27 October 2011
Volume 3 Issue 4

Land and Environment Court of NSW Judicial Newsletter

Legislation

- **Statutes and Regulations**

Local government and planning related legislation

Environmental Planning and Assessment Amendment (Part 3A Repeal) Act 2011 commenced 1 October 2011 (apart from Schedule 1.2 [28]). It repealed Pt 3A of the *Environmental Planning and Assessment Act 1979* and introduced a new system for the assessment of State significant projects. The Act also made a number of changes to the operation and make-up of the Planning Assessment Commission and Joint Regional Planning Panels [full explanatory notes].

The Department of Planning and Infrastructure has information on its website on the current planning assessment systems:

- State significant assessment system;
- State significant infrastructure (SSI);
- Part 3A (not accepting new applications);
- Local and regional development;
- Return of certain regional development to councils for determination (circular PS 11-020); and
- Part 5.

Environmental Planning and Assessment Amendment (Part 3A Repeal) Regulation 2011, published 28 September 2011, makes provision for the purposes of the commencement of the *Environmental Planning and Assessment Amendment (Part 3A Repeal) Act* 2011(including the revised savings and transitional provisions in the proposed Sch 6A to the *Environmental Planning and Assessment Act* 1979).

Environmental Planning and Assessment Amendment (Wagga Wagga Relevant Planning Authority) Regulation 2011, published 16 September 2011, makes transitional provision for the exercise of the functions of the Wagga Wagga Interim Joint Planning Panel as a consequence of the abolition of that Panel. The Regulation provides that, on the repeal of the Order constituting that Panel:

(a) any function that the Panel had under a direction given by the Minister that makes the Panel the relevant planning authority for a proposed instrument is taken to be a function of the Southern Region Joint Planning Panel; and

(b) anything done or omitted by Wagga Wagga Interim Joint Planning Panel in relation to an unresolved matter that on repeal can be determined by the Southern Region Joint Planning Panel, is taken to have been done or omitted by the Southern Region Joint Planning Panel.

Western Lands Regulation 2011, published 26 August 2011, remade, with minor amendments, the provisions of the Western Lands Regulation 2004, which was repealed on 1 September 2011.
This Regulation provides for the following:

(a) leases under the *Western Lands Act* 1901, including provisions with respect to:
  (i) the procedures for extending the term of the purchasing, the transferring, the exchanging and the surrendering of a Western Lands lease;
  (ii) the payment of rent and other amounts due under a Western Lands lease; and
  (iii) the alteration of conditions to which a Western Lands lease is subject;
(b) the prescription of classes of land for which consent to cultivate is required, and the circumstances under which land is exempt from that requirement;
(c) the fencing of land under a Western Lands lease and the enclosure of roads; and
(d) other matters of a machinery or miscellaneous nature.

Joint Regional Planning Panels Amendment (Wagga Wagga City) Order 2011 will include Wagga Wagga City as a local government area over which the Southern Region Joint Planning Panel is constituted, and repeal the Environmental Planning and Assessment (Wagga Wagga Interim Joint Planning Panel) Order 2009 so as to abolish the Wagga Wagga Interim Joint Planning Panel established pursuant to that Order.

Environmental Planning and Assessment (Abolition of Wagga Wagga City Council Planning Panel) Order 2011, published 16 September 2011, abolished the Wagga Wagga City Council Planning Panel.

The Local Government (General) Amendment (Elections) Regulation 2011, published 9 September 2011, updates the Local Government (General) Regulation 2005 as a consequence of the enactment of the *Local Government Amendment (Elections) Act* 2011, which provides that council elections, polls and referendums may be administered by the general manager of the council or by the Electoral Commissioner.

Local Government (General) Amendment (Electoral Commissioner) Regulation 2011, published 29 July 2011, extends the date by which a council may resolve that the Electoral Commissioner is to administer its elections, council polls and constitutional referendums from 31 October 2011 to 30 November 2011.

Environmental Planning and Assessment Amendment (EPP (Major Development) 2005) Order 2011, published 5 August 2011, amends SEPP (Major Development) 2005 to extend the total gross floor area of the local centre of the Vincentia Coastal Village site.

Water legislation

The *Marine Parks Amendment (Moratorium) Act* 2011 commenced 13 September 2011, amends the *Marine Parks Act* 1997 to impose a five (5) year moratorium on the declaration of additional marine parks or the alteration or creation of sanctuary zones within existing marine parks.

Sydney Water Regulation 2011, published 26 August 2011, remakes, with some amendments, the provisions of the Sydney Water Regulation 2006, which was repealed on 1 September 2011. A number of redundant offences relating to the Prospect Reservoir controlled area and the provision of false and misleading information have not been carried across into this Regulation.

Water Management (General) Regulation 2011, published 1 September 2011, remakes, with various changes, the Water Management (General) Regulation 2004 and the Water Management (Water Supply Authorities) Regulation 2004 which were repealed on 1 September 2011. This Regulation makes provision for:

(a) water access licences (including exemptions from certain requirements for such licences);

(b) water use approvals, water supply work approvals, controlled activity approvals and aquifer interference approvals (including exemptions from certain requirements for approvals); and
(c) the issuing of penalty notices for certain offences.

Water Management (General) Amendment (Water Sharing Plans) Regulation 2011, published 30 September 2011 prescribes a new category of access licence to which Pt 2 of Ch 3 of the *Water Management Act* 2000 applies and makes provision with respect to entitlements under the *Water Act* 1912 that authorise the taking of water from certain water sources in the Western and Central West Water Management Areas, being entitlements that are to become access licences to which Pt 2 of Ch 3 of the *Water Management Act* 2000 applies.

Water Management (Application of Act to Certain Water Sources) Proclamation 2011 , commenced 1 October 2011, applies Pts 2 and 3 of Ch 3 of the *Water Management Act* 2000 (access licences and approvals) to the Water Sharing Plan for the Castlereagh (below Binnaway) Unregulated and Alluvial Water Sources 2011 and the Water Sharing Plan for the North Western Unregulated and Fractured Rock Water Sources 2011. A number of water sharing plans have been amended by the following orders:

- Water Sharing Plan for the Alstonville Plateau Groundwater Sources Amendment Order 2011, published 12 August 2011;
- Water Sharing Plan for the Bega and Brogo Rivers Area Regulated, Unregulated and Alluvial Water Sources Amendment Order 2011, published 12 August 2011;
- Water Sharing Plan for the Dorrigo Plateau Surface Water Source and Dorrigo Basalt Groundwater Source Amendment Order 2011, published 12 August 2011;
- Water Sharing Plan for the Kulnura Mangrove Mountain Groundwater Sources Amendment Order 2011, published 12 August 2011;
- Water Sharing Plan for the Lower Gwydir Groundwater Source Amendment Order 2011, published 12 August 2011;
- Water Sharing Plan for the Lower Lachlan Groundwater Source Amendment Order 2011, published 12 August 2011;
- Water Sharing Plan for the Lower Macquarie Groundwater Sources Amendment Order 2011, published 12 August 2011;
- Water Sharing Plan for the Lower Murray Groundwater Source Amendment Order 2011, published 12 August 2011;
- Water Sharing Plan for the Lower Murrumbidgee Groundwater Sources Amendment Order 2011, published 12 August 2011;
- Water Sharing Plan for the NSW Great Artesian Basin Groundwater Sources Amendment Order 2011, published 12 August 2011; and
- Water Sharing Plan for the Tomago Tomaree Stockton Groundwater Sources Amendment Order 2011, published 12 August 2011.

Marine Pollution Amendment (On-board Treatment of Greywater) Regulation 2011, published 30 September 2011:

(a) makes provision for some commercial vessel operators to choose an alternative method to manage their greywater waste, so that operators of Class 1 commercial vessels used in the Sydney Harbour locality must ensure that the vessel is fitted with a greywater holding tank as currently required, but other commercial vessel operators may choose either to use a greywater treatment system that complies in all respects with Australian Standard AS 4995—2009 *Greywater treatment systems for vessels operated on inland waters,* or to comply with the current requirements; and
(b) requires greywater treatment systems to be regularly flushed to a waste collection facility or in accordance with an environment protection licence.

Criminal legislation

Criminal Case Conferencing Trial Amendment Regulation 2011, published 7 October 2011, amends the Criminal Case Conferencing Trial Regulation 2008 to end the trial scheme of compulsory pre-committal conferences and codification of sentence discounts for guilty pleas under the *Criminal Case Conferencing Trial Act* 2008 on 7 October 2011. The Act will not apply to proceedings in respect of an indictable offence to which the Act applies for which a court attendance notice is filed after that date, but will continue to apply in respect of such proceedings for which a court attendance notice was filed on or after 1 May 2008 and before 8 October 2011.

Courts and other legislation

The *Courts and Other Legislation Further Amendment Act* 2011 was assented to on 13 September 2011. Schedule 1 will postpone the commencement of Pt 2A of the *Civil Procedure Act* 2005. Part 2A contains measures to encourage the early resolution of civil disputes. The postponement allows time for the equivalent Commonwealth provisions to be evaluated and for further consultation with stakeholders.

The *Courts and Other Legislation Further Amendment Act* 2011 was assented to on 13 September 2011. Schedule 3 will amend s 19 of the *Land and Environment Court Act* 1979 to make clear that appeals by Aboriginal Land Councils under s 36(7) of the *Aboriginal Land Rights Act* 1983 fall within Class 3 of the Court's jurisdiction.

Court Security Regulation 2011, published 12 August 2011, remakes, with some amendments, the provisions of the Court Security Regulation 2005 which was repealed on 1 September 2011.

On 1 August 2011 the Court's fees increased 3.5% as set out in the Civil Procedure Amendment (Fees) Regulation 2011 and the Criminal Procedure Amendment (Fees) Regulation 2011.

Subordinate Legislation (Postponement of Repeal) Order (No 2) 2011, published 26 August 2011, postpones the repeal of a number of Regulations, including the following:

- Aboriginal Land Rights Regulation 2002;
- Civil Procedure Regulation 2005;
- Co-operative Housing and Starr-Bowkett Societies Regulation 2005;
- Co-operatives Regulation 2005;
- Criminal Records Regulation 2004;
- Heritage Regulation 2005;
- Home Building Regulation 2004;
- Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2005; and
- Marine Pollution Regulation 2006.

- **State Environmental Planning Policies**

A new State Environmental Planning Policy ("SEPP") has been issued to complement the repeal of Pt 3A. SEPP (State and Regional Development) 2011, published 28 September 2011, aims to:

(a) identify development that is state significant development;
(b) identify development that is state significant infrastructure and critical state significant infrastructure; and
(c) confer functions on joint regional planning panels to determine development applications.

Subject to s 74(1) of the Act, in the event of an inconsistency between this SEPP and another environmental planning instrument, whether made before or after the commencement of this SEPP, this SEPP will prevail to the extent of the inconsistency. The SEPP also amends (Sch 6) the following SEPPs:

- SEPP No 14 - Coastal Wetlands;
- SEPP No 26 - Littoral Rainforests;
- SEPP No 59 - Central Western Sydney Regional Open Space and Residential;
- SEPP No 64 - Advertising and Signage;
- SEPP No 65 - Design Quality of Residential Flat Development;
- SEPP No 71 - Coastal Protection;
- SEPP (Infrastructure) 2007;
- SEPP (Major Development) 2005;
- SEPP (Mining, Petroleum Production and Extractive Industries) 2007;
- SEPP (Western Sydney Parklands) 2009; and
- SEPP (Sydney Harbour Catchment) 2005 ;

SEPP (Temporary Structures) Amendment (Davis Cup Play-off) 2011, published 1 September 2011, amended the SEPP (Temporary Structures) 2007 to allow the Davis Cup to be played at the Royal Sydney Golf Club and the erection of a grandstand and other associated structures for the event.

SEPP (Major Development) Amendment (Edmondson Park South) 2011, published 5 August 2011, amends SEPP (Major Development) 2005 to define the Edmondson Park South site as state significant development.

SEPP (Repeal of Site Compatibility Provisions) 2011, published 29 July 2011, repeals site compatibility provisions in a number of SEPP's and sets out savings and transitional provisions.

State Environmental Planning Policy (Sydney Region Growth Centres) Amendment (Area 20 Precinct) 2011, published 21 October 2011, amends or replaces the maps of the regional growth centres.

- **Bills**

Aboriginal Land Rights Amendment (Housing) Bill 2011 seeks to amend the *Aboriginal Land Rights Act* 1983 to facilitate the entering into and management of residential tenancy agreements of less than 3 years or periodic agreements by Boards of Local Aboriginal Land Councils where the other parties to the agreements are natural persons.

Local Government Amendment Bill 2011 amends the *Local Government Act* 1993 as follows:

(a) to extend the maximum term for which a lease or licence may be granted over community land from 21 years to 30 years and to require the consent of the Minister for leases or licences granted for more than 21 years;
(b) to convert the status of councils and county councils from their existing status as bodies politic of the State to bodies corporate;
(c) to provide that a councillor who has been suspended from office by the Local Government Pecuniary Interest and Disciplinary Tribunal for misbehaviour does not vacate office because of his or her absence from meetings during the period of suspension;
(d) to provide that the voting system in a contested election is to be preferential if only one councillor is to be elected, and proportional if two or more councillors are to be elected;
(e) to reduce the period for which special arrangements exist for non-senior staff of councils affected by the constitution, amalgamation or alteration of council areas;
(f) to make further provision with respect to disclosures of pecuniary interests and the duties of councillors with respect to matters in which they have a pecuniary interest; and
(g) to enact provisions of a savings or transitional nature.

Plumbing and Drainage Bill 2011 seeks to regulate the carrying out of plumbing and drainage work, including by prescribing the standards and requirements that must be complied with in carrying out such work and provide for a single plumbing regulator to oversee the regulation of plumbing and drainage work regardless of where the work is carried out in the State.

Protection of the Environment Legislation Amendment Bill 2011 seeks to amend certain environment protection legislation as follows:

(a) to provide for the appointment of a Chairperson of the Environment Protection Authority ("the EPA") who will have the function of managing and controlling the affairs of the EPA;
(b) to reconstitute the Board of the EPA;
(c) to require that when a pollution incident occurs that causes or threatens material harm to the environment, an expanded list of government authorities must be notified and to require that they must be notified immediately, rather than as soon as practicable, as currently required;
(d) to provide that the information required to be notified is the information known when the immediate notice is given and that if further information later becomes known, it must also be immediately notified;
(e) to double the maximum penalty for the offence of failing to immediately give notice of pollution incidents to $2,000,000 for corporations and $500,000 for individuals;
(f) to impose a duty on all holders of environment protection licences, and on certain other persons, to prepare and implement pollution incident response management plans;
(g) to add to the circumstances in which a mandatory environmental audit may be required;
(h) to require public access to be given to certain monitoring data required to be recorded by the holders of environment protection licences; and
(i) to require further details to be recorded in the public register kept by regulatory authorities.

The Protection of the Environment Operations Amendment (Notification of Pollution Incidents) Bill 2010 seeks to expedite the notification of pollution incidents that cause or threaten material harm to the environment. At present, s 148 of the *Protection of the Environment Operations Act* 1997 requires any such pollution incident to be notified to the appropriate regulatory authority as soon as practicable after the persons associated with the activity that has caused the incident become aware of the incident. Section 149 of that Act enables the regulations to prescribe the manner or form of notifying those pollution incidents. The regulations require those pollution incidents to be notified verbally by telephoning the EPA environment line, followed by notification in writing within 7 days of the incident. The object of the Bill is to amend that Act so as to require the immediate notification of those pollution incidents.

Heritage Amendment Bill 2011, introduced 18 October 2011, seeks to reduce the number of members of the Heritage Council and change the process for the heritage listing [full explanatory notes].

Home Building Amendment Bill 2011, introduced 19 October 2011, will amend the *Home Building Act* 1989, the Home Building Regulation 2004 to make further provision in respect of home warranty insurance, statutory warranties, developers, building disputes and administrative arrangements; to amend the *Civil Liability Act* 2002 in relation to proportionate liability; and for other purposes [full explanatory notes].

National Parks and Wildlife Legislation Amendment (Reservations) Bill 2011 – introduced 17 October 2011, will amend the *National Parks and Wildlife Act* 1974:

(a) to change the reservation of part of Wianamatta Regional Park to a nature reserve to be known as Wianamatta Nature Reserve;
(b) to add certain land to Hunter Wetlands National Park; and
(c) to revoke the reservation of certain other land that is currently reserved as part of Hunter Wetlands National Park.

The Bill also amends the *National Park Estate (South-Western Cypress Reservations) Act* 2010 to delay the commencement of the reservation of certain State forests as part of Lachlan Valley National Park and Yathong Nature Reserve.

Redfern–Waterloo Authority Repeal Bill 2011 ,introduced 18 October 2011, repeals the *Redfern–Waterloo Authority Act* 2004 and dissolves the Redfern–Waterloo Authority constituted by that Act. All assets, rights, liabilities and certain functions of the Authority will be transferred to the Sydney Metropolitan Development Authority, which is constituted under the *Growth Centres (Development Corporations) Act* 1974 in respect of certain land in Redfern and Waterloo where the Redfern–Waterloo Authority currently operates.

Statute Law (Miscellaneous Provisions) Bill (No 2) 2011 is a bill for an Act to repeal certain Acts and instruments and to amend certain other Acts and instruments in various respects and for the purpose of effecting statute law revision; and to make certain savings. For instance minor changes to the *Environmental Planning and Assessment Act* 1979 include:

(a) amending a provision that deals with the modification of development consents granted by the Land and Environment Court in order to make it consistent with provisions that deal with development consents that are granted by a consent authority. Currently, s 96(5) of the Act provides that restrictions on the modification of development consents granted by consent authorities (being restrictions relating to threatened species and biobanking statements) do not apply to State significant development. The amendment provides for a similar exemption where the development consent to carry out State significant development is granted by the Land and Environment Court;
(b) making a minor clarifying amendment relating to objectors to designated development to take account of objectors to State significant development (being development that would be designated development if it were not declared to be State significant development); and
(c) providing that environmental impact statements for State significant infrastructure must be prepared in the form prescribed by the regulations (rather than in the form approved by the Director-General), consistently with other provisions of the Act relating to environmental impact statements.

- **Miscellaneous**

The Attorney General has asked the Law Reform Commission to review the *Crimes (Sentencing Procedure) Act* 1999. Preliminary submissions are sought by 31 October 2011 [terms of reference].

The new NSW Barristers' Rules commenced 8 August 2011.

The NSW Parliamentary Library Research Service has released an e-brief on Caravan Parks (11/2011).

Judgments

- **Overseas**

Barr v Biffa Waste Services Limited [2011] EWHC 1003 (Coulson J)

Facts: the 152 claimants lived in an estate near a landfill operated by the defendant. By way of class action the claimants sought damages in nuisance.

Issues:

(1) whether the defendant could rely on a defence of statutory authority; and

(2) whether the defendant could rely on a defence of reasonable use of land having regard to the detailed terms of a granted permit, the absence of breaches of that permit, no alleged negligence nor failure to use best practices.

Held: dismissing the claims:

(1) the defendant could not rely on a defence of statutory authority as it had no statutory obligations and was operating the landfill on a voluntary basis for financial benefit: at [317];

(2) the use of land for tipping waste was a criminal activity and the carrying out of activities beyond the conditions of the permit would give rise to statutory liabilities: at [344] and [346];

(3) an activity ought not be permitted by detailed legislation yet give rise to a liability to a third party by reference to a more general set of principles in common law: at [347];

(4) the mere fact that there was an odour emission did not, of itself, mean there was an actionable claim. There would only be liability if negligence or failure to use best practices was established: at [349];

(5) a careful balancing act between competing rights meant that the defendant, not in breach of its permit, should not be liable in nuisance: at [358]; and

(6) the issuing of the defendant's permit meant the character of the locality had changed from purely residential to mixed use: at [371].

Republic v National Environmental Management Authority ex parte Sound Equipment Limited [2011] eKLR (Kenya Court of Appeal) (Omolo, Onyango, Otieno and Visram JJA)

Facts: the appellant was issued with an order to cease construction of a residential development and to prepare a new Environmental Impact Assessment Report. The appellant sought judicial review of that order.

