30 January 2012
Volume 4 Issue 1

Land and Environment Court of NSW Judicial Newsletter

Legislation

- **Statutes and Regulations**

Planning:

Environmental Planning and Assessment Further Amendment (Part 3A Repeal) Regulation 2011, published 1 December 2011,

(a) revises the transitional arrangements that apply to existing Part 3A projects consequent on the repeal of Part 3A of the *Environmental Planning and Assessment Act* 1979; and

(b) clarifies the on-going status of concept plans for Part 3A projects and confirms that concept plans for transitional Part 3A projects or former Part 3A projects may be modified.

Environmental Planning and Assessment Amendment (Transitional) Regulation 2011, published 16 December 2011, extends the approval period for certain mining leases (see cl 8K of the Environmental Planning and Assessment Regulation 2000) to 31 March 2012.

Environmental Planning and Assessment (Cessnock City Council Planning Panel Repeal) Order 2012, published 27 January 2012, abolished the Council's Planning Panel and provides for consequential savings and transitional matters.

Pollution:

The Protection of the Environment Legislation Amendment Act 2011 No 63 published 20 January 2012, proclaims dates in February and March 2012 for the commencement of most of the amendments made by the *Protection of the Environment Legislation Amendment Act* 2011. The Act will amend environment protection legislation to create the office of Chairperson of the Environment Protection Authority and to make further provision with respect to the notification and management of pollution incidents, and for other purposes. The only amendment not being commenced is one that creates a duty to prepare and implement pollution incident response management plans (Schedule 2 [12]).

Protection of the Environment Operations Amendment (Miscellaneous) Regulation 2011, published 26 October 2011, amends various environmental legislation, such as Schedule 1 to the *Protection of the Environment Operations Act* 1997, to:

(a) remove any requirement for an environment protection licence for the generation of electricity by means of emergency stand-by plant that operates for less than 200 hours per year;

(b) remove an exemption for all resource recovery activities consisting of the separation and sorting of less than 60 tonnes of lead acid batteries per year from the requirement for a licence;

(c) remove any requirement for a licence for the treatment of waste received on site; and

(d) clarify that a licence is not required for the processing of stormwater as a form of waste processing.

Water:

Water Management (Application of Act to Certain Water Sources) Proclamation (No 2) 2011, published 11 November 2011, commenced 14 November 2011. It declares that Part 2 and 3 of Chapter 3 of the *Water Management Act* 2000 apply to the Water Sharing Plan for the NSW Great Artesian Basin Shallow Groundwater Sources 2011 and the Water Sharing Plan for the Intersecting Streams Unregulated and Alluvial Water Sources 2011 both of which commenced on 14 November 2011.

Water Management (General) Amendment (Water Sharing Plans) Regulation (No 2) 2011, published 11 November 2011, commenced 14 November 2011. It makes provision with respect to entitlements under the *Water Act* 1912 that authorize the taking of water from certain water sources in the Border Rivers, Central West, Gwydir, Namoi and Western Water Management Areas, being entitlements that are to become access licences to which Part 2 of Chapter 3 of the *Water Management Act* 2000 applies.

Water Sharing Plan for the NSW Great Artesian Basin Groundwater Sources Amendment Order 2011, published 11 November 2011, amends the Water Sharing Plan for the NSW Great Artesian Basin Groundwater Sources 2008.

Water Sharing Plan for the NSW Murray Darling Basin Fractured Rock Groundwater Sources 2011, published 2 December 2011, commenced on 16 January 2012, as did the Water Sharing Plan for the NSW Murray Darling Basin Porous Rock Groundwater Sources 2011. Additionally Parts 2 and 3 of Chapter 3 of the *Water Management Act* 2000 apply to the above two Water Sharing Plans, as proclaimed in the Water Management (Application of Act to Certain Water Sources) Proclamation (No 3) 2011, published 16 December 2011.

The Water Management (General) Amendment (Water Sharing Plans and Aquifer Interference) Regulation 2011, published 16 December 2011:

(a) prescribes a new category of access licence to which Part 2 of Chapter 3 of the *Water Management Act* 2000 applies and to declare that type of licence to be a specific purpose access licence;

(b) prescribes a new subcategory of access licence;

(c) makes provision with respect to entitlements under the *Water Act* 1912 that authorize the taking of water from certain water sources in the Border Rivers, Central West, Gwydir, Lachslan, Lower Murray Darling, Murray, Murrumbidgee, Namoi and Western Water Management Areas, being entitlements that are to become access licences to which Part 2 of Chapter 3 of the *Water Management Act* 2000 applies; and

(d) extends the operation of transitional provisions retaining certain entitlements under the *Water Act* 1912 (to take water for the purpose of prospecting or fossicking for minerals or petroleum) so that those entitlements may be retained until 1 July 2012.

Water Sharing Plan for the Lower Murray-Darling Unregulated and Alluvial Water Sources 2011 and the Water Sharing Plan for the Murray Unregulated and Alluvial Water Sources 2011 commenced on 30 January 2012.

The Water Management (General) Amendment Regulation 2012, commenced 30 January 2012:
(a) declared Eagle Creek Cutting and Waddy Creek Cutting to be rivers for the purposes of the *Water Management Act* 2000; and
(b) made some provisions, including to exempt holders of certain approvals arising from entitlements relating to Bungaree and Bingera Creeks and the Eagle Creek System from the requirement to hold a water access licence to extract water from those rivers, as a consequence of the extension of Parts 2 and 3 of Chapter 3 of the Act to certain water sources in the Murray Unregulated and Alluvial WaterSources and the Lower Murray–Darling Unregulated and Alluvial Water Sources, as proclaimed in the Water Management (Application of Act to Certain Water Sources) Proclamation 2012.

Mining:

Mining Amendment (Transitional) Regulation 2011, published 18 November 2011, extends for 12 months the transitional arrangements that are currently in place for existing rights to prospect or mine for privately owned minerals or coal.

Miscellaneous:

The *Valuation of Land Amendment Act* 2011, which commenced on 28 November 2011, amended the *Valuation of Land Act* 1916 to:

- make it clear that the Valuer-General can make a valuation of land for the purposes of a private agreement at the request of a party to the agreement and to provide that for the purposes of such an agreement a valuation carried out in accordance with the Valuer-General's usual delegation and contract valuer arrangements is deemed to have been carried out by the Valuer-General; and

- affirm the methodology used by the Valuer-General in valuing heritage restricted land by ensuring that the cost of construction of improvements is not to be taken into account in determining the land value of land and to make it clear that there is to be no adjustment of the land value of heritage restricted land except that which results from the specific assumptions required by the Act for such a valuation.

The *Heritage Amendment Act* 2011 was assented to on 28 November 2011, but has yet to be proclaimed. The Act amends the *Heritage Act* 1977 in relation to the Heritage Council and the listing of items on the State Heritage Register and for other purposes.

Repealed:

The Redfern – Waterloo Authority was dissolved on 1 January 2012. All of the Authority's assets and functions have been transferred to the Sydney Metropolitan Development Authority. [full explanatory notes]

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

SEPP (Exempt and Complying Development Codes) Amendment (Miscellaneous) (No 2) 2011, published 25 November 2011, extends the transition period for the operation of local complying development controls. [see the Department of Planning and Infrastructure's Circular PS 11-023]

SEPP (Sydney Region Growth Centres) Amendment (Marsden Park Industrial Precinct) 2011, published 25 November 2011, updates the maps for the precinct in the SEPP (Sydney Region Growth Centres) 2006.

