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Land and Environment Court of NSW Judicial Newsletter

Legislation

Note: the legislation information in this Newsletter is up to date to and including 27 February 2015.

- Statutes and Regulations

Planning:

Environmental Planning and Assessment Amendment Act 2014 — assented to 19 November 2014**,** will amend the *Environmental Planning and Assessment Act* 1979:

- to increase substantially the maximum penalties for offences against the Act and the regulations;
- to create additional offences, including for providing false or misleading information in connection with planning matters;
- to consolidate and expand the investigative powers of council and Departmental officers for the enforcement of the Principal Act and to make other provision for the enforcement of the Act, including provision for cessation of utilities orders; and
- to require the Secretary of the Department to establish and facilitate the online delivery of planning services and information (by means of the NSW planning portal), including to enable planning applications to be lodged and dealt with online and to facilitate public access to planning information.

Environmental Planning and Assessment (Cattle Bay and Snug Cove) Order 2014 — published 17 October 2014, designated land adjoining Bega Valley local government area as part of that local government area for the purpose of making LEPs.

Local Government:

Local Government Amendment (Elections) Act 2014 — commenced 6 February 2015, amended the *Local Government Act* 1993 to, *inter alia*:

- enable, in certain circumstances, filling of a casual vacancy for a councillor by a countback of votes rather than a by-election;
- require each council having its general manager administer its elections (instead of the Electoral Commissioner) to publish on its website a resolution, dealing with various election administration matters, at least 18 months before the ordinary election; and
- require the Electoral Commissioner to provide each general manager who is administering the elections of the council with a printed and an electronic copy of the residential roll for the local government area concerned.

Further provisions are set out in the Local Government (General) Amendment (Elections) Regulation 2015 — published 6 February 2015.

Criminal:

See *Environmental Planning and Assessment Amendment Act* 2014 at Planning above. *Protection of the Environment Legislation Amendment Act* 2014 — commenced 1 January 2015, contains amendments to the *Contaminated Lands Management Act* 1997; the *Protection of the Environment Operations Act* 1997; *the* *Radiation Control Act* 1990

and the Protection of the Environment Operations (General) Regulation 2009 to increase penalties and make other changes to enforcement provisions. Consequential amendments are also made to the *Land and Environment Court Act* 1979.

Water:

Marine Estate Management Act 2014 No 72 - commenced 19 December 2014. The Act replaces the *Marine Parks Act* 1997.
Marine Estate Management Legislation Amendment Regulation 2014 — published 19 December 2014, revised Regulations under the *Marine Parks Act* 1997 in connection with the repeal and replacement of that Act by the *Marine Estate Management Act* 2014.
Water NSW Act 2014 — commenced 1 January 2015. [explanatory notes]
Water Management Amendment Act 2014 – partially commenced on 1 January 2015, amends the *Water Management Act* 2000 relating to the following matters:

(a) overland flow water and related terminology;
(b) supplementary water access licences;
(c) harvestable rights;
(d) controlled allocation of access licences;
(e) metering requirements;
(f) offences involving the taking of water;
(g) authorisation to take water from uncontrolled flows;
(h) streamlining of licensing and trading processes;
(i) management plans;
(j) combined approvals; and
(k) floodplain harvesting access licences.

Water Management (General) Amendment (Anabranch Water) Regulation 2014 – published 12 December 2014.

Wybong Creek Water Source Access Licence Conversion Factor Order 2014 – published 19 December 2014.

Pollution:

Schedule 1 [1] of the *Protection of the Environment Operations Amendment (Illegal Waste Disposal) Act* 2013, will commence 1 August 2015. Schedule 1 [1] amends s 88 of the *Protection of the Environment Operations Act* 1997 to remove the exemption from payment of the waste contribution by licensees of waste facilities used for the re-using, recovering, recycling or processing of waste other than liquid waste. The Protection of the Environment Operations (Waste) Amendment (Contributions) Regulation 2014 contains amendments to the Protection of the Environment Operations (Waste) Regulation 2014 that are related to the commencement of Schedule 1 [1].

Protection of the Environment Operations (General) Amendment (Newcastle Air Monitoring) Regulation 2015 — published 6 February 2015, makes provision for the establishment of the Newcastle Local Air Quality Monitoring Network which is to be an environmental monitoring program under Part 9.3C of the *Protection of the Environment Operations Act* 1997. This Regulation includes provisions:

- for a levy on holders of environment protection licences in the Newcastle local government to pay towards the cost of the monitoring program;
- to require licence holders to provide the EPA with information about emissions;
- to allow persons authorised by the EPA to enter land owned or occupied by licence holders for the purposes of the operation of the monitoring program; and
- to require the EPA to make air quality data available on its website and to report publicly on the monitoring program.

Mining and Petroleum:

The *Mining Amendment (Small-Scale Title Compensation) Act* 2014 - commenced 1 January 2015. This legislation and the regulations (link below) are the NSW Government's response to the Wilcox Report concerning compensation issues in the NSW opal fields.
Mining Amendment (Small-Scale Title Compensation) Regulation 2014 — published 19 December 2014.
Petroleum (Onshore) Amendment (NSW Gas Plan) Act 2014 — assented to 28 November 2014, expunges certain pending applications for petroleum titles (being applications where the applicant is not currently the holder of a petroleum title over the area that is the subject of the application).
Protection of the Environment Operations Amendment (NSW Gas Plan) Regulation 2014 — published 19 December 2014:

(a) removes coal seam gas exploration, assessment and production, crude oil/shale oil production and natural gas/methane production as scheduled activities under the *Protection of the Environment Operations Act* 1997;

(b) includes petroleum exploration, assessment and production as a new scheduled activity under that Act; and

(c) provides for licensing fees in relation to that new scheduled activity and the existing scheduled activity of petroleum products and fuel production.

State Environmental Planning Policy Amendment (Gas Exploration and Mining) 2014 — published 19 December 2014.

Miscellaneous:

Aboriginal Land Rights Amendment Act 2014 – assented 19 November 2014, amends the *Aboriginal Land Rights Act* 1983, *inter alia*:

(a) to provide for Aboriginal Land Agreements to be made between the Crown Lands Minister and Aboriginal Land Councils as an alternative to land claims under the principal Act;
(b) to clarify the functions of Local Aboriginal Land Councils in relation to business enterprises (including by expressly authorising such a Council to establish an Aboriginal and Torres Strait Islander corporation under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* of the Commonwealth and limiting a Local Aboriginal Land Council's power to establish corporations under the *Corporations Act 2001* of the Commonwealth);
(c) to simplify the matters that are required to be included in a community, land and business plan of an Aboriginal Land Council;
(d) to clarify the reporting obligations of Local Aboriginal Land Councils in relation to arrangements between Councils and other persons in relation to the exercise of the Council's functions and the requirements for the approval of the transfer of assets under such an arrangement;
(e) to provide for disciplinary action to be taken in relation to officers of Aboriginal Land Councils (including Board members of Local Aboriginal Land Councils and councillors of the NSW Aboriginal Land Council) who engage in misconduct such as failing to comply with the disclosure requirements under the principal Act;
(f) to authorise the Registrar to apply for search warrants in relation to apparent contravention of the principal Act or the failure of a person to provide records as required by the principal Act;
(g) to increase maximum penalties for offences under the principal Act;
(h) to provide for the appointment by the Registrar under the principal Act of administrators and investigators in respect of Local Aboriginal Land Councils;
(i) to allow the Registrar to apply for an injunction to prevent a contravention of the principal Act; and
(j) to allow for members of a Local Aboriginal Land Council who have not attended 6 consecutive meetings to be declared to be inactive and provide that such members should not be counted for the purposes of determining the quorum required for a meeting of the Council.

None of the provisions of the legislation have commenced as at the date of this Newsletter.

Aboriginal Land Rights Amendment (Regions) Order 2014 — published 16 January 2015, amends Schedule 5 to the *Aboriginal Land Rights Act* 1983 to delete two dissolved and to insert one newly constituted Local Aboriginal Land Council.

Building Professionals Amendment (Accredited Certifiers) Regulation 2014 — published 19 December 2014, amended the Building Professionals Regulation 2007 deals with compliance issues under *Swimming Pools Act* 1992 as part of the regime for registration of swimming pools.

Administrative Arrangements (Administrative Changes—Local Water Utilities) Order 2014 — published 19 December 2014.
Administrative Arrangements (Administration of Acts—Amendment No 3) Order 2014 — published 19 December 2014.
Liquor Amendment (Miscellaneous) Regulation 2014 — published 12 December 2014, amended the Liquor Regulation 2008 to, *inter alia*, provide that the recording of the amount of liquor sold after 8 pm for consumption on licensed premises in the Kings Cross precinct is to be done, in the case of high risk venues, on an hourly basis, and, in the case of other licensed premises in that precinct, on a daily basis and enable the granting of exemptions from the special licence conditions that apply to premises situated in the Kings Cross precinct (other than the condition to record alcohol sales data).

Liquor Legislation Amendment (Statutory Review) Act 2014 provisions have a staged commencement from 1 December 2014 to 1 March 2015. The Act amends various legislation to give effect to certain recommendations arising out of the statutory review of the *Liquor Act* 2007 and the *Gaming and Liquor Administration Act* 2007, including:

(a) modifying the grounds on which the Independent Liquor and Gaming Authority can issue long-term banning orders prohibiting persons from entering licensed premises in the Kings Cross or Sydney CBD precincts;
(b) providing for an escalating regime of sanctions (including automatic licence suspension or cancellation) for selling liquor to minors on licensed premises;
(c) providing that liquor may be supplied on unlicensed premises to a minor by a parent of the minor, or by a person authorised by a parent of the minor, only if the supply is consistent with the responsible supervision of the minor;
(d) providing that liquor may be sold or supplied without a licence at a fundraising function held by or on behalf of a non-proprietary association but only if certain requirements are complied with (including supervision and responsible service of alcohol requirements);
(e) providing for a new type of extended trading authorisation that enables licensed premises to trade late outside of the standard trading period (but no later than 3 am) on up to 12 occasions over a 12-month period;
(f) enabling the Minister to exempt venues in the Kings Cross and Sydney CBD precincts from the patron ID scanning requirements in certain circumstances;
(g) enabling the Authority to suspend or revoke a person's RSA certification, or to disqualify a person from holding RSA certification for a specified period, if the person has contravened the person's obligations in relation to the responsible service of alcohol; and
(h) providing an alternative process for the transfer of a licence in cases where the ownership of the business carried on under the licence remains unchanged.

Liquor Amendment (Special Licence Conditions) Regulation (No 2) 2014 — published 28 November 2014, changed the list of licensed premises that are subject to the special licence conditions set out in Schedule 4 to the *Liquor Act* 2007.

Environmental Planning and Assessment Amendment (Westconnex) Order 2014 — published 5 December 2014, declared development for the purposes of parts of WestConnex to be State significant infrastructure and critical State significant infrastructure.

National Park Estate (Riverina Red Gum Reservations) Amendment (Description of Lands) Notice 2014 — published 14 November 2014, amended land included in the Schedules of the *National Park Estate (Riverina Red Gum Reservations) Act* 2010.

Bills:

Courts and Crimes Legislation Amendment Bill 2014, introduced 12 November 2014, seeks to amend a number of Acts including the following:

(a) to amend the *Land and Environment Court* 1979 to extend the classes of proceedings in which judges of the Land and Environment Court of NSW may be assisted by commissioners to include Class 4 proceedings (Class 4 proceedings relate to environmental planning and protection and development contract civil enforcement);
(b) to amend the *Oaths Act* 1900 to enable justices of the peace to witness certain interstate and Commonwealth oaths, affidavits and statutory declarations; and
(c) to amend the *Trees (Disputes Between Neighbours) Act* 2006 to extend the application of certain provisions relating to court orders in respect of high hedges that obstruct sunlight or views to land within a zone designated "rural-residential" under an environmental planning instrument.

This Bill will lapse as a consequence of the dissolution of the Parliament for the 2015 State election.

Valuation of Land Amendment Bill 2014 – introduced 4 November 2014, seeks to:

(a) to reverse the effect of the decision of the Land and Environment Court in *Fivex Pty Ltd v Valuer-General* [2014] NSWLEC 27 by making it clear that, in determining the land value of land, the assumptions required to be made about the continuance of the land's present use and the improvements that may be continued or made to allow the present use to continue must be made in every case and not just in a case where the present use represents a higher order of use than other uses to which the land may be put; and

(b) to make it clear that it is to be assumed that the improvements required in order to enable the present use of land to continue include the improvements presently on the land.

This Bill will lapse as a consequence of the dissolution of the Parliament for the 2015 State election.

- State Environmental Planning Policy [SEPP) Amendments

SEPP (Western Sydney Employment Area) Amendment 2014 — published 16 January 2015, amends the maps in the SEPP (Western Sydney Employment Area) 2009.
SEPP Amendment (West Byron Bay) 2014 — published 14 November 2014, amends the Byron Bay LEP 1988.

- Miscellaneous

The NSW Parliament Research Service has released the following papers:

- Native vegetation clearing in NSW: a regulatory history [BF 5/2014]
- Builders' liability to Owners Corporations: the recent High Court decision [EB 13/2014]
- Crown land management [EB 15/2014]
- The Long Paddock: a legislative history of travelling stock reserves in NSW [BF 7/2014]

The Department of Planning and Environment has released a Planning Circular 'Coastal hazard notations on section 149 planning certificates' [PS 14-003]

All 111 regional councils in NSW now have standard planning schemes.

The Valuer General has continued to release valuation policies concerning the activities of his Office: http://www.valuergeneral.nsw.gov.au/publications/policies

The Office of Local Government has issued a circular, Changes to the land acquisition process for acquiring authorities in NSW.

Court Practice and Procedure

The Court has issued a new Practice Note - Subpoena Practices, which came into effect 1 January 2015.

Increased transparency measures
Three measures to increase the transparency of the Court's processes and provide greater access to details of outcomes of proceedings in merit appeals will be implemented from 1 March 2015:

1. When a matter settles as a consequence of a successful conciliation conference conducted pursuant to s 34 or s 34AA of the Land and Environment Court Act 1979, the terms of the orders made to reflect the agreement between parties (the decision referred to s 34(3) of the Court Act) will be published;
2. When a decision in a merit appeal is given with the decision incorporating directions requiring the preparation of further material (such as revised proposed conditions of development consent) prior to the making of the orders, when the orders are subsequently made, an addendum will be added to the published decision noting that the orders have been made and providing a link accessing the terms of the orders and any annexures to them; and
3. All merit appeal decisions that are finalised by orders made at the time of giving the decision will have any annexures referred to in such orders (for example conditions of development consent) made available by the incorporation of a link to them published with the judgement referring to them.

Judgments

- United Kingdom

Cotswold Grange Country Park LLP v Secretary of State for Communities and Local Government and Tewkesbury Borough Council [2014] EWHC 1138 (Admin), [2014] J.P.L. 981 (Hickinbottom J)

Facts: the claimant owned and occupied land at Cotswold Grange Country Park, Gloucestershire. In May 2005, the Tewkesbury Borough Council ("the Council") granted planning permission in respect of land owned by the claimant for: "Change of use from agricultural land to extension to existing holiday caravan park (Stationing of 30 additional static caravans)" ("the 2005 Permission"). Permission was subject to a number of conditions, including condition 2 stating that: "The land shall not be used for more than 30 static holiday caravans". In 2010, the Council granted planning permission for the same land: "To erect static caravan site office and wardens use, replace and re-site 40 static caravans and provide 14 additional static caravans (within original area) and ancillary works (partially retrospective) all for year round holiday use" ("the 2010 Permission"). Condition 3 of the 2010 Permission stated: "The re-sited static caravans and additional 14 static caravans shall be occupied for holiday purposes only and shall not be occupied as a person's sole, or main place of residence".

On 11 July 2012, the claimant submitted an application under s 192(1)(a) of the *Town and Country Planning Act 1990* (UK) ("the Act") for a Certificate of Lawfulness of Proposed Use or Development for the siting of an additional six caravans for residential use. The application relied on the fact that the 2010 Permission did not include a condition limiting the number of caravans on the site. The applicant relied on

the proposition in *I'm Your Man Ltd v Secretary of State for the Environment* (Queen's Bench Division, 4 September 1998; (1999) 77 P. & C.R. 251; [1998] 4 P.L.R. 107; [1999] P.L.C.R. 109; [1998] N.P.C. 131), that a planning condition cannot be implied from a limitation in the description of the development. On 3 December 2012, the Council refused the application. On 18 January 2013, the claimant appealed that refusal. The Secretary of State referred the matter to the Planning Inspectorate. On 9 July 2013, the Inspector dismissed the appeal. The Inspector found that the 2010 Permission (including the description of the development and the wording of condition 3) limited the number of static caravans to 54. He concluded that the stationing of the proposed six caravans for residential use would be in conflict with the terms of the 2010 Permission. The Inspector considered that there was no need for him to address the question of whether an additional six caravans would amount to a "material change in the use of any buildings or land" under s 55(1) of the Act. Under s 57(1) of the Act, planning permission was required for the carrying out of development, including a material change of use. The claimant applied under s 288 of the Act to quash the Inspector's decision. The applicant contended that the Inspector erred in treating the language used in the 2010 Permission relating to numbers of caravans as if it were a condition, whereas in fact there was no condition or enforceable limitation restricting the number of caravans on the site.

Issue:

(1) whether the Inspector erred in treating the language used in the description of the development in the grant of the 2010 Permission relating to numbers of caravans as if it were a condition.

Held: allowing the application, quashing the decision of the Inspector and referring the matter back to the Secretary of State to consider whether the proposal would be a material change of use:

(1) the grant of planning permission identifies what can be done so far as use of land is concerned, whereas conditions identify what cannot be done: at [15]. Simply because something is expressly permitted in the grant does not mean that everything else is prohibited: at [15]. Unless what is proposed is a material change of use requiring planning permission, the only things which are effectively prohibited by a grant of planning permission are those things that are the subject of a condition: at [15];

(2) the principle in *I'm Your Man Ltd* is that if a limitation is to be imposed on a permission granted pursuant to an application, it has to be done by condition: at [21];

(3) the Inspector was correct in finding that the 2010 Permission was described in terms of only 54 caravans plus an additional caravan for the warden and office: at [27]. The description of the development was clear on the face of the permission: at [27]. However, the determinative issue was not whether the limitation was imposed merely in terms of a restricted description of the permission granted, but whether it was in the form of a condition: at [28];

(4) the only possible contender was condition 3: at [29]. The condition reflected the description given in the grant of the permission. However, this was a different thing from a condition restricting the numbers of caravans on the site: at [29]. There was simply no condition restricting the number of caravans: at [29]. Any limitation found merely in the description of the development was insufficient to amount to a limitation in law: at [29];

(5) the Inspector acknowledged the principle derived from *I'm Your Man,* but applied it incorrectly. He failed to respect the difference between a limitation of number of caravans in the description in the grant, and a limitation of such numbers in the form of a condition: at [30]. In doing so, the Inspector materially erred in law: at [30]; and

(6) the consequence of this decision would not be that every grant of planning permission would have to set out every limitation the planning authority wished to impose on the use of the relevant land: at [31]. If a material change of use was proposed, then planning permission would be required. If a change was not material, then it would be open to an authority to restrict the use within the prescribed development, but, following *I'm Your Man,* only by way of condition: at [31]. In this case, it would not have been onerous to have restricted the numbers of caravans that could be pitched on the site by an appropriate condition: at [31].

Vicente & Anor v Secretary of State for Communities and Local Government & Anor [2014] EWCA Civ 1555 (Longmore LJ, Lewison LJ and Burnett LJ)

(related decisions: *San Vicente v Secretary of State for Communities & Local Government* [2013] EWHC 2713 (Admin) Collins J; *Secretary of State for Communities and Local Government v San Vicente* [2013] EWCA Civ 817 Lloyd LJ, Jackson LJ and Beatson LJ)

Facts: Taylor Wimpey UK Ltd ("Taylor Wimpey") had appealed under s 78 of the *Town and Country Planning Act 1990* ("the Act") against the refusal of the local authority of planning permission for a residential development on a site on land in Essex. The Secretary of State decided that the appeal would be determined by an Inspector conducting a hearing rather than a full inquiry. The Inspector held a hearing at the Council offices for a full day on 11 April 2012 with a site visit on 12 April 2012. Numerous persons had made written objections to the development however proper notification was not given to those objectors that they were entitled to attend the hearing and make representations if they wished. After it became apparent that the notification had not been given, the Planning Inspectorate decided that it would be necessary for the hearing to be re-run, by the same Inspector. The subsequent hearing on 7 June 2012 was over in half a day with the site visit held in the afternoon. The Inspector allowed the appeal and granted outline planning permission.

A number of the objectors challenged the decision to grant planning permission under s 288 of the Act. The grounds in the objectors' original application essentially challenged the merits of the decision, and Taylor Wimpey applied for summary judgment. The objectors were granted leave, some two and a half months after the expiry of the six week period within which s 288(3) required the application to be brought, to amend the grounds. An appeal from that decision to the Court of Appeal was dismissed. On the hearing of the substantive application before Collins J, the only ground was:

"The [Secretary of State]'s decision was unlawful by reason of procedural unfairness, namely the failure to ensure that all parties were notified of the hearing in accordance with the Town & Country Planning (Hearings Procedure) (England) Rules 2000 and having discovered a complete absence of notification of concerned residents, his failure to re-start the inquiry with a new Inspector."

Collins J quashed the decision of the Inspector, finding that the objectors had been prejudiced in that while they had not been precluded from raising all matters that they wished to raise, the Inspector had had regard to the earlier hearing; that while a different Inspector should have presided over the hearing, the mere fact that it was the same inspector did not of itself mean that the further hearing could not be regarded as fair; and that it was not inevitable that an inspector would reach the same decision on a fresh decision. The Secretary of State appealed on the grounds that the primary judge was wrong to equate the objectors with formal parties in a planning inquiry, and that there was no procedural unfairness or prejudice relating to the second hearing. Taylor Wimpey advanced a third ground, that in any event there was only one realistic outcome to the appeal before the Inspector, and even if there was procedural unfairness it was immaterial.

Issue:

(1) whether the primary judge was right to conclude that there had been a want of procedural fairness that prejudiced the objectors.

Held: allowing the appeal and setting aside the order of the primary judge:

(1) a complaint concerning procedural fairness from persons in the position of the objectors in an appeal under s 78 of the Act determined by way of hearing, rather than a formal planning inquiry, was to be answered by asking whether they had a reasonable opportunity to raise their points in the course of the hearing and, if not, whether they suffered any material prejudice. A reasonable opportunity to raise their points entailed knowing the main points relied upon by those whose plans they were objecting to: at [21], [32];

(2) the evidence demonstrated that the Inspector treated the second hearing as a fresh hearing. There was no issue of which the objectors were not apprised and upon which they had every opportunity to comment: at [23]-[26]; and

(3) it was unnecessary to deal with the third ground raised by Taylor Wimpey that irrespective of what was said by the objectors the result of the appeal would have been the same. It was sufficient to record that

in an environment where planning judgment was engaged and where an inspector reached a different decision from a Council, such an argument was a difficult one: at [31].