Issues:

(1) whether an alternative remedy existing in the legislation under which the order was made was a bar to judicial review; and

(2) whether an alternative remedy was more effective and convenient and should therefore be preferred to judicial review.

Held: dismissing the appeal:

(1) the existence of an alternative remedy did not bar judicial review as the nature of judicial review ignored the merits of the impugned decision: at 5; and

(2) where Parliament had provided an alternative remedy that was more efficient and convenient, it was only in exceptional circumstances that an order for judicial review would be granted: at 6.

Mendaing v Ramu Nico Management (MCC) Limited [2011] PGNC 95 (National Court of Papua New Guinea) (Cannings J)

Facts: the plaintiffs sought a permanent injunction to restrain the defendant from operating a deep-sea tailings placement system (“DSTP”) which would dispose of tailings from the defendant's open-cut ore mining project.

Issues:

(1) whether the operation of the DSTP was a nuisance and the plaintiffs had the right to sue under common law;

(2) whether the operation of the DSTP breached the National Goal, of the conservation of natural resources and the environment and their use for the collective benefit; and

(3) whether the Court should decline to grant any injunction on a discretionary basis.

Held: declining to grant the relief claimed:

(1) the plaintiffs had standing to sue in nuisance because the DSTP would affect the manner in which they used the land and nearby seas: at [69];

(2) the action in common law was not extinguished by the legislation granting the permit: at [74];

(3) the type of environmental harm and interference complained of would go beyond the amount predicted and authorised by the permit and therefore, the defence of statutory authorisation did not apply to the nuisance claim: at [76];

(4) the discharge of mine tailings into a pristine bay was contrary to the National Goal: at [123]; but

(5) an injunction was not granted as there had been delay by the plaintiffs in commencing the proceedings; the defendant had made significant investment in the mining project; and there were many people who were reliant on the imminent commencement of the project: [131]–[138].

- **High Court of Australia**

Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd [2011] HCA 27 (Gummow ACJ, Hayne, Heydon, Crennan and Bell JJ)

(related decisions: *Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd* [2010] NSWCA 214; (2010) 175 LGERA 433 Tobias, McColl JJA and Handley AJA and *Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd (No 2)* [2009] NSWSC 1157 Smart AJ)

Facts: Cumerlong Holdings Pty Ltd ("Cumerlong") was the registered proprietor of Lot 1. The first respondent, Dalcross Properties Pty Ltd, was the registered proprietor of neighbouring land (Lots 102 and 103). The second respondent, Dalcross Holdings Pty Ltd ("Dalcross Holdings"), operated a private hospital on Lot 101, which adjoined Lot 103. Dalcross Holdings proposed to extend the hospital to include Lot 103. The third respondent, Australasian Conference Association Limited, acquired Lots 102 and 103.

On 27 August 2008, Ku-ring-gai Municipal Council approved a development application by the second respondent to construct on Lot 103 an extension of the hospital. Prior to 2004, Lot 103 was zoned 2(b) under the Ku-ring-gai Planning Scheme Ordinance. Subsequently, Lot 103 was re-zoned 2(d3) under the Ku-ring-gai Local Environmental Plan No 194 ("LEP 194"), which in cl 68(2) suspended any restrictions on land, including land zoned 2(d3).

Section 88B(3) of the *Conveyancing Act* 1919 placed a restrictive covenant on Lots 102 and 103 upon registration that benefited Lot 1. The restriction provided that no parts of Lots 102 and 103 were to be used for a hospital.

Section 28(2) of the *Environmental Planning and Assessment Act* 1979 ("the EPAA") provided that "an environmental planning instrument may provide that … a regulatory instrument specified in that environmental planning instrument shall not apply to any such development or shall apply subject to the modifications specified in that environmental planning instrument." Sub-section 28(3) stated that sub-section (2) shall only have effect if the Governor approved the provision before the making of the environmental planning instrument.

The primary judge dismissed the summons. Cumerlong appealed to the Court of Appeal, which dismissed the appeal. Cumerlong was granted leave to appeal to the High Court.

Issues:

(1) whether the procedures set out in s 28 of the EPAA were permissive rather than mandatory;

(2) whether, in any event, s 28 of the EPAA had been engaged in the making of LEP 194; and

(3) whether sub-sections 28(2) and (3) of the EPAA should have been construed broadly because they had the ability to impact upon the property rights of individuals.

Held: allowing the appeal:

(1) the restrictive covenant binding Lot 103 was a "regulatory instrument" within the meaning of s 28 of the EPAA. LEP 194 was a "environmental planning instrument" within the meaning of s 28 of the EPAA: at [22];

(2) the procedures set out in s 28 of the EPPA were not followed in respect of the creation of LEP 194: at [18];

(3) LEP 194 did provide for the suspension of the restrictive covenant in accordance with s 28(2) of the LGA: at [24]; however,

(4) LEP 194 did not have the effect that the operation of the restrictive covenant burdening Lot 103 was suspended because approval of the provision had not been given by the Governor as required by s 28(3) of the EPAA: at [23];

(5) the restrictive covenant benefiting Lot 1 was a property right of Cumerlong: at [31];

(6) sub-ss 28(2) and (3) of the EPAA should have been construed generously and liberally because they were protective of the interests of those whose property rights may have been damaged by an environmental planning instrument: at [34]; and

(7) the protective function of s 28(3) of the EPAA ensured that before an environmental planning instrument could contain a provision that a covenant did not apply to the development a mandatory procedure must have been carried out. That procedure, namely the approval of the Governor, was not followed: at [34]–[38].

Lithgow City Council v Jackson [2011] HCA 36 (French CJ, Gummow, Heyden and Bell JJ, Crennan J in dissent)

Facts: shortly before 6:57am on 18 July 2002, passers-by found the respondent lying unconscious in a concrete drain in a park. The drain ran downhill in an east-western direction at the end of the park. There was a pool of dry blood and other bodily fluid 2.69m from the vertical face of the drain's retaining wall, from which extended a shear drop of 1.4 to 1.7m on the west and protruded between 90 and 280mm from the grass at all points. The drain had sloping sides to the north and the south. The respondent had no memory of how he came to be in the drain, no one witnessed his accident, and there was no evidence of exactly where he was lying when found. At trial, the respondent's case of negligence against the council was that he fell by tripping from the small retaining wall of the top of the western vertical face of the drain and not from one of the sides. The respondent conceded, both at trial and before the High Court, that if he failed to establish this, his entire case would fail. Ambulance officers summoned to assist the respondent recorded the following in a statement: "? fall from 1.5 metres onto concrete".

The trial judge admitted into evidence the records of the ambulance service, including the ambulance officers' statement, ruling that the statement by the officers was not to be used as evidence of the truth of its contents. Because there was no other relevant use of the ambulance officers' statement the trial judge's ruling effectively amounted to a rejection of it. The trial judge found that the council owed the respondent a duty to take reasonable care to avoid foreseeable risks of injury to a person in his position. Her Honour found that it was entirely foreseeable that the wall would pose a risk of injury to a person walking in the park at night. She was not persuaded that the risk presented by the wall and the drop off the side into the drain was obvious. However, her Honour held that the respondent had not established that his injuries were caused by the council's breach of its duty because he had not established that he fell over the western vertical face after walking over it as distinct from stumbling down one of the sides or standing at the top of the northern vertical face and losing his balance. She also found that there was no evidence that would permit a finding that the respondent fell into the drain in darkness rather than in daylight.

The respondent appealed to the Court of Appeal. No specific complaint was made about the trial judge's dealing with the ambulance officers' statement. But the Court of Appeal viewed the statement as crucial. They read it as an opinion, admissible under s 78 of the *Evidence Act* 1995 ("the Act"), to the effect that the

respondent had fallen over the wall above the western vertical face. However, during the special leave application to the High Court, it emerged that the Court of Appeal had assumed that there was no question mark at the start of the statement. This was due to a copying error in the preparation of the appeal books. The High Court granted special leave, allowed the appeal and remitted the matter for further consideration in light of the accurate trial record. In the second Court of Appeal decision, after construing the ambulance officers' statement as "less positive" but nevertheless an admissible opinion, the Court adhered to their original conclusion that the respondent had proved causation and that the council was negligent. The council appealed to the High Court.

Issues:

(1) whether the Court of Appeal in its second decision was correct to hold that the ambulance officers' statement was admissible as an exception to the hearsay rule or as an exception to the opinion rule; and

(2) even if inadmissible, whether the conclusion that causation was established could be supported by other evidence.

Held: allowing the appeal:

(1) the statement was hearsay pursuant to s 59(1) of the Act. While the statement appeared in a business record, s 69 did not render the business record admissible because pursuant to s 69(2), the ambulance officers did not have personal knowledge of a fall of 1.5m onto concrete and could not reasonably be supposed to have had it given that the fall had happened before they arrived and there were no bystanders who had personal knowledge of the fall. To hold an opinion that the respondent fell in a certain way was different from having personal knowledge that he fell in that way. Personal knowledge can normally only be derived from seeing or perhaps hearing the event and not by drawing inferences from some other circumstances observed: at [17];

(2) even if the statement was admissible under s 69 of the Act, that provision provided that the evidence was admissible if no other exclusionary rule applied. Accordingly, regard had to be had to the exclusion of opinion evidence under s 76 of the Act: at [18]–[22];

(3) the statement was not an opinion. The statement did no more than raise the question of whether the respondent had fallen 1.5m onto concrete. The ambulance officers' records were so shrouded in obscurity about what they observed that it was not possible to find, on the balance of probabilities, what the statement was actually stating. It was therefore not possible to positively find that it stated an opinion: at [38];

(4) even if the statement did express an opinion, s 78(a) of the Act was not satisfied. First, the statement was not stating an opinion about the extent of the respondent's injuries, only about their cause. It was an assertion of something said to have happened beforehand. It was not based on what the ambulance officers actually witnessed. Section 78 only applied to opinions given by those who actually witnessed the event about which the opinion was given: at [40]–[41]. Second, the opinion was not based on what the officers saw, heard, or otherwise perceived about a matter or the event. "Perceived" had its ordinary meaning, namely, to observe by one of the five senses of sight, hearing, smell, taste or touch: at [43];

(5) the statement was also not admissible pursuant to s 78(b) of the Act. While the term "necessary" in s 78(b) meant that the opinion could not be admitted unless it was the only way to obtain an account of the ambulance officers' perceptions, that test was not satisfied in this case: at [50]. The function of s 78(b) was to make up for incapacity to perceive the primary aspect of the events and conditions, or to remember the perception, or to express the memory of that perception. But the ambulance officers were not shown to be suffering from any incapacity in perception, memory or expression. Had the ambulance officers been called, they might have been able to give more evidence on the nature of what they saw. Exclusion of that possibility on the balance of probabilities was an unfulfilled precondition of admissibility: at [51];

(6) it was not correct to construe "necessary" as meaning "not unreasonable": at [53]. However, it was not required that the primary perception be identified by the holder of the opinion. That is to say, that a full statement by a witness of perceptions and observations was not required, although the less the witness

states concerning his or her primary perceptions, the harder it is for the tendering party to establish the conditions of admissibility in s 78(a) or (b): at [57]; and

(7) in the absence of any satisfactory evidence, the conclusion that a fall from the vertical face took place could not be drawn on the balance of probabilities and the respondent failed on the issue of causation: at [75].

Sharples v Minister for Local Government [2011] HCATrans 217 (Crennan and Kiefel JJ)

(related decisions: *Sharples v Minister for Local Government* [2010] NSWCA 36; (2010) 174 LGERA 129 Beazley, Tobias and McColl JJA, *Sharples v Minister for Local Government* [2008] NSWLEC 328; (2008) 166 LGERA 302, *Sharples v Minister for Local Government* [2008] NSWLEC 308, *Sharples v Minister for Local Government* [2008] NSWLEC 67; (2008) 159 LGERA 391 and *Sharples v Minister for Local Government (No 2)* [2009] NSWLEC 62 Biscoe J)

Facts: the application concerned the validity of determinations made by the Minister for Local Government ("the Minister") under s 508A of the *Local Government Act* 1993 ("the LGA") and an order for partial costs under the Land and Environment Court Rules 2007. Mr Sharples claimed that a guideline requirement for making determinations under s 508A of the LGA of evidence of community support had not been met, with the consequence that the determination was invalid. The Court of Appeal dismissed the appeal. Mr Sharples applied for an extension of time and special leave to appeal to the High Court.

Issues:

(1) whether special leave to appeal should be granted.

Held: refusing the application:

(1) there was no reason to doubt the Court of Appeals' construction of s 508A that invalidity of a determination was not intended to result from non-compliance with the Guidelines. The process of construction undertaken followed settled principles and no new question of construction was raised.

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

Sevenex Pty Limited v Blue Mountains City Council [2011] NSWCA 223 (Young, McColl JJA and Sackville AJA)

(related decisions: *Sevenex Pty Limited v Blue Mountains City Council (No 2)* [2010] NSWLEC 101 Sheahan J and *Sevenex Pty Limited v Blue Mountains City Council* [2009] NSWLEC 1264 Moore SC)

Facts: the appellant operated a tourist facility known as the "Three Sisters Plaza" and wanted to expand its activities by reorganising its premises to incorporate an Aboriginal cultural exhibit, a live koala exhibit and a vivarium. The appellant appealed the deemed refusal of development consent by the respondent (which was subsequently an actual refusal) to the Land and Environment Court, where it was unsuccessful, both before Moore SC and in the s 56A appeal before Sheahan J. Subsequently, the subject land was deemed "residential bushland conservation" and the present and proposed uses were prohibited. However, the Three Sisters Plaza enjoyed a consent granted by the respondent in 1993 for the continuing use of the land. The development application for the 1993 consent was not in evidence in the Land and Environment Court.

The appellant argued that the purpose of the 1993 consent was for the establishment of a "commercial development" on the land, and because the proposed uses were a commercial development, all that was needed was consent for the alterations.

Alternatively, the appellant relied on cl 41(1)(e) of the Environmental Planning Regulation 2000 on the basis that the change in use was from the existing commercial use to another commercial use. Under cl 41(3), "commercial use" included the use of the building for "business premises" or "retail premise"' (as defined in the Standard Instrument (Local Environmental Plans) Order 2006).

Issues:

(1) whether the development consent granted in 1993 authorised the carrying out of the proposed use and did not amount to a change of use; and

(2) whether the proposed use was a "business premises" or a "retail premises" for the purposes of cl 41(1)(e) and (3).

Held: granting leave to appeal but dismissing the appeal:

(1) the purpose of a consent is the purpose specified in the development application, and the onus was on the appellant to demonstrate the purpose of the consent relied upon: at [13] and [23];

(2) whilst the purpose was to be described in liberal language, describing the purpose of the 1993 consent as a commercial development was too vague and nebulous and it was not a proper construction of the consent to say that the purpose was for an unspecified commercial development: at [20] and [24];

(3) the plans incorporated in the 1993 consent showed the use being for the sale of souvenirs and food, whereas the proposed use was to include tourist entertainment, including a mini zoo: at [20];

(4) in considering whether the proposed use was a "retail premises", the appellant had to distinguish between what was purchased in a shop and the purchase of entertainment: at [32];

(5) the proposed development was not a "business premises" as it did not involve the provision of services to individuals in accordance with their particular circumstances: at [33]; and

(6) the word "services" could have a wide connotation, however, the term must be construed in context: at [34].

Martin v State of New South Wales (No 10) [2011] NSWCA 287 (Basten JA and Handley AJA)

(related decision: *Martin v State of New South Wales* [2011] NSWLEC 20 Pain J)

Facts: the second respondent, Highlake Resources Pty Ltd ("Highlake Resources"), applied in Class 8 proceedings to strike out the points of claim and stay the proceedings until a security for costs order was provided. The substantive proceedings related to a claim by Mr Martin that the application for mining licence (El 7613) was based on confidential information obtained by him in the course of his exploration activities and conveyed to persons connected with Highlake Resources. Mr Martin's interest in El 7613 was based on the fact that his wife held mining licence (El 6355). EL 6355 had been refused renewal on 17 June 2009.

The primary judge ordered that the points of claim be struck out; made an order requiring the provision of security of costs; stayed the proceedings pending the provision of security; and ordered that the proceedings be dismissed if no security was provided within two months of the date of the order. In the event that security was provided, Mr Martin was granted 28 days to file amended points of claim, to be accompanied by an affidavit verifying facts supporting "any general statements" made in the amended points of claim and facts supporting Mr Martin's standing to bring the claim. Mr Martin appealed.

Rule 42.21(e) of the Uniform Civil Procedure Rules 2005 ("the UCPR") stated that a security for costs order could be made where "a plaintiff is suing, not for his or her own benefit, but for the benefit of some other person and there is reason to believe that the plaintiff will be unable to pay the costs of the defendant if ordered to do so".

Issues:

(1) whether the primary judge erred in striking out the pleadings;

(2) whether the primary judge erred in granting a security for costs order; and

(3) if the primary judge erred, whether it warranted granting leave to appeal.

Held: granting leave to appeal:

(1) appeals in relation to Class 8 proceedings under s 57 of the *Land and Environment Court Act* 1979 are limited to decisions on questions of law. Appeals in relation to interlocutory decisions can only be brought with leave of the Court. The notice of appeal was, therefore, incompetent without leave: at [5];

(2) there was no error demonstrated in the primary judge's conclusion that the points of claim should be struck out: at [7];

(3) the primary judge's conclusions that a cause of action for theft of intellectual property, or misuse of confidential information, could not form the basis for challenging the grant of EL 7613; that the challenge to the delegation under the *Mining Act* 1992 was misconceived and must fail; and that Mr Martin had no interest in the area subject to EL 7613, were not attended by legal error: at [7]–[12];

(4) the further directions that Mr Martin be granted leave to replead and that an affidavit identifying the facts supporting Mr Martin's standing was to be filed, were also not attended by legal error: at [12];

(5) the fact that the primary judge ordered security pursuant to r 42.21(e) of the UCPR on the basis of the proceedings being pursued only for the benefit of Mr Martin's wife and not for his own benefit, where the judge was of the view that Mr Martin had no standing to pursue the proceedings, was to exercise a power that was not available in the circumstances: at [14];

(6) the primary judge's finding that it was "reasonably possible" that Mr Martin would not be able to meet a costs order was not a finding in the language of r 42.21 of the UCPR ("there is reason to believe") and applied a lower threshold: at [15];

(7) in relation to the outstanding costs orders against Mr Martin, the primary judge failed to consider that, absent an order that the costs were payable forthwith upon assessment, such costs did not become payable until the conclusion of the proceedings: at [16];

(8) there was, therefore, arguable grounds for the view that the primary judge decided questions of law erroneously in relation to the security for costs order. However, that in itself was not sufficient to warrant a grant of leave to appeal: at [17]; and

(9) leave to appeal was granted because the orders had the potential to stultify proceedings; the terms of the security for costs order were misconceived because if Mr Martin were to plead a supportable claim in respect of which he had a relevant interest, the basis of the order would disappear; it would be unfortunate that the claim could not go ahead because those implicated in the conduct obtained an order for security of costs; and Mr Martin was asked to provide security for costs for the trial before he could file amended points of claim and before it was known that the matter would proceed to trial: at [18]–[23].

Martin v State of New South Wales (No 8) [2011] NSWCA 285 (Basten JA and Handley AJA)

(related decision: *Martin v Minister for Mineral and Forest Resources* [2011] NSWLEC 1011 Dixon C)

Facts: Mr Martin challenged the refusal of the Minister for Mineral and Forest Resources to grant an application for an exploration licence (ELA 3747) under the *Mining Act* 1992 in Class 8 proceedings. A commissioner of the Land and Environment Court dismissed the challenge. Several separate questions were referred to be determined by a judge of the Land and Environment Court.

Mr Martin applied for leave to appeal to the Court of Appeal from the decision of the commissioner. The respondent opposed leave being granted on the basis that an appeal to the Court of Appeal lay only from a decision of a judge and that there was no appeal, whether as of right or by leave, from a judgment of a commissioner to the Court of Appeal.