SEPP Amendment (North Penrith) 2011, published 25 November 2011, amends the maps in the Penrith City Centre Local Environmental Plan 2008.

SEPP (Major Development) Amendment (UTS Ku-ring-gai Campus) 2011, published 16 December 2011, updates the maps for the site in the SEPP (Major Development) 2005.

SEPP (Major Development) Amendment (Edmondson Park South) (No 2) 2011, published 27 January 2012, amends the SEPP (Major Development) 2005 in respect of the State Significant site of Edmundson Park South.

SEPP Amendment (Miscellaneous) 2011, published 27 January 2012, lists amendments to maps in the SEPP (Sydney Region Growth Centres) 2006.

- **Bills**

The Criminal Procedure Amendment (Summary Proceedings Case Management) Bill 2011, will amend the *Criminal Procedure Act* 1986 to make provision for case management procedures to reduce delays in trial and sentencing proceedings before the Supreme Court and the Land and Environment Court in their summary jurisdiction, by:

(a) granting those courts the discretion to make orders requiring that certain disclosures be made by the prosecution and the defence before a trial or sentencing hearing; and

(b) providing for pre-hearing mechanisms (for example, preliminary hearings and preliminary conferences) which are aimed at achieving a more efficient management and conduct of the proceedings.

The Marine Pollution Bill 2011 aims to protect the State's marine and coastal environment from pollution by oil and other marine pollutants discharged from ships by:

(a) repealing and re-enacting the *Marine Pollution Act* 1987, which currently prohibits discharges of oil and noxious liquid substances; and

(b) implementing additional provisions of the *International Convention for the Prevention of Pollution from Ships,* 1973 (known as MARPOL), so as to also prohibit discharges of harmful substances in packaged form and discharges of sewage and garbage.

- **Miscellaneous**

The Conveyancing (General) Amendment (Prescribed Authorities) Regulation 2011, published 16 December 2011, amended the Conveyancing (General) Regulation 2008 to prescribe SPI Rosehill Network Pty Limited, Crown Castle Australia Pty Ltd and Sydney Desalination Plant Pty Limited as prescribed authorities for the purposes of s 88A of the *Conveyancing Act* 1919 so that easements without dominant tenements may be created in favor of those corporations. Any such easements may

be created in favor of the corporations only if they are for the purpose of, or incidental to, the supply of a utility service to the public, including the supply of gas, water or electricity.

The Government Information (Public Access) Amendment Bill 2011, makes miscellaneous amendments to the *Government Information (Public Access) Act* 2009. [full explanatory notes]

Oaths Regulation 2011, published 23 December 2011, will commence on 30 April 2011. The Regulation sets out identification provisions for taking or receiving affidavits and statutory declarations.

The NSW Parliamentary Library Services has released an e-brief titled: Regulation of brothels: an update [EB 15/2011].

See also the Department of Planning and Infrastructure:

- Circular PS 12-000; and
- Guideline on call-in of State significant development

Reviews:

The following reviews are open for submissions:

- 'The way ahead for planning in NSW?' is the Issues Paper of the NSW Planning System Review;
- Draft NSW Planning Guidelines: Wind Farms; and
- Review of the Swimming Pools Act 1992.

Court Practice and Procedure

- **Fees**

From 1 January 2012, fees for retrieving archived files changed (so that clients pay the actual costs incurred by courts):

Civil Procedure Amendment (Retrieval Fees) Regulation 2011 and Criminal Procedure Amendment (Retrieval Fees) Regulation 2011, published 16 December 2011.

- **Civil Procedure Amendments**

Uniform Civil Procedure Rules (Amendment No 50) 2011, published 9 December 2011, amended rule 33.10 of the Uniform Civil Procedure Rules 2005 to recognise that the notice and declaration are no longer required to be attached to a subpoena because they form part of the subpoena. [new Forms 26A and 27A]

Uniform Civil Procedure Rules (Amendment No 49) 2011 — published 18 November 2011, amended Part 31 of the Uniform Civil Procedure Rules 2005 to require a party who intends to tender an audio-visual recording at a hearing to allow the other parties an opportunity to inspect the recording and

agree to its admission without proof at least 7 days before the commencement of the hearing (extending the current requirement relating to plans, photographs and models). However, photographs and audio-visual recordings that are made or obtained for the purpose of testing the credibility of a witness may be tendered despite this requirement if the court is satisfied that the party seeking to tender the evidence had a legitimate forensic purpose for not giving the other parties an opportunity to inspect the item. The existing exception, which allows such evidence to be tendered with leave of the court, is retained in relation to all other types of evidence.

Judgments

- ### High Court of Australia

Michael Wilson & Partners Limited v Nicholls [2011] HCA 48 (Gummow ACJ, Hayne, Heydon, Crennan and Bell JJ)

(related decision: *Nicholls v Michael Wilson & Partners Limited* [2010] NSWCA 222 Basten JA, Young JA & Lindgren JA)

Facts: Michael Wilson & Partners Ltd ("MWP") was incorporated in the British Virgin Islands and practised as a law firm and business consultancy from offices in Kazakhstan. In 2001 MWP made an agreement with Mr Emmott that he would join MWP as a director and shareholder. From 2004 to 2006 the first respondent, Mr Nicholls, was employed by MWP as a senior associate. From 2005 to 2006 the second respondent, Mr Slater, was employed by MWP as an associate. By the end of 2006 Messrs Nicholls, Slater and Emmott had left MWP. The third, fourth and fifth respondents ("the Temujin companies") were companies that were associated directly or indirectly with some or all of Messrs Nicholls, Slater and Emmott. MWP alleged that each of Messrs Nicholls, Slater and Emmott, separately and together, furthered his or their own interests at the expense of MWP. A central allegation was that Messrs Nicholls, Slater and Emmott had conspired together to divert and in fact had diverted clients and business opportunities away from MWP by having one or more of the Temujin companies act for the clients or by taking advantage of business opportunities that would otherwise have gone to MWP. MWP sought relief in several different jurisdictions, the principal proceedings being an arbitration in London against Mr Emmott commenced in August 2006 pursuant to an arbitration clause in the agreement between those parties; and proceedings in the Supreme Court of New South Wales against Messrs Nicholls and Slater and the Temujin companies commenced in October 2006. Mr Emmott was invited to consent to being joined as a party to the NSW action, and declined. There was substantial but not exact overlap between the allegations made in the arbitration and NSW proceedings. Hearing of the arbitration commenced on 10 November 2008 and concluded on 24 February 2009; there was a challenge to parts of the award made filed on 22 March 2010. Hearing of the NSW proceedings began on 15 June 2009 and concluded on 10 September 2009, with reasons for judgment delivered on 6 October 2009 and 11 December 2009.