Holder v Gedling Borough Council and Charles-Jones [2014] EWCA Civ 599 (Maurice Kay LJ, Patten LJ and Sir Stanley Brunton)

Facts: Gedling Borough Council ("the Council") granted planning permission for the erection of a wind turbine with a maximum height of 66m within the Nottingham Green Belt ("the Green Belt"). The site for the turbine was located on farmland owned by Mr and Mrs Charles-Jones. Under s 70(2) of the *Town and Country Planning Act 1990* (UK) ("the Act"), the Council was obliged to have regard to the "provisions of the development plan, so far as material for the application, and to any other material considerations". Planning Policy Guidance Note 2 ("PPG Note 2") set out the Green Belt policy as follows: "general policies controlling development in the countryside apply with equal force in Green Belts but there is, in addition, a general presumption against inappropriate development within them. Such developments should not be approved, except in very special circumstances" (para 3.1). Special circumstances will not exist unless the harm is "clearly outweighed by other considerations" (para 3.2). As to renewable energy, paragraph 20 of the Supplement to Planning Policy Statement 1 stated that applicants were not required to demonstrate either the overall need for renewable energy, or an energy justification for why a proposal must be sited in a particular location. Paragraph 16 of Planning Policy Statement 22 stated that applications should not be refused solely on the ground that the level of output is small. Prior permissions had been granted for the erection of two wind turbines with 18m high masts, and two ground mounted solar panels, as appropriate development in the Green Belt.

The current planning application was submitted on 11 May 2011. There was substantial objection to the application. The planning application was reported to the Council's Planning Committee on 2 November 2011. The report listed various representations under "Non-material Planning Issues", including: granting permission would set a precedent for further turbine development nearby; the proposed turbine would not generate a significant amount of energy and would be inefficient; the proposal would only benefit the applicant financially; the turbine should be sited elsewhere outside of the Green Belt; and there were other alternative methods of producing renewable energy instead of the proposed turbine. The planning officers accepted that the proposal was inappropriate development in the Green Belt. However, the planning officers considered that the wider economic benefits associated with increased production of energy from renewable sources constituted very special circumstances for the purposes of PPG Note 2. The Committee resolved to approve the application by 10 votes to seven. Mr Holder, a member of Woodborough and Calverton Against Turbines ("WACAT"), made an application for judicial review of the planning permission. The application was dismissed by Parker J. Sullivan LJ granted leave to appeal to the Court of Appeal. The central substantive issue on appeal concerned the ambit of "material considerations" under the Act, and the advice of the planning officers in this regard. Mr and Mrs Charles-Jones also submitted that the Court should stop short of quashing the planning permission, on the basis that the additional material considerations would not have made any difference to the granting of the existing permission, and that it would be contrary to the interests of justice to require them to dismantle the turbine.

Issues:

(1) whether the fact that a grant of planning permission may set a precedent for further developments of the same character was a material consideration;

(2) whether alternatives (in the form of alternative sites and alternative methods of producing energy) were material considerations;

(3) whether the fact that the proposed turbine would not generate a significant amount of energy and would be inefficient was a material consideration; and

(4) whether, even if the grant of planning permission was legally flawed, the Court should exercise its discretion not to quash the planning permission.

Held: (per Maurice Kay LJ, with whom Patten LJ and Sir Stanley Brunton agreed) allowing the appeal and quashing the challenged planning permission:

(1) it was necessary to construe the planning officer's advice having regard to how a reasonable planning decision maker would understand it: at [13]. The use of the heading "Non-material Planning Issues", and the wording that followed, would only be understood by the Planning Committee as meaning that precedent was of no materiality whatsoever: at [13]. However, precedent was a live issue: at [14]. Whilst no two planning applications are exactly the same, a grant of planning permission in this case would undoubtedly be advanced as a precedent in relation to a similar application in the same area: at [15]. The advice that precedent was incapable of achieving material consideration status was simply wrong: at [15]. This, in itself, vitiated the ultimate decision: at [15];

(2) the question of alternatives raised two different considerations: alternative sites, away from the Green Belt, and alternatives on the same site: at [17]. Alternative sites away from the Green Belt were not dwelt on. However, alternatives on the farm were a potential issue: at [17]. In particular, there was the extant planning permission for the two smaller turbines: at [17]. In a case concerning inappropriate development within the Green Belt which could only be justified by very special circumstances, alternatives were a material consideration: at [17]. The fact that very special circumstances had been found in relation to the two significantly smaller turbines located in a different position within the farm did not mean that very special circumstances would also attach to the single significantly larger wind turbine in a different position within the farm: at [17]. It was a legal error to proceed on the basis that it was immaterial that other alternative methods of producing reasonable energy existed: at [17]. It was a factor for the Planning Committee to weigh in the balance: at [17];

(3) it was not accepted that matters such as volume and efficiency were irrelevant and could be left to the working of the market: at [22]. Any consideration of special circumstances must necessarily embrace assessment of the benefit which is likely to ensue: at [22]. It cannot be the case that a very large but unproductive and inefficient installation ranks equally with a small but extremely efficient one: at [22]. Size, efficiency and ability to meet need are all considerations relevant to the issue of very special circumstances. It was legally erroneous for the Planning Committee to have been advised to the contrary and its subsequent decision was vitiated by that error: at [22];

(4) it was not possible for the Court to conclude that there would have been no real possibility of a different outcome or that the decision would have been the same: at [25]. The fact that permission had been granted to two smaller turbines did not militate against a refusal of permission in relation to the current application: at [25]. It was for the Planning Committee rather than the Court to assess whether there were very special circumstances in a case in which the answer is not self-evident and there is a real possibility (which need not amount to a probability) of a different outcome: at [25]. The fact that the policy framework had changed may or may not have made the framework more stringent: at [27]. However, this did not enable the Court to find that the narrowly divided Planning Committee would now, having had regard to all current material considerations grant retrospective permission: at [27]; and

(5) Mr and Mrs Charles-Jones contracted to purchase the turbine and proceeded to erect it at times when they knew that WACAT and Mr Holder were seeking permission to appeal the order of Parker J: at [30]. It was accepted that the consequences of quashing the permission would be detrimental and damaging to Mr and Mrs Charles-Jones: at [31]. However, they were not compelled to act as they did. They chose to and must be assumed to have appreciated the risks: at [31]. There was no good reason why this successful appeal establishing the legal invalidity of the planning permission should leave the appellant without the normal fruits of success: at [31].

- High Court of Australia

Argos Pty Ltd v Corbell, Minister for the Environment and Sustainable Development [2014] HCA 50

Facts: the first appellant holds a lease of Crown land at the Kaleen Local Centre in the ACT. The second appellant is the sub-lessee, and operates a supermarket on that site. The third appellant holds a sub-lease of a Crown lease at Evatt Local Centre, and operates a supermarket on that site. The second respondent lodged a development application for a commercial development, including a supermarket and specialty shops, at the Giralang Local Centre. The first respondent, the Minister for the Environment and Sustainable

Development, made a decision under s 162 of *the* *Planning and Development Act 2007* (ACT) ("the Planning Act") to approve the proposal. The appellants sought judicial review of the Minister's decision under the *Administrative Decisions (Judicial Review) Act 1989* (ACT) ("the ADJR Act"). Under s 5(1) of the ADJR Act a person aggrieved by a decision is entitled to make an application to the Supreme Court of the ACT to have that decision reviewed. Section 3B(1) defines "person aggrieved" relevantly as "(a) a person whose interests are adversely affected by the decision". The Supreme Court of the ACT both at first instance and on appeal held that none of the appellants was a "person aggrieved" by the Minister's decision within the meaning of s 3B of the ADJR Act and on that basis dismissed their applications for judicial review. On appeal, the appellants contended that the owner of a business, who is likely to suffer a loss of profitability from a greater exposure to commercial competition as a result of the Minister's decision, is a person aggrieved for the purpose of seeking judicial review of that decision. The primary judge and the Court of Appeal had accepted, as a fact, that the approval of the proposal would adversely affect the profitability of the businesses owned and operated by the second and third appellants. That finding was not challenged on the appeal to the High Court.

Issue:

(1) whether any of the appellants was a person aggrieved.

Held: finding that the second and third appellants were entitled to seek review of the Minister's decision and (by majority) that the first appellant was not, and remitting the matter to the Court of Appeal to determine the grounds related to the merits of the appeal:

(1) per French and Keane J:

(a) in the application of s 3B(1)(a) of the ADJR Act, judgments of fact and degree may be required. The judgments of fact and degree may conveniently be expressed in terms of directness or remoteness or proximity. But those terms are expressions of conclusionary judgments. Once it is shown on the balance of probabilities that the second and third appellant would suffer a not insignificant loss of profitability in their businesses, no further inquiry as to directness or remoteness or proximity was required in order to determine whether their interests were adversely affected by the decision in question. The adverse effect on their interests was sufficient to support the conclusion that they were persons aggrieved for the purposes of s 3B(1)(a) of the ADJR Act: at [37]-[40]; and

(b) the test for standing for review of a decision under the ADJR Act was expressed in that Act. The text of the criterion, that the applicant must be "a person aggrieved", did not on its face allow for its expansion or contraction according to the scope and purpose of the enactment under which the decision was made. It was not to be read or applied with reference to normative considerations based on the policy of the enactment. To do so by reference to individual enactments would undermine an important purpose of the ADJR Act, which was to simplify judicial review processes: at [42]; and

(c) consistently with that proposition it would be necessary to have regard to the enactment under which the impugned decision was made and the legal effect and operation of the decision in order to determine how the interests of the applicant for review might be adversely affected or the applicant otherwise a person aggrieved: at [43];

(2) per Hayne and Bell JJ:

(a) in construing the words of s 3B(1)(a) regard had to be had to the subject matter, scope and purpose of the ADJR Act. However content could not be given to that expression, in its application to a particular decision, without regard to the subject-matter, scope and purpose of the Act under which the decision was made and the proper construction of that Act. Only then could the relationship between the impugned decision and the interests said to be affected adversely be properly identified: at [66]; and

(b) at the time of the approval the planning controls for Local Centres required consideration of any significant adverse impact on other commercially viable local centres. The respondents' submissions that the economic interests of the second and third appellants were in some way foreign to the Planning Act, or to the subject-matter, scope and purposes of that Act, could not be sustained: at [72]; and

(3) per Gageler J:

(a) the ADJR Act permits a person whose interests are adversely affected by a purported decision of an administrative character, made outside the subject-matter, scope or purposes of the enactment under which it was purported to be made, to seek an order setting it aside or declaring it invalid. The ADJR Act would be self-defeating were the person denied that permission on the basis that the interests of the person so affected were themselves outside the subject-matter, scope or purposes of the same enactment. The argument of the Minister that the interests to which the ADJR Act refers are limited to those which fall within the subject-matter, scope and purposes of the particular enactment under which the decision was made or purported to be made, must for that reason be rejected in principle : at [79]-[80]; and

(b) having found that the decision would likely have an adverse effect on the profitability of the second and third appellants, and to have the potential adversely to affect the profitability of the first appellant, the primary judge was wrong to dismiss those interests as too remote to allow each of the appellants properly to be characterised as a person whose interests were adversely affected by the decision. The effect of the decision on the economic interests of each appellant was shown to be both real and of an intensity and degree well above the effect of the decision on an ordinary member of the public. Each was shown to be a person whose interests were adversely affected by the decision: at [91].

- NSW Court of Appeal

Davis v Gosford City Council [2014] NSWCA 343 (Beazley P, Ward JA and Preston CJ of LEC)

(related decisions: *Davis v Gosford City Council* [2012] NSWLEC 62 Lloyd AJ, *Davis v Gosford City Council* [2013] NSWLEC 49 Pepper J, *Davis v Gosford City Council* [2012] NSWLEC 1329 Brown C and Fakes C)

Facts: the appellants applied for development consent under the *Environmental Planning and Assessment Act 1979* (NSW) ("EPA Act") for an integrated resource recovery facility on their land at Somersby. The appellants' proposed development involved clearing native vegetation that was habitat for, amongst other flora and fauna, a threatened species of fauna, the Eastern Pygmy Possum. If the development was in respect of land that was, or was part of, critical habitat or was likely to significantly affect threatened species, populations or ecological communities, or their habitats: (a) the development application was required to be accompanied by a species impact statement ("SIS") under s 78A(8)(b) of the EPA Act; and (b) development consent could not be granted without the concurrence of the Director-General of the former Department of Environment, Climate Change and Water under s 79B(3) of the EPA Act. The appellants' development application was accompanied by an environmental impact statement ("EIS"), but not a SIS. The EIS included a flora and fauna assessment report that concluded that the proposed development was not on land that was, or was part of, critical habitat and was not likely to significantly affect threatened species, populations or ecological communities, or their habitats, including the Eastern Pygmy Possum. The respondent, Gosford City Council, refused consent on the ground that a SIS was required. The appellants challenged by judicial review the council's refusal. The Land and Environment Court declared the council's refusal null and void, holding that a SIS was not required because the proposed development was not likely to significantly affect threatened species, including the Eastern Pygmy Possum. The appellants also appealed against the deemed refusal of the development application to the Court under s 97 of the EPA Act. The appeal was dismissed by two Commissioners of the Court and consent refused. The appellants appealed against the decision of the Commissioners on questions of law under s 56A(1) of the *Land and Environment Court Act 1979* (NSW). This appeal was dismissed by a judge of the Court. The appellants sought and were granted leave to appeal to the Court of Appeal on two matters.

Issues:

(1) whether the Commissioners and the Court below erred on the standard or degree of impact on the threatened species required to be demonstrated before a development application could be refused on that ground and the method of assessment of that impact that is permitted by the EPA Act; and

(2) whether the Commissioners failed to consider the Director-General's concurrence and the Court below erred in not correcting that failure.

Held: (Preston CJ of LEC, with whom Beazley P and Ward JA agreed) determining that the Commissioners and the Court below did not err on questions of law and dismissing the appeal:

In relation to (1):

(1) the appellants' construction of s 79C(1)(b) of the EPA Act, that an effect on threatened species, populations or ecological communities, or their habitats, which was not likely to be a significant effect, was not a relevant matter for evaluation under s 79C(1)(b) and could not found a ground of refusal of consent, was erroneous: at [73];

(2) the head of consideration in s 79C(1)(b) was expressed in words of high generality and encompassed all likely impacts of the development on the natural environment, including on threatened species, populations or ecological communities, or their habitats: at [74];

(3) the context of s 79C(1)(b) did not support the appellants' narrow construction. The likely effects of the development on threatened species, populations or ecological communities, or their habitats, may also arise for consideration elsewhere under s 79C(1), including under the chapeau requiring determination of the development application and the other generic heads of consideration: at [75]-[85];

(4) the reference to s 79C in the chapeau of s 5A(1) of the EPA Act did not demand construing s 79C(1)(b) in the manner contended for by the appellants: at [86];

(5) section 5A only applies in deciding "whether there is likely to be a significant effect on threatened species, populations or ecological communities, or their habitats". The EPA Act uses this statutory formulation for three purposes: first, to decide whether a SIS needs to be prepared; second, as a head of consideration; and third, to decide whether there needs to be consultation with or the concurrence of a public authority: at [86]-[91]. Section 5A provides matters that must be taken into account in deciding whether the statutory formulation is satisfied for these purposes: at [92];

(6) section 5A does not apply and the factors and assessment guidelines in s 5A provide no assistance for purposes other than to decide whether the likely effects of the development on threatened species, populations or ecological communities, or their habitats, attain the threshold of being 'significant': at [94], [115];

(7) section 79C and the other sections to which particular reference is made in s 5A(1) all employ, directly or indirectly, the statutory formulation for one of the three purposes: at [95]. The factors and assessment guidelines in s 5A are used in the administration of the sections to decide whether the statutory formulation is satisfied for the various purposes of the sections: at [96];

(8) this construction of s 5A and s 79C is supported by the legislative history: at [97]-[113]; and

(9) an effect on threatened species, populations or ecological communities, or their habitats, that is not likely to be a significant effect, is not an irrelevant matter for evaluation under s 79C(1): at [114].

In relation to (2):

(10) the Commissioners and the Court below did not err by not considering or giving effect to any concurrence of the Director-General under s 79B(3): at [135];

(11) the prohibition in s 79B(3) on the grant of development consent only applies, and the precondition to obtain the concurrence of the Director-General need only be satisfied, where the development is on land that is, or is part of, critical habitat, or is likely to significantly affect a threatened species, population or ecological community, or its habitat: at [118];

(12) as the appellants' development had been held by the Court not to have either of these consequences, the Director-General had no power to grant concurrence, or to inform the consent authority that concurrence could be assumed, to the grant of development consent: at [120], [121];

(13) there was no concurrence of the Director-General, actual or assumed, which the consent authority could consider or give effect to: at [122]; and

(14) there was no statutory obligation for the consent authority to consider, or to give effect to, a written notice of the Director-General informing the consent authority that concurrence may be assumed, if the preconditions in s 79B(3) for the grant of concurrence were not satisfied: at [125].

Health Administration Corporation v George D Angus Pty Ltd [2014] NSWCA 352 (Emmett JA, Leeming JA and Tobias AJA)

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

Facts: the appellant, Health Administration Corporation ("the Corporation"), compulsorily acquired a parcel of land known as 10 Yabtree Street, Wagga Wagga ("the Yabtree St land"). The registered owner of the land was Benantra Pty Ltd ("Benantra"). The respondent, George D Angus Pty Ltd ("GDA"), occupied the Yabtree St land under a tenancy agreement with Benantra. The sole director of GDA was Dr Angus. GDA a provided gynaecological and obstetric services from its premises on the Yabtree St land through Dr Angus. The Yabtree St land was a five-minute walk to Wagga Wagga Base Hospital and Calvary Hospital. This attribute of the land was of special advantage to Dr Angus, as it enabled him to attend to obstetric patients in either hospital within five minutes. In September 2011, GDA relocated its practice from the Yabtree St land to leased premises at 90 Peter Street, Wagga Wagga ("the Peter St land"). This relocation incurred financial costs to GDA. The Peter St land was physically more distant from both hospitals. Because of this distance, Dr Angus considered that the risk for obstetric patients was unacceptable. Therefore, following the relocation to the Peter St land, Dr Angus ceased providing obstetric services for GDA, and restricted himself to providing gynaecological services. This resulted in a decline in the income and profitability of GDA. GDA, through Dr Angus, provided gynaecological services at the Peter St land from 23 September 2011 to 14 June 2013, when the practice ceased. GDA then commenced a new practice in Newcastle, where GDA only provided obstetric services. Financial costs were incurred in connection with this relocation.

GDA made a claim for compensation under the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) ("the JT Act"). The Corporation offered GDA $287,815 for compensation for disturbance losses. GDA lodged an objection to this amount of compensation with the Land and Environment Court under s 66(1) of the JT Act. GDA contended that the amount of compensation to which it was entitled should be assessed having regard only to losses attributable to disturbance under s 55(d) of the JT Act. The claimed losses included the financial costs incurred in connection with both relocations (under s 55(c) of the JT Act), and loss of income or profit from GDA's business at both locations compared to the income or profit GDA would have earned at the Yabtree St land (under s 55(f) of the JT Act). The Corporation submitted that the nature of GDA's interest in the land was a leasehold interest, determinable on one month's notice, which limited the amount of compensation to which GDA was entitled. The Corporation also submitted that: GDA was only entitled to financial costs incurred in connection with the first relocation, and not the second relocation; and GDA was not entitled to the claimed loss of income or profit. The Land and Environment Court held that: GDA's entitlement to compensation for the extinguishment of its interest in the Yabtree St land crystallised at the time the land was compulsorily acquired by the Corporation; and GDA was entitled to an aggregated amount of compensation which incorporated, first, the financial costs reasonably incurred in connection with the first relocation (under s 55(c) of the JT Act) and, secondly, the loss of income or profit GDA suffered at the Peter St land (under s 55(f) of the JT Act). The Court held that the loss of income or profit was a financial cost reasonably incurred, relating to the actual use of the land, as a direct and natural consequence of the acquisition. The Corporation appealed the decision on the basis that: "financial costs" in s 59(f) of the JT Act meant only expenditure and did not include financial losses; any loss or potential loss of income could only be assessed as special value of the land under s 57 of the JT Act and not under s 55; and, because the interest the Corporation acquired from GDA was a statutory tenancy determinable at will by one month's notice in writing, GDA was only entitled to compensation for the loss of one month's income.

Issues:

(1) whether the primary judge erred in the construction and application of s 55(a) and s 59(f) of the JT Act in holding that GDA's claim for lost income was compensable under s 59(f); and

(2) having found that GDA's interest in the land that had been compulsorily acquired was a statutory tenancy at will created by s 127 of the *Conveyancing Act 1919* determinable by one month's notice in writing expiring at any time, whether the primary judge erred:

(a) in not determining compensation for loss attributable to disturbance pursuant to s 55(a) and s 59(f) of the JT Act as being compensation for those financial costs incurred as a direct and natural consequence of the termination of GDA's interest without first being given one month's notice; and

(b) in taking account of the fact that, but for the compulsory acquisition, Benantra would not have determined the tenancy.

Held: (Tobias AJA, with whom Emmett and Leeming JJA agreed) dismissing the appeal with costs:

In relation to (1):

(1) prior to the commencement of the JT Act, loss due to disturbance was not a separate head of compensation, as it now is under the JT Act. As a result, cases dealing with statutory language operating prior to the enactment of the JT Act could not be relied upon in construing the provisions of the JT Act entitling compensation for loss due to disturbance: at [47]-[52];

(2) loss of income and/or profits due to disturbance could not be compensated as part of special value, as that head of compensation is now separately and differently defined in s 57 of the JT Act: at [53]-[60]. This interpretation was supported by the decision of the NSW Court of Appeal in *Tolson v Roads and Maritime Services* [2014] NSWCA 161: at [57];

(3) the correct construction of s 59(f) of the JT Act was that the expression "financial costs" included financial losses and was not limited to expenditure: at [61]-[63]. The primary judge's construction of s 59(f) did not involve compensating an owner for business losses or foregone profits by capitalising them: at [62]; and

(4) given that the authorities before the commencement of the JT Act permitted the recovery of disturbance losses such as loss of trade or production during the period of relocation, it would be odd in the extreme if such losses could no longer be recovered because no expenditure was involved: at [63]. The primary judge was correct in finding that GDA was entitled to recover compensation for the lost or foregone net income it sustained as a direct and natural consequence of the acquisition of its interest in the Yabtree St land: at [63].

In relation to (2):

(5) the terms and limitations of GDA's interest in the Yabtree St land were relevant to the assessment of the market value of the interest acquired, but not to the assessment of any loss attributable to post-acquisition disturbance: at [69];

(6) as GDA's tenancy was terminable on one month's written notice, it had no market value: at [70]. But the fact that it was compulsorily acquired thereby converted the relevant interest into an entitlement to claim compensation in accordance with the Act: at [70]. That acquisition gave rise to loss attributable to disturbance where that loss related to the actual use of the land and was reasonably incurred as a direct and natural consequence of the acquisition: at [70]. That consequence was triggered by the compulsory extinguishment of an interest in the land as defined: at [70];

(7) the respondent's disturbance costs were triggered by the extinguishment of its interest in the Yabtree St land but were not referable to it: at [71]. On the contrary, those losses were referable to the actual use of the land as a direct and natural consequence of its acquisition: at [71]; and

(8) the primary judge found that GDA's tenure was secure for as long as it wished to carry on an obstetrics and gynaecological practice upon the Yabtree St land and that it was reasonable for it to recover its losses for a period of up to two years: at [73]. These were findings of fact: at [73]. Unless the Corporation could demonstrate an error of law on the part of the primary judge in making those findings, they were incapable of challenge. No such error was demonstrated: at [73].