Section 57(4) of the *Land and Environment Court Act* 1979 (" the LECA") states that an appeal does not lie to the Supreme Court, except by leave, from a decision of a commissioner made after a judge's determination on a question of law pursuant to a reference under s 36(5) of the LECA, where the judge's determination is itself the subject of an appeal to the Supreme Court.

Issues:

(1) whether the separate questions were referred pursuant to s 36(5) of the LECA; and

(2) whether the Court of Appeal had the jurisdiction to hear an appeal from a decision of a commissioner.

Held: refusing the application for leave to appeal:

(1) the separate questions were not referred pursuant to s 36(5) of the LECA but were referred under s 42(5) of the LECA. Section 57(4) did not include a reference to s 42(5) of the LECA: at [6];

(2) the only right of appeal to the Court of Appeal was pursuant to s 57 of the LECA, in relation to Class 8 proceedings, excluded an appeal against a decision of a commissioner (s 57(3) of the LECA): at [7]; and

(3) it followed that an appeal to the Court of Appeal could only be made following an appeal to a judge of the Land and Environment Court pursuant to s 56A of the LECA: at [7].

Farriss v Minister Administering the Crown Lands Act 1989 [2011] NSWCA 275 (Macfarlan, Campbell JJA and Sackville AJA)

(related decision: *Farriss v Minister Administering the Crown Lands Act 1989* [2010] NSWLEC 206; 179 LGERA 283 Pain J)

Facts: the appellant had the benefit of a domestic waterfront licence in respect of Crown land under s 34 of the *Crown Lands Act* 1989 ("the Act"). On 11 August 2009 the Land Property Management Authority issued, on behalf of the Minister a Notice of Redetermination, under s 143 of the Act, of the rent payable by the appellant. The appellant objected to the redetermination and appealed, pursuant to s 142(5) of the Act, to the Land and Environment Court.

The Minister relied upon a review by the Independent Pricing and Regulatory Tribunal ("IPART") into Rentals for Waterfront Tenancies on Crown Land in NSW issued in April 2004 ("the Review") in making the redetermination. The recommendation in the Review included a formula for setting rentals but also included a statement that "the rate of return needs to be regularly reviewed". Section 143 of the Act provided that if the recommendation of IPART was applied by the Minister in redetermining the rent concerned, the Land and Environment Court is to apply the recommendation in any appeal against the Minister's decision. The appellant contended that the IPART recommendation encompassed not only the formula, but also the statement that the rate of return would need to be regularly reviewed.

Issues:

(1) whether the IPART recommendation encompassed not only the formula stated but also the statement that "the rate of return will need to be regularly reviewed"; and

(2) whether the rate of return had been "regularly reviewed" and, if not, whether this obliged the trial judge to conduct such a review.

Held: dismissing the appeal:

(1) the statement constituted comments in relation to the formula that IPART recommended be used and did not form part of the recommendation itself. Rather, it flagged the fact that IPART would, in time, need to review the rate of return: at [24] and [25];

(2) the statement contrasted with the highly prescriptive language of the formula itself and the report gave no indication as to the regularity of the "review" or what the review might entail: at [26] and [27]; and

(3) the Land and Environment Court could not conduct such a review and any attempt to do so would be antithetical to its judicial function as well as seriously contradict the inherent policy of the legislation: at [30] and [31];

Botany Bay City Council v Saab Corp Pty Ltd [2011] NSWCA 308 (Basten, Macfarlan JJA and Tobias AJA)

(related decision: *Botany Bay City Council v Ralansaab Pty Limited* [2010] NSWLEC 225 Sheahan J)

Facts: Moscat Pty Ltd ("Moscat") was granted two development consents by Botany Bay City Council ("the council") for the development of two lots located in Mascot. The first development consent related to the demolition of the existing buildings, earthworks and the provision of infrastructure. The second development consent was a deferred commencement consent for the construction of a building. Condition 32 of the latter development consent stated that the electricity and telecommunications cables within the road reserves and within the site were to be placed underground with appropriate street light standards put into place. Moscat sold the sites to Ralansaab Pty Ltd ("Ralansaab"). The development consents were implemented on behalf of Ralansaab by Saab Corp Pty Ltd ("Saab"). Mr William O'Dwyer and Mr Anthony Saab were directors of Ralansaab, and Mr Joseph Saab and Mr Anthony Saab were directors of Saab. Together the abovementioned directors were the "individual respondents". Ralansaab went into liquidation before the determination of the appeal.

The council alleged a breach of condition 32 and sought orders in the Land and Environment Court requiring the respondents to place the the electricity and telecommunications cables underground. The primary judge rejected the council's claim holding that condition 32 was invalid and unenforceable; that even if there had been a breach of condition 32 that it had been committed only by Saab and Ralansaab, and not the individual respondents; and that even if condition 32 had been valid, the Court would have declined to exercise its discretion to grant the relief sought. The council appealed.

Section 80A of the *Environment Planning and Assessment Act* 1979 ("the EPAA") empowers the council to impose a consent condition if it relates to any matter referred to in s 79C of the EPAA. Section 79C identifies general matters for consideration by the council in determining a development application, including the the likley impacts of that development on both the natural and built environments.

Issues:

(1) whether the primary judge erred in declaring condition 32 invalid;

(2) if valid, whether condition 32 had been complied with;

(3) whether the primary judge erred in finding only the corporate respondents liable; and

(4) if condition 32 was valid, whether the Court should exercise its discretion and grant the relief sought.

Held: allowing the appeal against Saab and dismissing the appeal against the individual respondents:

(1) a tripartite test applied for determining the validity of conditions of development consents: first, whether the condition was related to the purpose for which the functions of the responsible authority were being exercised, with that purpose being ascertained from the applicable legislation; second, whether the condition was imposed for an ulterior or improper purpose; and third, whether the imposition of the condition was manifestly unreasonable in the *Wednesbury* sense: at [9]–[16];

(2) properly construed, the obligation in condition 32 was not restricted to cables providing services to the development itself. However, condition 32 only related to the undergrounding of cables in the road reserves adjacent to the frontage of the development, not the undergrounding of services the total length of the two streets bordering the development: at [19], [25] and [90];

(3) improvement to the amenity of the area immediately adjacent to the development was a proper subject of a condition: at [20], [25] and [90];

(4) condition 32 was, therefore, within power, having regard to the scope of s 80A of the EPAA and was not uncertain: at [91];

(5) the fact that a director was the primary actor on behalf of the company did not mean that the act became that of the director as distinct from that of the company: at [119];

(6) given the nature of the company and the task it was performing, its directors in supervising the work, directing the work and making decisions as to what particular work was to be performed were doing no more than performing the directorial duties of a building company and should not be held individually liable: at [120];

(7) the primary judge was correct in finding that the individual respondents should not be the subject of an order that they personally remedy the breach by Saab: at [123]; and

(8) the council was entitled to the relief it sought against Saab because there was a public interest in ensuring that conditions of consent were complied with: at [179].

Teoh v Hunters Hill Council (No 4) [2011] NSWCA 324 (Allsop P, Beazley JA and Handley AJA)

(related decisions: *Teoh v Hunters Hill Council* [2008] NSWLEC 263 Sheahan J, *Teoh v Hunters Hill Council (No 3)* [2009] NSWLEC 121; (2009) 167 LGERA 423 Sheahan J and *Teoh v Hunters Hill Council (No 2)* [2010] NSWCA 321 Allsop P, Beazley JA and Handley AJA)

Facts: Mrs Teoh applied for an order under r 36.16(3A) of the Uniform Civil Procedure Rules 2005 ("the UCPR") setting aside the decision of the Court of Appeal dismissing her renewed application for leave to appeal from a decision of the Land and Environment Court. The underlying dispute had a long history. Mrs Teoh applied in the Land and Environment Court in Class 4 of its jurisdiction for judicial review of a development consent granted by the Hunters Hill Council ("the council") for the erection of a second storey on a neighbour's house. The application was dismissed by the primary judge ("the first judgment"). Mrs Teoh sought to reopen the judgment initially relying on fraud and then on r 36.36.15(1) of the UCPR, which enables a judgment or order made "irregularly, illegally or against good faith" to be set aside or varied. The first application was not pursued and the second application was dismissed ("the second judgment"). Mrs Teoh then applied for leave to appeal the second judgment, which was subsequently dismissed ("Court of Appeal No 1"). Mrs Teoh's consequent application under r 36.16(3A) of the UCPR to set aside or vary the orders in Court of Appeal No 1 was also dismissed ("Court of Appeal No 2"). The present application concerned the setting aside or varying of the orders in Court of Appeal Nos 1 and 2.

Issues:

(1) whether the orders in Court of Appeal Nos 1 and 2 should be varied or set aside pursuant to r 36.16(3A) of the UCPR; and

(2) whether a court could act of its own motion to control abuse of its process.

Held: dismissing the application:

(1) an order refusing leave to appeal was interlocutory. Therefore, a renewed application for leave to appeal was competent and the Court's power to reconsider its interlocutory orders was preserved by r 36.16(4) of the UCPR: at [14];

(2) the first judgment was final and once 14 days had elapsed from entry of the orders, pursuant to r 36.11 of the UCPR those orders could only be set aside or varied by the Land and Environment Court on very limited grounds: at [25];

(3) there was no reason to doubt the second judgment in that those orders were not given, entered or made irregularly, illegally or against good faith: at [26];

(4) Mrs Teoh had failed three times to persuade the Court that she had arguable grounds for leave to appeal from the second judgment and a fourth application on the same grounds and materials would be vexatious and an abuse of process: at [30] and [33];

(5) the Court would not declare Mrs Teoh a vexatious litigant absent notice being provided to her and could do so only after giving her an opportunity to be heard: at [31];

(6) the Court, however, was empowered to act of its own motion to prevent abuses of its own processes in order to preserve its resources and to ensure their availability for other litigants: at [32] and [37]–[38]; and

(7) if Mrs Teoh was to file a fourth notice of motion seeking, in substance, the same relief, the Registrar was to vacate the return date in order for a judge to review the application. If the application warranted a fourth hearing then a return date would be fixed, but if the judge considered that a fourth hearing was not warranted, Mrs Teoh would be invited to show cause why her application should not be summarily dismissed as vexatious and an abuse of process: at [39].

Edyp v Brazbuild Pty Ltd [2011] NSWCA 218 (Allsop P and Giles JA, Basten JA in dissent)

Facts: Dr Edyp and Ms Baumung were directors of R & S Healthy Living Pty Ltd ("Healthy Living"). Healthy Living owned land at Coffs Harbour. A contract dated 28 March 2006 was executed for the construction on the land of a surgery and dwelling. The contract was expressed to be between Brazbuild Pty Ltd ("Brazbuild") as the builder and Dr Edyp, Ms Baumung and Healthy Living as the owners. Building work commenced, however, before substantial work had been performed disputes arose. In October 2006 Ms Baumung told Mr Brazel of Brazbuild that the contract was "cancelled". Acting under a term of the contract, Brazbuild gave notice treating this as a substantial breach by the owners and requiring rectification of the breach. In January 2007 it gave notice terminating the contract. In the proceedings that followed it was common ground that the contract had come to an end. In April 2007 Brazbuild brought an application in the Consumer, Trader and Tenancy Tribunal ("the Tribunal") claiming damages for breach of contract. The Tribunal ordered that Healthy Living pay damages and costs to Brazbuild. On appeal by Brazbuild to the District Court, the Tribunal's orders were varied whereby Dr Edyp and Ms Baumung were also ordered to pay the damages and costs. Dr Edyp and Ms Baumung applied to the Court of Appeal for relief pursuant to s 69 of *Supreme Court Act* 1970 on the ground of jurisdictional error or error of law on the face of the record in the District Court. They contended that the Tribunal had not relevantly "decided a question with respect to a matter of law" as required by s 67(1) of the *Consumer Trader and Tenancy Tribunal Act* 2001 ("the Act") for an appeal to the District Court and that therefore the District Court had no jurisdiction to hear the appeal. Further, they contended that if the District Court had jurisdiction, it had exceeded that jurisdiction by making findings beyond deciding the question of law the subject of the appeal when it varied the Tribunal's orders.

Issues:

(1) whether the Tribunal decided a question, either impliedly or expressly, with respect to a question of law;

(2) whether the District Court therefore had jurisdiction to hear the appeal; and

(3) whether the District Court had exceeded its jurisdiction by making findings beyond deciding a question with respect to a matter of law.

Held: dismissing the appeal:

(1) a decision of a question with respect to a matter of law as referred to in s 67(1) of the Act may be implied and need not be expressed. This was recognised by the High Court in *Kostas v HIA Insurance Services Pty Ltd* [2010] HCA 32; (2010) 241 CLR 390: at [94]–[95];

(2) a decision may be made on a question with respect to a matter of law although the question was not raised by the parties: at [32] and [108]. Unless the particular language otherwise requires, it should not matter that the legal error lies in studied decision of an over looked question, in an unexpressed false assumption or misunderstanding as to a question, or in coming to a conclusion without attention to a question which must be determined: at [110];

(3) the meaning of the prepositional phrase "with respect to" in s 67 of the Act must be taken as words of limitation and not expansion and that fact finding as to the merits of the substantive dispute was intended to remain the exclusive reserve of the Tribunal: at [34];

(4) whether or not a decision on a question with respect to a matter of law exists will generally be discerned from the nature of the asserted error giving rise to the applicant's dissatisfaction. From the error, the question and decision will be identifiable. Each of the question and decision may be expressed or implied: at [57];

(5) the error of the Tribunal was that it failed to give effect to a centrally important common position of the parties. The implied decision was that the Tribunal had resolved all relevant questions or issues placed before it by the parties necessary to resolve the controversy and to make the orders. This was a decision on a question with respect to a matter of law and, therefore, the District Court had jurisdiction to hear the appeal: at [57] and [118];

(6) the Tribunal overlooked the role of Dr Edyp and Ms Baumung as contracting parties given that, as found in the District Court, the matter proceeded in the Tribunal on the basis that all three of Dr Edyp, Ms Baumung and Healthy Living were parties to the contract. This did not mean that there was not a decision, rather there was an implicit decision by the Tribunal that it had completed its jurisdictional task: at [114]. This decision was with respect to a matter of law in so far as the Tribunal had failed to fully determine Brazbuild's application and had failed to fulfil the jurisdiction conferred on it and required to be exercised: at [117];

(7) pursuant to s 67(3)(a) of the Act, the District Court could make such an order in relation to the Tribunal proceedings as, in the District Court's opinion, should have been made by the Tribunal. Alternatively, it could remit its decision on the question to the Tribunal and order a re-hearing of the proceedings (s 67(3)(b)). In doing the former, the District Court made a finding of fact that Dr Edyp and Ms Baumung were parties to the contract: at [120]–[121]. However, s 67(3)(a) did not empower the District Court to make this finding of fact: at [121] and [138]. That was not the question the subject of the appeal. Indeed, the ground of appeal assumed in fact that all three of the Dr Edyp, Mr Baumung and Healthy Living were parties to the contract: at [136] and [139];

(8) the Tribunal's error was failing to complete the exercise of its jurisdiction in so far as the Tribunal should have, given the manner in which the matter proceeded before the Tribunal, made an order against all three of Dr Edyp, Ms Baumung and Healthy Living. No further fact finding was necessary and such an order would not have contravened the mandate in s 67(3)(a) of the Act: at [139]; and

(9) relief was refused on discretionary grounds because the District Court's excess of jurisdiction was not material to the result: at [140].

Dillon v Gosford City Council [2011] NSWCA 328 (Basten, Macfarlan JJA and Handley AJA)

(related decisions: *Dillon v Gosford City Council* [2008] NSWLEC 186 Sheahan J and Miller AC, *Dillon v Gosford City Council* [2010] NSWLEC 44 Sheahan J and *Dillon v Gosford City Council* [2010] NSWLEC 168 Sheahan J and Miller AC)

Facts: Mr and Mrs Dillon ("the Dillons") commenced proceedings in Class 3 of the Land and Environment Court's jurisdiction challenging the amount of compensation offered by Gosford City Council ("the council) for the compulsory acquisition of an interest in their land described as "an easement for a levee bank". The council had constructed the levee on the Dillons' land in order to prevent floodwaters flowing across the property. The Dillons sought compensation in the amount of $375,108 pursuant to the *Land Acquisition (Just Terms Compensation) Act* 1991 ("the Act"), comprising the market value of the interest and the damages for loss attributable to disturbance involving the construction of scour protection works to prevent erosion of the banks of the creek.

On 6 June 2008, the primary judge and commissioner delivered judgment upholding the council's assessment of market value of $45,000 and allowing $5,000 for legal and valuation costs ("the first judgment").There remained a dispute in respect of the disturbance claim. The Dillons filed a notice of motion seeking to reopen the land valuation, which was dismissed on 31 March 2010 with costs, but leave was granted for the disturbance claim for scour protection works to be determined at a later hearing ("the second judgment"). On 16 September 2010, the primary judge and commissioner determined that the Dillons' were entitled to a further amount of $98,152 compensation for distrubance for the scour protection works ("the third judgment"). The council was ordered to pay 75% of the Dillons' costs of the first stage of the proceedings and the Dillons were ordered to pay 50% of the council's costs in respect of the third stage of the proceedings. The Dillons appealed.

Issues:

(1) whether the court below properly construed the notice of acquisition;

(2) whether the court below failed to provide reasons with respect to the operation of s 59A of the *Local Government Act* 1993 ("the LGA");

(3) whether the court below erred in dismissing the motion to reopen the question of market value determined in the first judgment;

(4) whether the court below erred in apportioning the costs of the scour protection works; and

(5) whether the court below erred in awarding costs of the proceedings.

Held: dismissing the appeal:

(1) the court below did not err in construing the easement the subject of the notice of acquisition. The easement was construed in relation to its purpose, namely a levee, and its topographical area, namely the area depicted on the plan: at [24];

(2) the powers conferred on the council did not extend to the construction or maintenance of a levee outside the area on the plan. The fact that the levee constructed years earlier by the council extended beyond the easement did not affect the construction: at [24]–[28];

(3) the court below did not provide reasons in relation to the application of s 59A of the LGA as it had decided to reject the application to reopen the land valuation and the only possible application of s 59A of the LGA was in relation to market value: at [32];

(4) it was in the lower court's discretion to revisit a matter which had been determined, even though the whole proceedings had not been finally disposed of, on the basis that the Dillons sought to reformulate their claim. There was no error of law in the primary judge's exercise of that discretion in dismissing the application to reopen: at [36]–[40];

(5) the apportionment of the scouring costs was based on various models of possible flooding and the redirection of the flow of water. However, these were not irrelevant considerations because they were not prohibited under the Act, and therefore, the court below did not err in having regard to them: at [46];

(6) consistent with the line of authority under the *Supreme Court Act* 1970, leave to appeal with respect to an appeal under s 57 of the *Land and Environment Court Act* 1979 against a costs order was not required where the appeal contained bona fide grounds relating to issues other than costs. If that conclusion was wrong, leave nevertheless would have been granted: at [53]–[59];

(7) a claimant for compensation in respect of a compulsory acquisition should usually be entitled to recover costs of the proceedings, having acted reasonably in pursuing the proceedings. *Hallley v Minister Administering the Environmental Planning and Assessment Act 1979 (No 3)* [2011] NSWLEC 94 was doubted. To the extent that *Halley* was premised on the assumption that r 42.1 of the Uniform Civil Procedure Rules 2005 ("the UCPR") applies to compulsory acquisition proceedings in Class 3 of the Land and Environment Court's jurisdiction, it was incorrect because Sch 1 of the UCPR expressly excludes that rule from Classes 1, 2 and 3: [65]–[66] and [70];

(8) whether pursuing the proceedings was reasonable depended upon the circumstances of the case including: the positions adopted by the parties at the commencement of proceedings and the final outcome; who was "successful" in the proceedings; and the time and expense in relation to specific items: at [72];

(9) in respect of the first stage of the proceedings the court below did not err in awarding the costs. In respect of the third stage of the proceedings, the court below erred in ordering that the Dillons pay 50% of the council's costs in circumstances where they were successful in obtaining more than the council's highest offer at the hearing and where the Dillons had offered to settle for the amount determined by the court more than two years before the hearing: at [79]–[80]; and

(10) each party was to bear its own costs of the third stage of the proceedings: at [80].