In the course of the NSW proceedings MWP made several applications ex parte seeking and obtaining orders against or in relation to Messrs Nicholls and Slater or their assets, including a number of applications made in 2007 and 2008 heard and determined by Einstein J. In May 2008 the defendants asked Einstein J to disqualify himself from hearing any further interlocutory application in the proceedings. In May and June 2009 the defendants asked Einstein J to disqualify himself from trying the action.

The primary judge (Einstein J) granted MWP substantially the relief it had claimed. On appeal, the Court of Appeal set aside the orders made at first instance, directed that there be a new trial because there had been a reasonable apprehension of bias of the trial judge, and further directed that the new trial not commence until finalisation of the arbitration proceedings on the basis that otherwise there would be an abuse of process.

Issues:

(1) whether a fair minded lay observer might reasonably have apprehended from what occurred in the interlocutory applications made before trial that the trial judge might not bring an impartial and unprejudiced mind to the resolution of the issues in the trial;

(2) whether the parties alleging a reasonable apprehension of bias were prevented from making that complaint in an appeal against the final judgment because they did not seek, before the trial began, to appeal against the trial judge's refusal to recuse himself; and

(3) whether the institution and/or prosecution of proceedings in the Supreme Court constituted an abuse of the process of the Supreme Court.

Held: allowing the appeal and remitting the matter to the Court of Appeal for further consideration of grounds of appeal not yet determined and for determination of MWP's cross appeal:

(1) an allegation of apprehended bias required an objective assessment of the connection between the facts and circumstances said to give rise to the apprehension and the asserted conclusion that the judge might not bring an impartial mind to bear on the issues to be decided. An allegation of apprehended bias did not direct attention to, or permit consideration of, whether the judge had in fact prejudged the issue: at [67];

(2) the Court of Appeal was wrong to take into account the reasons for judgment published after the trial in deciding whether in this case there was a reasonable apprehension of bias: at [68];

(3) the fact that Einstein J made several ex parte interlocutory orders and on each occasion directed that those applications, the material in support the reasons for making the orders, and the orders themselves, not be disclosed to one side of the litigation did not found a reasonable apprehension of prejudgment of the issues to be fought at trial: at [70];

(4) in none of the applications was Einstein J required to make, or made, any determination of any issue to be decided at trial; in none of the applications was it necessary to make any finding about the reliability of any party or witness, or to make any choice between competing versions of events; and neither the hearing nor disposition of any of the ex parte applications could found a reasonable apprehension of prejudgment of the credit of those who gave evidence in support of the applications: at [72], [73];

(5) whether failure to seek leave to appeal against a refusal of an application that a judge not try the case precluded maintenance of the complaint in an appeal against the final judgment would require consideration of whether the failure to seek that leave was reasonable. That would require examination of all the circumstances, which would ordinarily include the stage the proceedings had reached and the consequences that would follow from leaving appellate determination of the issue of disqualification until after trial: at [84];

(6) the common starting point for all the arguments that there was or would be an abuse of process was that MWP's claims against the respondents in the Supreme Court were limited by the nature and extent of the relief it sought and obtained in the arbitration of its claims against Mr Emmott. That premise was flawed, and accordingly neither the institution nor the prosecution to judgment of the claims against the respondents as knowing assistants of Mr Emmott would be an abuse: at [109]; and

(7) the fact that the same transactions and events were the subject of two separate proceedings in different forums might raise a question about abuse of the process of one or other of those forums, but did not lead inexorably to the conclusion that there was an abuse. There was no abuse in this case: at [110].

- **NSW Court of Appeal**

Hoxton Park Residents Action Group Inc v Liverpool City Council [2011] NSWCA 349 (Giles, Basten and Macfarlan JJA)

(related decision: *Hoxton Park Residents Action Group Inc v Liverpool City Council* [2010] NSWLEC 242 Biscoe J)

Facts: the applicant challenged the validity of a development consent for the erection of a school on land owned by the Australian Federation of Islamic Councils Inc. Access to the school was to be via an undeveloped road which required a bridge across a public reserve and waterway. The bridge was not assessed as part of the development application but was to be assessed later under Pt 5 of the *Environmental Planning and Assessment Act* 1979 ("EPA Act"). A condition of consent required that the bridge be constructed and the access road completed before the grant of an occupation certificate. The construction of the bridge would require the clearance of about 998m² of bushland, largely comprising an endangered ecological community ("EEC"). A notice of the grant of development consent was published by the Council in a local newspaper on 8 July 2009. At first instance, Biscoe J held that the Council had failed to consider the likely environmental impacts of the bridge, and that no relief was available as the proceedings had not been commenced within three months of the publication of the notice as required by s 101 of the EPA Act. The appellant appealed against the finding that the notice published by the Council was effective and valid, and the Federation of Islamic Councils Inc and school sought to uphold the primary judge's conclusion on the ground that the application should have been dismissed on the merits.

Issues:

(1) whether the notice of the grant of development consent was valid; and

(2) whether the development consent was invalid.

Held: allowing the appeal, setting aside the orders and remitting the proceedings for determination of the appropriate relief:

(1) the notice did not include the words "during office hours", either alone or with a specification of the relevant hours, and did not comply with the requirements of cl 124(i)(c) of the Environmental Planning and Assessment Regulation 2000: at [17], [19]-[20];

(2) the notice was not given "in accordance with the regulations" and therefore did not trigger the commencement of the limitation period in s 101, and as a result the proceedings were not out of time: at [29];

(3) there was no error in the findings that the Council did not consider the impact of the construction of the bridge as part of its consideration of the development application, or that at the time of consent it was likely that the bridge would be constructed: at [40], [41];

(4) the same environmental impacts of a development might need to be considered separately in the exercise of separate powers. Once it was found that a particular activity was a likely impact of the development for which approval was sought, the impacts flowing from that activity could only be excluded from consideration in the development application if s 79C(1)(b) of the EPA Act could be read as excluding environmental impacts which had been or were likely to be considered in relation to a separate development application required for that activity: at [53];

(5) the conclusion that the likely impacts of the school development included the likely impacts of the construction of the bridge on the EEC and that the failure to take into account such impacts invalidated the consent was correct: at [56].

Leda Manorstead Pty Ltd v Chief Commissioner of State Revenue [2011] NSWCA 366 (Allsop P, Campbell and Whealy JJA)

(related decision: *Leda Manorstead v Chief Commissioner of State Revenue* [2010] NSWSC 867 Gzell J)

Facts: the appellant ("Leda") purchased 593ha of land in northern NSW known as Cobaki in 1995. At the time of acquisition there were two development applications lodged relating to the land, one for bulk earthworks and the other for a 730 lot urban subdivision, and both were granted. Leda intended developing the land in accordance with further development consents it anticipated applying for and obtaining, and further development applications for an additional 990 lot urban subdivision and associated bulk earthworks were made up to 2000. In 2004 the scale and intensity of the earthworks expanded and Leda had expended $8M by the year ended 30 June 2004, a further $4.5M in the year ended 30 June 2005, and $1.2M in the year ended 30 June 2006 on improvement to the land for subdivisional development. At the

same time as the earthworks and other associated activity for anticipated construction of residential buildings was taking place Leda conducted cattle grazing operations on the land, which included sales in 2005 and 2006 years of 121 head of cattle. The cattle trading statement for the period 1 July 2005 to 30 June 2006 showed a closing stock value of $92,750. Leda challenged the assessment issued in February 2006 by the respondent for land tax. Section 10AA of the *Land Tax Management Act* 1956 ("the Act") exempted land from taxation if it is "land used for primary production". Subsection 10AA(3)(b) defined as "land used for primary production" land "the dominant use of which" was for "maintenance of animals… for the purpose of selling them…". Leda appealed from the finding of the primary judge that as at 30 December 2005 the use of the land was for commercial redevelopment of the land and Cobaki was not land used for primary production within s 10AA(3)(b).