Sertari Pty Ltd v Quakers Hill SPV Pty Ltd [2014] NSWCA 340 (McColl and Barrett JJA, Tobias AJA)

(related decisions: *Sertari Pty Ltd v Quakers Hill SPV Pty Ltd* [2013] NSWLEC 208 Pain J, *Quakers Hill SPV Pty Ltd v Blacktown City Council* [2013] NSWLEC 1133 Dixon C, *Nirimba Developments Pty Ltd v Blacktown City Council* [2008] NSWLEC 1229 Murrell C)

Facts: Quakers Hill SPV Pty Ltd ("Quakers Hill") has the benefit of a right of way ("ROC") over part of land owned by Sertari Pty Ltd ("Sertari"). In 2006 development consent was granted for a residential flat building on Quakers Hill's land. In 2008 Murrell C granted consent for the use of the ROC subject to conditions including a deferred commencement condition requiring Quakers Hill to prepare and submit to the council for its approval a Pedestrian Management Plan ("PMP") for provision of a safe pedestrian path of movement between the Quakers Hill land and the Quakers Hill railway station. Murrell C's judgment annexed figure 2 which identified two alternative pedestrian routes including on railway land outside the ROC. Quakers Hill submitted a PMP to the council, and appealed against the deemed refusal of council's satisfaction of the deferred commencement condition. By the time of the Class 1 appeal the pedestrian pathway within the railway land was no longer available. Three versions of the PMP were tendered in the appeal and Dixon C approved the third option which involved pedestrians and vehicles sharing the ROC. Dixon C upheld the appeal and ordered that the application seeking the council's satisfaction of the deferred commencement condition be approved. Sertari was joined as a party in the Class 1 appeal, and appealed pursuant to s 56A of the *Land and Environment Court Act* 1979 ("the LEC Act"). That appeal was dismissed, and Sertari sought leave to appeal under s 57 of the LEC Act.

Issues:

(1) whether there was jurisdiction to approve a PMP which provided for shared access for pedestrians and vehicles over the ROC; and

(2) whether it was necessary to refer to the development application and other documents, or the judgment of Murrell C, in order to determine what was approved in the 2008 development consent.

Held: (Tobias AJA, with whom McColl and Barrett JJA agreed) granting leave to appeal, dismissing the appeal and ordering the applicant to pay the first respondent's costs of the summons for leave to appeal and the appeal:

(1) all extrinsic considerations and the judgment of Murrell C pointed in the direction that, viewed objectively, the Commissioner did not intend to proscribe use of the ROC for pedestrian access to the development on Quakers Hill's land; nor did she intend that the only safe pedestrian paths of movement were the routes identified in Figure 2; nor did she only approve of the route within the railway land. The Commissioner clearly left the matter open to be determined upon a detailed PMP being prepared and approved: at [83];

(2) it was unnecessary to determine whether recourse could be had to Murrell C's reasons, because even if it were the reasons did not support the proposition that Murrell C approved a particular pedestrian path of movement which did not involve pedestrian use of the ROC: at [87];

(3) when the orders of the Court were read together, what was being approved in 2008 was an application to use the ROC for the benefit of the Quakers Hill land. That use extended to both vehicle and pedestrian use and there was no reason to limit it by reference to any other document. It could not be said that the form of application let alone the accompanying documents were incorporated into the consent the subject of Murrell C's orders expressly or by necessary implication: at [88]; and

(4) even if the application had only sought consent to the use of the ROC for vehicular traffic it followed that Murrell C's order only extended to granting consent to vehicular use of the ROC, which left the issue of pedestrian access at large. How that was achieved was a matter for the preparer of the PMP subject to its approval by the nominated council officer or the Court on appeal. As the Commissioner could only approve the development for which consent was sought, it also followed that she could not have proscribed the use of the ROC as a pedestrian path of movement for the purpose of the PMP: at [90]-[92].

Dansar Pty Ltd v Byron Shire Council [2014] NSWCA 364 (Macfarlan, Meagher and Leeming JJA)

(related decision: *Dansar Pty Ltd v Byron Shire Council* [2013] NSWSC 17 McCallum J)

Facts: Byron Shire Council ("the council") was both the development consent authority and the water and sewerage authority for the Byron Shire. In mid 2000 a council officer assessed that there was spare capacity in the West Byron Sewage Treatment Plant ("STP"). At its meeting in September 2000 the council noted that the STP had an unused capacity available for allocation to applicants for development approval. On 6 February 2001 Dansar Pty Ltd ("Dansar") lodged a development application for residential development. On 27 February 2001 the council's senior development engineer stated in a memorandum that some of the previously identified spare capacity had been allocated to various approved development applications and that the allocations required to satisfy further applications that had been lodged with the council exceeded the balance of the spare capacity. On 1 March 2001 the Mayor issued a media release stating that the development applications the council was processing would consume the remaining capacity of the STP and that any spare capacity that emerged would be allocated on the basis of date of receipt. The council passed a resolution to that effect on 24 April 2001. In August 2001 Dansar appealed to the Land and Environment Court ("LEC") against the deemed refusal of its development application. The council raised as an issue in those proceedings that there was insufficient capacity to satisfy the sewerage need for the development, and that prior adequate arrangements for the provision of services had not been made as required by cl 45 of Byron Local Environmental Plan 1988 ("the LEP") as a precondition for the granting of development consent. The appeal was dismissed by the LEC. In 2002 Dansar lodged new development applications for the same development. On 29 April 2004 the council advised that there was availability of the original capacity as determined in March 2001, and Dansar's applications were approved in 2005. It was common ground on the appeal that at all material times sufficient of the total spare capacity identified in 2001 remained available to accommodate Dansar's proposed development application, and that errors had been made in continuing allocations for applications that had been withdrawn or that did not require an allocation and in double counting for other applications. In 2007 Dansar commenced proceedings against the council alleging that the council had breached a duty of care owed to Dansar, claiming damages for economic loss suffered as a result of delay in approving the development application. Dansar claimed that but for that breach of duty it would have been allocated the required sewerage capacity and received development approval at some time between December 2001 and February 2002.

The primary judge held that the council did not owe the posited duty of care and entered judgment for the council. Dansar appealed. In its statement of claim Dansar framed the alleged duty of care as being a duty to give proper consideration when the time came to determine the development application to whether sufficient capacity existed at the STP, and that when giving consideration to its application the council had a duty of care to act upon information which was properly and soundly based and accurate and reasonable in its conclusions as to the existing spare capacity of the STP at time. On the appeal Dansar formulated the alleged duty more narrowly, distinguishing between, on the one hand, the exercise of deciding whether there was available capacity and if so, how that capacity was to be allocated, and on the other hand the task of implementing that decision. The more narrowly formulated duty was said only to apply to the task of implementation, to have arisen once the decision as to capacity was made and to have applied for as long as that decision was adhered to. Dansar accepted that the duty did not extend to the making of any decision about capacity and how it might be distributed, and nor did it require that at any relevant time the council adhere to any earlier decision as to the availability of capacity or as to how that capacity should be allocated.

Issue:

(1) whether the council owed Dansar a duty of care.

Held: (Meagher and Leeming JJA; Macfarlan JA dissenting) dismissing the appeal with costs:

(1) (Meagher JA, Leeming JA agreeing): the function in relation to which it was said the council owed a duty of care was that of deciding whether to increase the permanent load on the treatment works by the amount of capacity required for Dansar's development. That question arose in the context of its determining whether to approve that development. The council undertook that function between December 2001 and February 2002. There were two particular matters to which it had to give attention: whether, as sewage authority, it should allocate capacity and consent in principle to the development

being connected to the public sewer, and secondly, whether, as consent authority, it was satisfied that there was an arrangement within cl 45 of the LEP: at [160];

(2) (Meagher JA, Leeming JA agreeing): those questions had to be addressed consecutively and the answer to the second was dictated by the answer to the first. In addressing the first the council had to give paramount consideration to the safety and continued operation of the treatment facilities, maintaining public health and protecting the environment. That obligation and the interests to which the council was to have regard were incompatible with the existence of a private law duty to take reasonable care to avoid economic loss to a developer resulting from refusal of or delay in its development approval: at [161];

(3) (Meagher JA, Leeming JA agreeing): that incompatibility was not avoided by restricting the duty to what was described as the "mechanical" task of allocation. When the council was considering Dansar's application in the period from December 2001 it remained subject to those statutory obligations: at [162];

(4) (Meagher JA, Leeming JA agreeing): the primary judge was correct to conclude that there was a disconformity between the alleged duty of care and the council's statutory functions and obligations and that the existence of such a duty would be inimical to the unimpeded exercise of those functions: at [163];

(5) (Meagher JA, Leeming JA agreeing): the primary judge was correct to conclude that there was no relevant reliance, no assumption of responsibility and no vulnerability in the relevant sense: at [164];

(6) (Leeming JA): in determining whether the duty for which Dansar contended existed it was necessary to ask whether the council was exercising its functions under the *Environmental Planning and Assessment Act* 1979 ("EPA Act") (responding to a particular application for consent by a landowner), or its functions as a sewerage authority implementing spare sewerage capacity in accordance with a resolution reflecting an evaluation of competing and diverse interest (such as the existing demand, the environmental impacts and compliance with council's EPA licence). The function of entering into an "adequate arrangement" was outside the functions exercised in a Class 1 appeal by the LEC pursuant to s 39(2) of the *Land and Environment Court Act* and therefore distinct from the council's functions under the EPA Act: at [190];

(7) (Leeming JA): accepting that Dansar's application for development consent necessarily amounted to its seeking an arrangement for provision of sewerage, where the council had no duty in formulating, from time to time, the policies it would put into place for allocating the limited sewerage capacity which necessarily were approximate, contestable and liable to change at any time and without notice, it was difficult to see how there could be a duty to take reasonable care in the implementation of those policies so as to avoid pure economic loss: at [191];

(8) (Macfarlan JA, dissenting): the council did not remain bound to adhere to its figure of available capacity and it was at all times open to the council to take a different judgmental or policy view about the available capacity and to act upon it. So long as it adhered to that figure, the council was subject to a common law duty of care in the operational task of allocating available capacity to developments for which approval was sought: at [73];

(9) (Macfarlan JA, dissenting): the statutory framework was not inconsistent with the posited duty of care: at [83]; and

(10) (Macfarlan JA, dissenting): the element of reliance was there, and Dansar was vulnerable, at least because it had no effective right of appeal it not having the knowledge of the council's steps in allocating the spare capacity that would have enabled it to know that it had cause for complaint. Other factors favouring the imposition of a relevant duty of care were that Dansar and the council were by reason of the lodgement of the development application and the council's responsibility to deal with it, in a close "one-to-one" relationship and the likelihood of Dansar suffering harm from the absence of or delay in approving its development application would have been readily foreseeable to a reasonable council in the position of the respondent: at [85], [86].

Burwood Council v Ralan Burwood Pty Ltd (No 3) [2014] NSWCA 404 (McColl and Barrett JJA, Sackville AJA)

(related decisions: *Burwood Council v Ralan Burwood Pty Ltd* [2013] NSWLEC 173 Sheahan J, *Burwood Council v Ralan Burwood Pty Ltd (No 2)* [2014] NSWCA 179 Sackville AJA)

Facts: Burwood Council ("the council") commenced proceedings pursuant to s 123 of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act") in the Land and Environment Court ("LEC") seeking declarations that the design and construction of a major residential and commercial development in the centre of Burwood were inconsistent with the development consent as modified granted for the project ("DA"), and that construction certificates ("CCs") issued by private certifiers in respect of the development were void and of no effect. The council sought orders requiring rectification works intended to make the building conform more closely with the DA. The respondents to the proceedings in the LEC were Ralan Burwood Pty Ltd ("Ralan"), the owner of the site, and the two accredited certifiers who issued the impugned CCs. The primary judge found that Ralan could not be held responsible for carrying out the development of the property otherwise than in accordance with the DA, on the basis that any breach could not be sheeted home to Ralan; and that in any event, the CCs were not inconsistent with the DA. The primary judge held that the CCs were valid and dismissed the summons.

The council appealed. Mr O'Dwyer, the sole director of Ralan, was joined as fourth respondent, and the Owners Corporation created by virtue of the registration of the strata scheme in respect of the development was fifth respondent. Representative orders were made to enable owners and occupiers of the strata lots to be joined as a party to the appeal or to make submissions; no owner or occupier took advantage of that opportunity.

On the appeal the council maintained the same arguments as to the invalidity of the CCs, and submitted that Ralan had carried out the development not in accordance with the consent, and thus in breach of s 76A(1)(b) of the EPA Act, and had erected the building in breach of s 81A(2)(a) of the EPA Act, which provides that erection of a building must not be commenced until a CC for the building work has been issued by the consent authority, the council or an accredited certifier. The grounds of appeal were that the primary judge had erred in failing to make findings on crucial factual issues and in failing to give adequate reasons for concluding that Ralan had not breached the EPA Act; that the primary judge had erred in failing to find three of the CCs void and of no effect; and challenged the primary judge's finding that orders could not be made against Ralan because it could not be held responsible for any breach of the EPA Act that may have occurred, and the primary judge's finding that had the council's substantive claims been made out, it would be inutile to grant the relief sought by the council. Ralan filed a Notice of Contention, on two grounds: that even if there was a breach of the requirements of s 109F of the EPA Act in issuing any of the CCs, such a breach did not give rise to invalidity of the CC; and that even if there was a breach of s 109F and even if Ralan was held to have carried out development, by reason of s 109P of the EPA Act Ralan had not carried out development in breach of s 76A(1)(b) of the EPA Act and had not carried out development in breach of s 81A(2)(a) of the EPA Act.

It was common ground that there were some obvious differences between the design and construction of the facade of the building contemplated by the DA and the design and construction of the facade contemplated by the CCs. Section 109F of the EPA Act relevantly provides:

> "(1) A construction certificate must not be issued with respect to the plans and specifications for any building work ... unless:
>
> (a) the requirements of the regulations referred to in section 81A(5) have been complied with, and
>
> (b) any long service levy payable under section 34 of the Building and Construction Industry Long Service Payments Act 1986 (or, where such a levy is payable by instalments, the first instalment of the levy) has been paid.
>
> (1A) A construction certificate has no effect if it is issued after the building work ... to which it relates is physically commenced on the land to which the relevant development consent applies".

Clause 145 of the Environmental Planning and Assessment Regulation 2000 ("the Regulation") relevantly provides:

"A certifying authority must not issue a construction certificate for building work unless:

...

(a) the design and construction of the building (as depicted in the plans and specifications and as described in any other information furnished to the certifying authority under clause 140) are not inconsistent with the development consent, and

(b) the proposed building (not being a temporary building) will comply with the relevant requirements of the Building Code of Australia (as in force at the time the application for the construction certificate was made)."

Issues:

(1) whether the primary judge erred in finding that Ralan could not be said to have carried out the development on the property in breach of the EPA Act because it was not responsible for any breach that occurred;
(2) whether the primary judge erred in finding that the plans and specifications furnished to the certifying authority and approved in the CCS were not inconsistent with the DA; and
(3) whether, on the assumption that the plans and specifications were inconsistent with the DA, the CCs were issued in breach of cl 145 of the Regulation and s 109F of the EPA Act and invalid.

Held: (Sackville AJA, with whom McColl and Barrett JJA agreed) dismissing the appeal (for reasons different from those of the primary judge) with costs:

(1) the primary judge erred in finding that Ralan could not be said to have carried out the development on the property in breach of the EPA Act. Ralan was not simply the owner of the property otherwise uninvolved in the development carried out: Ralan instigated and planned the project, engaged the contractors, retained possession of the property subject to the contractual rights of the contracted builder, and benefited from completion of the project: at [139];
(2) there was no warrant in the language of ss 123 and 124 of the EPA Act for importing a test of knowing involvement in a contravention: at [140];
(3) in construing cl 145 of the Regulation, the ordinary meaning of “inconsistent” includes “lacking in harmony between different parts or elements” or “self-contradictory”; “discrepancy” or “incongruity”. There was no reason to think that the expression “not inconsistent” was used in anything other than its ordinary meaning, and the primary judge should have directed attention to whether the two sets of specifications were inconsistent, in the sense of lacking harmony between different elements or lacking congruity: at [147];
(4) the primary judge’s finding that the plans and specifications furnished to the certifying authority and approved in the CCs were not inconsistent with the DA was affected by two errors: first, in the absence of findings as to the nature and extent of the variations, the primary judge did not provide adequate reasons for the finding; and secondly, insofar as the primary judge construed cl 145 of the Regulation, he did not apply the correct test for determining whether the two sets of plans and specifications were “not inconsistent”: at [151];
(5) the scope and object of the legislation, construed as a whole, did not require a CC issued in breach of s 109F(1)(a) or in breach of cl 145(1) of the Regulation to be held invalid: at [166];
(6) section 109P operates to limit liability to third parties of a person who exercises functions under the EPA Act, such as a council or consent authority or an accredited certifier. Ralan had the benefit of the DA and the CCs, and if valid, they rendered lawful conduct which otherwise would or might be in breach of the EPA Act. Ralan certainly was acting pursuant to a development consent and CCs granted by a body or individual exercising a power, authority or duty under the EPA Act, but Ralan itself was not exercising a power, authority or duty under that Act: at [196];
(7) an accredited certifier issued the CCs and they were valid, at least until set aside. The plain words of s 80(12) had the effect of deeming the plans and specifications issued by the accredited certifier with respect to the CC to be part of the DA. To the extent that there was an inconsistency between those plans and specifications and the plans and specifications approved in the DA, the former must prevail: at [202]; and
(8) the primary judge erred in finding that the CCs were not inconsistent with the DA, and in finding that Ralan could not be held responsible for any failure to carry out the development in accordance with the EPA Act. On the assumption that the CCs were inconsistent with the DA and had been issued in

breach of s 109F(1)(a) of the EPA Act, the CCs were nonetheless valid. The effect of s 80(12) of the EPA Act was that the approved plans and specifications issued with respect to the CCS formed part of the DA; and Ralan was therefore not in breach of s 76A of the EPA Act: at [206].

Arnold v Minister Administering the Water Management Act 2000 [2014] NSWCA 386 (Meagher and Barrett JJA, Tobias AJA)

(related decision: *Arnold v Minister Administering the Water Management Act 2000 (No 6)* [2013] NSWLEC 73 Biscoe J)

Facts: in 2006 the respondent Minister made a Water Sharing Plan ("the Plan") for the Lower Murray Groundwater Source ("the Source") pursuant to s 50(1) of the *Water Management Act 2000* ("the WM Act"), to take effect on 1 November 2006 and cease on 30 June 2017. The effect of the Plan was that over time existing entitlements to extract groundwater were to be reduced by 68 percent in order to achieve a long term extraction limit equal to the estimated sustainable yield for the Source. The extraction limit at the commencement of the Plan exceeded the longer term extraction limit of 83.7 GL/year by a considerable degree, and the Plan provided for supplementary water licences which would gradually be reduced until 30 June 2016, and at that point the extraction limit of 83.7 GL/year would become operative. The Plan's extraction limit of 83.7 GL/year was derived from the sustainable yield estimated in a model prepared by Ecoseal ("the Ecoseal model"). The Ecoseal model was prepared in 2001 on behalf of the Department of Land and Water Conservation ("the Department"), and adjusted to take into account certain flaws identified by Departmental staff. In 2002 a firm of hydrogeological consultants called Aquaterra identified further flaws in the Ecoseal model, and stated that while the Ecoseal report was of a high standard, the sustainable yield values stated in the report and modified by departmental staff were not sufficiently robust to be permanently adopted at that time. The Minister subsequently established the Murray Groundwater Management Committee ("MGMC") as an advisory body under s 388 of the WM Act. The MGMC discussed whether it should commission a formal socio-economic study in relation to the proposed plan, and whether it was possible to conduct a farm-by-farm analysis of its impact; no consensus was reached as to the methodology for such a study, and no study was conducted. The MGMC considered the ways in which the effects of the proposed reduction in entitlements could be minimised or distributed more fairly between licence holders. After the public exhibition of the draft plan the MGMC recommended that a socio-economic study to investigate the impact of entitlement reduction on the viability of affected farms be carried out during the first five years of the Plan. A departmental officer involved in the development of the Plan, Mr Jacobs, provided a submission to the Minister stating that the Plan did not provide for variation of the sustainable yield or environmental water provisions during the duration of the Plan for a number of reasons, including that the Source "has the best hydrological model available presenting a high confidence in groundwater recharge as set out in the Plan".

About 113 farmers affected by reductions in their entitlements instituted proceedings in the Land and Environment Court seeking judicial review of the decision to make the Plan. The application was dismissed at first instance, and the applicants appealed.

Issues:

(1) whether the Minister had failed to comply with a mandatory requirement under the WM Act to consider sustainable yield and recharge, which in turn required a sound and reliable numerical groundwater model in order to calculate the correct recharge and sustainable yield;

(2) whether the Minister's decision to make the Plan was manifestly unreasonable because the extraction limit of 83.7GL/year was based on the Ecoseal model which was so flawed that it was irrational to adopt it;

(3) whether the Minister's decision was invalid because he received misleading information as to the quality of the Ecoseal report in the form of Mr Jacobs' submission; and

(4) whether the Minister failed to consider the socio-economic impacts of proposals considered for inclusion in the draft Plan by neglecting to undertake a formal socio-economic study or a farm-by-farm analysis of the proposed Plan.

Held: (Tobias AJA, with whom Meagher and Barrett JJA agreed) dismissing the appeal with costs:

(1) it was impossible to tease out of the provisions of the WM Act on which the appellants relied a mandatory requirement that before making of a management or water sharing plan which provides for a sustainable yield or recharge, the Minister was bound to consider a sound numerical hydrological model; nor could such a mandatory requirement be implied from a consideration of the subject matter, scope and purpose of the WM Act as a whole: at [84];

(2) the objects in s 3 and the water management principles in s 5 of the WM Act were stated in too general terms to enable one to divine from them a mandatory obligation of the nature of that contended for. Even if it be accepted that such modelling was desirable, it was impossible to elevate that to the status of a mandatory requirement: at [84];

(3) there was no statutory basis for construing s 9(1)(a) of the WM Act, which required the Minister to "take all reasonable steps" to exercise his functions under the WM Act in accordance with, and so as to promote, the water management principles including that in s 5(2)(d) that the cumulative impacts of water management licences and approvals and other activities on water sources and dependent ecosystems be considered and minimised, as an obligation to use a sound numerical groundwater model before it could be said that the Minister had considered and minimised those impacts: at [86];

(4) the decision of the Minister was not irrational nor manifestly unreasonable. There was no illogicality or irrationality in the Minister's adoption of the figure of 83.7 GL/year for use in the Plan notwithstanding that in part it was based on the Ecoseal model which he recognised as requiring recalibration and refinement by so providing in the Plan: at [117];

(5) there was constructively before the Minister material of sufficient probative value as to enable him to make the Plan, notwithstanding the flaws in the Ecosystem model: at [118];

(6) misleading advice to a Minister, of itself, does not necessarily lead to invalidity of a decision which takes into account that advice: at [130]. Whether misleading advice introduces legal error into a Minister's decision would depend on the significance of the error or omission in the advice tendered: at [132];

(7) it could not be said that the Minister was unaware of the undoubted fact that the Ecoseal model was flawed. He had before him, constructively, the Aquaterra report which identified the flaws in the model but also expressed the view that notwithstanding those flaws the extraction limit referred to in the model was roughly of the correct order. Furthermore, in view of the constructive knowledge of the Minister he could not have been relevantly misled by Mr Jacobs' comment, particularly as he had to be taken to have knowledge that the Plan expressly contemplated the necessity to recalibrate and refine the Ecosystem model during its term: at [136];

(8) the Minister was only required by s 18(1) of the WM Act to have "due regard" to the socio-economic impacts of the proposals, he was not required to eliminate them. Conducting a socio-economic study on a farm-by-farm basis would be one way in which the socio-economic impacts could be measured, but it was not the only way: at [162]; and

(9) the Minister was entitled to rely on the steps taken by the MGMC with respect to the socio-economic impacts of the proposals considered for inclusion in the Plan: at [164].