R v AB [2011] NSWCCA 229 (Bathurst CJ, Hoeben and Johnson JJ)

Facts: the Crown appealed under s 5B of the *Criminal Appeal Act* 1912 the sentences imposed for three counts of dangerous driving and one count of taking and driving a vehicle without consent in the District Court as being manifestly inadequate. AB had pleaded guilty before the Local Court at the earliest opportunity. However, the course of the proceedings in the District Court were protracted and involved a significant evidentiary hearing to resolve disputed questions of fact. In the course of determining the appeal against sentence, the Court made observations about the erosion of the utilitarian value of the guilty plea in

protracted sentence hearings. These observations had no application to the determination of the discount on appeal because the Crown had conceded in the District Court that a 25% discount in the circumstances was warranted.

Issues:

(1) whether the utilitarian value of a guilty plea was eroded if there was a protracted hearing on sentence.

Held: allowing the appeal and making the following observations:

(1) where a sentencing court is required to undertake a lengthy hearing in circumstances where there are disputed questions of fact that are resolved adverse to an offender, then a sentencing court is entitled, if not required, to have regard to these events when assessing the utilitarian value of the guilty plea: at [27];

(2) an offender is not to be penalised because he or she disputes certain facts on sentence and requires the Crown to prove those facts. However, a person who pleads guilty but puts the Crown to proof on certain factual issues and loses, is not entitled to the same discount on utilitarian grounds as a person who does not require a contested hearing: at [30]–[32];

(3) the utilitarian value of a guilty plea is not a fixed element and is capable of erosion as a result of the conduct of the sentencing hearing. This is because the utilitarian value of the guilty plea, being the avoidance of a trial, can be lost by a protracted sentence hearing that involves the adducing of evidence and the consumption of public resources: at [2] and [33]; and

(4) there also can be exceptional circumstances in which it is appropriate to give a full utilitarian discount for a guilty plea, notwithstanding that it has not been entered at the earliest opportunity: at [2].

- **NSW Supreme Court**

Snowy River Alliance Inc v Water Administration Ministerial Corporation (No 2) [2011] NSWSC 1132 (Hislop J)

(related decision: *Snowy River Alliance Inc v Water Administration Ministerial Corporation* [2011] NSWSC 652 Hislop J)

Facts: the plaintiff had unsuccessfully sought judicial review of decisions relating to the review, and variation, of a licence issued by the Water Administration Ministerial Corporation to the Snowy Hydro Company ("the second defendant") in relation to the Snowy Mountains Hydro Electric Scheme. The defendants sought costs. The plaintiff sought an order under r 42.1 of the Uniform Civil Procedure Rules 2005 that each party should bear its own costs.

Issue:

(1) whether the usual costs order should be made.

Held: ordering each party to bear its own costs:

(1) the scheme set up by the legislature was unique and had not been the subject of prior judicial consideration: at [17];

(2) the issues were novel and of importance, were reasonably arguable, and there was no impropriety or unreasonableness in the conduct of the proceedings: at [17];

(3) the public interest in the Snowy River extended well beyond its geographical location: at [17];

(4) the plaintiff raised issues concerning the public obligations of the defendants, and had nothing to gain from the proceedings other than seeking to uphold the law: at [17];

(5) this was the type of case where no order was appropriate, if access to justice was not to be unnecessarily inhibited: at [17]; and

(6) the proper exercise of discretion was to order that each party bear its own costs: at [18].

Anderson v The Council of the City of Lismore [2011] NSWSC 1058 (Brereton J)

Facts: s 713 of the *Local Government Act* 1993 ("the Act") empowers a council to sell land for overdue rates and charges where monies have been outstanding for at least five years and the amount owed exceeds the value of the land. The Act (s 715) sets out the procedural requirements for the notice of the proposal to sell the land. Additionally ss 582 and 583 give councils the discretion to waive or reduce rates, charges and interest due by pensioners. The Council of the City of Lismore ("the council") adopted a policy in 2009 entitled "Rates and Charges Hardship" ("the policy") which states, inter alia, that pensioners' land would not be sold for unpaid monies except under exceptional circumstances.

Ms Anderson was a disability pensioner. In about 2000, she stopped paying rates and by July 2010, was in arrears for around $16,226, of which over $6,000 had been outstanding for more than five years. Consequent to the adoption of the policy, enforcement of a default judgment obtained in 2008 was not pursued.

The council first notified Ms Anderson that her property may be sold for the debt in August 2010 and on 26 October 2011, she was notified that the property would be sold and that the process had commenced. To avoid having her property sold Ms Anderson would have to pay the debt in full (s 715(2)(a)) or come to a satisfactory arrangement with council to repay the debt (s 715(2)(b)). No such arrangement was made and on 14 May 2011 the property was sold at auction.

Issues:

(1) whether the council was under an obligation to afford a ratepayer a reasonable opportunity to make a "satisfactory arrangement" within the meaning of s 715(2)(b) of the Act;

(2) whether the policy gives rise to a legitimate expectation that a pensioner's land would not be sold for unpaid rates;

(3) whether the actions of council contrary to the policy denied Ms Anderson procedural fairness; and

(4) as the General Manager of the council executed the contract for the sale of the land, was the sale of the land validly exercised by council.

Held: allowing the application:

(1) the provision for a "satisfactory arrangement" was an indulgence granted to a debtor in default. The council was not obliged to afford a ratepayer a reasonable opportunity to make an acceptable arrangement. It was enough that the council complied with s 715(1). The history of the correspondence about the sale of the land demonstrated she had ample opportunity to make such an arrangement. The rules of procedural fairness did not apply to decisions of parties in arm's length negotiations as to whether or not to accept an offer made by the other: at [25];

(2) the council's power to sell the land would not normally attract the rules of procedural fairness as it was like a mortgagee's power of sale that was charged on the land by statute: at [28];

(3) the principles of legitimate expectation that applied in this case were:

    (a) statements by public authorities of policies as to how discretions or powers will be exercised are liable to create "legitimate expectations" that those policies will be applied;

    (b) it is not necessary that a person affected subjectively entertain such an expectation; it suffices that objectively the policy was calculated to engender such an expectation;

    (c) a legitimate expectation does not found a right to have it fulfilled, but where the authority proposes to depart from the policy, so as to defeat a "legitimate expectation", a person affected is entitled to be heard as to why there should not be a departure from the policy; and

    (d) where the policy admits of departure in "exceptional circumstances" and the authority proposes to invokes such circumstances, a person affected is entitled to be informed of the circumstances relied upon: at [38];

(4) the policy created, especially in pensioners, a legitimate expectation that the council would not sell their land other than in exceptional circumstances: at [40];

(5) the only letter to Ms Anderson advising her that the council was considering selling of her land prior to that decision being made, did not inform her that council's policy was not to sell a pensioner's land except in exceptional circumstances, nor did it invite her to make submissions as to why she should not be excluded from the beneficial operation of the policy. This amounted to a denial of procedural fairness: at [41]–[42];

(6) as the land had not been transferred to the purchaser and the purchaser had yet to finalise finance to buy the land, there was no evidence of economic prejudice from the loss of the contract, it followed that the acts of council, including the contract, were void: at [48]–[49]; and

(7) s 377(1)(h) expressly excluded the delegation of the power of sale. As the contract was not executed in accordance with the Local Government (General) Regulation 2005 as an act of the council (in the presence of both the Mayor and the General Manager) and there could be no delegation of the power of sale, there was no valid exercise by the council of its power of sale: at [50].

Gales Holdings Pty Ltd v Tweed Shire Council [2011] NSWSC 1128 (Bergin CJ in Eq)

(related decisions: *Gales Holdings Pty Ltd v Tweed Shire Council* [2006] NSWLEC 85 Talbot J; *Gales Holdings Pty Ltd v Tweed Shire Council* [2006] NSWLEC 212 Talbot J; and *Gales Holdings Pty Ltd v Tweed Shire Council* [2008] NSWLEC 209 Preston CJ)

Facts: the plaintiff owned 27ha of land, which it planned to develop into a combination of residential and retail uses. Since 1994, the Tweed Shire Council ("the Council") conducted various drainage works, constructed roads, and permitted various developments that caused untreated stormwater runoff to discharge directly and indirectly onto the plaintiff's land. The runoff pooled and remained on the land for long periods of time, causing changes to the habitat and ecology of part of the land. In 1999, the Wallum Froglet, a "vulnerable species" under the *Threatened Species Conservation Act* 1995, was detected on the land. The number of Wallum Froglets increased between 1999 and 2003. In May 2004, the plaintiff's solicitors wrote to the Council alleging that the Council's conduct amounted to nuisance and asking it to provide adequate drainage to stop the ponding. In 2005, the plaintiff lodged a development application to fill the land and construct a shopping centre. In 2008, the Land and Environment Court granted a development consent subject to certain conditions, including the production of a Wallum Froglet management plan and annual monitoring and reporting to the Council on the Wallum Froglet population.

The plaintiff commenced proceedings in the Supreme Court seeking a mandatory injunction requiring the Council to implement a drainage scheme to abate the nuisance. The plaintiff also claimed damages for the cost of maintaining and monitoring the Wallum Froglet population and compensation for the loss of the use of that part of the land for development

Issues:

(1) whether the stormwater runoff and pooling on the land constituted an actionable nuisance; and

(2) whether the plaintiff was entitled to recover damages for the cost of maintaining and monitoring the Wallum Froglet population and for the loss of the use of that part of the land for development.

Held: dismissing the claim for a mandatory injunction, but awarding damages in the sum of $600,000 plus 30% of any costs of treating the stormwater:

(1) the inundation of the land with untreated stormwater runoff caused very serious interference with the plaintiff's enjoyment of the land. Apart from losing the use of that part of the land, the plaintiff had to instruct many consultants in order to prepare drainage plans and construct drains: at [327]–[328];

(2) if the Council knew or ought to have known of the nuisance and the real risk of reasonably foreseeable consequential damage to the plaintiff, it had an obligation to take such positive action as a reasonable person in its position and circumstances would consider necessary to eliminate the nuisance: at [331];

(3) no later than May 2004 when the plaintiff's solicitors complained of nuisance, the Council was aware that the increased flow of water onto the land may cause physical damage to the land. It was

reasonably foreseeable that harm would be caused to the plaintiff by the ponding of untreated stormwater. This constituted an actionable nuisance from May 2004 onwards: at [330], [333] and [336]–[339];

(4) a mandatory injunction requiring the Council to construct a drainage scheme was unsuitable because it would have involved obligations to and of third parties. It would also have required the Court's supervision. The appropriate relief was damages on the basis that the plaintiff would install a drainage system itself: at [420]–[421];

(5) the plaintiff was unable to recover damages for the exclusion of part of the land set aside for Wallum Froglet habitat from its development because their presence was not a consequence of the actionable nuisance. It may have been a consequence of the conduct of the Council prior to 2004, but the actionable nuisance did not arise until May 2004: at [422]–[424];

(6) in any event, the prospect of invasion of a colony of Wallum Froglets was not reasonably foreseeable at the time of the Council's conduct: at [427]–[429]; and

(7) at the time the Council became aware that the plaintiff's enjoyment of the land was being unreasonably interfered with, it knew that there was a viable population of Wallum Froglets on the land. The risk that the plaintiff would be put to additional cost in treating the stormwater as to accommodate the Wallum Froglets was foreseeable. The plaintiff was therefore able to recover 30% of any costs of treating the stormwater up to the date of completion of its drainage works: at [430], [432] and [440].

- ## Land and Environment Court of NSW

Judicial Review

Olofsson v Minister for Primary Industries (No 2) [2011] NSWLEC 181 (Preston CJ)

(related decision: *Olofsson v Minister for Primary Industries* [2011] NSWLEC 137 Pain J)

Facts: in 1876, land at Camberwell was devoted to temporary commonage (Reserve 170176). In March 2009, Ashton Coal lodged a project application under Pt 3A of the *Environmental Planning and Assessment Act* 1979 for approval of an open cut coal mine which would impact the Common. In 2010, after failed negotiations with the Common Trust, Ashton Coal requested that the Land and Property Management Authority ("LPMA") grant Ashton Coal access to the Common for the purpose of undertaking environmental assessment. The LPMA recommended that the Minister revoke the common, reserve it for the purpose of rural services and grant a temporary licence for access, grazing and site inspection to Ashton Coal. By notice published in the *Government Gazette* on 16 April 2010, the land was reserved for the purpose of rural services. The notice stated that "Reserve 170176 is hereby auto revoked". On 30 April 2010, an erratum was published in the Gazette, stating that the previous notice should have read "Common 170176 is hereby revoked pursuant to s 61A of the *Commons Management Act* 1989". Ashton Coal subsequently lodged an application for a mining lease over the land. Mrs Olofsson, a commoner, brought proceedings challenging, inter alia, the revocation of the common and the reservation of the land for rural services.

Issues:

(1) whether the only source of power to revoke the common was s 61A of the *Commons Management Act* 1989;

(2) whether the notices published in the gazette were effective to reserve the land and revoke the land as a common;

(3) whether the decision to revoke the common and reserve the land for rural services was made for unauthorised purposes;

(4) whether the decision to revoke the common and reserve the land for rural services was made taking into account irrelevant considerations; and

(5) whether the Minister failed to comply with s 91 of the *Crown Lands Act* 1989 in reserving the land.

Held: dismissing the proceedings:

(1) when the land was devoted to temporary commonage under the *Crown Land Occupation Act* 1861, it remained Crown land. Therefore, there was power under s 87 of the *Crown Lands Act* to reserve the land previously devoted to temporary commonage for a different purpose. This inconsistent reservation impliedly revoked the previous devoting of land to temporary commonage: at [81]–[85], [87], [89]–[90] and [100];

(2) the first notice published in the Gazette was effective under ss 87 and 89 of the *Crown Lands Act* to reserve the land and impliedly revoke the common: at [108], [110]–[111] and [113]–[116];

(3) the notice as amended by the erratum was also effective under s 61A of the *Commons Management Act* as it identified the land affected, identified that the land had been set aside as a common and that by the notice, the land identified as a common was being revoked: at [117]–[118], [124]–[126] and [129];

(4) none of the reasons for the Minister's decision were unauthorised purposes. The revocation of a common and identification of the reservation of that Crown land for a different purpose necessarily must have involved consideration of the competing uses for the land. It could not be an unauthorised purpose to exercise the power of revocation of a common in order to achieve a purpose different to the continuation of the land as a common: at [137], [140], [142]–[144] and [165]–[166];

(5) none of the reasons for the Minister's decision were irrelevant considerations. Neither the *Crown Lands Act* nor the *Commons Management Act* expressly stated that these matters were not to be considered. No implied limitation of the consideration of those matters could be found within the subject matter, scope and purpose of the statutes: at [147] and [165]–[166]; and

(6) the applicant failed to establish that the Minister's approval to waive the requirement for assessment of the land under Pt 3 of the *Crown Lands Act* miscarried: at [155], [162] and [163].

Brown v Randwick City Council [2011] NSWLEC 172 (Preston CJ)

Facts: the second and third respondents lodged a development application with the Council for the erection of an elevated swimming pool and deck to the rear of their existing dwelling. A report was prepared by one of Council's Environmental Planning Officers, which recommended that the Council's delegate refuse development consent. On 17 September 2008, the Council's delegate refused consent. No public notice of the determination was given. Subsequently, three councillors requested the development application be referred to the Council for consideration. On 11 November 2008, the Council resolved to grant development consent to the new swimming pool and deck. The Council subsequently gave notice in a local newspaper that consent had been granted for the "new swimming pool" only. Mr Brown brought proceedings to challenge the November consent on the basis that the Council had no power to determine the development application under s 80 of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act"), because the Council, by its delegate, had already refused consent in September 2008.

Issues:

(1) whether the privative clause in s 101 of the EPA Act protected the November consent from judicial review;

(2) whether the Council had power under s 80 of the EPA Act to grant consent in November 2008; and

(3) whether the failure of the Council to notify the determination of September 2008, as required by s 81 of the EPA Act, meant that the determination was not effective and could be re-exercised.

Held: upholding the challenge and declaring the Council's determination of November 2008 to grant consent invalid;

(1) s 101 of the EPA Act did not operate to protect the November determination from judicial review for two reasons. First, s 101 was only operative if public notice of the granting of consent was given. Under cl 124 of the Environmental Planning and Assessment Regulation 2000, the notice must describe the development the subject of the consent. The public notice, however, described the development only

as a "new swimming pool", omitting reference to the deck. Therefore, public notice was not given for the purposes of s 101 of the EPA Act: at [33]–[35]. Secondly, even if proper public notice had been given, s 101 did not operate to protect the development consent from judicial review for jurisdictional error: at [37]–[38];

(2) the Council could not exercise the power under s 80 of the EPA Act by granting consent in November 2008, because the power had already been spent by refusing consent in September 2008: at [41]–[44] and [56];

(3) as a matter of fact, the Council, being unaware of the prior determination in September, never attempted to exercise any inherent power (if one existed) to reconsider and rescind the prior determination: at [53]; and

(4) a determination to refuse consent was effective and operated from the date of determination. The fact that there was no notification of the September decision did not give the Council a power to rescind or alter the decision: at [54]–[55].

Rogers v Clarence Valley Council [2011] NSWLEC 134 (Preston CJ)

Facts: Ms Rogers was the president of Happy Paws Haven Inc, which operated a dog and cat shelter. In 2008, Happy Paws Haven lodged a development application with Clarence Valley Council ("the Council") seeking development consent for the erection of sheds and enclosures for the "temporary foster care of domestic dogs and cats". The Council purported to grant development consent for the purpose of "animal establishment". Conditions of the development consent provided that the establishment would be restricted to the temporary foster care for domestic cats and up to 6 domestic dogs at any one time. Happy Paws Haven carried out the development. The Council became concerned that the shelter was housing more than six dogs and issued an order under s 121B of the *Environmental Planning and Assessment Act* 1979 to cease using the premises in contravention of the development consent ("the order"). Ms Rogers brought judicial review proceedings challenging the development consent and order and seeking declaratory relief that the development was in fact for a purpose that was permissible without consent, namely, "agriculture". The Council contended that the development was properly characterised as being for the purpose of "commercial dog breeding and kennelling", a purpose for which development consent was required.

Issues:

(1) whether the development consent was invalid because it was granted for "animal establishment" which was not a purpose specified as permissible with consent in the relevant zone;

(2) whether the order was invalid; and

(3) whether the development was for "agriculture" (a purpose permissible without consent) and not for "commercial dog breeding and kennelling" (a purpose permissible only with consent).

Held: upholding the challenge and declaring the development consent and order invalid:

(1) the development consent and conditions clearly established that the Council did not purport to grant development consent to carry out development for the purpose of commercial dog breeding and kennelling, but rather for the different and broader purpose of animal establishment, a purpose not specified in the Nymboida Local Environment Plan 1986 as one requiring development consent. Therefore the development consent was outside power and invalid: at [12], [19] and [21]–[22];

(2) the order which sought to enforce compliance with conditions of that development consent was also necessarily outside power and invalid: at [25];

(3) the development could be characterised as being for the purpose of agriculture and could not properly be characterised as being for the purpose of "commercial dog breeding and kennelling" because Happy Paws Haven cared for cats as well as dogs, did not conduct dog breeding, did not provide the service of kennelling and did not provide the service of commercial kennelling as any keeping of dogs was not in order to engage in trade or commerce but for an animal welfare objective: at [33], [40], [41]–[42], [43]–[44], [45] and [53]–[58]; and

(4) the Court made declarations that the development consent and the order were invalid and that the development was for the purpose of agriculture and not for the purpose of commercial dog breeding and kennelling: at [60].