Issues:

(1) whether it was open to conclude that the land was used for commercial land redevelopment; and

(2) whether the use of cattle grazing was the dominant use of the land.

Held: dismissing the appeal:

(1) none of the elements of the meaning of "use" required a conclusion that use must involve productive return to be present use: at [23];

(2) section 10AA required that there be a present use for which the land was being used. The fact that the land was at the stage of earthworks did not deny the present use of the land for commercial land redevelopment, and the overall evaluation of the use for which Leda was putting the land, as commercial land development or residential development, was correct: at [24], [25];

(3) considering s 10AA in its place in the Act, it was not to be understood as a statutory encouragement for primary production, and there was no requirement to approach the matter in some beneficial fashion: at [28];

(4) Leda was using the land for two purposes, cattle grazing and commercial land development, and the question was whether the former was the dominant use so as to attract or satisfy s 10AA(3): at [40];

(5) the primary judge had correctly approached the evaluative task in comparing and weighing the competing uses of the land, and his conclusion that the land was not land the dominant use of which was for cattle production within s 10AA(3)(b) was correct: at [43]–[44].

Huntlee Pty Ltd v Sweetwater Action Group Inc; Minister for Planning and Infrastructure v Sweetwater Action Group Inc [2011] NSWCA 378 (Beazley JA, Sackville, Tobias AJJA)

(related decision: *Sweetwater Action Group Inc v Minister for Planning* [2011] NSWLEC 106 Biscoe J)

Facts: Sweetwater Action Group Inc challenged the validity of the amendment of the State Environmental Planning Policy (Major Development) 2005 ("MD SEPP") which brought a proposed large scale residential development on 1702ha of land in the Lower Hunter region within Part 3A of the Environmental Planning and Assessment Act 1979 ("the Act"), thereby conferring power on the Minister to grant approval to the development. Most of the land was owned by Huntlee Pty Ltd ("Huntlee"). On 3 December 2010 the Minister, Huntlee, the Minister for Climate Change and Environment, and the other owner of part of the site, had entered into an agreement requiring payment of Development Contributions ("the 2010 Agreement"). The primary judge held that the decision of the Minister to recommend that the Governor amend the MD SEPP ("the Recommendation Decision") was invalid on the grounds that he had failed to comply with the conditions in cl 6(1)(b) and 6(2) of State Environmental Planning Policy No 55 Remediation of Land ("SEPP 55") which required that a "planning authority" consider whether a site was contaminated and whether remediation was necessary, and that the Minister had taken into account an irrelevant consideration, namely that the 2010 argument was a voluntary planning agreement made in conformity with s93F of the Act. The primary judge held that the invalidity of the Recommendation Decision rendered the amendment of the MD SEPP ("the MD SEPP Amendment") void.

Issues:

(1) whether the primary judge had erred in concluding that the MD SEPP Amendment was invalid by reason of non-compliance with cl 6 of SEPP 55; and

(2) whether the 2010 Agreement was an irrelevant consideration.

Held: allowing the appeals and setting aside the orders made:

(1) a Ministerial recommendation to make a SEPP is an exercise of executive power: at [93];

(2) there was nothing in the Act that lead to the conclusion that the making of a "valid" Ministerial recommendation was a necessary precondition to the Governor exercising the power to make a SEPP. The power under s 37(1) was conditional only on the advice of the Executive Council and the additional statutory requirement for the SEPP to be "for the purpose of environmental planning by the State": at [95];

(3) whatever the effect of a failure to comply with cl 6 of SEPP 55 on the Recommendation Decision, the consequence was not that the MD SEPP Amendment was invalid: at [96];

(4) there was nothing in s 26 of the Act that could be construed as conferring power on the Governor to make SEPPs that curtailed or constrained the Governor's power to make a subsequent SEPP without following the procedures laid down in the earlier SEPP. Accordingly, even if the MD SEPP Amendment was made without complying with the procedures laid down by cl 6 of SEPP 55, the latter SEPP was not thereby rendered invalid: at [99];

(5) in any event, cl 6 of SEPP 55 did not render the Recommendation Decision invalid, as the Minister was not a "planning authority" as defined in s 145A of the Act for the purposes of cl 6 of SEPP 55: at [105]–[107];

(6) section 93F(3)(g), which requires that a planning agreement provide for "the enforcement of the agreement by a suitable means", did not specify a jurisdictional fact or a matter to be determined objectively by a court, and the Minister was entitled to form the view that the 2010 Agreement incorporated a suitable means for enforcement of the obligations to make the Development Contributions: at [124]; and

(7) the 2010 Agreement, objectively considered, provided a suitable means of enforcement: at [143].

D'Anastasi v Environment, Climate Change & Water NSW [2011] NSWCA 374 (Campbell and Young JJA, Sackville AJA)

(related decision: *D'Anastasi v Environment Protection Authority & Anor* [2010] NSWLEC 260 Pain J)

Facts: the appellant challenged the validity of a notice issued by an authorised officer of the Environment Protection Authority ("EPA") under s 193 of the *Protection of the Environment Operations Act* 1997 asking questions concerning events in the management of land owned by the appellant's mother, and requiring records relating to the use of pesticides at or on the premises on a range of specified dates. The EPA had commenced an investigation in response to reports of dead birds on the land in February and March 2010. Section 193 enables the issue of a notice requiring a person to furnish "such information or records (or both)" as the officer requires "in connection with any matter within the responsibilities and functions" of the regulatory authority. The primary judge held that the notice was valid. The notice had to be complied with by a period of 10 business days after the first instance decision, early in January 2011. If the basis for the issue of the notice was the sighting of dead birds between 26 February and 2 March 2010, the time for prosecution had passed.

Issues:

(1) whether the appeal had become spent; and

(2) whether the notice was authorised by s 193.

Held: allowing the appeal with costs:

(1) while the decision was not likely to affect other cases directly the principal questions being dealt with on the appeal would effectively define the limits of the power to issue notices calling for information, and it was permissible for the court to determine the appeal: at [28], [104];

(2) the notice did not comply with s 193(1) because it did not identify a matter of the kind contemplated by s 193(1). The notice did not identify a matter within the responsibilities and functions of the regulatory authority, in connection with which the information was required: at [55], [105];

(3) it was doubtful that s 193, on its proper construction, authorised notices that could require the recipient to make enquiries of third parties with whom that recipient had no relevant association: at [109].