Tempe Recreation (D.500215 and D.1000502) Reserve Trust v Sydney Water Corporation [2014] NSWCA 437 (Basten, Emmett and Leeming JJA)

(related decision: *Tempe Recreation (D.500215 & D.1000502) Reserve Trust v Sydney Water Corporation* [2013] NSWLEC 221 Biscoe J)

Facts: Sydney Water Corporation ("Sydney Water") compulsorily acquired under the *Land Acquisition (Just Terms Compensation) Act 1991* ("the JT Act") four easements for a pipeline over different parts of Crown land that is part of a reserve as defined in s 78 of the *Crown Lands Act 1989* ("the CL Act") ("the Tempe Reserve"). The four easements A, B, C and D were defined in the notice published in the Gazette on 2 December 2011 ("Acquisition Notice") by reference to two other documents, first described in the Acquisition Notice as being "shown on DP1155181", and secondly, as being "more fully described in Clauses 1 to 4 inclusive and [one of the Schedules] of Memorandum AG277407". Easement B

corresponded with Schedule 4, Easement C with Schedule 2, and Easement D with Schedule 1 of Memorandum AG277407 ("the Registered Memorandum"). The appellant ("the Trust") is trustee of the Tempe Reserve under s 62 of the CL Act, and commenced proceedings in the Land and Environment Court ("LEC") for determination of the amount of compensation payable. The Trust claimed compensation in the sum of $1,790,000. By the time of the hearing in the LEC the Trust's claim was for $5,000,000; that was disputed, save for $6,000 for disturbance. The primary judge determined compensation in the amount of $106,000. Sydney Water applied for a costs order in its favour, in light of an offer of compromise made on 13 February 2013, some 10 months before the hearing, in the amount of $268,000. That offer was expressed to be made in accordance with r 20.26 of the Uniform Civil Procedure Rules 2005 ("UCPR"). The primary judge dismissed that application, finding that r 42.15 of the UCPR was not engaged, and that he would exercise the discretion to order otherwise in favour of the Trust.

The Trust appealed as of right from the determination of compensation. Central to that appeal was the proper construction of Easements B, C and D, it being common ground that the compensation payable was determined in accordance with the full extent of the rights conferred by the easements. Sydney Water sought leave to appeal from the primary judge's order that it pay the Trust's costs.

Issues:

(1) whether the primary judge erred in construing Easements B and C in using extrinsic materials, being (a) the terms of other easements, notably Easement D, and (b) the works which had been undertaken at the date of acquisition;
(2) whether the primary judge erred in construing a reference in Schedule 2 to the surface levels of the land "as it exists from time to time" to be confined to natural processes such as erosion;
(3) whether the primary judge had failed to address claims for compensation under s 106A(3) and (4) of the JT Act for removal of gazebos, barbeque areas and paths erected on Easement B and replacement with gazebos and playground structures; and
(4) whether the primary judge had erred in ordering costs in favour of the Trust.

Held: (Leeming JA, with whom Basten and Emmett JJA agreed) dismissing the Trust's appeal, granting leave to Sydney Water to cross-appeal, allowing the cross-appeal and setting aside the costs orders and in lieu thereof ordering that Sydney Water pay the Trust's costs up to and including 13 February 2013 with no order as to costs for the balance of the proceedings:

(1) it was axiomatic that an Act is to be read as a whole and the same principle applies to all other legal documents: at [53]. There was a relationship between the critical definitions in the registered instrument, as anticipated by the variation in descriptions in the Acquisition Notice and the corresponding terms in the Registered Memorandum. The differences in language were apt to convey differences in the legal meaning and it would be quite wrong to fail to have regard to them: at [57];
(2) the Registered Memorandum had to be construed as a whole. It comprised four Schedules describing different kinds of easements. In Schedules which appeared in the same instrument, forming part of a series of contiguous acquisitions for the same purpose and which were structurally and textually very similar, textual differences were especially significant: at [63];
(3) the general rule was that materials outside the Torrens register might not be used in construing registered instruments such as an easement, but that did not rule out reliance on evidence of the physical characteristics of the land. As the primary judge observed, the physical features of the land, and the fact that the pipeline was constructed before the easement was acquired, merely confirmed the conclusion reached from the language: at [77];
(4) Easement C did not contemplate a change to the surface of the mound consistent with the construction that the mound was able to be amended by the dominant tenement: at [79]-[82];
(5) there was no error in the approach taken by the primary judge to the claims for compensation pursuant to s 106A(3)(a) having regard to the way in which the Trust ran its case at trial. The Trust had acknowledged that if under s 106A(3)(b) the value of improvements was included as reflecting the loss attributable to the reduction in public benefit, it could not also be awarded under s 106A(3)(a) and/or (c). The primary judge had accepted an alternative submission advanced by the Trust and found there was or would potentially be a realistic reduction in public benefit and assessed the loss at $100,000 under s 106A(3)(b). There could be no constructive failure to exercise jurisdiction where a plaintiff advances a case in the alternative, and the court rejects the primary case but finds in favour of the alternative case: at [89];

(6) the fact that the Trust had the advantages of certainty as to the meaning of the easements and confirmation that Sydney Water's rights under those easements were more limited than the Trust had contended for the purposes of determining compensation were not separate advantages to displace the operation of the rules. Further, the provisions of the rules as to offers of compromise were specifically made applicable to compensation proceedings in Class 3 of the LEC's jurisdiction and were intended to encourage the compromise of contests that could be long and expensive: at [98];
(7) rule 42.15 applied, however the Court should otherwise order. There was no challenge to the factual finding by the primary judge that the Trust had conducted the litigation reasonably: at [102]; and
(8) the appropriate way to give force to the evident purpose of an offer of compromise, in a jurisdiction where the dispossessed plaintiff who litigates reasonably is ordinarily entitled to costs, in the present case was for the Trust to obtain its costs up to and including 13 February 2013 but that there be no order thereafter, with the intention that the parties bear their own costs: at [103], [104].

Sydney Water Corporation v Marrickville Council [2014] NSWCA 438 (Basten, Emmett and Leeming JJA)

(related decision: *Marrickville Council v Sydney Water Corporation* [2013] NSWLEC 222 Biscoe J)

Facts: Sydney Water Corporation ("Sydney Water") compulsorily acquired under *the Land Acquisition (Just Terms Compensation) Act 1991* ("the JT Act") a series of connected easements for the purpose of a water pipe along the edge of land owned by it just north of Tempe reserve and adjacent to the Alexandra Canal. The pipeline is mostly elevated above the surface of the land and runs in a corridor close to the canal. To the north-east of the land, the land adjoins, and the pipeline runs into, land owned by Sydney Airport Corporation ("SACL") in respect of which a further easement had been acquired. In proceedings to determine the compensation payable to the respondent Council, there was agreement between the parties' valuers as to the valuation principles to be applied; the parties differed as to which sales were comparable and the appropriate adjustments to be made. The primary judge determined the compensation payable in the amount of $1,634,000. Sydney Water appealed and the Council cross-appealed, both challenging parts of the methodology adopted by the primary judge.

Issue:

(1) whether there was a question of law in either the appeal or the cross-appeal.

Held: (Leeming JA, with whom Basten and Emmett JJA agreed) dismissing the appeal and cross-appeal, with no order as to costs:

(1) an error of valuation principle may – but need not be – an error of law. However the fact that there was agreement on the applicable methodology was a powerful indication that no error of law was involved in the present case: at [28];
(2) almost every "comparable" sale requires adjustment. Whether or not an adjustment to a comparable sale should be made, and if so, by what amount, is a matter of degree and judgment: at [32];
(3) there was no error of law in the approach taken to making adjustments: at [34]. The primary judge's reasons for making the adjustments were contestable, but they were rational: at [35]; and
(4) the task required to be undertaken was difficult. The easements were located on a highly unusual parcel of land. It was unsurprising that there were no closely comparable sales. It was plain that the primary judge fully appreciated the limitations of the different sales propounded by the parties and endeavoured, in a way that was transparent and rational, albeit undoubtedly contestable, to bring points of distinction to account. In doing so, no error of law was disclosed: at [48].

Peregrine Mineral Sands Pty Ltd v Wentworth Shire Council [2014] NSWCA 429 (McColl, Meagher and Ward JJA)

(related decisions: *Wentworth Shire Council v Bemax Resources Ltd* [2013] NSWSC 1047; *Wentworth Shire Council v Bemax Resources Ltd* [2013] NSWSC 1364 Rein J; *Peregrine Mineral Sands Pty Ltd v Wentworth Shire Council* [2012] NSWLEC 237 Sheahan J)

Facts: the appellants are part of the Cristal (formerly Bemax) group of companies, involved in mineral sands mining ventures in the Wentworth Shire in NSW. The first three appellants hold the mining lease in

respect of a mine known as the Gingko Mine. On 30 January 2002 development consent was granted to Bemax Resources NL ("Bemax") on behalf of the BIP Joint Venture for the mineral sands mine and associated surface facilities, subject to a condition requiring an "appropriate" agreement with the Council regarding construction and maintenance of a road from the mine site to the Silver City Highway, to be at the expense of the developer. Around 20 February 2002 Bemax sought an indication from the Council as to the rate the Council would charge for the Gingko Mine. The Council received a report noting that the Valuer General would provide a valuation when a mining licence had been issued, and passed a resolution that the Council would "provide a rate for the Gingko mine at an indicative rate of $100,000 per annum". The mining lease for the Gingko Mine was granted on 6 March 2002 and the mine became operational in 2006. On 28 April 2005 the fourth appellant, Pooncarie Operations Pty Ltd ("Pooncarie"), entered into an agreement with the Council ("the Road Agreement") as agent for the appellants relating to construction and maintenance of the road. Sub-clause 3.1(a) of the Road Agreement provided that:

> "3.1 In addition to the Company's Undertakings, the Company will:
>
> (a) Pay to Council in respect of the Gingko Mine, land rates of $100,000.00 per annum commencing 1st January, 2006 and adjusted annually in accordance with the Local Government Act."

In April 2006 the Council issued an invoice for "ex gratia rate charge" in the amount of $100,000. In September 2006 the Council issued a "supplementary" rate notice in the sum of $360,190. Minutes of the relevant Council meeting showed that the Council had received a provisional valuation of the Gingko Mine, prior to adoption of the Management Plan for 2006, with an approximate value of $338,000, and that it had received a supplementary valuation from the Valuer-General at $6m. The explanation for the difference in valuation was said to be that the original estimate had been based only on the land value and had not taken into account the mineral content of the land. The Council adjusted the rate for the mine from a base rate of $190 plus an ad valorem rate of $1 per $1 of valuation to a base rate of $190 plus $0.06 per $1 of valuation, to reduce the rates from the advertised amount of $6m to $360,000. In its explanation to Bemax for the striking of the rate in the supplemental notice the Council advised that the rate was not struck in accordance with the provisions of the *Local Government Act* 1993 ("the LG Act"), and at that stage there was no valuation of the land by the Valuer General.

The Council commenced proceedings in the Common Law Division of the Supreme Court against Bemax seeking judgment in respect of outstanding rates notices in respect of another mine. The appellants brought proceedings in the Equity Division against the Council seeking declaratory and other relief in relation to the rates payable in respect of the Gingko Mine ("the Peregrine Sands proceedings"), and Class 3 proceedings in the Land and Environment Court against the Council pursuant to s 574 of the LG Act. The Class 3 proceedings were transferred to the Equity Division and all three sets of proceedings were heard together by the primary judge. The primary judge dismissed the first and third proceedings, and in the Peregrine Sands proceedings dismissed the appellants' statement of claim and gave judgement for the Council on its cross-claim in respect of the outstanding rates under the notices as issued, in the amount of $1,916,005.75 inclusive of interest up to and including 2 August 2013, the date of judgment. The primary judge held, inter alia, that by the Road Agreement the Council had agreed to levy rates at $100,000 per annum with adjustments contemplated in s 506 of the LG Act; that cl 3.1(a) could not stand because it impermissibly fettered the Council in undertaking its statutory duty of assessing rates each year in accordance with the LG Act; and that cl 3.1 was not authorised by the LG Act and was incompatible with it and hence was a provision beyond the power of the Council to make.

The appellants appealed, maintaining that the effect of the Road Agreement was to set the ordinary rates that the Council could levy for the Gingko Mine over the term of the Road Agreement to the amount of $100,000 per annum, adjusted only by reference to the percentage increase determined by the Minister from time to time in accordance with s 506 of the LG Act. The appellants also appealed in relation to the costs orders made in respect of the three sets of proceedings. The Council filed a notice of contention seeking to affirm the decision on grounds that the primary judge erred in the construction of cl 3.1(a) of the Road Agreement and in his findings as to an intention of the Council so as to permit rectification of cl 3.1(a).

Issues:

(1) whether the primary judge erred in finding that the agreement as to rates was not authorised by, or was inconsistent with, the LG Act;

(2) whether the primary judge erred in not holding that s 564(1) of the LG Act specifically authorised the agreement as to rates;
(3) whether the primary judge erred insofar as his Honour dealt with ultra vires in terms of the procedure leading to the execution of the Road Agreement, which it was contended was not an issue below;
(4) whether, if the Council's notice of contention was upheld and the primary judge erred in failing to order rectification of cl 3.1(a) of the Road Agreement; and
(5) if those grounds of appeal failed, whether the primary judge erred in the exercise of the discretion as to costs in ordering the appellants to pay the whole of the costs of the proceedings and interest on costs.

Held: (Ward JA, with whom McColl and Meagher JJA agreed) dismissing the appeal with costs:

(1) unless authorised by s 564 of the LG Act, an agreement to fix future rates up to 20 years in advance was not one expressly authorised by the LG Act. Insofar as the Road Agreement had fettered the ability of the Council properly to consider matters that might in future be required to be considered in relation to the making of rates, it was incompatible with the legislation and the primary judge did not err in so concluding: at [152];
(2) the LG Act provides a detailed regime for the making and levying of rates and it is inconsistent with that detailed regime for s 564 to permit agreements as to rates that might be determined outside, or inconsistently with, that detailed regime. Section 564(1) of the LG Act does not authorise an antecedent agreement capping future rates in advance, and his Honour did not err in this regard: at [174], [175];
(3) the primary judge had concluded that cl 3.1(a) should not be understood as the manifestation of an exercise of the statutory discretion to fix rates, and pointed to the steps that would have been required for there to be a proper exercise of the discretion. On a fair reading of the judgment, the primary judge had not engaged in an uninvited review of the decision making process leading to the execution of the Road Agreement, nor had he determined the proceedings on a basis not raised by the parties. Even if the primary judge had erred in considering the evidence as to the anterior decision making process, which he had not, nothing turned on that: at [193], [194];
(4) the appellants' construction of cl 3.1(a) was the correct one and the primary judge did not err in so concluding. The Council's notice of contention was not made out, and the primary judge did not err in not making an order rectifying cl 3.1(a) of the Road Agreement: at [210], [216];
(5) on the material before the Court the appellants' rectification claim would have been difficult to make out. It was not necessary to determine that issue in light of the conclusion that the primary judge did not err in the construction of the Road Agreement: at [232]; and
(6) there was some sympathy with the proposition that the appellants entered into an agreement with the Council under which the Council bound itself to certain arrangements from which it then sought to resile on the basis (correct as it transpired) that the contract was beyond the Council's power. However, it was not suggested that the Council was aware at the time of entry into the Road Agreement of the limitations on its powers in that regard and the effect of the appellants' position in the litigation would seem to have been to give it a windfall benefit by reference to the mistake as to the valuation of the land in the first instance. The primary judge clearly turned his mind to the matters raised by the appellants and it could not be said that his decision was manifestly unreasonable. The primary judge was better placed to assess the matters raised as to the conduct of the litigation by the Council and the other parties, and the centrality of particular issues raised in the proceedings. The primary judge did not err in the exercise of the discretion in relation to costs: at [243]-[246].

New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (the Nelson Bay Claim) [2014] NSWCA 377 (Beazley P, Basten JA and Preston CJ of LEC)

(related decision: New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (Nelson Bay) [2013] NSWLEC 148; 198 LGERA 122 Pain J)

Facts: the Minister refused two claims over an area of Crown land near Nelson Bay on the Central Coast, on the basis of an opinion that the land was needed or likely to be needed as residential lands. Under s 36(1)(b1) of the *Aboriginal Land Rights Act 1983* (NSW) ("the ALR Act"), claimable Crown lands "do not comprise lands which, in the opinion of a Crown Lands Minister, are needed or are likely to be needed as residential lands". The New South Wales Aboriginal Land Council ("NSWALC") lodged an appeal in the Land and Environment Court. The primary judge, applying the principle in *Carltona Ltd v Commissioner of*

Works [1943] 2 All ER 560, held that it was sufficient that the requisite opinion under s 36(1)(b1) of the ALR Act was held by departmental officers. The primary judge dismissed the appeal. The NSWALC appealed to the Court of Appeal, pursuant to s 57(1) of the *Land and Environment Court Act 1979* (NSW). On appeal, the NSWALC argued that: the necessary precondition for rejecting the claim required the opinion to be held by the Minister personally; the *Carltona* principle did not permit the requisite opinion to be held by a departmental officer; the Minister did not hold an opinion at the relevant time; and in any event, there was no evidence capable of supporting the finding that any relevant officer held such an opinion. It was not disputed that the Minister did not personally hold the relevant opinion.

Issue:

(1) whether the primary judge erred in finding that it was sufficient that the requisite opinion under s 36(1)(b1) was held by departmental officers.

Held: (Basten JA, with whom Beazley P and Preston CJ of LEC agreed) allowing the appeal, setting aside the order of the Land and Environment Court dismissing the application, directing the Land and Environment Court to determine any outstanding issues raised by the application, and ordering the respondent to pay the appellants' costs of the appeal:

(1) the exclusion of Crown land from the category of claimable Crown land, based on the Minister's opinion that it was needed or likely to be needed as residential lands, required the Minister himself or herself to form the relevant opinion: at [23];

(2) the beneficial purpose of the statutory scheme under the ALR Act, the historical purpose and structure of the ALR Act, the subject matter of the opinion being formed and the absence of an express power of delegation with respect to decisions of the Minister under the ALR Act supported this conclusion: at [23]-[27], [30]-[31], [33]-[34]. The combination of these factors demonstrated that it was only the opinion of the Minister personally, taken no doubt on the basis of information and advice supplied by departmental officers, which could preclude a successful land claim under s 36(1)(b1): at [36];

(3) the underlying principle in *Carltona* was that where a power or function is conferred on a Minister, in circumstances where, given administrative necessity, Parliament cannot have intended the Minister to exercise the power or function personally, an implied power of delegation (or agency) may be inferred: at [12]. The fact that there might be no occasion prior to the claim for the Minister to consider whether the lands were needed as residential land made it difficult to establish that any departmental officer had authority to form such an opinion: at [43]. Furthermore, no case was brought to the attention of the Court of Appeal which would expressly uphold the operation of the *Carltona* principle with respect to the formation of an opinion as opposed to administrative acts: at [44]. Thus, the passages relied upon by the trial judge did not provide support for the application of the *Carltona* principle in this context: at [45];

(4) the conclusion that the Minister did not personally hold the opinion necessary to engage s 36(1)(b1) was sufficient to dispose of the case in the event that the *Carltona* principle was not available: at [80];

(5) given the errors of law already identified, it was not necessary to embark upon an analysis as to (a) the authority of various departmental officers; (b) the opinions they held at the relevant time; (c) whether the findings of fact made by the trial judge were adequate; or (d) the extent to which they involved questions of fact as opposed to law: at [85];

(6) the NSWALC was entitled to succeed on the basis that the opinion required to engage the exclusion of Crown lands from the definition of claimable lands under s 36(1)(b1) of the ALR Act was the opinion of the Minister personally: at [86]. While the Minister may rely upon information and advice supplied by officers in the Department of Lands, it is an opinion of the Minister which must be established at the time of the claim and not an opinion held by an officer within the department: at [86]. The doctrine of administrative necessity upon which the *Carltona* principle was based did not operate in the circumstances of s 36(1)(b1) of the ALR Act to imply a power in the Minister to confer on a departmental officer the function of forming the relevant opinion: at [86];

(7) if that conclusion of law was wrong, the implied power would not permit an opinion held by a departmental officer to have legal effect in circumstances where the evidence demonstrates that the Minister held a different opinion, or, arguably, the Minister having considered the suitability of the land

for different purposes, did not hold the opinion in s 36(1)(b1): at [87]. The manner in which the trial judge dealt with the evidence in relation to the Minister's opinion demonstrated legal error: at [87]; and

(8) it was doubtful whether the evidence demonstrated that: (a) any particular departmental officer had implied authority to form the opinion required by s 36(1)(b1); (b) any relevant officer did form such an opinion; and (c) whether the trial judge made findings of fact sufficient to support the affirmative conclusion that an agent of the Minister held the opinion at the time of claim that the claimed lands were needed or likely to be needed as residential lands: at [88]. It was unnecessary to determine whether these doubts gave rise to an error of law on the basis that there was a constructive failure to exercise the jurisdiction conferred by s 36(7) of the ALR Act: at [88].

- NSW Court of Criminal Appeal

Liverpool City Council v Maller Holdings Pty Ltd t/as Sydney Horse Transport [2014] NSWCCA 299 (Macfarlan JA, Fullerton and Bellew JJ)

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

Facts: the respondent, Maller Holdings Pty Ltd ("Maller"), carries on business under the name "Sydney Horse Transport" on and from a property located at Warwick Farm. Commencing in the 1960s, development consents had been granted under the County of Cumberland Planning Scheme Ordinance1951 and the Liverpool Planning Scheme Ordinance 1972 authorising use of the property as "stables". That term was defined in the Liverpool Planning Scheme Ordinance 1972 as "a building or place used or intended for use for the purpose of receiving, maintaining, boarding or keeping a horse or horses". The appellant prosecutor alleged that during an identified two year period Maller had used the property in a manner prohibited by the current environmental planning instrument, the *Liverpool Local Environmental Plan 2008* ("the LEP"), to conduct a horse transport business. From 2002 to 2007 the property was used for the training of racehorses at Warwick Farm Racecourse; after 2010 no horses were kept on the property that trained at the racecourse. The primary judge found that there were a large number of changes to the property during the charge period, and concluded that the purpose of Maller's activities on the property should be characterised as being for the conduct of a "horse transport business variously described by reference to three definitions in the [LEP] (transport depot, truck depot, freight transport facility)", and not for an "animal boarding or training establishment", which was a use permissible with consent under the LEP. The primary judge found that the use of the property in the charge period included use of the property for the stabling of horses, and did not find that that use covered the whole of the activities being carried out on the property. The primary judge concluded that the activities on the property were authorised by the historic consents, and found that the appellant had failed to prove that the alleged offence had taken place. Before proceeding to make final orders the primary judge acceded to the prosecutor's request to submit for determination by the Court of Criminal Appeal the following questions of law arising in the proceedings:

"(1) Having found (at Judgment [127]) that the use of the property in the charge period can be characterised as being for the purpose of horse transport business, did I err in not finding that the Defendant did something which it was forbidden to do by the Environmental Planning and Assessment Act 1979 ("the EPA Act") because part of that use was authorised by historic consents?

