and South East Corner Bioregions listed as an Endangered Ecological Community ("EEC") under Schedule 1 of the *Threatened Species Conservation Act 1995*. In 2010, Shoalhaven City Council identified a number of properties that had outstanding rates unpaid for more than 5 years, including the site, which was subsequently sold at auction, the applicant outbidding the council.

As required by s 79BA of the *Environmental Planning and Assessment Act 1979* ("EPA Act"), concurrence was sought and obtained from the Rural Fire Service ("RFS"). The RFS gave their approval contingent on clearing 73% of the vegetation on the lots, erection of a 1.8m radiant heat shield (metal fence) and the construction of a dwelling capable of being within the flame zone.

The applicant appealed the deemed refusal of the development application. Council's principal contentions as to why the proposal should be refused related to unacceptable adverse impacts on the Bangalay Sand Forest EEC and associated inconsistencies with the objectives of Zone 7(f3) Environmental Protection "F3" (Foreshores Protection) in *Shoalhaven Local Environmental Plan 1985* ("SLEP 1985"), Zone E3 in Draft SLEP 2013, *SEPP 71 – Coastal Protection*, *Jervis Bay Regional Environmental Plan* ("JBREP") and the NSW Coastal Policy. In addition, the council contended there was insufficient informal to enable a proper assessment of the likely impacts of the proposal under s 5A of the EPA Act and therefore the need for a Species Impact Statement ("SIS"). Council received hundreds of submissions opposing the development; the main reasons being related to: impacts on the EEC, bush fire safety, coastal erosion and visual impact.

The applicant principally relied on cl 15 of the SLEP 1985 and the site being identified as a "1964 holding" which permitted a dwelling house with consent within Zone 7(f3) Environmental Protection, as well as their ecologist's Assessment of Significance that concluded there would be no significant impact on the EEC.

Issue:

(1) whether a SIS was required pursuant to s 78A(8)(b) of the EPA Act;

(2) whether the express provisions of cl 15 SLEP 1985 applied; and

(3) whether the proposed extent of clearing and the likely impacts on the environment met the objectives of relevant planning instruments and policies.

Held: dismissing the appeal and refusing development consent:

(1) despite the acknowledged shortcomings of the applicant's ecological reports and the proposed removal of 73% of the Bangalay Sand Forest on the site, the proposal was not likely to significantly affect the local occurrence of the EEC to the extent it may be rendered extinct and therefore an SIS was not required: at [34]-[66];

(2) the site was a '"1964 holding" under SLEP 1985 and dwelling houses were permitted in the zone with consent. Clause 15 of SLEP 1985 did not confer any separate or independent source of power to the council to grant consent to the erection of a dwelling on the site: at [84]-[85];

(3) although the impact on the BSF EEC was found to be insufficient to require an SIS, the extent of EEC to be removed for the purposes of construction and creation of an inner protection zone was

inconsistent with the aims of SEPP 71 and JBREP (a deemed SEPP) to protect and preserve native coastal vegetation and protect the natural and cultural values of Jervis Bay: at [99];

(4) given the extent of clearing, at the level of the consolidated lots, the proposal did not achieve three of the four ESD principles upon which the NSW Coastal Policy is based. Refusal of this development did not unduly or unreasonably limit the availability of housing stock in the Callala Beach area: at [112];

(5) while the council did not raise bush fire as an issue, it was raised many times in written and oral submissions from local residents. Notwithstanding the RFS' recommended conditions of consent, the proposal did not satisfy the requirements in cl. 28(1) of SLEP 1985 or achieve a number of the objects of the *Rural Fires Act 1997* and consent could not be granted to the proposal: at [126]; and

(6) after considering the relevant matters under s 79C(1) of the EPA Act, the site was found to be unsuitable for the proposed development and approval was not in the long term public interest: at [128].