Macquarie Generation v Hodgson [2011] NSWCA 424 (Whealy and Meagher JJA, Handley AJA)

(related decisions: *Gray v Macquarie Generation* [2010] NSWLEC 34 ("Gray No 1")); *Gray v Macquarie Generation (No 3)* [2011] NSWLEC 3 (Pain J) ("Gray No 3")

Facts: Macquarie Generation ("Macquarie") is a State owned corporation that operates Bayswater Power Station at Muswellbrook. Macquarie holds a licence authorising the generation of electricity from burning coal. The licence was issued by the EPA under s 55 of the *Protection of the Environment and Operations Act* 1997 ("the Act").

The applicant bought proceedings under s 252(1) of the Act seeking relief in respect of the emission of carbon dioxide (CO_2) from Bayswater as the wilful disposal of waste contrary to s 115(1).

Macquarie sought to have the proceedings summarily dismissed and in Gray No 1 most points of claim were struck out. In Gray No 3 the applicant was granted leave to file a further amended summons and points of claim. Only two claims remained and it was held that they were reasonably arguable, namely that there may be an implied condition in the licence preventing Macquarie from emitting CO_2 in excess by exercising reasonable care for the interests of other persons and the environment. It was alleged that this level had been exceeded creating an offence under s 64(1) of the Act.

Macquarie sought leave to appeal from this interlocutory decision.

Issues:

(1) whether there was an implied condition in the licence limiting the emission of CO_2 under s 64(1);

(2) whether CO_2 is waste within s 115(1) and, if so, whether Macquarie had a defence of lawful authority under s 115(2); and

(3) whether there was an implied condition in the licence limiting the consumption of coal to 7 million tonnes per year.

Held: granting leave to appeal, allowing the appeal and dismissing the applicant's amended summons:

(1) to determine if there is any implied conditions in the licence is an exercise in its interpretation: at [55]. Applying the principles of contract interpretation, for a condition to be implied in the licence it must be necessary, obvious, clear and consistent with the express terms of the licence: at [61]. There were no express conditions in the licence limiting electricity generation, coal consumption or CO_2 emissions. The licence was relevantly unrestricted and there were no implied terms necessary to make it effective, apart from implying a term in the licence permitting Macquarie to emit CO_2, otherwise the licence to burn coal would be ineffective: at [63]–[64]. Therefore the implied condition should be rejected, disposing of the claim under s 64(1): at [65].

(2) as there was no implied condition limiting CO_2 emissions, it was not necessary to determine if CO_2 is waste within s 115(1): at [68]; and

(3) the alleged implied condition limiting the consumption of coal was based on information in an environmental impact statement ("EIS") submitted in 1980 to the local Council as part of the original development application of Macquarie's predecessor. While s 45(1) required the EPA to consider any relevant EIS in connection with an application for a licence, the Act does not provide for automatic

incorporation of any or all of an EIS, in a licence. That there is no express condition limiting coal consumption is a decision for the EPA, not the Court: at [69]–[75].

- **NSW Supreme Court**

MM Constructions (Aust) Pty Ltd v Port Stephens Council (No 6) [2011] NSWSC 1613 (Johnson J)

Facts: the first plaintiff was the owner of a site in Church Street Nelson Bay and the second plaintiff, Mr Maruncic, was sole director and shareholder of the first plaintiff. The Port Stephens Council ("the council") had granted development consent in May 2000 for the erection of two five storey residential buildings on the site, with a maximum height of 15.7m above natural ground level, with the concurrence of the Director General of the Department of Planning as required under cl 58(1) of the Hunter Regional Environmental Plan 1989 for a building over 14m. Work commenced in May 2002. In March 2003 a stop work order was placed on the development following complaints by the owner of an adjoining property, who thereafter obtained an injunction prohibiting further work; that injunction was lifted in December 2004. Between 2001 and 2005 the council approved 8 modification applications in respect of the site, which included increases in the height. In 2002 and 2005 the council approved development applications for three other sites on Donald Street Nelson Bay, including one with a maximum height of 17m. Mr Maruncic sought to increase the height and number of units of his development in order to make his development viable, and in February 2006 lodged an application under s 96 of the *Environmental Planning and Assessment Act* 1979 ("the Act") to modify the development consent. During the course of the council's consideration of the modification application Mr Maruncic lodged a number of amended plans, which were advertised and exhibited, and he contacted councillors to obtain support for the modification application. The council's Development Co-ordinator, Ms Gale, sought legal advice including on the issue of whether the proposed modifications could be dealt with under s96, and sought concurrence from the Department of Planning ("the Department") for the increase in height. By the time of the refusal of the modification application in July 2007 the first plaintiff was in default and the mortgagee had taken possession of the site in November 2006.

The plaintiffs sought damages for misfeasance in public office and negligence relating to the council's consideration of the modification application. The plaintiffs claimed that they were subjected to a protracted process whereby the council purported to consider the application on its merits although Ms Gale had formed a predetermined view that it ought to be refused, and that but for the tortious conduct of the council they would have built and sold apartments on the site with resulting profits between $2.2 and $3.7million.

Issues:

(1) whether the plaintiffs had established the ingredients of the deliberate or intentional tort of misfeasance in public office; and

(2) whether the defendant owed the plaintiffs a duty of care with respect to the processing of the s 96 application which duty was breached.

Held: giving verdict and judgment for the defendant, with costs:

(1) the council and its officers were entitled if not obliged to consider closely the application lodged in February 2006, and the process was protracted for a number of reasons, not the least being the fairly regular changes to the plans advanced by the plaintiffs: at [244];

(2) the processing of the application was delayed to some extent by consideration as to whether concurrence of the Department was required. While viewed in hindsight the answer to that question might be considered to be a clear one, the processes undertaken in 2006 and 2007 including the legal advice obtained by Ms Gale and statements in correspondence from the Department suggested that the position was far from clear at the time. The fact that Ms Gale was seeking independent legal advice on the question did not sit comfortably with a conclusion that she intended to cause harm to the plaintiffs: at [245];

(3) this was not a case where officers of the council in some way encouraged the plaintiffs to proceed down the s 96 pathway in the expectation that the application would be favourably received, nor was it

a case where once the application was lodged the plaintiffs were encouraged by Ms Gale to persist with suggestions that a favourable outcome was on the horizon: at [247];

(4) the evidence fell short of demonstrating that Ms Gale suppressed relevant information concerning the height of other developments from the councillors: at [254];

(5) Ms Gale was the holder of a public office for the purposes of the tort of misfeasance in public office. Even if an officer of the council is not exercising planning functions as a delegate, the officer with day to day management of the application undertakes a significant role in gathering and evaluating material for the purpose of a decision made by a council: at [270];

(6) Ms Gale was concerned about the height and density issues arising from the s 96 application, but remained open to persuasion to a contrary view, with the plaintiffs having an ample and extended opportunity to do so over several months: at [304];

(7) at any time after 27 March 2006 the plaintiffs could have commenced proceedings in the Land and Environment Court, taking the process away from the defendant and Ms Gale and they did not do so: at [308];

(8) although the expert planners and Ms Gale touched on different approaches on the part of town planners working for councils as to the way in which a s 96 application might be progressed, no witness expressed the opinion that it was either appropriate or necessary for a council to tell an applicant what it would accept so that the applicant could then submit exactly that: at [317];

(9) the plaintiffs had not established that Ms Gale intended to cause harm to them in her involvement with the s 96 application and had not established that element of the tort of misfeasance in public office: at [321];

(10) insofar as the case for misfeasance in public office was said to arise from recklessness on the part of Ms Gale, her seeking independent legal advice in April 2006, October 2006 and April 2007 stood in the way of a finding in the plaintiffs' favour on that issue: at [323];

(11) the ability of the plaintiffs to appeal to the Land and Environment Court under s 96(6) supported a construction that a council does not owe an enforceable duty of care to an applicant to assess an application promptly: at [331];

(12) it had not been demonstrated that the plaintiffs were vulnerable in the relevant sense to be owed a duty of care by the council. The plaintiffs were able to protect themselves from the consequences of a lack of reasonable care by taking legal advice, and retaining a planner to advance their case, as they did, and (should they wish) by appealing to the Land and Environment Court: at [335], [336];

(13) even if a duty of care arose, the plaintiffs had not established a breach of such a duty: at [340];

(14) the evidence did not support a finding that the conduct of the council's staff was of a character that was so unreasonable that no reasonable authority with like power could properly consider the acts and omissions to be a reasonable exercise of the power as required by ss 43 and 43A of the Civil Liability Act 2002: at [342].