(2) Having found (at Judgment [127]) that the use of the property in the charge period can be characterised as being for the purpose of horse transport business, did I err in finding that the use described in the existing consents as 'stables' (Judgment [130]-[133]) was available for the purposes of s 109B of the EPA Act to cover the use of the stables buildings during the charge period?

(3) Having found (at Judgment [127]) that the use of the property in the charge period can be characterised as being for the purpose of horse transport business, and having found (at Judgment [132]) that the part of the business undertaken at the property during the charge period which relies on bringing and taking horses to and from the property is part and parcel of the stabling of horses, did I err in finding that that part of the business however described is permissible under the existing consents because of my finding (at Judgment [90]) that s 76B and s 109B operate concurrently?"

Held: (Macfarlan JA, with whom Fullerton and Bellew JJ agreed) answering Questions 1 and 2 in the affirmative, answering Question 3 "Does not arise", and remitting the proceedings to the Land and Environment Court for resolution:

(1) the most that could be said in favour of Maller was that some of the activities on the property were conducted for the purpose of stabling, that being a use authorised by the historic consents. That left other activities being conducted for the purpose of the unauthorised horse transport business. Even if it could be said that two businesses were conducted on the property, one of those businesses was unauthorised and that was the subject of the charge, and the charge was accordingly proved: at [38]. On the other hand, if the assumption were made that there were not two independent businesses conducted on the property but that stabling activities were a part of and subsumed by the horse transport business, the same result would follow: Maller conducted an unauthorised horse transport business on the property during the charge period: at [39];
(2) if the primary judge was saying that the apparently non-stabling aspects of the horse transport business were in effect ancillary to the stabling use, her Honour erred in her approach. Both for the purpose of determining whether the use of the property was prohibited by the LEP and for the purpose of determining whether the use of the property was authorised by the historic consents, the primary judge needed to find what, according to ordinary terminology, was the appropriate designation of the purpose being served by the use of the premises during the trial period. That was a single task that did not involve determining the use of the property twice: at [41];
(3) the primary judge erred in not simply asking herself whether use of the property as stables was in substance the same as the use to which she found the property to have been put, namely, use as a horse transport business. In light of her factual findings, the answer to that question would necessarily have been in the negative: at [45]; and
(4) the fact that part of the business may have been authorised did not mean that there was not, as alleged by the prosecutor, a use of the property for the impermissible purpose of conducting a horse transport business. Whether the identified part of the use was authorised would turn on whether that use was for an independent purpose of stabling or whether the activities in question, while constituting stabling, were subsumed in the overall horse transport business such that they were not carried out for the purpose of stabling but for the purpose of the conduct of the horse transport business, That would have been a question of fact for determination by the primary judge if it had been relevant: at [48].

- Land and Environment Court of NSW

Judicial Review

CSKS Holdings Pty Ltd v Woollahra Council [2014] NSWLEC 176 (Pain J)

Facts: the Applicant sought an order in the nature of mandamus requiring the council to determine its development application ("DA"). The Applicant is the lessee of Crown land in Paddington under a lease transferred to the Applicant by Paddington Bowling Club Ltd. This transfer was consented to by the Minister Administering the Crown Lands Act ("the Minister"). On 14 March 2013 the Applicant lodged a DA with the council seeking consent for construction of a child care centre. On 5 March 2013 the Minister had granted landowner's consent for the DA to be lodged. On 21 March 2013 the council issued a "stop the clock" letter requesting additional information from the Applicant. In April 2014 the NSW Government ordered an independent review into the transfer of the lease from Paddington Bowling Club to the Applicant, the terms of reference including obtaining owner's consent to the DA. In May 2014 the council resolved to defer determination of the DA. In August 2014 the Department of Trade and Investment ("Department") wrote to the council stating that had findings of the independent review been known at the time landowner's consent was granted it was doubtful whether it would have been recommended. In August 2014 the council again resolved to defer determination of the DA until after the outcome of a referral to the Independent Commission Against Corruption ("ICAC") was known and completed.

Issue:

(1) whether an order for mandamus should be made.

Held: amended summons dismissed:

(1) the council was acting as the consent authority under the *Environmental Planning and Assessment Act 1979* ("EPA Act") in assessing the DA. Under s 79C(1)(e) the council was required to take into account, inter alia, the public interest. The granting of owner's consent is a requirement in the DA process under the EPA Act. It is within the council's discretion in considering a DA in accordance with s 79C to consider in the public interest whether owner's consent had been validly granted. Corrupt conduct can be relevant to the assessment of the public interest: at [50];

(2) owner's consent purportedly given under cl 49 of the Environmental Planning and Assessment Regulation 2000 may be vitiated by corrupt conduct, if established. This was supported by general law principles: at [51]. The letter from the Department to the council raised a substantial concern about the granting of owner's consent which was not speculative: at [52];

(3) if owner's consent is found to have been fraudulently or corruptly granted there was arguably no valid DA for which development consent could be granted. Owner's consent is an essential precondition for a valid DA and hence for a development consent: at [53]; and

(4) the option of refusing the DA was not properly open as the council was not presently in a position to be clear on the issue of whether owner's consent was properly granted as the outcome of the ICAC investigation was unknown: at [59].

Hornsby Shire Council v Trives [2014] NSWLEC 171 (Craig J)

Facts: in three separate proceedings, the council sought judicial review of decisions by Mr Trives, an accredited certifier, to issue complying development certificates for a new structure to be erected on each of three residential properties. Each of the proposed structures contained at least one bedroom, a bathroom, a kitchen and a living/dining area, and was separated from the existing dwelling house but located within the boundaries of the property on which the existing dwelling was erected. The Court ordered that a separate question be tried as to whether Mr Trives issued valid complying development certificates.

Issues:

(1) whether, properly characterised, the proposed development could be described in each certificate as a "detached studio" under the State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 ("Complying Development SEPP"), or whether the proposed development was for the separate purpose of an additional dwelling house;
(2) whether the development, when properly characterised as an additional dwelling house, was permissible with consent under the relevant land use zone; and
(3) whether, upon erection of the proposed structure on each property, there would be more than one dwelling house on the same lot.

Held: finding that the complying development certificates were not validly issued:

(1) having regard to the Complying Development SEPP, it is apparent that the intention of the drafter of the instrument cannot have been one to accommodate, under the rubric of "detached studio", something that is both separate from and can be used independently of an existing dwelling house on land in respect of which an application is made: at [25]. It is also apparent that what is intended by the concept of "detached studio" is not a "dwelling house": at [21]. Here, as was acknowledged in the statement of facts, the separate building or "detached studio" was, in each case, capable of being used as a separate dwelling house. When the statement of facts was considered with the manner in which each building was internally configured, there could be no doubt that the proposed structures were, in truth, properly characterised as serving the purpose of separate dwellings or "dwelling houses" within the meaning of cl 1.5 of the Complying Development SEPP: at [26];

(2) upon proper characterisation of the proposed development in each case, it was apparent that the development not only fell outside the "detached studio" definition in the Complying Development SEPP but also fell within either one of the definitions of "dual occupancy" or "secondary dwelling"; development categories not permissible within the relevant land use zone: at [28]; and

(3) if each of the three properties was developed in accordance with the certificates issued by Mr Trives, completion of the development would have resulted in more than one dwelling house on each lot, contrary to cl 3.8 of the Complying Development SEPP: at [29]. Clause 3.8 of the Policy operates so as to exclude "ancillary development" specified in cl 3.5 from engaging the provisions of the Complying Development SEPP: at [29].

Community Housing Limited v Clarence Valley Council [2014] NSWLEC 193 (Harrison AJ)

Facts: Community Housing Limited ("the company") owns a number of properties leased at a reduced rate to low income tenants eligible for social housing or affordable housing. Clause 3 of the company's Constitution provides the objects of the company:

> "The object for which the Company is established is to be a non-profit corporation that: -
>
> (a) acquires on its own behalf, or manages or holds as trustee on behalf of any public, government, semi or local government or charitable person, association, bodies, funds, institutions or organizations, land and buildings so that:
>
> (i) shelter is provided to persons in crisis and/or who have inadequate access to safe and secure housing;
>
> (ii) housing may be provided to low income persons including members from ethnic groups, young people (single, dependent or otherwise), people with disabilities, people who are aged, childless couples, single parent families, families and/or other households in need;
>
> (b) provides housing advice and referral services which may assist homeless persons into stable and long term housing.
>
> (c) provide training, vocational and related education, and skills development to improve employment opportunities."

The company claimed to be both a public benevolent institution and a public charity and contended that the land owned by it is used for its purposes as such, and claimed that its lands are exempt from payment of rates under s 556 of the *Local Government Act 1993* ("the LG Act"). The company brought proceedings under s 20 of the *Land and Environment Court Act 1979* ("the Court Act") against six councils seeking declarations, including declarations that the company's lands are exempt and that rates notices issued to the company are invalid, and an order restraining the councils from taking steps to enforce the rates notices. The councils contended that the proceedings ought properly be characterised as a rates appeal and as such were barred by operation of s 574 of the LG Act which requires that an appeal against the levying of a rate on the ground that the land is not rateable be made within 30 days after service of the rates notice, and that the company is neither a public benevolent institution or a public charity.

Issues:

(1) whether the proceedings were barred by operation of the time limit that constrains appeals under s 574 of the LG Act;

(2) whether the company was, and was at the time the rates were levied, a public benevolent institution or a public charity for the purposes of s 556(1)(h) of the LG Act; and

(3) whether the land owned by the company was used or occupied for the purposes of the public benevolent institution or public charity.

Held: dismissing the proceedings and ordering the company to pay the respondents' costs:

(1) the proceedings were not barred by operation of the time limit that constrains appeals under s 574 of the LG Act. It was inaccurate to characterise the company's claims for relief as an appeal. The company did not appeal against the rate that had been levied but challenged the entitlement of the councils to levy the rates in the particular circumstance in the first place: at [16]. Quite apart from whether or not the company could also have appealed in accordance with s 574, Chapter 15 of the LG Act dealing with "How are councils financed" is expressly defined as a "planning or environmental law" in respect of which the Land and Environment Court has jurisdiction under s 20 of the Court Act. Presumably there would have been no reference to Chapter 15 in s 20 if it had been intended to restrict the company's claims for relief in the manner contended for by the councils: at [17]. In any event, the

relief sought by the company was clearly wider, and went further than the relief contemplated by s 574: at [18];

(2) clause 3(c) of the company's Constitution identified as one of the company's purposes a non-charitable object that was not merely incidental to the company's charitable purpose identified or expressed in cl 3(a) and (b): at [51]. The balance of cl 3 qualified as charitable: at [54]. The company did not satisfy the first limb of s 556(1)(h) that the land belong to a public charity or public benevolent institution: at [57]; and

(3) provided the properties were owned for purposes that otherwise qualified for an exemption under s 556(1)(h), the fact that some of the properties were or may be temporarily untenanted did not mean that they were not relevantly being "used" by the company for its purposes: at [72]. The company's properties were used by it for the purposes identified in cl 3(a) and (b) of the Constitution: at [75].

Eurobodalla Fluoride Issues Inc v Eurobodalla Shire Council [2014] NSWLEC 182 (Craig J)

Facts: Eurobodalla Fluoride Issues Inc ("the applicant") challenged the validity of a decision made by Eurobodalla Shire Council ("the Council") to install and operate a fluoride dosing facility which would add fluorine to the Eurobodalla water supply. That decision was made by resolution at a Council meeting whereby a large number of people, both supporting and opposing fluoridation of the water supply, attended and addressed the Council. The Council subsequently lodged an application with the Department of Health to fluoridate its water supply under s 6 of the *Fluoridation of Public Water Supplies Act 1957* ("the Fluoridation Act"). That application was approved and the fluoride dosing facility was placed into service at a newly established water treatment plant.

Issues:

(1) whether the Council was required to comply with ss 111 and 112 of the *Environmental Planning and Assessment Act 1979* ("EPA Act") by dint of s 110E;
(2) whether, if the provisions of s 110E of the EPA Act were not engaged and the Council was required to comply with s 111 of the EPA Act, the evidence established compliance with s 111;
(3) whether, if the provisions of s 110E of the EPA Act were not engaged, the Council's failure to obtain and consider an environmental impact statement amounted to a breach of s 112; and
(4) whether the Minister for Land and Water Conservation was required by s 60 of the *Local Government Act 1993* ("LG Act") to approve installation and operation of the fluoride dosing facility.

Held: dismissing the applicant's amended summons:

(1) the requirement for the Council to comply with ss 111 and 112 of the EPA Act was removed by s 110E(c) of that Act. All matters identified by the applicant as being those required to be considered for the purposes of ss 111 and 112 of the EPA Act when determining whether to carry out the "activity", that is, operating the dosing facility so that treated water at the plant was also fluoridated, were matters that fell for consideration by the Director-General of the Department of Health when deciding to grant fluoridation approval under s 6 of the Fluoridation Act. There being no challenge to the validity of that approval, ss 111 and 112 did not apply to the decision by the Council to give effect to the "permission" evidenced by that approval: at [127] and [130];
(2) the evidence established that the Council did relevantly engage with the provisions of s 111 when considering the "activity" identified by the applicant. That it did so was implicit in the decisions it made to implement the project and the fluoride dosing facility, cognisant of the material available and considered by it as to the affect or likely affect upon the environment of that activity, being material provided both prior to and subsequent to the May 2008 resolution: at [146]. The applicant did not establish that a breach of s 111 occurred, insofar as that claimed breach alleged that the Council failed to address, in the manner required by the section, the human health effects that the applicant identified: at [147];
(3) the provisions of s 112(1) were not engaged such that the "activity" could not be carried out without the Council first obtaining and considering an environmental impact statement conformably with that subsection. Acceptance of the beneficial effect of fluoridation did not equate to acceptance that it had or was likely to have a significant effect upon the environment, thereby removing any obligation upon the Council to comply with s 112(1): at [171]; and

(4) an approval under s 60 of the LG Act was not required to install and operate the dosing facility: at [180]. Although the necessary equipment and elements of the dosing facility were installed in the space set aside for it within the Plant, no further "construction" was required to the existing water treatment works, thereby removing the requirement for the Council to obtain approval under s 60: at [175].

Botany Bay City Council v Minister for Planning and Infrastructure & Ors [2015] NSWLEC 12 (Beech-Jones AJ)

Facts: the Botany Bay City Council ("the Council") challenged an approval granted by the Planning Assessment Commission ("the PAC") on 19 September 2013 ("the Approval") to a mixed use development on the current site of the Eastlakes Shopping Centre ("the Project"). The Approval was purportedly granted by the PAC, as delegate of the respondent Minister, under s 75J(1) of the former Part 3A of the *Environmental Planning and Assessment Act 1979* ("the EPA Act"). The second to fifth respondents were the various corporate entities pursuing the Project ("the proponents"). The Project area comprises two sites on either side of Evans Avenue Eastlakes. The northern site spans the southern side of Gardeners Road to the north of Evans Avenue, bounded on the western side by Racecourse Place; it is presently used by a number of retail shops fronting Gardeners Road and a car park. The southern site is the site of the Eastlakes Shopping Centre, bounded on its western side by Eastlakes reserve and on the eastern and southern end by Barbers Avenue. St Helena Parade intersects with Barbers Avenue along the southern edge of the southern site. The Project was to be completed in two stages, Stage 1 being the basement, retail and residential components of the northern site, and Stage 2 being the southern site.

The environmental assessment requirements for the Project issued by the Director-General pursuant to s 75F(3) of the EPA Act included a "key issue 13", requiring the proponents to address drainage and groundwater issues; the proponents were also required to "address the design principles of SEPP 65 and the Residential Flat Design Code with particular reference to unit sizes". On 28 September 2012 the Council lodged a detailed submission in response to the Environmental Assessment Report ("EAR") prepared by the proponents, which included submissions on the drainage and groundwater issues associated with the Project, noting that the development contemplated by the Project required the extinguishment of easements to which it had not consented; that the relocation of pipes may have an adverse effect on the development and surrounding area and that an overland flow path analysis was required; and that a large proportion of the residential apartments did not comply with *State Environmental Planning Policy 65 – Design Quality of Residential Flat Development* ("SEPP 65"). The proponents were required to include in their Preferred Project Report further analysis and justification of non-compliance with the Residential Flat Design Code ("RFDC") guidelines for internal and external areas, and to provide additional stormwater management details including overland flow path analysis and emergency overflow path of OSD systems in accordance with the issues raised by the Council. In March 2013 the "Preferred Project Report and Response to Submissions" ("PPR") was provided by Don Fox Planning ("DFP") on behalf of the proponents. On 11 April 2013 a PAC officer sent an email to DFP concerning a "few matters which require additional information or justification", including unit sizes. A letter dated 8 May 2013 from DFP to the Department responded to that email. On 8 May 2013 the letter and two of its annexures were emailed both to the Department and the Council, and hard copies of the letter and all the annexures were delivered to the Department the next day. There was a factual dispute as to whether the annexures to the letter, including a CD which included an electronic file containing a "DRAINS" model, were provided to the Council. On or about 13 June 2013 the Director-General's report required under s 75I of the EPA Act was signed. In subsequent consultation with the Council a possible modification of the Project to include a road linking Racecourse Place to St Helena Parade ("the link road") was raised. In granting the Approval, the PAC rejected the option of including the link road, and determined conditions under s 75J(4) including condition B2(a) requiring design modification to amend units sizes "to meet the requirements of the [RFDC]", and condition B18 requiring provision of a detailed overland flow path analysis before the extinguishment of existing Council's drainage easements and relocation of Council drainage pipes on the southern site. The approved plans included a plan relating to Stage 2, DA010, containing an entry "relocate drainage easement".

The Council contended that the approved Project involved construction that would constitute an interference with Council's easements requiring their extinguishment and the Council had not agreed to their extinguishment, and that by reason of the Council's easements the Project was incapable of being

lawfully carried out; and that the PAC had failed adequately to consider the groundwater and drainage issues raised by the Project, and compliance with the RFDC.

Issues:

(1) whether the approved Project was incapable of being lawfully carried out in compliance with the conditions to which the Approval was subject;

(2) whether the asserted fact that the approved Project was incapable of being lawfully carried out by reason of the Council's easements was a matter relevant to the decision to approve the Project under s 75J(1) and a matter relevant to be included in the Director-General's report under s 75I, and whether it was manifestly unreasonable not to consider it;

(3) whether it was manifestly unreasonable to approve the Project otherwise than subject to a condition that the approval would not operate unless or until the easements had been extinguished;

(4) whether the PAC had failed to consider or adequately consider the matters referred to in key issue 13;

(5) whether the effect of condition B2(a) was that the Project as depicted in the approved plans was likely to be materially different to the Project as ultimately constructed; and

(6) whether in considering whether the approve the Project and deciding not to approve it with a modification providing for the inclusion of the link road, the PAC had taken into account an irrelevant consideration, namely that to require modification would require a redesign of a significant part of the southern side requiring reassessment of the Project.

Held: dismissing the proceedings with costs:

(1) to complete Stage 2 of the Project in accordance with the conditions the Council's easements had to be relocated. That meant they would have to be extinguished either by agreement with the Council or pursuant to the statutory regime provided for by s 89 of the *Conveyancing Act 1919* ("Conveyancing Act"). The completion of Stage 1 did not require the relocation of any of the easements: at [76];

(2) the granting of an approval under Part 3A of the EPA Act did not affect the proprietary rights of a third party such as the Council. If the carrying out of a development in accordance with the terms of an approval involved an interference with any such proprietary rights then, at the point at which an unlawful interference with those rights was threatened, imminent or occurring, the affected party could approach the Supreme Court. However, such action by the proponents would not involve a breach of s 75D(1) of the EPA Act: at [78];

(3) at no stage had the Council expressly stated that it would never grant consent to the extinguishment of its easements. It would be surprising if it had as all public bodies including the Council must consider such matters bona fide. At most, it was only necessary for the PAC and the Court to note the possibility of extinguishment occurring by reason of an order under s 89 of the Conveyancing Act. There was nothing in the EPA Act which justified the Court speculating as to the outcome of such an application. The prospect of the extinguishment so as to allow Stage 2 to proceed remained a contingency, and the existence of that contingency had no relevance to the validity of the PAC's approval, and nor did it give rise to an actual or threatened breach of the EPA Act: at [79]-[81];

(4) in any event the Court would not grant a declaration that the Project was "incapable of being carried out or carried out in compliance with the conditions", as it would not reflect the application of the EPA Act to findings of fact made by the Court concerning events that had happened, and instead purported to record a prospective assessment of the likelihood that the carrying out of the Project would unlawfully interfere with the Council's proprietary rights: at [82];

(5) the Council had not identified why the alleged (legal) incapacity to complete the Project was a factor that the Director-General was required to include in his or her report under s 75I or was a matter that the Minister or his delegate was bound to consider in exercising the power conferred by s 75J: at [88];

(6) the Council did not establish that either the Director-General or the PAC did not take into consideration the necessity to extinguish the Council's easements to complete Stage 2: at [94];

(7) it was not manifestly unreasonable to grant the Approval without a condition that the approval not operate until the easements were extinguished. The imposition of that condition would have placed the

proponents in a position of unfair disadvantage in dealing with the Council in that they would have been unable to start Stage 1 of the Project without having secured the extinguishment of the easements, even though that was only necessary for Stage 2 and the commencement of construction of State 2 would not take place for many years: at [97];

(8) the annexures to the letter of 8 May 2013 from DFP and the CD were hand delivered on 8 May 2013 to the Council premises, and those documents were not passed on to the relevant Council officers (at [73]). The Council never disputed receiving a copy of the letter by email. The Council had had a proper opportunity to respond to the letter and its accompanying material. To the extent that the Council may have been hampered in responding because the relevant members of its staff did not have all the annexures to the letter, that was a result of a breakdown of its own procedures: at [103];

(9) the Director-General appeared to consider that what was attached to the letter of 8 May 2013 was an overland flow path analysis, and at the Council's suggestion, a condition was imposed requiring a more detailed overland flow path analysis prior to the extinguishment of the easements. The Council had not established that there had not been an overland flow path analysis, or that the PAC had not considered the matters referred to in key issue 13: at [106]-[108];

(10) the Court was not satisfied that the Director-General's report had failed to address key issue 13 of the Director-General's requirements: at [116];

(11) nothing in Part 3A of the EPA Act required either the Director-General or the PAC to have regard to SEPP 65: at [121]. It was common ground that the RFDC was not made under statute or regulation and did not have any force of law except to the extent that it was expressly incorporated in some other instrument such as SEPP 65. In this case the effect of condition B2(a) was that at least some aspects of it were incorporated into the Approval, although there was a substantial contest as to which ones: at [124];

(12) it was not possible to assess in any detail the extent to which compliance to condition B2(a) would alter the parameters of the residential component of the Project as depicted in the approved plans. However condition A1 capped the number of units at 405 and the envelope of the residential component was not affected by condition B2(a): at [137]. While compliance might lead to a not insignificant reduction in the number of apartments or a change in the apartments mix, or both, that would not be a significant alteration to the approved plans: at [139];

(13) it was unfortunate that condition B2(a) used the phrase "requirements of the [RFDC]". The RFDC did not have the force of law and the language of the entire document was anything but prescriptive. The RFDC referred to the Table in Part 03 (Building Configuration) concerning Apartment Layout for nine apartment types as merely "provid[ing] information" and as being only "examples" for use as a "comparative tool", and did not purport to suggest that the apartment types were mandatory or that the apartment areas represented some minimum standard. The areas listed in the table could not be described as "[u]nit size requirements": at [144];

(14) the "Rules of Thumb" which included reference to minimum apartment areas for one, two and three bedroom apartments were more easily characterised as "requirements" than the table; they were at least described as being "rules" (albeit "rules of thumb") and were referred to as "minimum apartment sizes" (albeit to be used "as a guide"), and the rules used more exhortatory language than the descriptive text: at [145];

(15) the "[u]nit size … requirements" of the RFDC were the "minimum apartment sizes" referred to in the rules of thumb. Although condition B2(a) was unfortunately drafted its meaning was not uncertain in any relevant sense: at [152], [153]. On its proper construction condition B2(a) only required a minimal reconsideration of the design of the apartments proposed to be built for the Project: at [155];

(16) the principles applicable to approvals under Part 4 of the EPA Act relating to finality and uncertainty do not apply to Part 3A, the features of which include the scale of the projects likely to be considered, the terms of s 75J and the power to grant modifications conferred by s 75J(4). In any event, no persuasive reason had been put forward by the Council as to why the authorities establishing that proposition should not be followed, and the Court declined to do so. Nothing in those decisions nor this judgment involved an acceptance that the power to impose conditions conferred by s 75J(4) was unlimited: at [159]-[161];

(17) the RFDC did not have the force of law, and it followed that to misconstrue the RFDC, if that is what the PAC did, was not an error of law: at [162]; and

(18) the effect of the PAC's findings was that the proposal for a link road was unnecessary to consider further because the Project adequately addressed traffic impacts, to consider it further would only cause delay, and in any event its adoption might exacerbate any adverse traffic impacts. There was nothing in the EPA Act which rendered that reasoning impermissible: at [170].