Bodalla Aboriginal Housing Co Ltd v Eurobodalla Shire Council [2011] NSWLEC 146 (Preston CJ)

Facts: the plaintiff was a housing corporation that owned 28 properties, most of which were tenanted by persons of Aboriginal descent. The plaintiff's Memorandum of Association enumerated the objects for which the plaintiff was established, one of which was "to provide housing for persons of Aboriginal descent". Many other objects were arguably non-charitable. In 2006, the plaintiff applied to Eurobodalla Shire Council for an exemption from rates under ss 556(1)(h) and 558(1)(c) of the *Local Government Act* 1993 on the basis that the plaintiff was a public charity or public benevolent institution. The Council did not exempt the plaintiff's properties and continued to levy rates, which the plaintiff failed to pay. In 2008, the Council commenced proceedings in the District Court of NSW to recover outstanding rates. Default judgment was given for the Council. The plaintiff applied to set aside the default judgment, which the District Court did on the condition that the plaintiff commenced proceedings in the Supreme Court seeking declaratory relief that the plaintiff's properties were exempt from all rates. The proceedings were transferred to the Land and Environment Court. On 16 March 2011, the plaintiff's Memorandum was amended to provide general and overarching objectives concerning the relief of poverty for persons of Aboriginal and Torres Strait Island descent. Other objectives were expressly stated to be ancillary or incidental to the overarching objectives. Many of the arguably non-charitable objects were also removed. The Council accepted that after 16 March 2011 the plaintiff was a public charity.

Issue:

(1) whether the plaintiff, prior to the amendment of its memorandum, was properly characterised as a "public benevolent institution" for s 556(1)(h) or a "public charity" for ss 556(1)(h) and 558(1)(c) of the *Local Government Act*.

Held: dismissing the summons:

(1) the characterisation of the plaintiff as either a "public benevolent institution" or a "public charity" for the purposes of the *Local Government Act* was determined by reference to the objects and powers with which the plaintiff was constituted, not by reference to the activities which are in fact being pursued on the land: at [10] and [14]–[16];

(2) the purpose of providing housing for persons of Aboriginal descent was classified as charitable: at [34]. Several other purposes were found to be sufficiently analogous to a recognised head of charity, or as incidental or ancillary to other charitable objects: at [36]–[41];

(3) there were, however, at least four objects that neither by express words nor by implication from the nature of the diverse businesses, trades and industries described in the objects could be properly characterised as either charitable in themselves, or ancillary or incidental to the object of providing housing for persons of Aboriginal descent. Therefore, the plaintiff could not properly be characterised as a public charity: at [42], [53]–[57] and [64]; and

(4) the conclusion reached in relation to the plaintiff's status as a public charity was followed in relation to whether the plaintiff was a public benevolent institution. As with a public charity, the existence of independent and collateral objects that were not of a public benevolent nature operated to deny an institution status as a public benevolent institution: at [67]–[71].

Friends of Turramurra Inc v Minister for Planning [2011] NSWLEC 128 (Craig J)

Facts: the applicant sought judicial review of a decision of the respondent Minister to make the Ku-ring-gai (Town Centres) Local Environment Plan 2010 ("Centres LEP"). The applicant challenged the validity of the Centres LEP and sought a declaration, on numerous grounds, that it was invalid and of no effect.

Issues:

(1) whether a s 65 certificate was validly issued and whether this had an effect on the validity of the Centres LEP;

(2) whether exhibition of the draft instrument was properly undertaken pursuant to s 66 of the *Environmental Planning and Assessment Act* 1979 (**"**the EPA Act");

(3) whether the relevant planning panel failed to consider cl 10 of *State Environmental Planning Policy No 19 – Bushland in Urban Areas* (**"**SEPP 19");

(4) whether a valid s 69 report was furnished to the Minister; and

(5) whether amendments made by the Panel and the Minister following initial exhibition were so substantial that, in the absence of final exhibition, the making of the Centres LEP was not a product of the processes ordained by Div 4 of Pt 3 of the EPA Act.

Held: the Centres LEP was declared invalid and of no effect:

(1) the planning panel did not issue a s 65 certificate in accordance with the EPA Act. The EPA Act required that prior to public exhibition of a draft LEP, a s 65 certificate be issued. However, breach of s 69 of the EPA Act did not invalidate the instrument: at [71];

(2) none of the grounds relied upon in relation to s 66 of the EPA Act were sustained. The public exhibition of the draft instrument met the requirements of s 66(1)(b) in that access to the exhibited material was provided and could be facilitated by council staff. The exhibition did not miscarry by reason of the limited number of documents identified as "key exhibition materials." The viewer who was alerted by the associated disclaimer and who was sufficiently interested to learn more, was directed to the correct place to do so. The material displayed was not in itself misleading in the sense that it would have lulled persons whose interests may be affected by the instrument into a false sense of security causing them to believe that their interests were not so affected: at [106]–[107], [135] and [150];

(3) there was consideration of cl 10 of SEPP 19 despite the fact that there was no discussion of the clause in a report prepared by the Panel in relation to the preparation of the draft Centres LEP in October 2008. Other material made it evident that consideration of the requirements of cl 10 had been given: at [257];

(4) the s 69 report submitted to the Minister was a report able to be considered by him conformably within s 70(1) of the EPA Act. The Panel observed the condition of the delegation as it related to compliance with the "Guidelines for Councils" considered by the Panel: at [277]; and

(5) the Centres LEP as made was not the outcome of the Pt 3 Div 4 process under the EPA Act. The instrument as made differed in important respects from the exhibited draft. Some changes were significant. Others while considered in isolation may not have been, but the cumulative effect of all of the changes rendered the instrument as made significantly different from the exhibited draft. It was the failure to renotify the exhibited draft that caused the breach of the EPA Act: at [245].

Alexander v Yass Valley Council [2011] NSWLEC 148 (Pain J)

Facts: the applicant challenged the grant of development consent by Yass Valley Council ("the Council") on 27 October 2010 to Rossi Street Development Pty Ltd ("the second respondent"), in relation to land owned by the Council and the second respondent. The applicant's land, the Council's land and the second respondent's land are contiguous. The Council acted as consent authority under the Environmental Planning and Assessment Act 1979 ("EPA Act") in the assessment and determination of the development application. The Council had a pecuniary interest in the development application as a contract for sale of the Council's land was entered into with the second respondent and its terms included that finalisation was conditional on development consent being granted. The Council dealt with the perceived conflict of interest by having a peer review report prepared by a neighbouring council which was before the Council when development consent was granted. Two written advices from independent heritage consultants were received by the Council recommending, inter alia, that buildings facing Rossi Street should not appear from Rossi Street as two-storey buildings. In the applicant's view, the Council's officers did not request redesign

of the development to take into account the expert advice when the director's report recommended approval of the development application, subject to conditions.

Issues:

(1) accepting the Council had a pecuniary interest in the second respondent's development application, whether there was a conflict of interest giving rise to apprehension of bias in relation to the Council's approval of the second respondent's development application; and

(2) whether there was a failure to take into account a mandatory relevant consideration, namely, heritage.

Held: dismissing the application:

(1) the conditional contract for sale with the second respondent did not fetter the Council's discretion in granting development consent. The contract specifically provided for either party to terminate it in the event that development consent was not granted: at [87]. But if the circumstances discussed in [83] and alternatively also in [85] were attributed to the fair-minded lay observer, and that observer was assumed to have a general appreciation that a local council had responsibilities to exercise multiple functions and could own property, the fair-minded lay observer might believe the Council might not have brought an impartial mind to the approval of the development application. However, the applicant did not establish a causal connection between the conflict of interest and the decision: at [90];

(2) there was no obligation on the Council or its staff to adopt the advice of the independent expert consultants. The Director's report recommended the reduction in height of buildings, inter alia, in order to address heritage matters. The summary in that report was not misleading: at [112]. The Court considered that the applicant was impermissibly raising the merits of heritage issues: at [114]; and

(3) there was no demonstrated failure by the Council to give proper, genuine and realistic consideration to the matters referred to in the heritage advices at the time it granted development consent: at [115].

Pittwater Council v Minister for Planning [2011] NSWLEC 162 (Pain J)

Facts: under the former Pt 3A of the Environmental Planning and Assessment Act 1979 ("the EPA Act"), the Minister for Planning ("the Minister") by his delegate, the Planning Assessment Commission ("PAC"), approved a concept plan and project application lodged by Meriton Apartments Pty Ltd ("Meriton"), the second respondent. The proposal was for a large multi-unit housing development at Warriewood ("the site"). The PAC approved the concept plan and the project with modifications relating to building height and density that required amended plans to be lodged with the Director-General. There were a large number of reports before the PAC. The PAC relied upon a high-level planning document, the Metropolitan Plan for Sydney 2036 ("the Metro Strategy"), to support its conclusions on the appropriate density. In judicial review proceedings Pittwater Council ("the Council") sought declarations that both approvals were invalid and identified four grounds of judicial review. Meriton Property Management Pty Ltd ("Meriton Property"), the owner of the site, was joined as the third respondent at the hearing.

Issues:

(1) whether the conditions imposed by the PAC in relation to the approvals fell outside the statutory framework of Pt 3A because of their uncertain effect in leaving too much discretion to the Director-General to approve modified plans presented by Meriton in light of s 75J(4) of the EPA Act (ground 1);

(2) whether the determination of the PAC was based on no probative evidence given the reliance on the Metro Strategy (ground 2);

(3) whether the determination of the PAC failed to take into account mandatory relevant considerations, namely, the density and height controls in the Local Environmetal Plan (which were raised in the Director-General's Environmental Assessment Requirements ("DGEAR") 1 and 4) and isolated sites (raised in DGEAR 5) (ground 3); and

(4) whether the determination of the PAC was manifestly unreasonable given its reliance on the Metro Strategy (ground 4).

Held: dismissing the application:

(1) in relation to ground 1:

(a) there was no basis on the facts for distinguishing the requirements of the two approvals. Consequently the requirement for certainty applied to the concept plan in addition to the project plan: at [71]; and

(b) there was sufficient certainty in the conditions of approval that the modifications were within s 75J(4) of the EPA Act, taking into account the need to allow flexibility in relation to Pt 3A matters. The modifications were in accordance with specified criteria which limited the discretion of the Director-General to approve modified plans: at [77];

(2) in relation to ground 2:

(a) the principles underpinning the no probative evidence ground emphasised that the ground was narrow: at [95]; and

(b) the PAC had a broad discretion under Pt 3A in weighing up the planning merits of the applications before it, provided this discretion was exercised within the scope and objects of the EPA Act: at [96]. There were extensive reports before the PAC supporting a greater density than that approved and the Metro Strategy was not an irrelevant consideration: at [99]. That the effect of its decision was to almost triple the density for the site above that which had been applied in the area to date was not outside the PAC's broad discretion: at [101];

(3) in relation to ground 3:

(a) the consideration of an environmental planning instrument could not be a mandatory relevant consideration for the Minister or his delegate in light of the explicit provisions in the former ss 75J and 75O that such instruments were not mandatory: at [144];

(b) the circumstances of the PAC's determination had to be considered as a whole: at [141] and [145]. The PAC was aware of the density controls under the Local Environmental Plan and that the proposed project did not comply with these. There was no failure by the PAC to consider the matters raised in the DGEAR 1 and 4 relating to identification and compliance with the Local Environmental Plan density and height provisions: at [145]; and

(c) there was no requirement that the PAC refer to any matter in any determination it chose to issue because it was not required to give reasons under Pt 3A. All the material before the PAC had to be considered: at [146]. As there was evidence before the PAC regarding isolated sites, raised in DGEAR 5, this ground could not be factually sustained: at [147];

(4) in relation to ground 4: that the PAC was a specialist planning body that exercised statutory responsibilities was relevant to the consideration of whether its decision was legally unreasonable: at [165]; and

(5) the PAC's reliance on the Metro Strategy was not unreasonable for reasons given in relation to ground 2, which overlapped with this ground: at [166] and [168].

Kang v Blue Mountains City Council [2011] NSWLEC 150 (Craig J)

(related decision: *Blue Mountains City Council v Waterland Blue Mountain Natural Water Pty Ltd* [2007] NSWLEC 101 Jagot J)

Facts: the applicants undertook extraction and bottling of groundwater upon the land on which they resided. These activities were carried out subject to a development consent that lapsed in October 2005. After the consent lapsed the activities nonetheless continued. The applicants sought, by way of summons, a declaration as to the lawfulness of the activities on the basis that it comprised use as a "home business" which did not require consent under the Blue Mountains Local Environmental Plan 2005 ("LEP 2005"). The applicants also sought to set aside an order made previously by Jagot J in *Blue Mountains City Council v Waterland Blue Mountain Natural Water Pty Ltd* [2007] NSWLEC 101, which restrained the activities.

Issues:

(1) whether the extraction and bottling of groundwater on the land could be characterised as a "home business" and was therefore permitted without development consent; and

(2) whether the orders made by Jagot J could be set aside or modified, or whether the applicant was estopped from making such an application.

Held: the applicant's summons was dismissed:

(1) the activities could not be described as a "home business" within the meaning of the LEP 2005. The essential elements of that activity identified the use of a building. The purpose of the "home business" provision was to allow a commercial function to be conducted within a dwelling or other building erected upon the dwelling allotment where the essential business of the operator was focused upon and was located within those structures. It did not contemplate exploitation of the land by extraction or removal of a primary product from which it had no essential connection with the residential buildings or residential use: at [42]–[43] and [61];

(2) characterisation of the development was by reference to its purpose. Extraction of groundwater fell within the definition of "commercial premises." Development for that purpose was prohibited: at [62]; and

(3) an estoppel of the kind identified in *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 ("Anshun estoppel") did not arise. The applicants were not bound, at the time of the judgment of Jagot J on 13 February 2007, to advance a defence which hypothesised a basis upon which they might carry out their activity so as to overcome the prohibited activity that founded the injunction granted by Jagot J: at [86].

Development Applications

Paynter Dixon v Fairfield City Council [2011] NSWLEC 127 (Craig J)

Facts: the applicant developer appealed against the Council's deemed refusal of its development application. The development application was for a new accommodation facility and elevated car parking structure to be located on the site of the Leo McCarthy Smithfield RSL Club's ("the Club") present premises. The applicant was acting on behalf of the Club.

Issues:

(1) whether the proposed development was permissible; and

(2) whether the proposed development ought to be granted as a matter of merit.

Held: appeal dismissed:

(1) the characterisation of the proposed development, on application of a "common sense and practical approach" as in *Chamwell v Strathfield City Council* [2007] NSWLEC 114, was found to be that of a "motel", which is prohibited in the development control table of the *Fairfield Local Environmental Plan* 1994 for the "2(a1) Residential A1" zone that applied to the site. The scale of the proposed accommodation facility, including the construction of a three-storey building containing 133 rooms satisfied the definition of "motel" in the planning instrument. The limitation of providing accommodation only to members was unpersuasive given the capacity of temporary members to be joined and to use the facility. Further, the accommodation facility did not subserve the use of the site for the purposes of a club, nor could the use be classified as innominate and therefore permissible with consent: at [32]–[36], [40] and [41]; and

(2) the development was also refused on its merits on the basis that the impact of the proposed structures was unacceptable, particularly to those with dwellings adjoining the site. The proposed development was not shown conclusively to serve the demands of the surrounding population. In the context of the objectives of the zone and considering the bulk of the carpark structure, the impact of the proposed development was unacceptable: at [55]–[56].

Civil Enforcement

McCallum v Sandercock [2011] NSWLEC 175 (Pepper J)

Facts: Mrs Beryl McCallum brought civil enforcement proceedings to restrain the operation of a quarry adjoining her land, pursuant to ss 252 or 253 of the *Protection of the Environment Operations Act* 1997 ("the Act"), which was allegedly causing noise, air and water pollution. The relief sought by Mrs McCallum was the temporary or permanent closer of the quarry. The quarry was owned and operated by Mrs Wendy Sandercock and Mr Raymond Sandercock ("the Sandercocks") and was in operation, albeit by different owners, prior to Mrs McCallum purchasing her property. The operations of the quarry caused acid rock drainage ("ADR"), which produced acidic surface water and groundwater that ran into an unnamed creek flowing through the quarry. There was, however, two other quarries in the vicinity and a prevalence of acid rock in the area. In response to complaints from Mrs McCallum, the Sandercocks had implemented a number of procedures to ameliorate the noise, water and air disturbances caused by the quarry.

Section 253 of the Act states that any person may bring proceedings for an order to restrain a breach (or a threatened or apprehended breach) of any Act, if the breach is causing or is likely to cause harm to the environment. Section 252 of the Act states that any person may bring proceedings to restrain breaches of the Act and that the Court may make such orders as it thinks fit to restrain the breach.

Issues:

(1) whether the Sandercocks caused water pollution in breach of ss 116 or 120 of the Act;

(2) whether the Sandercocks caused air pollution in breach of ss 124 or 126 of the Act;

(3) whether the Sandercocks caused noise pollution in breach of ss 139 or 140 of the Act; and

(11)if breach of the Act was found, whether the Court should exercise its discretion to grant the relief sought.

Held: finding breach of s 120 of the Act only:

(1) the definition of "water pollution" in the Act encompassed both indirect and direct methods of pollution. Consequently, the fact that water pollution resulted from the activities of the quarry and not any direct act or omission by the Sandercocks did not matter: at [102];

(2) the activities of the quarry added to the levels of soluble metals and acid sulphates in the water of the creek and in this sense the chemical and physical condition of the creek was changed within the meaning of the definition of "water pollution" in the Act: at [107]–[108];

(3) Mrs McCallum failed to demonstrate that the Sandercocks had "wilfully or negligently" caused, or would cause in the future, the substances giving rise to the water pollution to "leak, spill or otherwise escape" into the creek, with the consequence that there was harm to the environment. There was, therefore, no breach of s 116 of the Act: at [111]–[115];

(4) consequent upon the finding that the operation of the quarry caused "water pollution", was that there was a breach of the offence created by s 120 of the Act. This was because the only element that needed to be established in s 120 of the Act was that a person had caused "water pollution": at [117];

(5) the Court declined to grant the relief sought under ss 252 or 253 of the Act because, first, Mrs McCallum had failed to establish that the breach of s 120 of the Act had caused harm to the environment; second, there was not a significant breach of the Act; third, the quarry was one of several contributing factors that resulted in the creek's degraded state; fourth, the quarry was the sole source of income for the Sandercocks and its life expectancy was limited; and fifth, the Sandercocks had implemented measures to minimise the ADR from the quarry. The Court did, however, order that the Sandercocks put in place additional measures to minimise the impact of the quarry's activities on the creek: at [120]–[125];

(6) the Sandercocks did not breach either ss 124 or 126 of the Act in respect of the dust emanating from the quarry. This was because there was no basis for finding that the dust on Mrs McCallum's property emanated from the quarry; and there was no evidence that the dust complained of was a result of the

Sandercock's failure to maintain, operate and deal with the material, plant and equipment at the quarry in a proper and efficient manner: at [137]–[142];

(7) the quarry admitted "offensive noise" as defined, but this noise did not result from the Sandercock's failure to maintain, operate and deal with the material, plant and equipment at the quarry in a proper and efficient manner, and therefore, ss 139 or 140 of the Act was not beached: at [162]; and

(8) if a past or future breach had been established of ss 124 or 126 or ss 139 or 140 of the Act, the Court would, in any event, have declined to grant the relief sought for the reasons given above and because there was no evidence to suggest that the Sandercocks' operation of the quarry had increased the levels of dust or noise associated with its activities: at [142] and [163]–[164].

Liverpool City Council v Main Homes Pty Ltd [2011] NSWLEC 174 (Biscoe J)

Facts: the applicant brought civil enforcement proceedings, pursuant to s 124 of the *Environmental Planning and Assessment Act* 1979 ("the EPAA"), seeking a declaration and orders to remedy the first to sixth respondents' ("Cosmopolitan") breach of the development consent, said to be Cosmopolitan's failure to dedicate part of its land as a public reserve. In 1995 Liverpool City Council ("the council") granted development consent to Cosmopolitan for the subdivision of land in Chipping North. The development application the subject of the consent was accompanied by a plan of subdivision that marked part of Cosmopolitan's land, Lot 389, as "Public Reserve". The consent notice described the development as "Subdivision of land … including the dedication of a public reserve and roads." Condition 1 of the consent required the development to be carried out generally in accordance with Cosmopolitan's development application and accompanying plan of subdivision. In 1999 Cosmopolitan submitted to the council a plan of subdivision that marked Lot 389 "Public Reserve" and noted that the land was intended to be dedicated as a public reserve. That plan was then uplifted by Cosmopolitan for unrelated reasons. The plan was amended for those unrelated reasons and returned to the council. Without the council's approval the plans had also been amended, on Cosmopolitan's instruction, to have all references to the dedication of Lot 389 as a "public reserve" removed. The council endorsed its certificate on the plan and it was thereafter registered in the office of the Registrar-General. The deletion of the "public reserve" notations were not noticed by the council until sometime after 2002, when Cosmopolitan submitted a development application for medium density housing on Lot 389. Thereafter the council and Cosmopolitan engaged in negotiations. During the course of negotiations the Liverpool Local Environment Plan 2008 ("LLEP") commenced with the effect that the applicant's proposed medium density development became prohibited development. The negotiations were terminated in 2009 and proceedings commenced in 2010. Cosmopolitan paid land tax and rates for Lot 389 for parts of that period.