- **Land and Environment Court of NSW**

Judicial Review

Moorlaben Coal Mines Pty Ltd v Director-General of the (former) Department of Industry and Investment NSW (Agriculture Division) [2011] NSWLEC 191(Moore AJ)

Facts: Moorlaben Coal, having been granted an exploration licence over large tracts of land under the *Mining Act* 1992 ("the Act"), made a subsequent application for a mining lease under the Act. A portion of

the land the subject of the mining lease application was owned by the third respondent, Ulan Coal Mines, who objected to the mining lease application on the basis that the land was "agricultural land".

The Director-General of the Department of Primary Industries' Agriculture Section determined that certain areas of land the subject of the mining lease were "agricultural land", having regard to an expert's report submitted by Ulan Coal and briefing notes prepared by departmental officers who inspected the site.

The applicant challenged the determination of the Director-General.

Issues:

(1) whether the applicant was denied procedural fairness; and

(2) whether the Director-General failed to address the question of whether the land was "agricultural" as at two relevant dates.

Held: upholding the appeal:

(1) the applicant had an interest that attracted procedural fairness, a special position recognised by the Act as it had obtained an exploration licence and made significant investments to which the licence related: at [35] and [36];

(2) while the applicant was not entitled to the expert's report commissioned by Ulan Coal, it was denied procedural fairness by not being notified of when the objection was before the Director-General so that it could submit such material as was relevant: at [44] and [45]; and

(3) the Director-General failed to address whether the land was "agricultural land" at two relevant dates, namely, the dates when the application for the exploration licence and when the mining lease were made: at [61].

Tuscany Farm Holdings Pty Limited and Alextor International Pty Limited v Hawkesbury City Council [2011] NSWLEC 190 (Sheahan J)

Facts: this was a hearing on a preliminary question of law that would be determinative of a Class 1 merits appeal. The Council had refused the development application ("DA") that first, proposed an additional use of the subject site, namely, the "*manufacture and packaging of dog food products (dog biscuits)*", and secondly, sought approval for "*rural industry and formalisation of unauthorised buildings"*, some of which required upgrading. Pain J in an earlier judgment related to this matter (*Tuscany Farm Holdings v Hawkesbury City Council* [2011] NSWLEC 18), characterised the question for determination before the Court as whether the proposed development could be classified as "*industry*" and was therefore prohibited in the zone of the subject site – a Mixed Agricultural Zone – under the Hawkesbury Local Environmental Plan 1989 ("LEP"). However, the question was recharacterised at the hearing on the basis that the LEP definition of "*industry*" excluded a definition of "*rural industry*".

Issues:

(1) whether the proposed development could be taken to comprise "*handling, treating, processing or packing of primary products*".

Held: at least one proposed use of the land went beyond the definition of a "*rural industry*", and the proposed use therefore became prohibited under the LEP:

(1) a "*primary product*" does not retain its character after processing and it was not correct to break down the elements of "*handling, treating, processing or packing*": at [103]–[105];

(2) the major inputs in the proposed process were no longer "*primary products*" when they came to be mixed with the other ingredients and then handled, treated, processed and packaged: at [106]; and

(3) regardless of whether the reasoning in (2) was found to be incorrect, the proposal was more accurately characterised as "*industry*" rather than "*rural industry*" because the way in which the "*primary products*" were handled, treated, processed and packaged was more akin to a "*manufacturing*" activity: at [107].

Lester v Minister for Planning [2011] NSWLEC 213 (Moore AJ)

Facts: the second respondent ("Ashton") conducts coal mining under a consent given in 2002 by the first respondent ("the Minister"). Ashton lodged an application to modify this consent in February 2011 under Part 3A of the *Environmental Planning and Assessment Act* 1979 ("the Act"). The modification request sought the construction of 15 surface gas drainage wells to facilitate the ventilation of gas for the safety of the mining operation.

The Department of Planning consulted with public authorities, in particular the Office of Environment and Heritage ("OEH") in relation to issues of Aboriginal cultural heritage assessment. The OEH responded by stating it was not able to recommend conditions of consent due to inadequacies in the information provided. Ashton subsequently provided additional information concerning the potential for the construction and operation of the gas wells to impact on Aboriginal cultural heritage.

A deficient link on the Department's website caused the information provided in relation to the environmental assessment only contained appendices 5-8 of Ashton's modification application.

The Planning Assessment Commission ("PAC"), as a delegate of the Minister, subsequently approved the modification subject to additional conditions requiring Ashton to avoid impacting the identified Aboriginal cultural heritage sites, objects and potential archaeological deposits.

Issues:

(1) whether the request to modify the major project failed to comply with s 75W and the regulations;

(2) whether the Minister failed to consider that the gas wells were to be constructed on areas not documented;

(3) whether the failure to make all appendices publicly available was in breach of s 75 (2)(a) and (f) of the Act;

(4) whether the decision failed to have regard to the public interest in relation to greenhouse gas emissions and Aboriginal heritage; and

(5) whether the condition regarding the placement of gas wells was uncertain.

Held: in dismissing the application with costs;

(1) there is no provision within the Act that requires the notation of the date on the application, or a provision that provides there is no power to approve an application without the notation: at [35];

(2) there was insufficient evidence that Aboriginal heritage sites identified in earlier documentation were not revealed in later documents advanced and there was no failure to consider this topic: at [39];

(3) an interested member of the public could have contacted the identified departmental officer and asked for the missing appendices whilst noting the problems with the deficient link: at [53];

(4) it can be inferred from the PAC's determination report to the department, that it had considered Ashton's assessment of greenhouse gas emissions: at [62];

(5) the PAC clearly had regard to the issues of Aboriginal heritage as it had imposed conditions relating to the issue: at [66]; and

(6) leaving the task to Ashton of determining the precise location of gas wells but constrained by the condition was not outside the statutory scheme: at [71].

Haughton v Minister for Planning and Macquarie Generation; Haughton v Minister for Planning and TRUenergy Pty Ltd [2011] NSWLEC 217 (Craig J)

Facts: the applicant sought judicial review of a decision by the Minister to make a critical infrastructure declaration pursuant to the *Environmental Planning and Assessment Act* 1979 ("EPA Act") and then to approve Concept Plans in relation to two new power stations in NSW.