Teys Australia Southern Pty Ltd v Burns [2015] NSWLEC 1 (Pain J)

Facts: Teys Australia Southern Pty Limited commenced judicial review proceedings against Mr Craig Burns and Mr Geoffrey Ashley (collectively, "the First Respondents") and Wagga Wagga City Council ("the Council") seeking a declaration that development consents granted to the First Respondent by the Council were void and of no effect. The consents were for land known as "Cartwrights Hill". Of the three planning proposals that considered this land for the purposes of inclusion into the *Wagga Wagga Local Environment Plan 2010*, only the second two were relevant to these proceedings. The relevant planning authority for the second two proposals was the Southern Joint Regional Planning Panel ("the JRPP"). In October 2011, the Deputy Director-General of the Department of Planning and Infrastructure decided that the proposed rezoning of the land at Cartwrights Hill should proceed subject to a number of conditions ("the gateway determination") including community consultation and public exhibition of relevant odour studies. In February 2012 the JRPP resolved to place the second planning proposal including supporting documents on public exhibition. The amendment was deferred to allow further reports and investigations. The third planning proposal similarly underwent a period of public exhibition. In May 2013 the JRPP resolved to request a further report on appropriate zonings and to request the Council to commission further odour and noise impact studies. Around mid-April 2013 the First Respondents lodged separate development applications ("DAs"). A council officer produced a report assessing the DAs and the development assessment coordinator approved them under delegated authority in late July 2013.

Issues:

(1) whether the second and third planning proposals constituted a "proposed instrument" for the purposes of s 79C(1)(a)(ii) of the *Environmental Planning and Assessment Act 1979* ("the EPA Act");

(2) whether there was a failure by the Council to consider a mandatory consideration, namely the proposed instrument, under s 79C(1)(a)(ii); and

(3) whether there was a failure by the Council to consider relevant considerations under s 79C(1)(b), (c), (d) and (e) of the EPA Act.

Held: summons dismissed and costs reserved:

(1) the amendments to Pt 3 Div 4 of the EPA Act made significant changes in the procedures for making LEPs: at [35]. In the planning proposal and gateway process, the concept of "proposed instrument" is embedded within those elements which are then the subject of public consultation: at [38]. The second planning proposal contained documents that generally met the description of what is required for a planning proposal by s 55(2)(a)–(e): at [42]. The second and third planning proposals should be considered as part of the same evolving planning proposal following the gateway determination: at [46];

(2) the second planning proposal as varied by the third planning proposal constituted a proposed instrument to which s 79C(1)(a)(ii) applied: at [47]. The requirement that the proposal be notified to the Council as the consent authority was met: at [51];

(3) the council officer's assessment report did not accurately reflect the wording in s 79C(1)(a)(ii), nevertheless, the contents of the report suggested that a proposed instrument such as existed at the time of the decision was taken into account: at [64], [67]. The report of the council officer should not be read as if drafted by a lawyer, so that absence of reference to the words "proposed instrument" was not indicative of error. There was no failure to consider a mandatory relevant matter: at [71]; and

(4) there was no failure by the Council to consider mandatory relevant considerations: at [90]. The council officer's report contained sections that addressed the likely impacts, including environmental, of the proposed development (s 79(1)(b)), the suitability of the site for development and an identification of

the odour and noise issues (s 79C(1)(c)), a summary of issues identified from submissions by the public (s 79C(1)(d)), and the public interest (s 79C(1)(e)): at [94]–[97].

Zhang v Woodgate and Lane Cove Council [2015] NSWLEC 10 (Preston CJ)

Facts: Mr Zhang was granted development consent by Lane Cove Council ("the Council") to carry out development on his property. A Council officer, Mr Woodgate, was a public officer within the meaning of s 3(1) of the *Criminal Procedure Act* 1986 and authorised under s 14 to commence proceedings for an offence against a person. The Council alleged that Mr Zhang carried out development otherwise than in accordance with the development consent and Mr Woodgate thus commenced criminal proceedings against Mr Zhang in the Local Court for an offence against s 125(1) of the *Environmental Planning and Assessment Act 1979* ("EPA Act"). Mr Zhang pleaded not guilty to the charge. Prior to trial in the Local Court, Mr Woodgate issued written notice under s 118BA of the EPA Act to Mr Richard Ferguson requiring him to attend at the Council's offices to answer questions "about the over excavation of [Mr Zhang's property] in the Lane Cove Government Area" ("the Notice"). The Notice was served to Mr Ferguson under cover letter from the Council's solicitors with the heading "Lane Cove Council v Zhang and Decon Constructions Pty Ltd…Illegal building works and over-excavation - prosecution". Mr Zhang sought judicial review challenging the validity of the Notice and seeking declaratory and interlocutory and final injunctive relief.

Issues:

(1) whether the Council was empowered under s 118BA to issue the Notice to Mr Ferguson in relation to pending criminal proceedings being prosecuted by the Council against Mr Zhang;

(2) whether the Notice amounted to a contempt of court; and

(3) whether the Notice was defective.

Held: the Notice is ultra vires and should be declared invalid:

(1) the Council acted ultra vires the power in s 118BA by issuing the Notice: at [71]. The power under s 118BA cannot be used to issue a notice to obtain information to enable a council to exercise its function to prosecute for an offence against the EPA Act because that is not a function of the Council under the EPA Act: at [65], [69]-[71]. The right of a council to institute a prosecution for an offence against the EPA Act is found in the *Criminal Procedure Act 1986* and the power of a council to institute proceedings for an offence under any Act is conferred by the *Local Government Act 1993*: at [66];

(2) the issue of the Notice did not amount to a contempt of court: at [92]. The issue of the Notice, and the compulsory interrogation of Mr Ferguson that it enabled, did not impede the conduct of the criminal proceedings against Mr Zhang or prejudice his defence or otherwise interfere with his rights under the accusatorial system of criminal justice: at [92]. The use of the power under s 118BA of the EPA Act to compel a person who is not a defendant in pending criminal proceedings and who is not yet even a witness to answer questions in relation to matters the subject of the criminal proceedings does not give the Council an advantage which the rules of procedure of the Local Court would otherwise deny the Council: at [97]; and

(3) the Notice was defective in that the identification of the matter in the Notice as "about the over excavation of [Mr Zhang's property] in the Lane Cove Government Area" was not clear and certain: at [118]-[120]. The Notice was not defective in not stating either the functions of the Council under the EPA Act or that Mr Woodgate suspected on reasonable grounds that Mr Ferguson had knowledge of matters in respect of which information was reasonably required to enable the Council to exercise its functions: at [115]-[117].

Agricultural Equity Investments Pty Limited v The Hon Chris Hatcher MP, Minister for Resources and Energy, Special Minister [2015] NSWLEC 23 (Pepper J)

Facts: the first plaintiff, Agricultural Equity Investments ("AEI") and second plaintiff, Gold and Copper Resources ("GCR") challenged an exemption order made by the Minister for Energy & Resources pursuant

to s 6 of the *Mining Act 1992* ("the Act") which allowed Westlime Pty Ltd and Big Island Pty Ltd to carry out certain 'mining purposes' on the site. The mining purposes specified in the exemption related to the processing of iron ore imported from the Dargues Reef Gold Mine located 370kms away, in addition to Westlime's current limestone operation on the relevant land. AEI held a current exploration licence for minerals within the land, while GCR held an application for an exploration licence.

The plaintiffs asserted that the grant of a mining exemption under s 6 of the Act was tantamount to the grant of a mining lease for mining purposes (distinguished from a mining lease for mineral extraction).

Issues:

(1) whether the grant of the exception order was invalid because:

  (a) s 58(1)(a) of the Act prohibited the grant of a mining lease over land that was subject to an exploration licence; and

  (b) a mining lease for mining purposes could only be granted for mining purposes carried out in the immediate vicinity of a mining lease in respect of minerals, or a mineral claim pursuant to s 63(5)(a) and (b) of the Act;

(2) in the alternative, whether the power to grant an exemption was exercised for an improper purpose to circumvent the operation of ss 58(1) and 63 (5) of the Act; and

(3) whether AEI was denied procedural fairness because the Minister was required to, and did not, notify AEI of the grant or give them an opportunity to be heard with respect to it.

Held: application dismissed with costs:

(1) a proper construction of the Act distinguished between the grant of an exemption under s 6 of the Act and the grant of a 'mining lease for mining purposes' described in s 73(1A). Because no mining lease was granted, neither ss 58(1)(a) nor 63(5) were enlivened;

(2) the primary purpose of the grant of exemption was the allowance of the prescribed mining purposes, rather than the circumventing of the Act. Having regard to the intent of the Act, this was both a proper and expected use of the Minister's discretion; and

(3) the right to procedural fairness is only to be enlivened where there is an adverse effect on legally recognised rights or interests. As the exemption for mining purposes did not affect in a material way the operation of the plaintiffs' actual and putative exploration licences, there was no denial of procedural fairness.

Criminal

Bankstown City Council v Hanna [2014] NSWLEC 152 (Preston CJ)

Facts: Mr Hanna ran a business that transported excavation and building waste and rubbish. On 5 April 2012, he transported and deposited eight stockpiles of building waste on a vacant block of private land at 890 Henry Lawson Drive, Picnic Point. On that same day, he transported and deposited one stockpile of building waste on a public park at 739 Henry Lawson Drive. Each stockpile was approximately 10 tonnes in size. Some of the stockpiles contained asbestos. Bankstown City Council ("the council") prosecuted Mr Hanna for four offences, two for each property, being, first, transporting waste to a place that cannot be used as a waste facility for that waste, contrary to s 143 of the *Protection of the Environment Operations Act 1997* ("the POEO Act") and, secondly, polluting land, contrary to s 142A of the POEO Act. Mr Hanna pleaded guilty to each of these offences. Over the last seven years, Mr Hanna has been issued with at least 29 penalty notices and prosecuted in courts at least 11 times for various offences concerning the unlawful transporting and dumping of waste.

Issue:

(1) what was the appropriate penalty to impose for each charge taking into account the objective circumstances and the subjective circumstances relevant to Mr Hanna.

Held: convicting the defendant of all four offences, ordering the defendant to pay fines totalling $225,000, ordering the defendant to pay the prosecutor's costs, and making a publication order:

(1) the significant degree to which Mr Hanna's conduct offended against the objects of the POEO Act and the statutory provisions creating the offences and undermined the regulatory scheme increased the objective seriousness of the offences: at [57];

(2) the harm to the environment and human health and the financial loss to the owners of the lands caused by commission of the offences were 'substantial' and an aggravating factor under s 21A(2)(g) of the *Crimes (Sentencing Procedure) Act 1999*: at [66], [67], [69];

(3) the premeditated and intentional commission of the offences with knowledge of their illegality increased the objective seriousness of the offences: at [72], [78], [79];

(4) Mr Hanna committed the offences to save incurring the expense of paying the tipping fees charged by licensed waste facilities and thereby to increase the money he earned from the job that he had agreed to do: at [81]. Such a reason for committing the offences increased the objective seriousness of the offences: at [82];

(5) Mr Hanna could reasonably have foreseen the harm caused or likely to be caused to the environment by the commission of the offences: at [85];

(6) the practical measure that Mr Hanna could and should have taken was to transport the building waste to and dispose of it at a place that could lawfully be used as a waste facility for that waste, instead of transporting and depositing the waste on the private land and the public park: at [87];

(7) Mr Hanna personally carried out the acts of transporting and depositing the waste that constituted the offences and therefore had complete control over the causes that gave rise to the offences: at [89];

(8) having regard to the objective circumstances, the offences were of medium objective gravity: at [91];

(9) Mr Hanna's significant record of previous convictions for offences of the same or similar kind to the offences for which he was to be sentenced were an aggravating factor and warranted increasing the severity of the punishment of the offences substantially beyond what had been imposed previously: at [98];

(10) Mr Hanna should be afforded the maximum discount for the utilitarian value of his pleas of guilty of 25%: at [103];

(11) Mr Hanna did not show genuine remorse, of the kind required by s 21A(3)(i) of the Crimes (Sentencing Procedure) Act 1999: at [118];

(12) Mr Hanna and his business were likely to re-offend: at [135];

(13) Mr Hanna's minimal assistance to law enforcement authorities was not an aggravating factor, rather, it simply was not established to be a mitigating factor: at [137], [140];

(14) the purposes of sentencing relevant to the offences and Mr Hanna were those that were retributive, preventative and restorative: at [142];

(15) the sentence must take account of the community's view of the moral reprehensiveness of dumping waste: at [144]-[146], and the community's concept of fairness that all persons should bear the costs of complying with environmental laws: at [149]-[150];

(16) the sentence needed to achieve individual deterrence to prevent Mr Hanna from re-offending and general deterrence to prevent others from committing waste offences: at [151]-[153];

(17) the sentence needed to recognise the harm caused or likely to be caused to the victims of the offences – the environment, the landowners and nearby residents: at [155];

(18) taking into account the objective and subjective circumstances relevant to Mr Hanna, the appropriate penalties for each of the offences were fines of: $120,000 for the offence of unlawfully transporting and depositing waste at the private land at 890 Henry Lawson Drive; $80,000 for the offence of polluting land at the private land; $100,000 for the offence of unlawfully transporting and depositing waste at the public park at 739 Henry Lawson Drive; and $60,000 for the offence of polluting land at

the public park: at [156]-[158]. These amounts were discounted by 25% for the early pleas of guilty, resulting in fines in the amounts of $90,000, $60,000, $75,000 and $45,000: at [158]. These penalties were within the appropriate range: at [161];

(19) the totality principle required there to be some adjustment of the aggregate fines for the two offences for each property: at [166]. Mr Hanna's conduct and the criminality involved in dumping waste on each property involved some but not an extensive degree of overlap: at [167]-[173]. A reduced fine of $125,000 for the two offences relating to the private land (apportioned $77,000 for the offence of unlawfully transporting and depositing waste and $48,000 for the offence of polluting land) and $100,000 for the two offences relating to the public park (apportioned $60,000 for the offence of unlawfully transporting and depositing waste and $40,000 for the offence of polluting land) was just and appropriate in the circumstances: at [173]. There should be no further adjustment for the aggregation of the sets of fines for the two properties. Mr Hanna's conduct in dumping waste on the private land was discrete to his conduct of dumping waste on the public park: at [174];

(20) it was not just or appropriate for Mr Hanna to benefit, by way of a reduction in the amount of the fines that would otherwise be appropriate to impose, from his self-inflicted financial stress: at [181]; and

(21) a publication order should be made to improve the effectiveness of both individual and general deterrence: at [183].

Chief Executive of the Office of Environment and Heritage, Department of Premier and Cabinet v Turnbull [2014] NSWLEC 150 (Sheahan J)

(related decisions: *Turnbull v Director-General, Office of Environment and Heritage* [2014] NSWLEC 84, *Turnbull v Director-General, Office of Environment and Heritage (No 2)* [2014] NSWLEC 112 Preston CJ*)*

Facts: the defendant, Ian Turnbull, pleaded guilty to illegally clearing native vegetation near Moree in north-west New South Wales between 1 November 2011 and 18 January 2012, in breach of s 12(1) of the *Native Vegetation Act 2003*.

The clearing occurred across two adjacent properties, named 'Strathdoon' and 'Colorado' respectively. Strathdoon had a total area of 916 ha, and Colorado had a total area of 1533 ha. At the time of the clearing the defendant did not own the properties, however the two bulldozers used to clear the vegetation were operated by himself and another man under his supervision, Ivan Maas.

The clearing was done in preparation of the purchase of Strathdoon by Turnbull's grandson Cory and Cory's wife Donna, and of Colorado by his son Grant. The defendant mortgaged his own property to secure finance for Cory's purchase of Strathdoon, and his desire to 'set his boys' up in the farming industry appeared to be the main motivation behind the clearing. Those title transfers were duly completed on 31 January 2012.

Prior to this sentencing hearing, Class 1 appeals were commenced challenging some remediation directions issued by the prosecutor to Cory, Donna and Grant. Those appeals were successful, and the directions were varied.

In respect of these proceedings, the parties came to substantial agreement, reflected in a lengthy statement of agreed facts. Importantly, however, agreement could not be reached on the total area of vegetation cleared in the charge period, the environmental harm caused, and the motive behind the clearing. Most of the four day hearing was spent on the competing expert evidence adduced in respect of the environmental harm caused and the area cleared. It was alleged that the defendant had cleared a total of 493 ha of native vegetation across the two properties within the charge period. This was based on the total area across which trees were removed. The defendant argued that calculating the area in this way was flawed, as it assumed that native groundcover existing between the felled trees was cleared within the charge period, when it was not. He submitted that the appropriate calculation was the aggregate area of tree canopy removed in the charge period, being a total of 38 ha.

Issues:

(1) appropriate sentence to be imposed for this offence; and

(2) costs.

Held: the defendant was fined $140,000, and ordered to pay the prosecutor's professional and investigative costs:

(1) a plea of guilty admitted the central elements of the charge, it did not admit the non-essential ingredients of an offence: at [22];

(2) any factor adverse to the defendant, regarding either the objective or subjective circumstances of an offence, had to be proved beyond reasonable doubt: at [118];

(3) it was fundamental that an offender is not punished for an act for which he had not been charged: at [105]. The groundcover between the cleared trees was not cleared within the charge period, and, therefore, could not be taken into account when calculating the area cleared for the purposes of sentencing. Accordingly, the defendant was sentenced on the basis that only 38 ha of native vegetation was cleared: at [107] – [110];

(4) the area cleared was only one factor to be taken into account in the determination of the level of environmental harm caused: at [37] – [38]. The removal of approximately 3000 trees, many of which were mature trees with developed hollows, would have significantly reduced the food and shelter available for native fauna in the area, in particular Koala, and the Grey-Crowned Babbler. The environmental harm caused by the clearing, was therefore substantial: at [125] – [136];

(5) other relevant objective circumstances were that the defendant's breach was reckless: at [144]; the clearing was financially motivated: at [152]; the high level of control exercised by the defendant in the breach: at [153]; and the high level of foreseeability that the clearing would cause environmental harm: at [154]; and

(6) the only subjective factor taken into account was the defendant's plea of guilty. However, he was entitled to only a 12.5 % discount as the utilitarian value of his plea was reduced by the need for a four day hearing: at [167]–[168].

Lismore City Council v Ihalainen (No 2) [2014] NSWLEC 198 (Biscoe J)

(related decision: *Lismore City Council v Ihalainen* [2013] NSWLEC 149 Pain J)

Facts: in the first of two proceedings heard together the defendant, Mr Ihalainen, pleaded not guilty to three charges of offences against s 125 of the *Environmental Planning and Assessment Act 1979* ("EPA Act") for carrying out development otherwise than in accordance with development consent ("the Consent") on his rural property at Terania Creek ("the Property"), contrary to s 76A(1)(b). In the second proceeding the defendant pleaded not guilty to one charge of an offence against s 120 of the *Protection of the Environment Operations Act 1997* ("POEO Act") that he polluted waters by introducing soil into an unnamed natural watercourse ("the Creek") on the Property. All of the charges related to construction of an unsealed fire trail required by a condition of the Consent. On the last page of the Consent appears the abbreviation "Encl" and the prosecuting council submitted that a site plan ("the Site Plan") and four other plans located immediately behind a copy of the notice of determination of the Consent were thereby incorporated into the Consent as approved plans.

Issues:

(1) whether the defendant breached condition 9 of the Consent by failing to install sediment controls in accordance with the Consent prior to commencing construction of the fire trail;

(2) whether the defendant failed to construct the fire trail in accordance with the alignment shown on the Site Plan;

(3) whether the Site Plan was enclosed with and incorporated in the Consent;

(4) whether the defendant breached condition 13(i) of the Consent by failing to construct the fire trail so that it complied with Section 4.3.3 of the NSW Rural Fire Service Planning for Bushfire Protection 2001; and

(5) whether the defendant polluted the waters of the Creek by causing stormwater runoff from the fire trail to change the physical condition of those waters.