Kogarah Town Centre Pty Limited v Valuer General (No 3) [2014] NSWLEC 1124 (Moore SC and Brown C)

(related decisions: *Kogarah Town Centre Pty Limited v Valuer General* [2014] NSWLEC 1085, *Kogarah Town Centre Pty Limited v Valuer General (No 2)* [2014] NSWLEC 1107 Moore SC and Brown C)

Facts: the Kogarah Town Centre is a suburban shopping complex constructed partially adjacent to and partially over the Southern Railway line and Kogarah railway station. The centre is constructed on two parcels of land, one of which comprises a stratum of airspace over the railway line and railway station. This parcel of land straddles the boundary between the Kogarah and Rockdale local government areas ("LGAs"). The two parcels are in common ownership and s 26 of the *Valuation of Land Act* 1916 ("the Act") requires that they be included in one valuation. Because the local government boundary does not follow the allotment boundary between the two lots s 28 of the Act requires that the aggregated value be apportioned between the two local government areas. The owner of the shopping centre was dissatisfied with and appealed against the Valuer General's rejection of objections to 5 statutory valuations for the base dates 1 July in 2006, 2007, 2008, 2009 and 2010. The appeals against the statutory valuations were commenced in five sets of proceedings, one for each valuation base date year.

During the course of the proceedings, it was conceded that, in undertaking the apportionment process required by s 28 of the Act, the Valuer General had applied apportionment factors of ~60% (Kogarah LGA) and ~40% (Rockdale LGA) whilst proper calculation of the ratio should have led to apportionment factors of ~69% (Kogarah LGA) and ~31% (Rockdale LGA). The result of this mal-apportionment was that the statutory valuations in each of the relevant years in each of the local government areas was conceded to be incorrect. The statutory valuations for the proportion of the site within the Kogarah LGA were overstated and those within the Rockdale LGA were understated. In the earlier decisions findings were made as to the appropriate statutory values for each of the base date valuation years, and the correct apportionment factors. This decision concerned the appropriate outcome of the proceedings. The conclusion reached by the Commissioners concerning the issue as set out below is subject to an appeal confined to a question of law.

Issues:

(1) whether the burden of proof in s 40(2) of the Act on an appellant to unsuccessful objections to a statutory valuation means that, if the burden is not discharged, those proceedings should be dismissed as an automatic consequence;

(2) whether the Valuer General is entitled to seek an order of the Court pursuant to s 40 (1) of the Act increasing the statutory value above that that was the subject of the appeal if an appellant is unsuccessful in discharging the statutory burden of proof;

(3) whether the Court has any power (or obligation) to rectify a statutory value entered on the register when the valuation is calculated on an apportionment basis and the Valuer General has made a fundamental error in determining the apportionment factors to be applied; and

(4) how should the orders disposing of the proceedings be structured, in circumstances where the proceedings involved a filing by the applicant's legal representatives of only five sets of originating process but 10 statutory valuations were involved.

Held: upholding the appeals and determining the land value in relation to that part of the land within the Kogarah LGA for each of the base dates, and dismissing the appeals and confirming the land values as issued for that part of the land within the Rockdale LGA:

(1) although only five sets of proceedings were initiated, as no objection had been raised to dealing with all of the objected to values, the appropriate course to follow was to issue two separate sets of orders in each proceedings, with one set of orders in each proceedings dealing with the apportioned value within the Kogarah LGA and the second set orders dealing with the apportioned value within the Rockdale LGA: at [67] to [74];

(2) if an objector failed to discharge the burden of proof imposed by s 40 (2) of the Act, the necessary consequence was that the appeal with respect to that valuation was required to be dismissed: at [75] to [79];

(3) as a consequence, it was not open to the Valuer General, in any circumstances where a lower value had been sought by the objection, to seek to have the Court determine and give effect to a higher statutory value than that which had been the subject of the appeal: at [82];

(4) there would never be a basis in a statutory valuation appeal of any nature when the outcome of the appeal could be less favourable to the position in which the applicant was placed by the original process and determination prior to the appeal: at [83]; and

(5) the application of correct apportionment factors and consideration of whether the burden of proof in s 40 (2) had been discharged would lead to the apparently perverse result that the statutory values that must follow from the orders of the Court would total less than 100% of the correct total apportioned statutory value and thus give rise to an apparently perverse valuation outcome. That was a result of the failure of the Valuer General to carry out the correct apportionment calculation in the first instance and followed as a necessary outcome from the statutory process required to be followed by the Act: at [94], [95].

Court News

- on 29 August 2014 Commissioner Bob Hussey retired after 21 years with the Court, first as an Assessor and then as a Commissioner
- the web address of the Court has changed to: lec.justice.nsw.gov.au