Issues:

(1) whether there was jurisdiction to entertain the proceedings having regard to the provisions of s 75T of the EPA Act;

(2) whether the Minister complied with the requirements of s 75C of the EPA Act when making the critical infrastructure declaration;

(3) whether, when granting the Concept Plan Approvals, the Minister failed to consider mandatory relevant considerations, namely ecologically sustainable development and anthropogenic climate change, as an element of the public interest;

(4) whether, when granting the Concept Plan Approvals, the Minister failed to enquire into the principles of ecologically sustainable development and the impact of the projects on climate change;

(5) whether the Minister misconceived the nature of his functions under s 75O of the EPA Act by disregarding the impacts of the proposals on climate change on the understanding that such consideration fell within the responsibility of another entity of the State or an entity of the Crown in right of the Commonwealth; and

(6) whether the determination to grant the Concept Plan Approvals was so arbitrary, illogical and unreasonable that no decision-maker in the position of the Minister would have so exercised the power.

Held: summons dismissed:

(1) the applicant was afforded standing to bring proceedings by operation of s 123 of the EPA Act. Further, s 75T of the EPA Act does not oust the jurisdiction of this Court to have those issues determined at the instance of the applicant where the challenge is made on grounds of jurisdictional error. If the applicant's standing was not sustained by s 123 of the EPA Act, he nonetheless had standing at common law. His interest was sufficiently "special" by reason of the importance of his concern with, and the closeness of relationship to, the subject matter of the proceedings; at [101]–[102];

(2) the language of the Minister's critical infrastructure declaration closely reflected the language of subsection (1) of s 75C. It was clear from the terms of the subsection that it is a category of project which, in the opinion of the Minister, possesses the requisite qualities of essentiality. Once that opinion was formed in respect of a category then any project that falls within the category may be the subject of the declaration. The declaration was validly made: at [109]–[122]; and

(3) the decisions of the Minister to grant Concept Plan Approvals were made within the legal boundaries set by these provisions of Pt 3A of the EPA Act for such approvals. Application of those provisions did not compel a particular result. Material was provided to the Minister upon which he could consider competing elements of the public interest including the security of the supply of electricity in this State. There was plausible evidence before him of the need for additional electricity generation plants that, absent their provision, could have threatened the security of supply. Equally, he was provided with material sufficient for the purpose of approving Concept Plans for each of two power stations to permit an understanding of the possible adverse environmental consequences that implementation of those concepts might have. The weighing of those potentially competing considerations was a function that the statute called upon him to exercise. In performing that function he did not exceed the power that he was given. Whether a contrary decision was available on the materials before the Minister was not a matter that identified legal error: at [226]–[227].

INL Group Limited v Director-General of the New South Wales Department of Planning [2011] NSWLEC 256 (Pepper J)

Facts: INL Group Limited ("INL") challenged a refusal to issue a site compatibility certificate by the Director-General ("the DG") for the development of a retirement village. The DG had a broad discretion to issue or refuse a certificate under the State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 ("the SEPP"). In support of its challenge, INL sought to rely on an expert report of Mr Garry Warnes, a town planner instructed to undertake a review of the documents submitted to the DG. The DG

objected to the entirety of the report on the basis that it was irrelevant and opinion evidence or, alternatively, sought to have the report excluded under s 135 of the *Evidence Act* 1995 on the basis that it was likely to mislead, confuse or result in undue waste of time.

Issues:

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

(2) whether the DG took into account irrelevant considerations;

(3) whether the DG failed to take into account mandatory relevant considerations;

(4) whether there was no evidence before the DG that the proposed development would degrade the environmental values of the site; and

(5) whether the decision of the DG was manifestly illogical or unreasonable.

Held: dismissing the amended summons with costs:

(1) the Court refused to admit the report of Mr Warnes into evidence because ordinarily in judicial review proceedings evidence of material that was not before the decision-maker at the time the decision was made is irrelevant and inadmissible; the report engaged with the merits of the decision; the report was coloured by intemperate and inflammatory language that was likely to mislead; the report consisted of a series of observations that Mr Warnes was unqualified to make; the report depended on material not before the decision-maker; and the report amounted to a submission on behalf of INL: at [31]–[39];

(2) the adverse impact of the proposed development on the biodiversity and habitat of the site was not an irrelevant consideration because it was not "unsubstantiated opinion" given the reference in INL's application to the site providing foraging for "possums, gliders, Koalas and bats". Further, the adverse impact on the habitat of the site was relevant given cls 25 and 26 of the SEPP: at [44]–[46]. The fact that the DG did not specify what the "key habitats" impacted by the development were did not make the consideration of them irrelevant: at [56];

(3) the Draft Vegetation Management Plan was not an irrelevant consideration given the criteria in cls 25 and 26. The fact that the Plan was in draft form did not alter the relevance of the mapping of the site or its identification as a site of high conservation value: at [47]–[48];

(4) the DG's reliance on aerial mapping of the proposed development site to draw the conclusion that conservation values of nearly the whole site were affected by the development was not an irrelevant consideration because the mapping together with the plans for the development suggested that the area for the proposed development was extensive and that an unspecified amount of vegetation would need to be cleared, which was relevant in light of cl 25(5)(b)(v)(i) of the SEPP: at [55];

(5) the lack of bush fire hazard reduction was not an irrelevant consideration, it was relevant in the context of how much vegetation would need to be cleared on the site: at [59];

(6) the DG did not fail to consider the mandatory relevant consideration of the existing uses and approved uses of the land in the vicinity of the site. A detailed review of the report to the DG revealed that the DG had engaged in an active intellectual process of considering the issue: at [70];

(7) it was mandatory for the DG to have regard to the services and infrastructure that were, or would be, available to meet the demands arising from the proposed development (cl 25(5)(b)(iii) of the SEPP). The DG considered this issue by relying on the material provided by the council and the material in INL's application. INL's complaint that the council's advice that reticulated water and sewer was not available to the site was factually incorrect was not a matter that could invalidate the decision of the DG: at [71]–[76];

(8) the DG did not fail to consider whether the substantial amount of vegetation that would need to be cleared was "native vegetation" within the meaning of the *Native Vegetation Act* 2003 because it could be inferred from the report, given the textual context of the report's conclusion as to the amount of vegetation to be cleared and the reference in the report to cl 25(5)(b)(vi) of the SEPP: at [78];

(9) there was ample evidence before the DG to conclude that the proposed development would degrade the significant environmental values of the site: at [83];

(10) the decision of the DG was not manifestly unreasonable. INL could not point to a sufficiency of erroneous factual findings to warrant it being characterised as such: at [88];

(11) further, there was no reviewable illogical or irrational reasoning process on the part of the DG that warranted the Court's intervention: at [92]; and

(12) the DG was not under a duty to make further inquiries in circumstances where INL simply failed to provide a sufficiency of material that would warrant a favourable decision: at [96].

South East Forest Rescue Inc v Bega Valley Shire Council [2011] NSWLEC 250 (Preston CJ)

Facts: on 14 June 2011, Bega Valley Shire Council ("the council") granted development consent to South East Fibre Exports Pty Ltd ("SEFE") for the installation of a pilot wood pellet manufacturing plant at the site of SEFE's existing woodchip mill. The applicant commenced judicial review proceedings challenging the development consent.