Held: both proceedings dismissed:

(1) the note to condition 9 "Inspections of the structural work will not be carried out and work may not proceed, until the sedimentation controls are in place" was not a footnote and was part of the Consent: at [69];

(2) the words in the note to condition 9 "work may not proceed" should be construed as meaning "work must not proceed". They imposed an obligation, not a discretion, as to whether or not to proceed with work: at [79];

(3) the note to condition 9 was a notice that until sedimentation controls were in place, the statutory critical stage inspections of the dwelling would not be carried out and structural work on the dwelling must not proceed: at [81];

(4) condition 9 apart from the note had no express requirement that sediment control measures must be put in place prior to any work being carried out: at [70], [82]. Nor was there any necessary implication of such a requirement. That construction was reinforced by the industry practice that sediment controls are not usually put in place for a fire trail prior to work commencing: at [82];

(5) the advisable way in which approved plans are incorporated into a development consent is for the development consent to expressly identify them, and for each plan to be stamped with the Council's approval and a cross reference to the development consent under which it was approved. That did not occur in this case: at [90];

(6) the in rem question as between a council and third parties is whether a third party searcher of the council's development consent records would know from the search that a particular plan was enclosed with and incorporated into a consent as an approved plan. That is an objective question: at [113];

(7) given the state of the evidence, including that the sequence of documents in the Council file having been changed, there was a reasonable doubt as to whether the Site Plan was enclosed with and incorporated into the Consent: at [107], [114];

(8) whereas there was an obligation under condition 11 to locate the building on a particular part of the site, there was no similar requirement in the Consent that the fire trail must follow any particular alignment: at [115];

(9) section 4.3.3 of Planning for Bushfire Protection 2001 is concerned with fire trails in their finished state, not with the process of construction of fire trails: at [126];

(10) there was a reasonable doubt as to whether the flow entering the Creek included sediment-laden runoff from the fire-trail as it was observed from a distance of about 34 metres on the far side of a grassy swale that acted as a grass filter: [143];

(11) there was a reasonable doubt as to whether the evidence of visual observations establishes that there was a change in the physical condition of the waters of the Creek caused by sediment-laden stormwater runoff as the specimens taken were not visually distinguishable from the waters of the Creek: at [146]-[147];

(12) insofar as *Environment Protection Authority v Munters Pty Ltd* (1997) 98 LGERA 279 decided that the change required by the statutory definition of water pollution does not have to be detrimental, that decision was not wrong: at [149]; and

(13) there was a reasonable doubt as to whether the water sampling proves that the sediment-laden stormwater runoff from the fire trail changed the physical condition of the waters of the Creek: at [169].

Environment Protection Authority v Riverina (Australia) Pty Ltd [2014] NSWLEC 190 (Pepper J)

Facts: the defendant, Riverina (Australia) Pty Ltd ("Riverina"), was charged with a water pollution offence in contravention of s 120(1) of the *Protection of the Environment Operations Act 1997* ("the POEO Act"). Riverina made an oral application on the first day of the two week hearing to set aside the summons on the

grounds that it was duplicitous. The summons, and a letter that the Environment Protection Authority ("the EPA") had provided to Riverina providing further particulars to the charge, stated that there were two possible methods by which the one count of water pollution was committed: either because Riverina was the occupier of the premises where the pollution occurred, and therefore, it had caused pollution in that capacity pursuant to s 257 of the POEO Act (particular 1(c)(i)) ("the first manner of contravention"); and/or, because pollutant was placed into a bund on the premises and the drain or drains into which that drain flowed (particulars 1(c)(ii) and (iii)) ("the second manner of contravention"). Riverina asserted that the charges in the summons were duplicitous because of the very broad description of "pollutant" that had been used in the summons; because two methods of contravention giving rise to the single offence as charged had been nominated in the particulars to the summons and because details of the act, matter or thing giving rise to the first manner of contravention had not been provided to it.

Issues:

(1) when should the application have been brought;

(2) whether the summons was duplicitous in its definition of the "pollutant";

(3) whether the summons was duplicitous in its specification of the manner of contravention; and

(4) whether s 257 of the POEO Act obviated the need for the prosecutor to provide factual particulars of the charge.

Held: the summons was duplicitous:

(1) Riverina should have brought the application before the trial commenced. This is because these controversies are often complex and require determination before the hearing starts: at [5]–[9];

(2) the pollutant, although broadly particularised, was known to Riverina; it was one or more of the matters specified in the summons that was placed in a drain leading from the bund: at [51]–[53];

(3) a problem arose when the broad description ascribed to the "pollutant" was read in the context of, and in conjunction with, the summons as a whole, and in particular, the two-fold manner of contravention of s 120. The evidence of the EPA referred to potential acts of pollution arising at the bund and another unspecified act of pollution occurring from one or other parts of the Riverina premises, giving rise to two distinct unlawful acts, and therefore, two separate offences charged within the one count: at [46], [53] and [69];

(4) s 257 of the POEO Act did not, by its language or context, abrogate a prosecutor's obligation to disclose the particular act, matter or thing alleged to be the foundation of the charge. Given the fundamental nature of the common law right of a defendant to know not only the legal nature of the offence with which he or she has been charged, but also the factual elements of the offence, it may be presumed that had Parliament intended by the enactment of s 257 to circumscribe this right, it would have done so by express statutory language or necessary intendment, neither of which were present. Section 257 was no more than a device attributing the criminal liability of third parties to occupiers of premises: at [55]–[57];

(5) it was a misreading of the remarks of Pain J in *Newcastle City Council v Pace Farm Egg Products Pty Ltd (No 2)* [2005] NSWLEC 241 to infer that she suggested anything to the contrary in relation to s 257. Such an interpretation was inconsistent with earlier remarks made by her Honour that s 257 did not overcome the necessity for the prosecutor to prove its case: at [58]–[62]; and

(6) it was no answer to say that because it was a results based offence, it was sufficient merely to particularise that pollution occurred at the specified waters at or from Riverina's premises as the occupier of those premises. Nor was it an answer to say that the particulars of the waters, when read in combination with the particulars provided for the pollutant and the first manner of contravention, were sufficient to avoid any duplicity. It did not afford Riverina with the requisite details of where, when and how the first manner of contravention took place: at [66] and [69].

Environment Protection Authority v Truegain Pty Limited (No 4) [2014] NSWLEC 179 (Pepper J)

(related decisions: *Environment Protection Authority v Truegain Pty Limited* [2014] NSWLEC 98 Lloyd AJ, *Environment Protection Authority v Truegain Pty Limited* [2013] NSWCCA 204 Leeming JA, RA Hulme and Button JJ, *Environment Protection Authority v Truegain Pty Limited (No 2)* [2012] NSWLEC 55 Lloyd AJ, *Environment Protection Authority v Truegain Pty Limited (No 3)* [2012] NSWLEC 78 Lloyd AJ)

Facts: Truegain Pty Limited ("Truegain") was charged with breaching a condition of its environment protection licence in contravention of s 64(1) of the *Protection of the Environment Operations Act 1997* ("POEO Act") in that it failed to adequately store liquid waste in a trade waste tank ("TWT") causing waste overflow from the tank. The overflow occurred as a result of a poor quality pump installed in the TWT to pump waste to the sewer; insufficient controls in the event of an overflow; and the lack of an alarm to alert employees to the pump failure or to TWT overflow. Truegain pleaded guilty to the offence at the earliest opportunity. In earlier proceedings, however, the original summons was found to be duplicitous and required amendment (*Environment Protection Authority v Truegain Pty Ltd* [2012] NSWLEC 41; (2012) 186 LGERA 412, upheld on appeal: *Environment Protection Authority v Truegain Pty Limited* [2013] NSWCCA 204; (2013) 85 NSWLR 125). The process extended the length of the proceedings. During the sentencing hearing, the prosecutor, the Environment Protection Authority ("the EPA"), intended, but omitted, to put any evidence before the Court as to the quantum of investigation costs it claimed an entitlement to. This was problematic because s 249 of the POEO Act expressly contemplates that the Court's power to order a defendant to pay investigation costs is predicated on those costs being fixed in a specific amount. Immediately prior to delivery of the judgment in the matter, the EPA sought to re-open the evidence to rely upon an affidavit of Mr Stephen Fuller in order to prove the quantum of the investigation costs claimed. The affidavit attached a document entitled "submission: 20100062" which the EPA submitted was an invoice for the amount it was claiming as investigation costs. It was not apparent on the face of the document how it was generated nor who its author was.

Issues:

(1) the environmental harm caused by the commission of the offence;

(2) whether Truegain's previous conviction for an environmental offence was an aggravating factor pursuant to s 21A(2)(d) of the *Crimes (Sentencing Procedure) Act 1999*;

(3) whether, and for what period, legal costs should be ordered against Truegain, in circumstances where considerable time and legal costs were earlier wasted as a result of the duplicitous summons;

(4) whether the prosecutor was entitled to the investigation costs it claimed; and

(5) whether the submission attached to Mr Fuller's affidavit was admissible.

Held: Truegain was fined $22,500 and a publication order was made:

(1) the environmental harm was at the lowest end of the spectrum. There was no evidence to the requisite criminal standard of any actual harm to the environment caused by the commission of the offence. The potential for harm caused by the presence of hydrocarbons occasioned by the overflow on the vegetation and the soil in the vicinity of the TWT was slight: at [99]–[104];

(2) Truegain's previous conviction for an environmental offence took place seven years prior to the commission of the present offence in 2010. Given its singular nature and the passage of time since the occurrence of the first offence, its commission did not amount to an aggravating factor: at [118];

(3) the EPA was not entitled to an order that Truegain pay any part of its costs incurred in relation to the charge prior to it being embodied in the amended summons filed 19 December 2013. Likewise the EPA was not entitled to an order that Truegain pay any part of the prosecutor's costs incurred in relation the interlocutory dispute concerning the duplicity of the unamended charges or an order that Truegain pay any costs incurred by the prosecutor in relation to those parts of the charge which were originally pressed but which were subsequently abandoned after the Court of Criminal Appeal found the charge duplicitous: at [131]–[139];

(4) the EPA was entitled to the investigation costs referrable to the offence as particularised in the amended summons. However, as no admissible evidence was put before the Court as to the quantum of these costs, the EPA failed to discharge its evidential burden under s 248 of the POEO Act and no order was able to be made: at [140] and [164]; and

(5) the submission attached to Mr Fuller's affidavit was inadmissible hearsay. It did not fall into the business record exception because it was generated for the purpose of the litigation, and therefore, was not admissible pursuant to ss 69(3)(a) or (b) of the *Evidence Act 1995*. There was nothing in Mr Fuller's affidavit that suggested a contrary conclusion should be adopted: at [151]–[161].

Aboriginal Land Claims

New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (Moonbi) [2014] NSWLEC 144 (Craig J)

Facts: in December 2010, the New South Wales Aboriginal Land Council ("the Land Council") lodged a claim with the Minister under s 36(2) of the *Aboriginal Land Rights Act 1983* ("the ALR Act") in respect of land which, at the date of claim, the "State of New South Wales" was recorded as registered proprietor. The claimed land consisted of four contiguous lots, having an aggregate area of 98.5ha near Moonbi in north western New South Wales. In 2012, the Minister refused the claim on the basis that the claimed lands were not "claimable Crown lands" within the meaning of the ALR Act, as the lands comprised "freehold land vested in the Minister for Public Works". The Land Council appealed to the Court under s 36(6) of the ALR Act.

Issues:

(1) whether, at the date of the land claims, the claimed land was vested in her Majesty for the purpose of s 36(1) of the ALR Act; and

(2) whether the Register was "conclusive" of title, even if registration had occurred in error or without authority.

Held: upholding the appeal:

(1) the claimed lands were, at the date of each claim, vested in Her Majesty within the meaning of s 36(1) of the ALR Act. As the State was recorded on each of the relevant folios of the Register as the registered proprietor of the claimed lands at the date upon which the Land Claims were made, and no other interest in the land was recorded on those folios, the land is vested in her Majesty by operation of s 42 of the *Real Property Act 1900* (NSW): at [97]. The Land Council was therefore entitled to an order for the transfer of the land; and

(2) the Register is conclusive of title, even if registration has occurred in error or without authority: at [69]. Where a correction is made to the Register under s 12(1)(d) of the *Real Property Act 1900* (NSW), subs 3(b) of that Act operates to maintain consistency with the indefeasibility provisions of the Act. It ensures that until such a time as a correction is made and recorded on the Register, rights accrued by reason of the information contained in the Register, immediately prior to correction, are preserved: at [87].

New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (Berrima) [2014] NSWLEC 188 (Pain J)

Facts: this was an appeal under s 36(6) of the *Aboriginal Land Rights Act 1983* ("ALR Act") from the Minister's refusal of Aboriginal land claim 36016 ("ALC 36016") made on 24 February 2012 for an area of land of 2.206ha used until November 2011 as Berrima Correctional Centre which included decommissioned prison buildings and grounds. ALC 36016 was refused by the Minister administering the Crown Lands Act ("the Minister") on the ground that the land was lawfully occupied by Corrective Services NSW ("CSNSW"). At the date of claim the claimed land was subject to three dedications for "Gaol Site (extension)", "Gaol Purposes" and "Gaol Site (addition)". By virtue of the definition of Crown land in s 3 of the *Crown Lands Act 1989* ("CL Act") the claimed land was not Crown land but public land (s 153 of the CL Act) because it was dedicated for a public purpose. On 19 October 2001, the claimed land was proclaimed as "Berrima Correctional Complex" and "Berrima Correctional Centre" pursuant to the *Crimes (Administration of Sentences) Act 1999* ("CAS Act"). On 6 September 2011, CSNSW announced that the

Berrima Correctional Centre would be closed by early November 2011. On 10 February 2012, the proclamations of "Berrima Correctional Complex" and "Berrima Correctional Centre" were revoked pursuant to the CAS Act. Indicia of occupation relied on by the Minister included the provision of 24 hour on-site security, maintenance of a contract for essential services, maintenance of the grounds and garden by workers under community service orders ("CSO workers") and the arrangement of a visit by Heritage Roses, a group concerned with species and varieties of roses generally developed in the nineteenth century or earlier.

Issues:

(1) whether any or all the indicia of occupation relied on by the Minister if established, amounted to occupation in fact of the claimed land within the meaning of s 36(1)(b) of the ALR Act at the date of claim; and

(2) if the answer to the first issue was yes, whether such occupation of the claimed land was lawful within the meaning of s 36(1)(b) of the ALR Act.

Held: the appeal was dismissed:

(1) a purpose for occupation may not be required: at [92]. If a purpose for occupation is required, to hold the land pending a decision on its future use was a purpose available to the Minister: at [93];

(2) the evidence gave rise to a proper inference that the provision of adequate security to the claimed land on a 24 hour basis was provided given payment of invoices for a specific number of guards: at [103]. Similar conclusions applied to the contract for maintenance of the gaol buildings: at [104]. The evidence of maintenance of fruit trees and rose bushes, gardening and grounds maintenance by CSO workers firmly established regular attendance as part of an on-going program of maintenance of the grounds and gardens at the date of claim which were not transitory or insubstantial: at [109]. The evidence concerning the arranging of a visit by Heritage Roses assisted in establishing that CSNSW was exercising control of the claimed land in the period leading up to the date of claim: at [111]. The various activities were considered collectively rather than individually. The activities of security and maintenance for the gaol buildings, provision of services as well as grounds maintenance were assessed as part of CSNSW exercising control over the claimed land in order to maintain it: at [113];

(3) the land was not divisible: at [125]; and

(4) there is no obligation imposed on the Minister administering the CL Act to create a reserve trust for public land under that Act: at [152]-[161]. The Crown can occupy public land as the owner of that land (at [162]-[164]). CSNSW could lawfully occupy the land: at [165]-[168].

Development Appeals

Blackmore Design Group Pty Limited v Manly Council [2014] NSWLEC 164 (Biscoe J)

(related decision: *Blackmore Design Group Limited v Manly Council* [2014] NSWLEC 151 Pepper J)

Facts: two matters were before the Court for determination in this Class 1 appeal against Manly Council's refusal of a development application for a proposed development at 9–11 Victoria Parade, Manly, which was in Zone B2 Local Centre under the Manly Local Environmental Plan 2013. The first matter was an uncontested, separate and preliminary question as to whether the proposed development is prohibited. The second matter was a notice of motion by the applicant for leave to amend to overcome the prohibition. The proposed amended plans sought to convert three ground floor residential units into commercial units in order to bring the proposed development within the definition of "shop top housing", which was development permitted with consent.

Issues:

(1) 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;

(2) whether the proposed amendments to overcome the prohibition convert the development into an original application, which does not engage the Court's power to permit amendment under cl 55 of the *Environmental Planning and Assessment Regulation* 2000;

(3) alternatively, as a matter of discretion under cl 55, whether leave to amend should be granted; and

(4) whether costs should be ordered on indemnity basis following *Calderbank* principles.

Held: answering the separate question in the affirmative, granting leave to amend the development application, and ordering the applicant pay the council's costs of the applicant's notice of motion for leave to amend and costs thrown away as a result of the applicant amending the development application:

(1) none of the ground floor apartments is located above a ground floor retail premises or a ground floor business premises. Therefore, they cannot be development for the purpose of "shop top housing" but are instead prohibited "mixed use development": at [13];

(2) the amendment proposal is essentially to change the proportions of residential use and commercial use and the consequences and further assessment are insufficient to convert the application into an original application. Therefore, there is power to allow the proposed amendment under cl 55: at [23], [25];

(3) the discretion under cl 55 should be exercised by granting the applicant leave to amend because the merit matters raised in opposition were insufficient (ie, parking shortfall; inadequate waste management), the assessment burden would be similar if the amendment were refused and the applicant had to lodge a new development application with council, council processes or Court processes could facilitate public participation, and the council had not successfully discharged its onus of proving its allegation that the amended application was a "sham": at [26];

(4) having regard to r 3.7(3)(a) of the Land and Environment Court Rules 2007 and the circumstances, the applicant should be ordered to pay the council's costs of the separate question, at least on the ordinary basis: at [31]; and

(5) costs should not be ordered on an indemnity basis because, assuming that *Calderbank* principles have a role in development appeals in Class 1 of the Court's jurisdiction, the applicant's position expressed in the pre-hearing correspondence was not unreasonable: at [38].

Ryan v Coffs Harbour City Council [2014] NSWLEC 159 (Sheahan J)

Facts: on 27 May 2013, Peter Ryan commenced this class 1 appeal against the Council's refusal of a development application ("DA") for a 5-lot subdivision of environmentally sensitive land on the New South Wales North Coast. He was named as the sole applicant in the appeal.

The subject land was owned by Red Rock Property Co Pty Limited (ACN 107 473 674) ("Red Rock"), of which Ryan was the sole shareholder and director. Red Rock engaged another company, GHD Pty Ltd, to lodge the DA on its behalf. The applicant named on the DA was "Red Rock Property Co Pty Ltd c/- GHD Pty Ltd (Shawn Lawer)".

Section 97(1) of the *Environmental Planning and Assessment Act 1979* ("EPA Act") provides that an "applicant" may bring an appeal against the decision of a consent authority in respect of a DA within 6 months after notice of the determination is given to the applicant, or the date on which that application is taken to have been determined pursuant to s 82(1). The word "applicant" is not defined in the EPA Act.

This decision of the court dealt with two competing notices of motion. The first, filed by the council on 6 May 2014, sought to have the appeal dismissed on the basis that Ryan was not an "applicant" under s 97(1) of the EPA Act. It was argued that the Court had no jurisdiction to hear a class 1 appeal brought in the name of a person who was neither the applicant on the DA, nor the principal of an agent engaged to lodge the DA on someone's behalf.

The second motion, filed by Ryan on 12 May, sought to substitute Red Rock for himself as applicant on the appeal, pursuant to s 64(1)(b) of the *Civil Procedure Act 2005* ("CP Act"). The motion also relied on s 65(2)(b), as the 6 month limitation period in respect of the lodgement of a class 1 appeal had expired.

Ryan engaged the services of Ross Creighton in this appeal, and it was Creighton who lodged the appeal application on Ryan's behalf. On 26 March, Red Rock/Ryan terminated the services of Creighton, and instructed a legal practitioner to take carriage of the matter.

Issues:

(1) whether Ryan was a proper "applicant" under s 97(1) of the EPA Act; and

(2) if not, whether ss 64(1)(b) and 65(2)(b) of the CP Act could be relied upon to substitute Red Rock for Ryan as applicant on the appeal.

Held: Ryan was a proper applicant on the appeal. However, if he was not, ss 64(1)(b) and 65(2)(b) could not be relied upon to substitute Red Rock as the correct party. Therefore, both notices of motion were dismissed:

(1) Red Rock could only act through its agents, and Ryan, as its sole director, was acting as Red Rock's agent when lodging the appeal. As actions of an agent are taken to be the actions of its principal, the appeal was essentially Red Rock's. In these circumstances there was no scope for a divergence of interests between the DA applicant, and the applicant on the appeal: at [67];

(2) section 64(1)(b) can cure only a mistake of fact, not law: at [44]; and

(3) a conscious decision was made to name Ryan as the applicant on the appeal, founded upon an (allegedly) erroneous belief that he would have been a proper applicant under s 97(1). Had Ryan not been a proper applicant under s 97(1) of the EPA Act, ss 64(1)(b) and 65(2)(b) would not have been available: at [75] – [79].

Compulsory Acquisition

Lawson v South Australian Minister for Water and the River Murray (No 2) [2014] NSWLEC 189 (Biscoe J)

(related decision: *Lawson v South Australian Minister for Water and the River Murray* [2014] NSWLEC 158 Biscoe J)

Facts: this was an application under s 102 of the *Public Works Act 1912* ("the PW Act") extending the time in which to make a compensation claim for the compulsory acquisition in 1922 of lands at Lake Victoria. The applicant is an Aboriginal woman. Her claim is that her Aboriginal great grandfather obtained possessory title (title by adverse possession) in 1848 (60 years after the first European settlement in New South Wales); in 1922 her paternal grandmother was a successor to that title and therefore had a statutory entitlement to compensation for the compulsory acquisition; and she is a successor to the statutory entitlement.

Issues:

(1) whether the action is time barred by virtue of s 14(1)(d) of the *Limitation Act 1969*; and

(2) in the Court's discretion, whether the application should be refused.

Held: the Court appoints 31 March 2015 as the date by which the applicant may serve the notice in writing referred to in s 102 of the PW Act in respect of the lands at Lake Victoria resumed in 1922:

(1) the weight of authority is against the submission that the application is time barred by virtue of s 14(1)(d) of the *Limitation Act*: at [13]–[15]; and

(2) on discretion, the Court should take into account of the fact that this is an Aboriginal land claim, and its context, which includes the history of indigenous dispossession and disadvantage, including suppression and deprivation since European settlement, and the relatively recent, nascent recognition by the courts that possessory title may have a role to play in land title claims by indigenous people: at [31].

Practice and Procedure

Friends of Tumblebee Incorporated v ATB Morton Pty Limited (No 5) [2014] NSWLEC 175 (Pepper J)

(related decisions: *Friends of Tumblebee Incorporated v ATB Morton Pty Limited* [2014] NSWLEC 127, *Friends of Tumblebee Incorporated v ATB Morton Pty Limited (No 2)* [2014] NSWLEC 134, *Friends of Tumblebee Incorporated v ATB Morton Pty Ltd (No 3)* [2014] NSWLEC 133, *Friends of Tumblebee Incorporated v ATB Morton Pty Limited (No 4)* [2014] NSWLEC 166 Pepper J)

Facts: the central issue for determination in the principal proceedings was whether, pursuant to s 78A(8)(b) of the *Environmental Planning and Assessment Act 1979* ("the EPA Act") the development application ("the DA") lodged by the respondent ("ATB") was required to be accompanied by a species impact statement ("SIS") because the application was in respect of development that was likely to significantly affect the Regent Honeyeater (a threatened species) and its habitat ("the central issue"). The DA was lodged over a site in the Hunter Economic Zone ("the HEZ"), an area known to be a habitat of the Regent Honeyeater. Friends of Tumblebee Incorporated ("Tumblebee") sought to rely on an affidavit affirmed 30 October 2014 of Mr Michael Roderick, an ecologist who was working as the coordinator of Woodland Birds for the Biodiversity project at BirdLife Australia. Mr Roderick had written papers in 2012 and 2013 on the prevalence of the Regent Honeyeater in the Lower Hunter Region of NSW, upon which both ecological experts in the proceedings, Dr Stephen Debus for Tumblebee and Mr Craig Anderson for ATB, had relied. Mr Roderick's affidavit attached raw spreadsheet data about the occurrence of the Regent Honeyeater in the Hunter Economic Zone ("the HEZ") in 2012, upon which he had based his 2013 report. The application came on day four of what was listed as a two day trial, during the concurrent evidence of the ecological experts. Tumblebee's explanation for the application's lateness was that it had not been aware that the occurrence of the Regent Honeyeater in the HEZ was a matter in dispute until the third day of the trial, when counsel for ATB had cross-examined Dr Debus on the subject in an attempt to prove that the HEZ was not as important a habitat for the Regent Honeyeater as had previously been thought.