Issues:

(1) whether the development consent, on its proper construction, required the dedication of Lot 389 as a public reserve; and

(2) whether, if the development consent did require that dedication, relief should be denied on discretionary grounds including delay, prejudice, acquiescence and the conduct of the parties.

Held: application upheld:

(1) the dedication of Lot 389 did not have to be dealt with by way of condition. The description of the development consent as "including the dedication of a public reserve" and the attached plan marking Lot 389 as "Public Reserve" made clear that such dedication was required;

(2) the consent could have been satisfied by dedicating the land by either method prescribed by s 49(1) of the *Local Government Act* 1993. Section 49(1) expressly contemplated two alternative methods by which land may be dedicated as a public reserve and vest in a council. First, by registration of a plan which marked the plan "public reserve". Secondly, by transferring the land to a council and by identifying that transfer for use as a pubic reserve: at [34]. The registered plan may have been generally in accordance with the consent, but absent the reference to Lot 389 as a "public reserve", Cosmopolitan was required to take the further step of transferring the land to the council: at [43];

(3) although the commencement of proceedings was long delayed, in the circumstances that delay was not of itself sufficient to disentitle to the council to relief: at [56];

(4) the negotiations between the parties did not amount to acquiescence: at [57]–[58];

(5) the effect of the commencement of the LLEP on Cosmopolitan's proposed medium density development did not amount to prejudice caused by the council's delay. Rather, Cosmopolitan chose to pursue those negotiations: at [61];

(6) had Cosmopolitan transferred the land at an earlier stage it would not have been subject to the land taxes. In this sense it was a prejudice that Cosmopolitan brought upon itself: at [60];

(7) the council levied, and received the benefit of, the rates payments and thus those payments should be refunded: at [60];

(8) in exercising the Courts' wide discretion under s 124, the absence of environmental harm was of little weight when balanced against the harm to the community of being denied the public reserve: at [46]; [65]; and

(9) the conduct of Cosmopolitan in unilaterally deleting the "public reserve" references in the registered plan was unsatisfactory and was relevant to the exercise of discretion.

Contempt

Gerondal v Eurobodalla Shire Council (No 6) [2011] NSWLEC 132 (Pain J)

(related decisions: *Gerondal v Eurobodalla Shire Council* [2009] NSWLEC 160 Pain J, *Gerondal v Eurobodalla Shire Council* [2010] NSWLEC 52 Biscoe J, *Gerondal v Eurobodalla Shire Council (No 3)* [2010] NSWLEC 60 Sheahan J, *Gerondal v Eurobodalla Shire Council* [2011] NSWLEC 58 Craig J and *Gerondal v Eurobodalla Shire Council (No 5)* [2011] NSWLEC 104 Pain J)

Facts: on 25 September 2009 in Class 6 appeal proceedings from the Local Court, the Court ordered pursuant to s 245 of the *Protection of the Environmental Operation Act* 1997 Mr Gerondal ("the defendant") to remove specified items from his property by 25 December 2009. The date for compliance was extended twice by the Court and on 16 July 2010, the Court further extended the date for compliance to 30 August 2010. Local Court proceedings commenced by the Eurobodalla Shire Council ("the Council") to enforce the order under s 245 were dismissed without a hearing. The Council commenced contempt proceedings on 17 December 2010 in relation to the defendant's failure to comply with the court order made on 16 July 2010. On 24 June 2011 the defendant was found guilty of contempt of Court in relation to six of the nine charges particularised in the statement of charge. At the sentencing hearing on 1 August 2011, the Council accepted that most items the subject of the contempt charge had been removed immediately before the sentencing hearing except for several items. The parties agreed that if these remaining items were removed by a specified date the Council would not further pursue a penalty. An order reflecting the agreement to remove the few remaining items by a certain date was made.

Issues:

(1) whether a conviction for contempt should be entered where no penalty was imposed;

(2) whether costs of the contempt proceedings ought be awarded to the Council; and

(3) if so, whether the costs should be awarded on an indemnity basis.

Held: convicting the defendant and ordering him to pay indemnity costs:

(1) the usual sentencing considerations did not need to be weighed up as no penalty was sought. It was appropriate to enter a conviction for contempt as part of the sentencing process for the contempt proven earlier. A purpose of punishment for contempt of court was the protection of the administration of justice. The purpose of punishment for contempt included the protection of the administration of justice by ensuring that court orders were enforced, as non-compliance constituted an interference with the administration of justice: at [8];

(2) the Council was awarded its costs of the proceedings. The factors considered included that it was reasonable for the Council to commence contempt proceedings (at [21]); the defendant had had ample

opportunity to remove the items (at [22]); and it was only immediately before the sentencing hearing that he had finally removed the outstanding items: at [23]. The defendant's means to pay was not a relevant consideration: at [26]; and

(3) indemnity costs may be awarded in contempt proceedings as a matter of judicial discretion: at [19]. The matters to be considered were not closed: at [28]. Considerations that were taken into account included the defendant's non-compliance with three extensions of time from 25 December 2009 onwards that necessitated the commencement of contempt proceedings and the fact that he had mounted manifestly groundless arguments in defence of the contempt proceedings: at [28].

Criminal

Terrey v Department of Environment, Climate Change and Water [2011] NSWLEC 141 (Pepper J)

Facts: Mr Terrey appealed against the severity of a sentence imposed by the Local Court in proceedings brought by the Department of Environment, Climate Change and Water ("DECCW") for failing to comply with a condition of a general licence to shoot Grey-headed Flying-foxes ("Flying-foxes") that was issued under s 120 of the *National Parks and Wildlife Act* 1974 ("the NPWA"). Condition 11 of the general licence compelled Mr Terrey to collect the dead Flying-foxes and place them in a marked and nominated location after they had been shot. Mr Terrey was the owner of a large commercial fruit growing business at Grose Vale ("the property"). On 6 December 2009, Mr Terrey carried out a search of the property but failed to collect two dead Flying-foxes that had been shot and place them in a nominated location. At the time of the offence it was harvest time. Mr Terrey had had one previous caution letter sent to him in relation to failure to comply with conditions of another general licence he held under the NPWA. Before the Local Court Mr Terrey pleaded guilty to the charge and was fined $2000 and ordered to the pay the prosecutor's costs in the sum of $400.

Section 37(1) of the *Crimes (Appeal and Review) Act* 2001 ("the Review Act") set out the nature of appeals, namely that an appeal was to be dealt with by way of rehearing on the basis of certified transcripts of evidence given in the original Local Court proceedings. However, on 30 March 2009, s 37(1) was amended to set out the nature of appeals against conviction only ("the amendment"). Section 37(2) of the Review Act states that fresh evidence may be given on the appeal but only by leave of the Court, which will be granted only if the Court is satisfied that it is in the interests of justice that the fresh evidence be given.

Issues:

(1) whether s 37(1) and (2) of the Review Act only applied to appeals against conviction;

(2) what was the nature of an appeal against sentence;

(3) in considering the objective circumstances of the offence and the subjective circumstances of the offender, what was the appropriate sentence; and

(4) whether an order under s 10 of the *Crimes (Sentencing Procedure) Act* 1999 ("the CSPA") was appropriate.

Held: allowing the appeal, upholding the conviction, and fining Mr Terrey $1000:

(1) following the amendment to the Review Act, s 37(1) of the Review Act no longer applied to appeals against sentence. As a consequence, there was no provision in the Review Act that described the nature of an appeal against sentence. This was so notwithstanding that there was an appeal as of right under s 31(1) of the Review Act to the Court from the Local Court: at [35] and [39]–[40];

(2) the limitation contained in s 37(2) of the Review Act in relation to fresh evidence on the appeal did not apply to appeals against sentence. Section 37(2) had to be read in its context and was not "at large", but followed on from the nature of an appeal against conviction (s 37(1)): at [47]–[48];

(3) the Court proceeded on the basis that the appeal was by way of rehearing, absent the restriction against adducing fresh evidence: at [51];

(4) the offence was of low objective gravity. In coming to this conclusion the Court considered that the offence offended against the objects of the NPWA and undermined the protective regulatory system contained in that Act; the offence did not cause actual harm to the environment; the low maximum penalty; the harm was foreseeable; Mr Terrey had complete control over the causes of the offence; DECCW did not prove beyond reasonable doubt that the offence was committed for financial gain; and there were practical measures that Mr Terrey could have taken to prevent the harm, namely, to continue to search for the Flying-foxes until they were located: at [57]–[83];

(5) subjectively, the Court took into account in imposing the penalty that Mr Terrey had no prior convictions; there was no expression of contrition or remorse; Mr Terrey pleaded guilty at the earliest opportunity; Mr Terrey was of prior good character; and there was no evidence that Mr Terrey did not have the capacity to pay a fine: at [84]–[96];

(6) general deterrence was a necessary factor to take into account in order to send a message to persons holding licences permitting them to kill vulnerable species to take care in ensuring compliance with the conditions of those licences: at [99];

(7) specific deterrence was also a necessary factor to take into account. This was because the issuing of the letter of caution suggested, when viewed together with the commission of the offence, a cavalier approach by Mr Terrey to compliance with his regulatory obligations: at [100]; and

(8) an order under s 10 of the CSPA was not appropriate: at [112]–[117].

Environment Protection Authority v Sibelco Australia Limited [2011] NSWLEC 160 (Pain J)

Facts: Sibelco Australia Limited ("the defendant") was charged by the Environment Protection Authority ("EPA") with polluting water under s 120 of the Protection of the Environment Operations Act 1997 ("the POEO Act"). The wall of a dam on the defendant's premises collapsed, discharging sediment laden water into Middle Brook. The defendant pleaded guilty and therefore admitted the essential elements of the offence. The offence was one of strict liability. The maximum penalty applicable to offences under s 120(1) of the POEO Act was $1 million for a corporation.

Held: the defendant was ordered to pay $78,000 to a third party plus ordered to pay the prosecutor's costs:

(1) there was short term moderate actual harm to the environment but once invasive clean-up operations over a six week period were complete, the creek returned to its normal ecological state: at [62]. The environmental harm caused was therefore in the low to moderate range: at [63];

(2) there were practical measures that could have been taken to avoid the harm caused: at [70]. There was no delay and significant steps were taken to mitigate the harm: at [72]. The harm was foreseeable in that the collapse of the dam wall would result in the dam contents discharging into Middle Brook: at [75]. Because it was unknown why the dam wall collapsed the extent to which the defendant had control over the causes was uncertain, but it was accepted that the defendant controlled the procedures by which the dam was inspected: at [77];

(3) the defendant entered an early guilty plea (at [90]); the general manager of operations expressed remorse on behalf of the defendant (at [91]); the defendant had no prior convictions (at [92]); the defendant was of good corporate character (at [93]); and the defendant had cooperated in the investigation of the offence: at [94];

(4) the fact that large clean-up costs were necessarily incurred because of the area of Middle Brook that was affected by the sediment discharge was not relevant to the determination of penalty: at [101];

(5) the appropriate penalty was $78,000: at [103]. The parties agreed to an alternative order under s 250(1)(e) of the POEO Act for $78,000 to be paid to the Hunter Central Rivers Catchment Management Authority for the general environmental purposes of that organisation: at [102]; and

(6) a publication order under s 250(1)(a) of the POEO Act was also made because it was important to publicise to the community at the time that the works were being undertaken that they were as a result of committing an offence: at [104].

Cessnock City Council v Bimbadgen Estate Pty Ltd (No 2) [2011] NSWLEC 140 (Pepper J)

Facts: Bimbadgen Estate Pty Ltd ("Bimbadgen") pleaded guilty to an offence of carrying out development on land without consent in contravention of s 76A(1)(a) of the *Environmental Planning and Assessment Act* 1979 ("the EPAA"). The development was the carrying out of earthworks and associated construction in order to accommodate an increased number of patrons at concerts held on the land. Officers of Cessnock City Council ("the council") had met with the general manager of Bimbadgen, previous to the development being carried out, and informed him that Bimbadgen would need development consent in order to carry out the works necessary for the land to accommodate an increased number of patrons at concerts. Following an inspection of the land on 10 August 2009, the council had sent a letter to Bimbadgen informing it that development had been carried out on the land without consent and to cease any further unauthorised works and to put into place adequate sedimentation and erosion control measures ("the cease work letter"). It was a matter of controversy whether Bimbadgen had complied with the cease work letter. Bimbadgen was before the Court for sentencing.

Issues:

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

Held: Bimbadgen was convicted of the offence and fined $20,000:

(1) no actual harm was caused to the environment or to the amenity of the surrounding area by the commission of the offence. However, harm was caused to the planning system under the EPAA: at [56] and [61]–[62];

(2) the offence was committed intentionally by Bimbadgen, which was a factor that augmented the objective seriousness of the offence. This was because the general manager of Bimbadgen was aware at the time of carrying out the development that it was necessary for Bimbadgen to have obtained development consent for the earthworks and he was aware that Bimbadgen had not done so: at [66];

(3) the offence was committed for financial gain because the reason for the development was to allow more space to accommodate a greater number of attendees at upcoming concerts: at [73]–[75];

(4) it was not found that Bimbadgen had carried out development after the cease work letter and it was found that Bimbadgen had assisted the council in its prosecution of the charge: at [85];

(5) the subjective considerations of Bimbadgen operated to mitigate to a reasonable degree the penalty to be imposed. Relevantly, Bimbadgen had no prior convictions; had pleaded guilty at the first available opportunity; had expressed contrition and remorse; had agreed to pay the prosecutor's costs; and, but for the commission of the offence, had demonstrated good character: at [82]–[84] and [86];

(6) specific deterrence was not a relevant consideration in the determination of an appropriate penalty because this was an isolated incident for a company that had no prior convictions; had always sought approval for any proposed development; and had put processes in place to ensure that development consent was obtained for all future works: at [94]; and

(7) there was a need to include general deterrence as a component of the penalty because the Court needed to send a message to companies carrying out works to which planning regulations applied that it was necessary to obtain the proper approvals before commencing work: at [95].

Costs

McLaren v Lewis (No 2) [2011] NSWLEC 176 (Preston CJ)

(related decision: *McLaren v Lewis* [2011] NSWLEC 1170 Fakes C)

Facts: Mr Lewis was the successful respondent to an application by Mrs McLaren under s 14B of the *Trees (Disputes Between Neighbours) Act* 2006 ("the Trees Act") to prune a high hedge. Mr Lewis sought,

by notice of motion, an order that Mrs McLaren pay his costs. Mr Lewis was self-represented in the proceedings. The claimed costs included mileage allowance for driving his car between his home in Queensland and his rental property in New South Wales, three nights accommodation, food, time spent preparing documents, travel time, appearance time at the hearing, and the filing fee for his notice of motion for costs, giving a total of $4,602.30.

Issues:

(1) whether the costs claimed were "costs" within the meaning of s 98(1) of the *Civil Procedure Act* 2005 ("the CPA") or r 3.7 of the Land and Environment Court Rules 2007; and

(2) whether it was otherwise fair and reasonable in the circumstances to order costs.

Held: dismissing Mr Lewis' notice of motion:

(1) costs are confined to money paid or liabilities incurred for professional legal services and do not include compensation for time spent by a litigant in person who is not a lawyer in preparing and conducting his case: at [17]–[18];

(2) a litigant in person is not entitled to travelling expenses as an out of pocket expense: at [18];

(3) Mr Lewis' expenses were not costs for which the CPA or the Land and Environment Court Rules provide: at [19];

(4) the only expense which could be claimed was the filing fee for Mr Lewis' notice of motion. However, as his notice of motion failed, there was no basis for reimbursing the filing fee: at [19];

(5) the usual position for proceedings under the Trees Act is that the Court will not make an order for costs unless the Court considers such an order to be fair and reasonable in the circumstances: at [20]; and

(6) even if Mr Lewis' expenses were costs within the meaning of the Act and the Rules, it was not fair and reasonable in the circumstances to make an order for costs because the evidence did not establish that Mrs McLaren acted unreasonably leading up to the commencement of, in commencing or in conducting, the proceedings: at [21]–[24].

Evans v Anderson (No 2) [2011] NSWLEC 169 (Pepper J)

(related decision: *Evans v Anderson* [2011] NSWLEC 1024 Fakes C and Galwey AC)

Facts: Mr Evans applied for a costs order against Mr Anderson to pay the costs of abandoned contempt proceedings because of Mr Anderson's failure to comply with orders of the Court made in Class 2 proceedings ("the substantive proceedings"). In the substantive proceedings, Mr Anderson was ordered to engage a AQF Level 3 (tradesperson) horticulturist or arborist to prune nine cypress trees on his property to a height of no more than 3.2m within 60 days. On 20 July 2011, Mr Evans sent Mr Anderson a letter complaining about non-compliance with the Court orders and giving Mr Anderson 7 days to rectify his breach. According to Mr Evans, Mr Anderson did not comply with the Court orders to prune the trees to the requisite height of 3.2m within the 7 days, and therefore, contempt proceedings were initiated by him on 5 August 2011.

At the hearing, the contempt order was not pressed because Mr Evans, since the date of the commencement of the contempt proceedings, had become satisfied that the Court orders had been complied with. Mr Evans nevertheless sought his costs of the contempt notice of motion. Mr Anderson opposed the order for costs and submitted that he had complied with the Court orders and pruned the trees to 3.2m within 60 days of the Court orders, although he could not recall when this had occurred or whom he had engaged to prune the trees.

Issues:

(1) whether Mr Anderson should pay the costs of Mr Evans in respect of abandoned contempt proceedings.

Held: dismissing the notice of motion and making no order for costs:

(1) absent evidence of when and by whom the trees were pruned the Court did not accept that the trees were pruned by Mr Anderson within 60 days of the Court orders. But the evidence did establish that the very latest the trees were pruned in compliance with the Court orders was 28 June 2011; at [23] and [25];

(2) the trees were, therefore, properly pruned before the filing of the notice of motion instituting the contempt proceedings: at [30];

(3) if r 3.7(2) of the Land and Environment Court Rules 2007 was the correct basis for determining a costs order in contempt proceedings in Class 2 of the Court's jurisdiction, the Court declined to make an order for costs in favour of Mr Evans. This was because it would be neither fair nor reasonable to order costs in circumstances where Mr Anderson had not acted unreasonably in the lead up to and after the commencement of the contempt proceedings and where Mr Anderson had complied with the Court orders before the filing of the notice of motion for contempt: at [36]–[37]; and

(4) if the general discretion to order costs under s 98 of the *Civil Procedure Act* 2005 applied because these were contempt proceedings, albeit commenced under the rubric of Class 2, the Court would similarly decline to make an order for costs in favour of Mr Evans for the same reasons: at [38].

Friends of Turramurra Inc v Minister for Planning (No 2) [2011] NSWLEC 170 (Craig J)

(related decision: *Friends of Turramurra Inc v Minister for Planning* [2011] NSWLEC 128 Craig J)

Facts: the applicant successfully challenged the validity of the Ku-ring-gai (Town Centres) Local Environment Plan 2010 (**"**Centres LEP") and sought a declaration, on numerous grounds, that it was invalid and of no effect. In these proceedings, it sought an order that the Minister pay its costs of the proceedings.

Issues:

(1) whether costs should follow the event pursuant to r 42.1 of the Uniform Civil Procedure Rules 2005, be apportioned, or whether each party should bear its own costs of the proceedings; and

(2) whether costs should be awarded for proceedings brought in the public interest.