Issues:

(1) whether Mr Roderick's affidavit constituted evidence that was relevant to the central issue for determination in the proceedings; and

(2) whether the lateness of the application unduly prejudiced ATB by delaying the finalisation of the proceedings further.

Held: leave granted to Tumblebee to rely on the affidavit:

(1) the evidence was relevant and significant. Reliance on the evidence would prevent the Court from proceeding on a potentially incorrect factual basis, namely, that there were fewer occurrences of the Regent Honeyeater in the area the subject of the development approval than the experts had previously understood. Evidence of the occurrences of the bird in the HEZ became critical when, as at 2011, it was estimated that only 350 to 400 mature Regent Honeyeaters remained in the world. While it was true that the spreadsheet data was unreliable because it constituted raw sightings data and was therefore likely to include multiple accounts of some birds and no account of other birds in the area, it was nonetheless the same data that formed the basis of two earlier reports written by Mr Roderick that both ecological experts in the proceedings had relied upon in expressing their opinions: at [31](b) and (d)]; and

(2) Tumblebee's belief that the occurrence of the Regent Honeyeater in the HEZ was not in contention was reasonable because the joint report of experts had agreed on its occurrence in the area. The unfairness to ATB caused by the granting of leave was not sufficient to outweigh the other factors that caused the Court to exercise its discretion in favour of Tumblebee. These factors included that Tumblebee acted with appropriate haste to bring the matter to ATB's and the Court's attention once it realised that reliance on this evidence was required, and that prejudice in the nature of "severe delay" to ATB was tempered by the fact that, as the result of various interlocutory applications made by both parties, the hearing of the matter would not have concluded that year in any event: at [31](a), (b) and (e)].

Cowra Shire Council v Fuller [2015] NSWLEC 13 (Pepper J)

Facts: the defendant, Mr Gregory Fuller, made an application to vacate the hearing dates for his sentencing proceedings in relation to the demolition of a building without consent contrary to ss 76A(1) and 125(1) of *the Environmental Planning and Assessment Act 1979*. He had pleaded guilty to the offence. Mr Fuller sought the vacation because his counsel was unavailable to appear in the matter because he was jammed in another matter that had gone over. The sentencing matter was otherwise ready to be heard. The prosecutor, Cowra Shire Council ("the council"), neither opposed nor consented to the application. Mr Fuller had not attempted to retain alternate counsel for the hearing of the matter.

Issues:

(1) whether the hearing dates should be vacated in circumstances where Mr Fuller had not attempted to find replacement legal counsel; and

(2) whether there would be any prejudice to Mr Fuller if the hearing were to proceed.

Held: the application was dismissed:

(1) the fact that a defendant's counsel of choice is no longer available to appear in proceedings, even if those proceedings are criminal in nature and even if the loss of counsel is not due to the fault of the defendant, will not automatically warrant vacation of the hearing dates: at [13]; and

(2) Mr Fuller was not able to point to any prejudice that would result if the hearing were to go ahead. The matter did not involve determination of criminal liability; was not complex; was otherwise ready to proceed; and no steps had been taken to secure new counsel: at [10] and [14].

Golden Max Pty Ltd v Hurstville City Council [2015] NSWLEC 16 (Biscoe J)

Facts: the applicant sought to review a decision of the Registrar not to arrange a conciliation conference between the parties or their representatives under s 34 of the *Land and Environmental Court Act 1979*. Instead the Registrar had fixed the proceedings for final hearing. The proceedings are an appeal on the merits against Hurstville City Council's decision to refuse a development application for the demolition of an existing dwelling and construction of a new multi-dwelling development.

Hurstville Council submitted three reasons why no s 34 conciliation conference should be ordered: firstly, that the Council has adopted a blanket position in all cases not to give any staff authority to enter into a binding agreement at any conciliation conference and as such would not be able to participate in good faith; secondly, that the proposed development does not meet a development standard concerning minimum lot size to a substantial degree; and thirdly, that a s 34 conference would add to the time involved in determination of the matter generally.

Issue:

(1) whether the Court should order s 34 conciliation conference.

Held: the decision of the Registrar not to arrange a conciliation conference was set aside and the parties were directed to approach the Registry for the listing of the matter for a conciliation conference before the final hearing. None of the reasons put forward by the Council were considered to be sufficient reason to not order a s 34 conference:

(1) whilst it is strongly desirable and usual that a participant to a s 34 conference has authority to bind that party by any action taken or position agreed at the conference, it is alternatively sufficient if a party's representative is given authority to enter into a legally non-binding agreement and for that agreement to be subsequently submitted to the party for the party's ratification: at [8]-[9];

(2) as the Council identified six reasons why the development application should be refused, only one of which concerned minimum lot size, there was scope for agreement or narrowing of the other five reasons at a conciliation conference. A conciliation conference may also provide scope for negotiation between the parties as to whether the development consent may be granted notwithstanding the

contravention of a development standard under cl 4.6 of the Hurstville Local Environment Plan: at [10]; and

(3) in consultation with the Chief Judge, the Court was able to make a commissioner available during the period before the matter was set down for final hearing so as to facilitate a s 34 conference without disturbing the final hearing dates set and the related timetable: at [11]-[13].

Access to Neighbouring Land

Watpac Construction (NSW) Pty Ltd v Council of the City of Sydney [2014] NSWLEC 163 (Biscoe J)

Facts: this was an application for an access order under s 11 of the *Access to Neighbouring Land Act* 2000 ("Access Act") over part of land known as Regimental Square, located at 339A George St, Sydney, owned by the respondent council. Regimental Square is a pedestrian thoroughfare and is classified as "community land" under the *Local Government Act* 1993 ("LG Act"). The access sought was for two years for the purpose of carrying out demolition and construction works in connection with a new commercial building on adjacent land ("Works"). The council argued that access was prohibited under s 44 of the LG Act since the Council's Generic Plan of Management ("the Plan") did not apply to Regimental Square because, in the Plan, the council had erroneously described Regimental Square as Crown land (rather than community land) and had failed to categorise Regimental Square as required by s 36(4) of the LG Act. Alternatively, Council argued that access for the purpose of the Works was prohibited by ss 46(1)(b) and 47D(1) of the LG Act.

Issues: the proceedings were fixed for hearing on all issues other than compensation:

(1) whether the application or the Court's jurisdiction to make an access order was barred by s 5(1)(b) and (2) of the *Access Act* because the Works, or access for the purpose of the Works, is prohibited under s 44, or ss 46(1)(b) and 47D(1), of the LG Act.

Held: making the access order on terms as agreed between the parties (modified at the hearing), with the applicant to pay the respondent's costs and the respondent reserving the right to apply for compensation for the access:

(1) the Plan manifested an intention to cover all community land (not covered by another specific plan of management), to categorise all community land appropriately in accordance with s 36(4), and to manage all Crown land similarly according to whichever of those categories it falls into: at [36];

(2) Regimental Square is in fact community land and the only s 36(4) category it is capable of falling into is "general community use": at [36];

(3) since the Plan's description of Regimental Square as Crown land was in error, the Plan should be construed as applying to it as community land categorised as general community use: at [38];

(4) the words of s 44 "adoption of a plan of management for the land" are of such generality as to apply to the peculiar circumstances of this case and consequently the s 44 prohibition against a change in nature or use is inapplicable: at [38];

(5) the nature and intensity of the proposed new use constitutes a change in the use of Regimental Square within the meaning of s 44: at [44];

(6) section 46 is only concerned with the lease, license or other estate in respect of community land, and does not limit the statutory power of the court: at [46];

(7) section 47D(1) is inapplicable because it is only concerned with "exclusive" occupational use; under cl 22 of the proposed terms of access, the applicant's occupation or use will not be exclusive: at [47]; and

(8) in the circumstances, this was an appropriate case for the Court to exercise its power under s 10(3) of the *Access Act* to waive the requirement to give notice under s 10(1): at [51].

Costs

Newton Denny Chapelle v Ballina Shire Council (No 2) [2014] NSWLEC 183 (Craig J)

(related decision: *Newton Denny Chapelle v Ballina Shire Council* [2014] NSWLEC 1123 Morris C)

Facts: prior to the final hearing of a Class 1 appeal commenced by the applicant pursuant to s 97AA of the *Environmental Planning and Assessment Act 1979*, the applicant sought, by way of a notice of motion, to have a separate issue heard and determined. Before the hearing of that motion commenced, the council filed a notice of motion seeking leave to amend its contentions. That leave was granted, consequently removing the need for the separate issue to be tried. Though the appeal was ultimately dismissed by Morris C, the applicant sought an order that the council pay the applicant's costs associated with the two notices of motion.

Issues:

(1) whether the motions were filed as a result of a mutual mistake made by the parties; and

(2) whether it was fair and reasonable in the circumstances to order costs under r 3.7 of the Land and Environment Court Rules 2007 (NSW).

Held: ordering the council to pay the applicants costs:

(1) the "common mistake" justification, which was advanced by the council in submitting that it was not fair and reasonable for the council to pay costs, could not be accepted. It is not the applicant, but rather the council, that is first required to identify the issue or issues that arise in Class 1 proceedings following refusal of an application. It would be wholly inappropriate for a consent authority to frame a contention when it is irrelevant to the determination sought to be advanced by the consent authority, namely that the application should be refused: at [21]; and

(2) it was fair and reasonable that the Applicant have an order in its favour for payment of costs associated with the two notices of motion. The applicant could not have been expected to treat lightly an assertion that its capacity to conduct activities on its land, including activities that could lawfully be the subject of a modification application, were as constrained as the contentions originally filed sought to assert: at [23].

Section 56A Appeals

Barrak Corporation Pty Ltd v Parramatta City Council [2014] NSWLEC 177 (Biscoe J)

*(*related decision: *Barrak Corporation Pty Ltd v Parramatta City Council* [2014] NSWLEC 1077 Pearson C*)*

Facts: this was an appeal under s 56A of the *Land and Environment Court Act 1979* to a judge from a decision of a commissioner; as such it is limited to errors of law. The case concerns the rating sub-categorisation of business rated land ("the Property") owned by the appellant ("Barrak"). The Council refused Barrak's application to change the rating sub-category from Business CBD to Business General. The Commissioner dismissed Barrack's subsequent appeal against that decision. Both the Council and the Court (constituted by the Commissioner) each concluded pursuant to s 525(3) of the *Local Government Act 1993* ("LG Act") that it had reasonable grounds for believing that the Property was not within the Business General rating sub-category but in the Business CBD rating sub-category. Under s 529(2)(d) of the LG Act a council may determine a rating sub-category for the business rating category according to a "centre of activity". The Commissioner decided that the centre of activity for the Business CBD rating sub-category comprised a core, middle, and fringe. The Commissioner concluded the Property was in the fringe.

Issues:

(1) whether the Commissioner erred in failing to apply the test under s 525(3) because she asked the converse question of whether the Property was not within the Business CBD rating sub-category, did

not "focus" on comparing the Property with others in the Business General rating sub-category, and consequently ignored "relevant facts" and gave "legally inappropriate weight" to facts and submissions;

(2) whether the Commissioner erred in failing to adopt a polycentric decision-making process and failed to "synthesise" the matters advanced by the parties;

(3) whether the Commissioner erred in concluding that a centre of activity for the Business CBD rating sub-category could include a fringe;

(4) whether the Commissioner erred in taking into account the Business zoning of the Property; and

(5) whether the Commissioner erred in failing to take into account certain aspects of critical evidence.

Held: appeal dismissed with costs:

(1) the decision as to whether there is a centre of activity within which particular business rated land falls calls for the exercise of an evaluative judgment (as distinct from an exercise of discretion) based on the facts of the particular case. The circumstances in which the formation of such a judgment can involve an error of law are limited: at [15];

(2) the grounds of appeal did not establish any errors of law but rather found fault with fact finding or with the evaluative judgment that the Commissioner was required to make as to the centre of activity: at [18];

(3) the Commissioner engaged with the logical approach of both parties that the Property was only either Business CBD or Business General – this was not an error of law: at [73]-[75];

(4) even if the Commissioner had to ask "why not Business General?" (rather than its logical antecedent, "why Business CBD?"), she did in fact ask the question: at [76];

(5) the Commissioner had focused on and made a direct factual comparison of the characteristics of the Property with the characteristics of nearby properties that were rated Business General: at [77]-[79];

(6) the Commissioner was not under an obligation to record every submission, but only those of importance. The Commissioner squarely addressed the thrust of Barrack's case that the Property was not part of the business CBD rating sub-category: at [80];

(7) in *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Ltd* [2013] NSWLEC 48, (2013) 194 LGERA 347, there was no discussion of failure to "synthesise" factors being an error of law and the nature of the merits decision in that case (under Part 3A of the *Environmental Planning and Assessment Act 1979*) was entirely different to the decision called for by ss 525-526 of the LG Act: at [88];

(8) the Commissioner did weigh or balance the various factors raised by the parties: at [89];

(9) depending on the facts, a centre of activity for a category or sub-category may comprise areas of varying intensity which radiate out and which may answer to the descriptions core, middle and fringe: at [95]; and

(10) there was no legal error in the Commissioner's reasoning that the distinction between the business zoning of the Property and the residential zoning of areas outside the rating sub-category boundary provided some justification for where the Council had chosen to draw the rating boundary: at [101].

Zizza v Minister Administering the Water Management Act 2000 [2014] NSWLEC 170 (Pain J)

(related decisions: *Zizza v Minister Administering the Water Management Act 2000* [2013] NSWLEC 1095, *Zizza v Minister Administering the Water Management Act 2000* [2014] NSWLEC 1017 O'Neill C)

Facts: a dam built on Mr Zizza's land on an unnamed creek between 1984 and 1989 failed in 1991 and did not function again until 1999. Repair works were carried out between 1994 and 1999. No water was held in the dam in April 1999. Water seeped from the dam during 2003 to 2005. Later repair works were undertaken in 2006 and 2011. The entire structure was prone to fail. The respondent Minister issued a direction on 29 March 2012 requiring removal of the dam structure inter alia under the *Water Management Act 2000* ("the WM Act"). Mr Zizza appealed against that decision. No water management work ("WMW")

approval was issued under the WM Act for the dam or repairs to it. The primary purpose of the existing dam is as an ornamental lake and for water sports use. In the first decision *Zizza v Minister Administering the Water Management Act 2000* [2013] NSWLEC 1095 the commissioner held the dam was excluded from approval requirements but the repair work carried out after 1999 was not. Mr Zizza lodged an application for a WMW approval after the first decision; that application was refused and Mr Zizza appealed. In the second decision *Zizza v Minister Administering the Water Management Act 2000* [2014] NSWLEC 1017 the commissioner refused approval of the WMW approval and upheld the amended direction to decommission the dam under the WM Act. Mr Zizza appealed under s 56A of the *Land and Environment Court Act 1979* against both decisions.

Issues:

(1) whether a direction to decommission a dam under s 329 of the WM Act applies to a WMW for which no approval is in force or is restricted to unlawful works;

(2) whether a dam is an excluded work (meaning excluded from a requirement for WMW approval under the WM Act) because it is not extracting water from the water source;

(3) whether the dam was constructed prior to 1 January 1999 and was therefore an excluded work; and

(4) whether the structure the subject of the approval appeal was a new WMW.

Held: finding that Mr Zizza had not established his grounds of appeal, and that the Minister's contention relating to the construction of s 329(1) of the WM Act succeeded, and subsequently dismissing the appeals:

(1) the clear statutory terms of s 329(1) of the WM Act do not require a restricted reading confining the application of the section to unlawful works: at [33];

(2) the dam which impounded water for the ornamental lake purpose was extracting water from a water source so that a WMW approval was required: at [80]-[83];

(3) the dam was constructed before 1 January 1999 and was an excluded work: at [112]-[113]; and

(4) the work the subject of the WMW application was a new structure and approval under the WM Act was required: at [138]-[139].

Valuer-General v Kogarah Town Centre Pty Limited [2014] NSWLEC 186 (Biscoe J)

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

Facts: these were five appeals brought under s 56A of the *Land and Environment Court Act 1979* against the decision of two Commissioners to dismiss appeals brought under s 37(1) of the *Valuation of Land Act 1916* ("VL Act") in relation to the apportionment of one of two adjoining parcels under s 28 of the VL Act. The appellant, the Valuer-General ("VG"), valued in each of five years two adjoining parcels of land as one as required by s 26 of the VL Act, and under s 28 apportioned that value between the two parcels approximately 70% and 30%. On appeal, the Commissioners found that the s 26 combined value in two years was higher and in three years was a little lower, and that the correct s 28 apportionment was approximately 60% and 40%. The Commissioners allowed the appeals and applied the correct apportionment of 60% instead of 70% to one parcel thereby reducing its value in each year. But in relation to the other parcel where the s 28 correctly apportioned value was higher than the VG's incorrectly apportioned value in each year, they dismissed the appeals and confirmed the incorrect s 28 apportionment of about 30% because they considered that under the VL Act the Court has no power to increase the VG's valuation, except where the appellant contends for a higher value. Thus, the appellant received the benefit of the correct apportionment for one parcel by way of a lower value but avoided the converse increase in the value of the other parcel.

Issue:

(1) whether the Commissioners erred in law by dismissing the appeals and confirming the incorrect s 28 apportionment of about 30% in relation to the other parcel.

Held: appeals allowed and orders made applying the correct apportionment to both parcels of land:

(1) given the mandatory terms of s 28(2), in an apportionment case the Court is not only empowered but required to give full effect to the apportionment and appropriately responsive orders under s 40(1)(b) (relating to powers of the Court on appeal) would give full effect to the apportionment by decreasing the value of one part and increasing the value of the other: at [37],[41]; and

(2) the Commissioners made partially responsive orders under s 40(1)(b) based on the correct apportionment by reducing the annual values of one parcel but they fell into error in not doing the same in respect of the other parcel: at [2], [42].

Commissioner Decisions

Johnson v Hornsby Shire Council [2014] NSWLEC 1215 (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 Hornsby Shire Council to grant consent to a new dwelling on proposed Lot 2, a battle-axe allotment, at the rear of 39 Hannah Street, Beecroft. The site is zoned R2 Low Density Residential. The subdivision of 39 Hannah Street into two allotments was approved on 6 October 2010 ("the subdivision approval") and required the preservation of remnant Blue Gum High Forest as a Restricted Development Area under a positive covenant. The subdivision consent also required the retention of certain trees (including tree preservation zones) outside the Restricted Development Area.

The *Rural Fires Amendment (Vegetation Clearing) Act 2014* (NSW) came into force on 1 August 2014 and amended the *Rural Fires Act 1997* (NSW). 39 Hannah Street, Beecroft is within a 10/50 vegetation clearing entitlement area. Two of the trees outside the Restricted Development Area, identified as trees 34 and 35 and required by the subdivision consent to be retained, had been lawfully removed, as they were within 10m of the existing dwelling.

Issue:

(1) whether the building footprint represented an acceptable balance between the development of the newly created and approved allotment and the preservation of the remnant Blue Gum High Forest in the Restricted Development Area.

Held: refusing the appeal:

(1) granting consent to the proposal would allow more than half of the remnant Blue Gum High Forest in the Restricted Development Area, identified as a critically endangered ecological community pursuant to the *Threatened Species Conservation Act 1995*, to be lawfully removed: at [41];

(2) the footprint of the proposal stepped around a portion of the former tree preservation zones of trees 34 and 35, creating a generous side setback to the western boundary. As trees 34 and 35 had been lawfully removed, they no longer presented a constraint to the footprint of the proposal: at [40]; and

(3) a more skilful design, occupying the area formerly identified as the tree preservation zones for trees 34 and 35 and with an increased setback to the Restricted Development Area, would preserve a greater proportion of the remnant Blue Gum High Forest in the Restricted Development Area and potentially address Council's (non-determinative) planning contentions: at [42],[43].

Australand Industrial No. 111 Pty Limited v Valuer General [2014] NSWLEC 1255 (Dixon C)

Facts: the applicant appealed under s 37 of the *Valuation of Land Act 1916* (NSW) ("Valuation Act") the respondent's land valuation for the base date July 2011. It submitted that the assessed land value of $5 million was too high because the values for which the respondent contended were calculated on the assumption that the land had commercial value and/or value as a bio banking site under the New South Wales Bio Banking Scheme. The land had extremely high ecological value and restrictive development opportunities under its E2 Environmental Conservation land zoning. The applicant submitted that the land

had been created as a conservation area and was the biodiversity conservation offset land to the impacts of the industrial development of its parent lot. The development consent that approved the subdivision of the land from its parent lot was conditional upon the registration of a positive covenant requiring the ongoing conservation of protected flora and fauna under the *Threatened Species Conservation Act 1995* ("TSC Act"). The positive covenant engaged Regulation 11(1)(d) of the Threatened Species Conservation (Biodiversity) Regulation 2008 ("the Regulation") and rendered the land ineligible for bio banking.

Issues:

(1) whether the requirements in s 6A of the Valuation Act that the object of the valuation exercise is the fee simple at the highest estate unencumbered and subject to no conditions means that the development consent condition requiring the registration of the positive covenant for the ongoing conservation of the land must be assumed not to exist in the s 6A valuation assessment; and

(2) whether the existence of the positive covenant requiring the ongoing conservation of the land could be taken into account for the purposes of determining whether the land would be ineligible as a bio bank site by operation of Regulation 11(1)(d).

Held: the appeal was upheld and the land value assessed under s 6A at $40,000:

(1) the land value under s 6A of the Valuation Act requires assessment as to its highest and best use, having regard to the physical, economic and legal constraints on the use of the land: at [44];

(2) the legal constraints on the use of the land include those imposed by the general law, assessed on the basis that the surrounding development exists,: at [53];

(3) only the hypothetical valuation required by s6A assumes no improvements and a disregard for restrictions on use and covenants: at [98];

(4) the 'no improvement assumption' in s 6A does not require that historical town planning regulation and restriction be ignored. Therefore, the development consents which created the allotment of land being valued and the conditions of that consent requiring the positive covenant for conservation purposes could be interpreted as a physical improvement which must be ignored in the s6A assessment at: [58] – [60]; and

(5) as the general laws that affect the use and alienability of the land are relevant in the s 6A assessment, it follows that Regulation 11(1)(d) must preclude the land from being eligible for bio banking: at [52]; [58].

Court News

Registrar Joanne Gray has returned to her position as Registrar of the Land and Environment Court. Acting Registrar Leonie Walton has returned to the Supreme Court after three years with the Land and Environment Court.

Acting Commissioners Paul Adam, Megan Davis, Lisa Durland, David Galwey, Jeff Kildea, Norman Laing, Craig Miller, David Parker, Bob Smith, Jenny Smithson, Ross Speers, and Sharon Sullivan have been reappointed as Acting Commissioners for the period commencing on 26 February 2015 and expiring on 25 February 2016.

Acting Commissioners Robert Hussey and John Maston also have one year terms which commenced in October 2014.