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

(1) costs were apportioned so that the Minister pay 50% of the applicant's costs. This apportionment was not undertaken with "mathematical precision", or on the basis of issues won or lost, but was determined on consideration of the overall proceedings: at [28]; and

(2) there was no sound basis upon which to alter this assessment because of the public interest nature of the proceedings. The applicant was unable to demonstrate "something more" as required for the purpose of applying public interest costs pursuant to r 4.2 of the *Land and Environment Court Rules* 2007. No adjustment was required on account of public interest: at [35].

Practice and Procedure

Wollongong City Council v Vic Vellar Nominees Pty Ltd [2011] NSWLEC 138 (Craig J)

(related decision: *Wollongong City Council v Vic Vellar Nominees Pty Ltd* [2011] NSWLEC 60 Biscoe J)

Facts: the Council sought an order pursuant to r 28.2 of the Uniform Civil Procedure Rules 2005 ("UCPR") that a question be determined separately and prior to any other remaining issue in the proceedings. The motion was brought in the context of three interrelated proceedings that arise from the rezoning of land owned by the applicant. A not dissimilar separate question had previously been determined by Biscoe J.

Issues:

(1) whether determination of the separate question would resolve the entirety of the proceedings and assist in reducing costs and delay; and

(2) whether determination of a separate question ought to be made where it depends on facts about which there is genuine contention.

Held: motion for separate question dismissed:

(1) the question was inappropriate for separate determination. The framing of questions in successive applications for separate determination, depending upon the answer to the previous question, is an inappropriate use of the procedure available under UCPR r 28.2. That procedure requires that a separate question or questions be framed so that the consequence of the answer or answers given is clear in its effect upon the outcome of the proceedings: at [30];

(2) the question was similar to that answered in the earlier decision by Biscoe J. The posing of a second question for separate determination should not be used in a manner that has the effect of reviewing an earlier judicial decision: at [37];

(3) the "utility, economy and fairness to the parties" in making the orders sought was not "beyond question" according to the principles in *Young v Parramatta City Council* [2006] NSWLEC 116 and *Tepko v Water Board* [2001] HCA 19; (2001) 206 CLR 1: at [38]; and

(4) there were contested issues of fact to be determined that were germane to the question posed. There was uncertainty as to those facts and any decision could possibly be hypothetical: at [40].

DEXUS Funds Management Ltd v Blacktown City Council [2011] NSWLEC 156 (Craig J)

Facts: the applicant sought to adduce expert evidence pursuant to r 31.19 of the Uniform Civil Procedure Rules 2005 ("UCPR"). The proceedings were for judicial review of the Council's decision to grant development consent to the second respondent's development application. Expert evidence is not ordinarily allowed in judicial review proceedings unless an order is made pursuant to r 31.19 of the UCPR.

Issues:

(1) whether the evidence sought to be adduced was reasonably required to ensure the resolution of the dispute.

Held: application dismissed:

(1) the "relevant factual matters" asserted by the applicant as a basis for its claim did not, for the purpose of judicial review, require expert evidence. These matters were capable of being argued on the basis of the material provided to the Council at the time of its determination: at [21]; and

(2) the kind of specificity required in identifying the expert evidence, and why it was necessary, was absent from the application. This requirement, given the limited circumstances in which expert evidence may be adduced in judicial review proceedings, gives effect to r 31.19 of the UCPR. It was necessary to give more than a mere "vague indication" of the area in which the evidence would be given: at [23]–[24].

Environment Protection Authority v Queanbeyan City Council (No 2) [2011] NSWLEC 159 (Pepper J)

Facts: Queanbeyan City Council ("the council") in a Class 5 criminal prosecution issued a subpoena to produce to the Office of Environment and Heritage ("OEH") who acted on behalf of the Environment Protection Authority ("the EPA"). The EPA produced the documents to the Court, but maintained a claim of client legal privilege in respect of a number of the documents listed in the subpoena. The council applied by way of notice of motion to be granted access to the documents for inspection over which privilege was claimed. The documents included email communications between the solicitor for the prosecutor, or the investigator for the prosecutor, and a third person. Some of the emails contained an express statement of their confidential nature.

Section 131A of the *Evidence Act* 1995 allowed for claims of privilege to be made in preliminary proceedings where "a person is required by a disclosure requirement to give information, or to produce a

document, which would result in the disclosure of a communication, a document or its contents or other information of a kind referred to in Division 1, 1A, 1C or 3".

Issues:

(1) whether the common law or the *Evidence Act* applied to the claim for client legal privilege in respect of documents and communications sought to be inspected after being produced to the Court;

(2) whether the documents and communications the subject of the privilege claim were confidential; and

(3) whether the documents and communications were made in the anticipation of litigation.

Held: dismissing the notice of motion:

(1) s 131A of the *Evidence Act* applied to documents and communications that had already been produced to the court that were sought to be inspected by a party. This was because to construe s 131A as only applying to producing a document to the court or adducing a document at trial would be to ignore the words in the provision "which would result in the disclosure of a communication". The mere production of a document to the court did not result in the disclosure of a communication, disclosure only occurred at the stage of gaining access for inspection. Further, this construction conformed with the objective legislative intention manifested by not only the words of s 131A but also the purpose underlying the enactment of the section as manifested by the extrinsic material: at [41] and [43]–[56];

(2) to the extent that previous decisions of the Supreme Court preferred an alternate construction of s 131A, holding that it only applied to producing evidence to the court or adducing evidence at trial, the Court was not bound by those decisions and none of those decisions rested on a detailed textual analysis or construction of s 131A: at [57];

(3) the application was, therefore, governed by the *Evidence Act* and not the common law: at [58];

(4) the onus of establishing client legal privilege fell on the party asserting or claiming privilege: at [65];

(5) in order to claim privilege the EPA had to establish: first, that that the communications or documents were "confidential" communications or documents, insofar as they were prepared in circumstances that the person for whom they were prepared was under an express, or implied, obligation not disclose their contents, and second, that the confidential communications were made, or the confidential documents were prepared, for the dominant purpose of the client being provided with professional legal services relating to anticipated litigation: at [66];

(6) all of the documents consisted of communications where one or more of the parties was under an obligation not to disclose it's contents, and therefore, all the documents were subject to an obligation of confidentiality. Where the emails did not expressly state they were confidential, the obligation could nevertheless be implied: at [75]–[78];

(7) given the objective contents of the documents and communications, which included the timing of their creation in close proximity to the commencement of proceedings, the documents were created for the dominant purpose of preparation for anticipated litigation. The documents, therefore, could not be disclosed to the council by curial compulsion: at [79]–[84]; and

(8) the result would not, in any event, have been different if the common law had applied: at [86].

Lester v Ashton Coal Mining Operations Pty Ltd [2011] NSWLEC 155 (Craig J)

(related decision: *Ashton Coal Operations Pty Ltd v Director-General, Department of Environment, Climate Change and Water (No 3)* [2011] NSWLEC 1249 Pearson C and Sullivan AC)

Facts: the applicant sought a stay of orders made in Class 1 proceedings by Commissioners determining an appeal to the Court under the *National Parks and Wildlife Act* 1974. The applicant was not a party to that appeal. The applicant also sought transfer of the proceedings to the Class 4 proceedings. The Class 1 proceedings involved an application by the respondent for an Aboriginal heritage impact permit ("AHIP"). The Class 1 proceedings were determined and an AHIP granted, subject to conditions. The Class 4 proceedings, which had not been determined, sought orders, among others, as to the validity of the application by the respondent for the AHIP, which had founded the Class 1 appeal.

Issues:

(1) whether the Court had power to make the orders sought.

Held: dismissing the application:

(1) the applicant was unable to demonstrate a source of power by which the Court could stay orders in proceedings to which he was not a party: at [16];

(2) s 16(1A) of the *Land and Environment Court Act* 1979 ("the Court Act") did not address the issues that arose: at [16];

(3) s 20(2) of the Court Act also did not grant the power. The civil jurisdiction conferred by s 20(2) is not a jurisdiction directed to the enforcement by a third party or review by that third party of a judgment or orders made in other proceedings before the Court. Section 56 of the Court Act provides that subject to specified rights of appeal, a decision of the Court determining proceedings is final and conclusive. The mechanism for appeal from the decision of a Commissioner is limited to a question of law and is available pursuant to s 56A of the Court Act. It did not assist the applicant as he was not a party to the proceedings before the Commissioners: at [18]–[21];

(4) the power was not available pursuant to r 36.16(1) of the Uniform Civil Procedure Rules 2005 which provides for the setting aside of judgments or orders made. That power was not available to the applicant, who was a stranger to the judgment or orders made in the Class 1 proceedings: at [23]–[24]; and

(5) there was no power under the newly inserted s 20(3A) of the Court Act to make the orders sought. That section is directed to proceedings transferred under s 149B of the *Civil Procedure Act* 2005, which was not relevant to the present application: at [26]–[27].

New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act [2011] NSWLEC 147 (Pepper J)

Facts: the Minister applied in a Class 3 *Aboriginal Land Rights Act* 1983 ("ALRA") appeal to have Davis AC disqualified by reason of apprehended bias. Acting Commissioner Davis and Dr Sarah Pritchard, the counsel for the NSW Aboriginal Land Council, were involved in the drafting of a report for the Expert Panel on Constitutional Recognition of Indigenous Australians ("the Expert Panel") concerning whether or not there should be formal recognition of Aboriginal and Torres Strait Islander people in the Constitution. The drafting of the report had already begun and as a result there would be intensive communications, including face to face meetings between Dr Pritchard and the writing sub-committee of the Expert Panel of which Davis AC was a member. There was to be a meeting in two weeks time in Sydney between Davis AC and Dr Pritchard. The appeal, although principally concerning questions of law, did require the Court to make some factual findings.

Section 37(2) of *the Land and Environment Court Act* 1979 ("the LECA") states that in Class 3 ALRA appeals the Court shall be assisted by a Commissioner. Section 37(4) of the LECA states that the Court may proceed without the assistance of a Commissioner "who is not available or has ceased to be available", if "in the opinion of the Judge, the proceedings or part of the proceedings concern or concerns a question of law only." Both parties agreed to proceed absent a commissioner.

Issues:

(1) whether a reasonable apprehension of bias existed; and

(2) whether the Court had the power to proceed hearing the appeal absent a commissioner.

Held: upholding the application to disqualify Davis AC and finding that the Court had the power to proceed absent a Commissioner:

(1) the test for determining whether an apprehension of bias existed, as stated in *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; 205 CLR 337, was whether a fair-minded lay observer might reasonably apprehend that the judge, or commissioner, might not bring an impartial mind to the resolution of the question: at [5];

(2) the test applied to commissioners and acting commissioners of the Court: at [7];

(3) a fair-minded lay observer might reasonably have apprehended that the decision-maker, in this instance Davis AC, might not have brought an impartial mind to the exercise of deciding a Class 3 ALRA appeal in circumstances where there was a continuing close professional collaboration on an aspect of Aboriginal affairs with the counsel acting for the applicant: at [9]–[11];

(4) by reason of her disqualification, Davis AC had "ceased to be available" within the meaning of s 37(4)(a) of the LECA: at [15]; and

(5) the matter concerned, at least, in part a question of law, notwithstanding that the Court would be required to make limited factual findings (s 37(4)(b) of the LECA). Therefore both criteria in s 37(4) of the LECA were satisfied: at [15]–[19].

Blue Mountains Conservation Society Inc v Delta Electricity (No 3) [2011] NSWLEC 145 (Pepper J)

Facts: Delta Electricity ("Delta") sought an order, in civil enforcement proceedings, dismissing the whole of the points of claim or, in the alternative, summarily dismissing or striking out prayer 1 of the summons and paragraph 13 of the points of claim, on the basis that the points of claim did not disclose a reasonable cause of action and even if such a claim was disclosed, it was not in the Court's jurisdiction to determine it. Blue Mountains Conservation Society Inc ("Blue Mountains") sought in prayer 1 of the summons a declaration that Delta had polluted waters of the Coxs River ("the river") in contravention of s 120 of the *Protection of the Environment Operations Act* 1997 ("the Act"), which states that "a person who pollutes any waters is guilty of an offence." The points of claim alleged at paragraph 13 and 14 that Delta had introduced, and was continuing to introduce, into the river pollutants that changed the physical, chemical and/or biological condition of the waters within the meaning of the definition of "water pollution" in the Act.

Delta was the owner and operator of the Wallerwang Power Station ("the power station") and it was not in dispute that in the course of its operations Delta discharged water and other substances into the river. Delta, however, denied that the discharge constituted "water pollution" in contravention of s 120 of the Act and maintained that at all times any discharge was pursuant to, and in conformity with, its environmental protection licence.

Section 252 of the Act states that any person may bring proceedings to remedy or restrain breaches of the Act and that the Court may make such orders as it thinks fit to remedy or restrain the breach. Under rr 13.4 and 14.28 of the Uniform Civil Procedure Rules 2005, proceedings can be dismissed and pleadings may be struck out if no reasonable cause of action is disclosed.

Issues:

(1) whether s 252 of the Act permitted civil proceedings to remedy or restrain an alleged contravention s 120 of the Act;

(2) whether the proceedings should be summarily dismissed; and

(3) if not, whether prayer 1 of the summons and paragraph 13 of the points of claim should be struck out.

Held: dismissing the application:

(1) summary dismissal of proceedings must only occur in clear cases: at [21];

(2) it was not necessary for the legislature to expressly state that a person "must not" or "shall not" pollute waters in s 120 of the Act to create a duty or obligation sufficient to enliven s 252 of the Act. This was because a provision that stated that it was an offence to pollute waters implicitly contained a duty on persons not to pollute waters: at [27] and [33];

(3) s 252 was sufficiently broad to capture provisions where no explicit duty was imposed, but where a contravention would result in a breach of the Act: at [35];

(4) to preclude the application of s 252 to s 120 of the Act did not accord with the objects of the Act and would result in no preventative measures being able to be taken to avoid anticipated, or halt continuing, water pollution: at [38]–[42];

(5) Blue Mountains was, therefore, not precluded from bringing proceedings under s 252 of the Act to restrain or remedy the alleged contravention of s 120 and the proceedings ought not be summarily dismissed: at [44];

(6) the points of claim at paragraph 13 did not give rise to a claim for relief by Blue Mountains that Delta be restrained from committing a past breach. Rather, what was sought to be restrained was the continuing pollution of the waters of the river: at [54]–[55];

(7) there was a remedy available on the evidence in respect of the past breaches alleged at paragraph 13. The remedy was the cessation of the continuing discharge of the pollutants into the river: at [65];

(8) paragraph 13 of the points of claim was, therefore, not to be struck out: at [55];

(9) a declaration was a remedy within the meaning of s 252 of the Act. This was because to restrict the term "remedy" in s 252 of the Act to exclude declarations subverted the objects of the Act and was inconsistent with the operation of s 20(c) of the *Land and Environment Court Act* 1979, that includes a jurisdiction "to make declarations of right in relation to any such right, obligation or duty or the exercise of any function" under the Act: at [57]; and

(10) it was premature, absent any evidence being adduced by either party, to make any final pronouncements on the utility of making the declaration sought by Blue Mountains. However, a declaration could have utility in respect of the alleged past breaches by Delta because there were many environmental protection licences that imposed similar conditions in the form in which they appeared on Delta's licence. Therefore, prayer 1 of the summons ought not to be struck out: at [71].

NA & J Investments Pty Ltd v Minister Administering the Water Management Act 2000; Arnold v Minister Administering the Water Management Act 2000 (No 3) [2011] NSWLEC 171 (Craig J)

(related decisions: *NA & J Investments Pty Ltd v Minister Administering the Water Management Act 2000; Arnold v Minister Administering the Water Management Act 2000 (No 2)* [2011] NSWLEC 115 Craig J and *NA & J Investments Pty Ltd v Minister Administering the Water Management Act 2000; Arnold v Minister Administering the Water Management Act 2000* [2011] NSWLEC 51 Criag J)

Facts: the applicants applied to have evidence from the applicants in each matter heard orally. The principal challenge to the decision of the Minister was founded upon conventional judicial review grounds. It was intended to call over 100 applicants to give evidence in one proceeding and over 40 in another.

Issues:

(1) whether the dictates of justice outlined in the *Civil Procedure Act* 2005 supported a departure from the Court's usual practice in Class 4 proceedings that evidence be given in affidavit form.

Held: dismissing the application:

(1) taking proper account of the dictates of justice, including the potential injustice that would be suffered by the respondents if the matter proceeded to trial on the basis of the outlines of evidence presently filed, no good reason was identified that would militate against adherence to the Court's Practice Note requiring that evidence in chief to be given by witnesses should be by way of affidavit served in advance of the hearing: at [27].

Lester v Ashton Coal Mining Operations Pty Ltd and the Office of Environment and Heritage (No. 2) [2011] NSWLEC 177 (Sheahan J)

(related decisions: *Lester v Ashton Coal Mining Operations Pty Ltd* [2011] NSWLEC 155 Craig J and *Ashton Coal Operations Pty Ltd v Director-General, Department of Environment, Climate Change and Water (No 2)* [2011] NSWLEC 116 Sheahan J).

Facts: Mr Lester ("the applicant") applied for interlocutory relief by way of access to various areas within Ashton's mine site. It was not disputed by Ashton that there had been subsidence of the land and that there were items of Aboriginal cultural heritage on that land. Access was sought to determine the extent of any (or any likely) harm to such items due to mining activities. Mr Lester had previously sought access on 11

July 2011, but Ashton refused to grant access on the basis of unresolved Class 1 proceedings before the Court and an ongoing investigation by the Office of Environment and Heritage. Mr Lester was a native title claimant and traditional owner. The Ashton project was approved as a state significant and integrated development and under the consent Ashton was required, upon receipt of a request, to provide the local Aboriginal community with the opportunity to recover artefacts pursuant to the conditions stipulated in s 90 of the *National Parks and Wildlife Act* 1974 ("the Act"). Access was sought for the applicant plus an expert archaeologist, an expert in mine engineering and/or a geologist/ geomorphologist/subsistence specialist and Mr Scott Franks, a native title claimant, traditional owner and Aboriginal Heritage specialist, who was the applicant in a related notice of motion in Class 1 proceedings.

Issues:

(1) whether a breach of s 86 of the Act could be pleaded in the Class 4, or only in the Class 5, jurisdiction of the Court;

(2) if the alleged breach was found to be correctly pleaded, whether a legitimate forensic purpose existed in granting an access order pursuant to r 23.8 of the Uniform Procedure Rules 2005, or whether the application was a "fishing expedition";

(3) if a legitimate forensic purpose was found to exist, whether Mr Franks should be included in the inspecting party;

(4) if a legitimate forensic purpose was found to exist, whether the areas to be viewed should be specifically defined; and

(5) if a legitimate forensic purpose was found to exist, whether a direction for the expert witnesses to confer was premature.

Held: access was granted:

(1) the applicant's prayers for relief, as they pertained to a breach of the Act, could be pleaded in Class 4: at [49];

(2) the Court's discretion should be exercised in favour of the applicant in the interests of justice: at [53];

(3) Mr Franks' expertise would assist Mr Lester during the inspection and he should be included in the inspecting party: at [54];

(4) the areas to be viewed were to be confined to identified Aboriginal sites: at [55]; and

(5) any direction for the expert witnesses to confer was premature: at [57].

Section 56A Appeals

Ku-ring-gai Council v De Stoop [2011] NSWLEC 164 (Craig J)

(related decision: De Stoop v Ku-ring-gai Council [2010] NSWLEC 1019 Murrell C)

Facts: the Council appealed pursuant to s 56A of the *Land and Environment Court Act* 1979 ("the Court Act") from a decision by a Commissioner granting development consent for a seniors living development.

Issues:

(1) whether the Commissioner erred in law when applying the provisions of State Environmental Planning Policy No 1 – Development Standards ("SEPP 1");

(2) whether the underlying objective of the planning instrument was properly identified; and

(3) whether the Commissioner entered into impermissible merits review.

Held: appeal dismissed:

(1) a fair reading of the Commissioner's judgment indicated that she identified the purpose of the development standards and provided reasons that were sufficient to demonstrate why the conclusion

was reached. No elaborate reasons were required in accordance with the principle observed by Mahoney JA in *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 273. Consideration of the judgment as a whole, rather than applying an impermissible fine toothcomb approach, indicated that the Commissioner's judgment did not demonstrate legal error in applying the provisions of SEPP 1: at [27] and [57];

(2) the underlying purpose of each development standard was correctly identified by the Commissioner and was based on evidence provided by planners during the hearing. The Commissioner had posed for herself the correct legal test when determining whether it was unreasonable or unnecessary to apply the relevant standard. Disagreement with the decision formed by reason of the evaluation made does not permit a challenge under s 56A(1): at [38] and [80]; and

(3) the Commissioner was limited to consideration of the parts of the proposal manifesting non-compliance and could not to slide into merits review of the entirety of the proposal. The Commissioner adhered to this limitation as she constrained any merits review to a determination of the objection lodged under SEPP 1 and did not enter into an overall assessment of the development application itself. It was not legally impermissible for her to apply so-called "merit" considerations to her assessment, so long as they were confined to a determination of the objection lodged under SEPP 1: at [24] and [63].

Huang v Hurstville City Council (No 2) [2011] NSWLEC 151 (Pain J)

(related decision: *Huang v Hurstville City Council* [2011] NSWLEC 1175 Dixon C)

Facts: the appellant appealed pursuant to s 56A of the *Land and Environment Court Act* 1979 ("the Court Act") against the refusal of development consent for the use of premises for sex services in proceedings before a commissioner under s 97 of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act"). Hurstville Local Environment Plan 1994 (Amendment No 7) ("Amendment No 7") introduced cl 16A into the Hurstville Local Environmental Plan 1994 ("the LEP") in 2006. It defined sex services premises and specified objectives for the management of these premises in Zone No 4 Light Industrial, the only zone where sex services premises were permissible under the LEP.

Issues:

(1) whether the Commissioner erred in holding that cl 16A(2)(a) of the LEP did not comprise a development standard as defined in s 4 of the EPA Act.

Held: dismissing the appeal:

(1) the LEP as a whole must be considered. That a provision could be considered as meeting the definition of development standard in s 4(a) and (c) and that there was no reference in the LEP map to prohibited areas, were not conclusive that cl 16A(2)(a) was a development standard. Prior to Amendment No 7, sex services premises were not separately defined as a prohibited or permissible use in Zone No 4 and Amendment No 7 included particular objectives specified in cl 16A(1): at [22];

(2) cl 16A(2) specified a condition precedent which had to be satisfied, namely, whether the land met the essential condition of not being near or within view of any of the other of the stated uses referred to in the subsection. Only if the Council was satisfied that this condition was met could development consent be granted: at [23]. This clause was inserted to provide permissibility for sex services premises within Zone No 4 in closely defined circumstances. The development proposed as a whole was prohibited in the circumstances identified in cl 16A(2)(a) when construed in the context of the LEP: at [33]; and

(3) the clause was not dealing with an aspect of development or in the carrying out of development. Clause 16A(2)(a) operated as a prohibition, not a development standard. There was no error of law in the commissioner's finding to that effect: at [38].

Randwick City Council v Scarf [2011] NSWLEC167 (Craig J)

(related decision: *Scarf v Randwick City Council* [2010] NSWLEC 1205 Murrell and Morris CC)

Facts: the council appealed pursuant to s 56A of the *Land and Environment Court Act* 1979 (" the Court Act") from a decision by Commissioners granting development consent for demolition of an existing dwelling house and its replacement with a residential apartment building in its place.

Issues:

(1) whether the Commissioners erred in law when applying the provisions of State Environmental Planning Policy No 1 – Development Standards ("SEPP 1");

(2) whether the underlying objective of the planning instrument was properly identified; and

(3) whether the Commissioners erred in law by failing to take account of the provisions of a Development Control Plan ("DCP") that the appellant had adopted as being relevant to development upon the site.

Held: dismissing the appeal:

(1) none of the five grounds upon which the council sought to challenge the decision of the Commissioners as manifesting legal error were sustained. The endeavours to find fault and, therefore, a ground or grounds of challenge involved an impermissible fine toothcomb approach to the judgment. An appropriate consideration of the judgment, including the fact that it was delivered ex tempore, did not demonstrate the legal errors of which complaint was made. To the extent to which there may have been disagreement with the result or the formation of opinions expressed by the Commissioners, they were not matters that attracted appellate intervention under the provisions of s 56A(1) of the Court Act: at [111];

(2) the underlying purpose of each development standard was correctly identified by the Commissioners and was based on evidence provided by planners during the hearing. The Commissioners referred to the decision of Preston CJ in *Wehbe v Pittwater Council* [2007] NSWLEC 827; (2007) 156 LGERA 446 when considering the objective of each development standard and no legal error could be found in the manner in which the Commissioners identified each of the relevant standards and addressed the fulfilment of purpose: at [30], [45]–[47] and [60];

(3) the manner in which the Commissioners structured their judgment demonstrated that they understood the necessity to keep separate the consideration and determination of objections under SEPP 1 from the assessment of those matters directed to the general merit of the respondents' development proposal. In recognising that separation, the acknowledgment of overlap between the two streams of consideration necessary to determine the application before them was realistic. Given that the assessment of an objection under SEPP 1 required the making of an evaluative judgment ounded upon evidence adduced, such an acknowledgment did not, in principle, demonstrate legal error: at [37]; and

(4) it was clear that the Commissioners took account of the DCP provisions relating to height, bulk and scale. They were aware of the provisions of the DCP and addressed them in substance: at [110].

DAA Holdings Pty Ltd v Kiama Municipal Council [2011] NSWLEC 183 (Biscoe J)

(related decision: *DAA Holdings Pty Ltd v Kiama Municipal Council* [2011] NSWLEC Brown C)

Facts: the applicant, DAA Holdings Pty Ltd ("DAA"), sought consent for development including a caravan park on land in Gerringong. The land was subject to three Local Environmental Plans ("LEPs"): Local Environmental Plan 5 ("LEP 5); Local Environmental Plan 1996 ("LEP 1996"); and the Draft Local Environmental Plan 2010 ("Draft LEP"). The respondent, Kiama Municipal Council ("the council"), refused consent. On appeal to this Court, the council's refusal of the development application was upheld. DAA sought to appeal the Commissioner's decision pursuant to s 56A of the *Land and Environment Court Act* 1979.

Issues:

(1) whether the Commissioner's finding that the proposed development was consistent with the zone objectives of LEP 2006, but inconsistent with the desired future character envisaged by the draft LEP indicated an error of reasoning of the type contemplated in *Avon Downs Pty Ltd v Federal Commissioner of Taxation* [1949] HCA 26; (1949) 78 CLR 353;

(2) whether the commissioner failed to take into account a mandatory relevant consideration, namely, the delay of the council in defining the Gerringong boundary; and

(3) whether the council had taken into account an irrelevant consideration, namely, the Commissioner's consideration of "likely future housing types" contemplated in a policy document, but not contemplated in the Draft LEP.

Held: dismissing the appeal:

(1) the Commissioner did not err in law in finding consistency with the 1996 LEP and inconsistency with the draft LEP. The two LEPs differed in their form and effect: the LEP 1996 only applied to a small portion of the land, whereas the Draft LEP applied to the land in its totality; the Draft LEP, unlike the LEP 1996, prohibited caravan parks; and the Draft LEP, unlike LEP 1996, sought to protect agricultural land for "long-term" agricultural production: at [16]–[17];

(2) the Commissioner took into account the council's delay in defining the Gerringong boundary, but did not give this consideration "any weight". To give the delay "no weight" did not constitute a failure to consider. Rather, it was a matter for the Commissioner, exercising the Court's merits review function, to determine the weight, if any, to attribute to that consideration: at [25]–[29]; and

(3) the "likely future housing types" detailed in the policy document formed part of the Commissioner's consideration of the public interest. Such a consideration was not irrelevant, but WAS expressly relevant by reason of s 79C(1)(e) of the *Environmental Planning and Assessment Act* 1979: at [30]–[38].

- **Commissioner Decisions**

Solotel Pty Ltd v Woollahra Council [2011] NSWLEC 1210 (Moore SC)

Facts: the applicant appealed under s 97 of the *Environmental Planning and Assessment Act* 1979 against the refusal by the council of its application to modify the internal space of the Paddington Inn hotel and to increase the number of persons permitted on the premises from 350 to 800 persons including staff. No change was sought to the trading hours, which were 10am to midnight seven days a week. The council contended that approval of the application would have adverse social impacts on the amenity of the residents in the vicinity of the hotel through anti-social behaviour of patrons, unsatisfactory management of the premises, and increased demand for parking; and that it would create an unacceptable additional workload on the already stretched resources of the NSW Police. There were a number of other licensed premises in the vicinity, with the closest closing earlier than the subject premises.

Issues:

(1) whether there was a cumulative effect on the residential community by the behaviour of patrons from multiple licensed premises in the vicinity;

(2) whether there would be an increase in anti-social behaviour by patrons of the hotel if numbers were increased;

(3) whether any increase in unacceptable anti-social behaviour should be permitted; and

(4) whether the proposed increase in internal facilities should be approved if there was no increase in permitted patron numbers.

Held: dismissing the appeal:

(1) as a consequence of the existence of licensed premises located in close proximity to residential areas there would be incidents of anti-social behaviour that were not capable of being eliminated no matter how good the management of the premises might be: at [51];

(2) there was a combination of sources for the inevitable but unreasonable anti-social behaviour impacting on the surrounding residential community: at [55];

(3) anti-social elements, from within the broader incidence of anti-social behaviour in the locality, could be attributed to patrons of the Paddington Inn: at [82];

(4) it was likely if patron numbers were increased that incidents of anti-social behaviour, which was entirely unacceptable, would increase: at [91];

(5) the present anti-social behaviour was of sufficient regularity and intensity that any increase, save for an increase that might be regarded as so trifling as to be unobservable in its impact on the residents, should not be permitted: at [97];

(6) as a consequence it was not appropriate to approve any increase in the maximum permitted number of persons on the premises: at [102]; and

(7) the increase in the internal facilities of the premises was so closely linked with the number of persons likely to be on the premises that the alterations to the premises should also be refused: at [112].

Ashton Coal Operations Pty Ltd v Director-General, Department of Environment, Climate Change and Water (No 3) [2011] NSWLEC 1249 ***(Pearson C and Sullivan AC)***

(related decisions: *Ashton Coal Operations Pty Ltd v Director General, Department of Environment, Climate Change and Water* [2011] NSWLEC 1162 Pearson C and Sullivan AC and *Ashton Coal Operations Pty Ltd v Director General, Department of Environment, Climate Change and Water (No 2)* [2011] NSWLEC 116 Sheahan J)

Facts: Ashton Coal Operations Pty Ltd ("Ashton") operated underground and open cut coal mining operations in the Upper Hunter Valley subject to a development consent granted in 2002. In December 2010 the consent was modified under Pt 3A of the *Environmental Planning and Assessment Act* 1979 to permit the diversion of two sections of Bowmans Creek, which would necessitate harm to Aboriginal objects as defined in the *National Parks and Wildlife Act* 1974 ("the Act"). Ashton appealed under s 90L of the Act against the deemed refusal of the Director-General of an application for the issue of an Aboriginal Heritage Impact Permit ("AHIP") required in accordance with the conditions of the modification approval. The parties reached agreement as to the terms of an AHIP and sought orders by consent.

Issues:

(1) whether the matters specified in s 90K(1) of the Act had been taken into account;

(2) whether the application for an AHIP had been accompanied by a cultural heritage assessment report complying with cl 80D of the National Parks and Wildlife Regulation 2009 as required by s 90A(2) of the Act; and

(3) whether the AHIP should be issued.

Held: issuing the AHIP subject to inclusion of an additional condition:

(1) the Aboriginal Cultural Heritage Report which accompanied the AHIP application addressed the matters specified in cl 80D(2) of the National Parks and Wildlife Regulation, and by including a copy of the submissions received from registered Aboriginal stakeholders, went some way to meeting the requirements of cl 80D(3). To the extent that any of the matters specified in cl 80D(2) may not have been adequately addressed, this would be relevant in considering whether the matters required by s 90K(1) had been properly taken into account: at [133];

(2) there was evidence addressing all the matters specified in s 90K(1) of the Act. While there were respects in which the consultation process engaged in by Ashton did not comply with the requirements of the legislation, the results of the consultation had provided sufficient evidence to enable proper consideration of the matters specified in s 90K(1): at [134]; and

(3) to the extent that there remained uncertainty as to the existence of Aboriginal objects that might be harmed by the proposed works, the terms of the proposed AHIP and the included methodology were adequate to address and respond to discoveries during the course of the works: at [134].

Alahmad v Randwick City Council [2011] NSWLEC 1240 (Hussey C)

Facts: the applicant appealed against the refusal of an application to modify the trading hours of a convenience store located in Coogee Bay Road Coogee, across the road from the Coogee Bay Hotel. The store had approval to trade from 6am to 12am Monday to Saturday and 6am to 10pm on Sunday, and approval was sought to operate from 6am to 3am, 7 days a week. The Council's Crime Prevention and Community Safety Plan ("the CP") adopted in December 2008 identified the Coogee Beach precinct as a "hot spot" for alcohol related crime, and stated that in order to reduce the potential for alcohol related anti-social behaviour during late night periods between 12 midnight and 6am, a maximum 12 midnight trading hour was to be imposed on late night food premises in Coogee. A crime risk assessment for the development was conducted by NSW Police based on the Crime Prevention through Environmental Design strategy ("CPTED"), which concluded that approval of the development would result in a high overall projected crime risk rating.

Issues:

(1) what weight should be given to the CP; and

(2) whether the social impacts arising from late night trading warranted refusal of the application.

Held: dismissing the appeal:

(1) the CP had been adopted after detailed community consultation; it had been consistently applied since its adoption; and it was consistent with the relevant planning controls, and crime prevention guidelines issued by the Department of Urban Affairs and Planning in 2001; and should be given significant weight: at [17];

(2) there was no compelling evidence submitted that indicated a significant change of circumstances that would result in setting aside the policy in the CP: at [20]; and

(3) the overall public interest considerations of public safety should override the private interest of late night trading: at [22].

Walton v Blacktown City Council [2011] NSWLEC 1261 (Brown C)

Facts: the applicant appealed under s 97 of the *Environmental Planning and Assessment Act* 1979 against conditions imposed when granting a deferred commencement consent under the State Environmental Planning Policy (Affordable Rental Housing) 2009 ("the SEPP") for a five bedroom group home. The matter was conducted as a conciliation conference under s 34AA of the *Land and Environment Court Act* 1979, and the council's further consideration of the conditions and discussions during the conciliation conference resulted in a number of conditions no longer being in issue; the hearing addressed the conditions that remained in dispute. Clause 46(1) of the SEPP provided that a consent authority must not:

> (a) refuse consent to development for the purpose of a group home unless the consent authority has made an assessment of the community need for the group home, or
>
> (b) impose a condition on any consent granted for a group home only for the reason that the development is for the purpose of a group home.

Issues:

(1) whether the requirement for a resident caretaker was appropriate;

(2) whether the requirement for a plan of management was appropriate;

(3) whether the requirements for emergency procedures were appropriate; and

(4) whether the light spill and other amenity requirements were appropriate.

Held: upholding the appeal in part:

(1) while the aims of the SEPP were to facilitate and provide incentives for a range of affordable rental accommodation, it did not follow that those aims were a reason themselves for approval, and the acceptability of a development had to be based on a consideration of all relevant matters: at [16];

(2) cl 46(1) of the SEPP did not impose a barrier to the imposition of conditions on an application for a group home: at [17];

(3) the use of a single dwelling to house up to 10 unrelated people on a potentially short term or temporary basis meant that there was a likelihood of impacts from the development that would not be likely in an area made up of residential developments, and those impacts could be minimised through the existence of a resident caretaker: at [20];

(4) the requirement for a resident caretaker was not unacceptably onerous: at [21];

(5) the requirement for a plan of management was appropriate because of the different characteristics of the group home compared to surrounding residential development and the need to minimise any amenity impacts: at [26];

(6) the conditions relating to emergency procedures were necessary given the potential unfamiliarity of the occupants with the dwelling in times of an emergency: at [27];

(7) the conditions relating to light spill were appropriate given the different operating characteristics of the group home: at [28];

(8) the potential existed for additional domestic waste services to be required, which could be monitored over a reasonable period: at [30]; and

(9) in the absence of at least one room satisfying the relevant requirements of the Building Code of Australia, it was reasonable to deny access to the group home for disabled persons: at [32].

Motto Farm Pty Ltd v Port Stephens Council [2011] NSWLEC 1293 (Brown C)

Facts: the applicant appealed under s 97 of the *Environmental Planning and Assessment Act* 1979 against the refusal of consent for the change of use of part of an existing restaurant within an existing motel on the Pacific Highway at Heatherbrae to a hotel. There were two caravan parks located to the north and south of the site, and other surrounding uses included an industrial area, a residential area, a school, and another motel. The proposed licensed area had a hypothetical maximum capacity of around 180 patrons. Sale of packaged alcohol was proposed to be available over the bar. The development application did not include the provision of gaming machines, however the applicant stated that five or six gaming machines and a TAB facility might be installed in the hotel. Clause 14A of the Port Stephens Local Environmental Plan 2000 provided that the consent authority could not consent to development for the purpose of a hotel or restaurant unless the development "is in conjunction with a tourist facility". The term "tourist facility" was defined to mean an establishment providing primarily for tourist accommodation or recreation, or both.

Issues:

(1) whether the proposed development was permissible;

(2) whether the hotel would increase the potential for alcohol-related harm;

(3) whether the economic impacts of the proposed development warranted refusal of the application;

(4) whether there was an unacceptable risk for pedestrian safety; and

(5) whether the proposed development was consistent with the zone objectives.

Held: dismissing the appeal:

(1) the motel was "tourist accommodation": at [29];

(2) there was a sufficient association or relationship between the two uses to conclude that the hotel would be used in conjunction with the motel, and the development was permissible: at [31]–[33];

(3) there was a need to balance the potential social impacts of the hotel against the legitimate rights to operate a hotel on the site, and it had to be accepted that a hotel because of its nature and operation would potentially or even likely have adverse impacts on a locality: at [75];

(4) the proximity of the hotel to the two caravan parks was a significant and unacceptable negative social impact: at [76];

(5) in balancing the potential social impacts of the other identified land uses in the primary locality against the legitimate ability to construct and operate the hotel, the impacts were not so unacceptable to warrant the refusal of the application: at [78];

(6) the establishment of the hotel in an area that did not have any hotels and consequently suffered little or no alcohol-related crime was a valid reason to refuse the development application: at [86];

(7) care was needed in the provision of evidence so that any analysis did not go beyond what was appropriate and necessary in order to address the concern over the economic impact of the hotel on the locality, and any response had to be proportional to the extent of the concern: at [98];

(8) the evidence did not support a finding that the proposed development would have an adverse economic effect on the locality: at [100];

(9) the potential impact on pedestrian safety combined with the proximity of disadvantaged groups within the caravan park and their lack of vehicle availability was a significant reason why the development application should be refused: at [112]; and

(10) the proposed development was consistent with the zone objectives: at [120].

New Developments

- The Court's Annual Review 2010 has been published.

Court News

- The Court welcomes The Hon Michael Moore as an Acting Justice for the period commencing 3 October 2011 and concluding 16 December 2011.
- The Court also welcomes Mr Tony McAvoy as an Acting Commissioner of the Court (Aboriginal Land Rights) for the period of 21 September 2011 to 20 September 2012.
- Commissioner Graham Brown has been appointed as the Acting Senior Commissioner of the Court until 24 February 2012 to replace Senior Commissioner Tim Moore, who is presently on leave from the Court to jointly chair the NSW Government's Review Panel of the planning system.
- The Court welcomes Ms Susie Packham who has joined the Court as the Associate to Acting Justice Moore.
- The Court welcomes Mr David Johnson to the Registry as the part-time Operational Assistant for the period commencing 25 August 2011 and concluding 16 December 2011.
- The Court has farewelled Ms Karen-Ann Hay from the Registry.
- Ms Manisha Patil from the Registry is on a two-year secondment to the Administrative Decisions Tribunal.