Issues:

(1) whether the council failed to consider and form the required mental state of satisfaction that the development was consistent with the objectives of the relevant zone under cl 8(3) the Bega Valley Local Environmental Plan 2002 ("the LEP");

(2) whether the council failed to consider all of the submissions made by members of the public objecting to the development;

(3) whether the council failed to consider the principles of ecologically sustainable development ("ESD") in the LEP or as an element of the public interest; and

(4) whether the council failed to consider anthropogenic climate change as an element of the public interest.

Held: upholding the appeal and declaring the development consent invalid:

(1) the council neither took into consideration the relevant objectives of the zone, nor formed the required mental state of satisfaction that the development was consistent with those objectives: at [92]. Most of the documents in the council's file were not provided to the councillors and no councillor requested to look at, or did look at, the documents in the file: at [95]. Nothing in the council officer's reports to the council meetings drew the councillors' attention to the need to be satisfied that the development was consistent with the zone objectives: at [101]. The council did not satisfy the precondition in cl 8(3) of the LEP. Therefore, it had no power to grant consent to the development and the exercise of power was invalid: at [125]–[126];

(2) the council was bound to, but failed to consider all public submissions under s 79C(1)(d) of the *Environmental Planning and Assessment Act* 1979 ("EPA Act"): at [134], [138], [150]. A council officer summarised the submissions in his reports to the council meetings. However, neither of these reports raised the issues of consistency of the development with the zone objectives or the application of the principles of ESD to the development raised in the submissions: at [142]. The councillors did not look at the section 79C assessments prepared by the council officer, and even if they did, those documents did not expressly identify these issues raised in the submissions: at [146]–[147];

(3) the council failed to take into consideration the principles of ESD, both in terms of cl 79 of the LEP and as an element of the public interest under s 79C(1)(e) of the EPA Act, because none of the material considered by the council at its meetings addressed ESD: at [158], [163]; and

(4) even if it was assumed that the council was obliged to consider the effect of the development on anthropogenic climate change as an element of the public interest, the applicant did not establish that the council failed to consider the issue. Both downstream and upstream impacts were addressed in the council officer's reports to the council meetings and in oral addresses at one of the council meetings: at [170], [184].

Dooralong Residents Action Group Pty Limited v Wyong Shire Council [2011] NSWLEC 251 (Pain J)

Facts: the Dooralong Residents Action Group Pty Limited ("the applicant") sought a declaration under s 123 of the *Environmental Planning and Assessment Act* 1979 ("EPA Act") that the approval of a development application lodged on behalf of the Salvation Army (NSW) Property Trust ("the Salvation Army") was invalid. The development application sought approval for a change of use for the site from "tourist accommodation" to "hospital", being a Salvation Army Recovery Centre. The applicant argued that properly characterised, the proposed use of the site was not for the purposes of a "hospital" but for one of the prohibited purposes of "housing for … people with a disability" or "boarding house" or "commercial premises". As these uses are prohibited within the Scenic Protection Zone in the Wyong Local Environmental Plan 1991 ("the LEP"), the applicant argued that the Wyong Shire Council ("the Council") did not have power to grant development consent and it was therefore invalid. The LEP definition of "commercial premises" specifically excluded "a building or place elsewhere specifically defined" in the definitions clause and therefore excluded a hospital.

Issues:

(1) whether the proposed use of the site was wholly or partially for the prohibited uses of "housing for … people with a disability" or "boarding house"; and

(2) whether the proposed use of the site was for the innominate use of "hospital" or the prohibited use of "commercial premises".

Held: summons dismissed:

(1) the description of the proposed use in the development application is not determinative of the characterisation of a development: at [94]–[98];

(2) the LEP definitions were intended to be mutually exclusive. It was important to consider the site as a whole and not break the use of the site into separate components: at [105];

(3) the applicant failed to establish that properly characterised the proposed use of the site was for the prohibited purpose of "housing for … people with a disability": at [118]. The purpose of the definition was housing and the purpose of the proposed use was to treat participants of the Bridge Program and accommodate them for the duration of their treatment lasting up to ten months: at [108], [112]. The evidence did not suggest that the site would used be for permanent housing/residential accommodation and persons with addictions were not considered disabled persons for the purposes of the definition: at [109]–[117];

(4) the applicant failed to establish that properly characterised the proposed use of the site was for the prohibited purpose of "boarding house": at [123]-[124]. Characterisation of the proposed use as a boarding house was too broad as it did not cover the Salvation Army's treatment activities which were the significant component of the proposed use: at [120]. The purpose of the definition of "boarding house" from a town planning perspective was housing, which was not the purpose of the proposed use: at [121]. The participants of the Bridge Program were not considered residents for the purposes of the definition: at [122]; and

(5) the proposed use satisfied the definition of "hospital" in the LEP. It was a building or place used to provide professional health care services in the form of counselling, preventative or convalescent care, medical treatment and services provided by health care professionals. The Salvation Army's evidence was that the program attempts to change the way participants live through abstinence and spiritual support and that all the services provided on site have a therapeutic base. These were to be provided to participants who had been screened and admitted as inpatients: at [126]–[138]. As the definition of "commercial premises" excluded a hospital, the proposed use could not fall within that definition: at [125].

Objector Appeals

Ironstone Community Action Group Inc v NSW Minister for Planning and Duralie Coal Pty Ltd [2011] NSWLEC 195 (Preston CJ)

Facts: Duralie Coal Mine is an existing open-cut coal mine about 10km north of Stroud within the Mammy Johnsons River catchment. On 26 November 2010, the Minister granted approval to extend the existing open-cut pit under Part 3A of the *Environmental Planning and Assessment Act* 1979 ("EPA Act"). The extension project would involve clearing an additional 207 ha of native vegetation. Approval was granted subject to conditions, including a biodiversity offset strategy. Ironstone Community Action Group Inc ("Ironstone") opposed the extension and appealed the approval under s 75L of the EPA Act. At the hearing, objectors from the local community also raised concerns about the unacceptable impacts of noise and dust.

Issues:

(1) whether the potential impacts on habitats of threatened species and biodiversity in general would be adequately mitigated by the proposed biodiversity offset;

(2) whether potential impacts on water quality and water flow would be adequately mitigated;

(3) whether potential impacts on the Giant Barred Frog, a threatened species, would be adequately mitigated;

(4) whether the extension would have unacceptable health impacts from small-sized particulate matter (PM 2.5) generated by the project; and

(5) whether the proposed measures to avoid noise impacts from mining operations and coal trains and dust emissions from coal trains were adequate.

Held: upholding the appeal and granting approval subject to extensive conditions:

(1) the extension project would impact individuals of the Varied Sittella by clearing of their habitat. The requirement to avoid clearing in the breeding season should be imposed as part of the Vegetation Clearing Plan: at [66];

(2) adverse impacts on other threatened species would be unlikely: at [50], [55], [58], [62], [69], [75], [80], [84], [85], [88], [90], [92];

(3) the revision of the biodiversity offset strategy, including expanding the number and extent of offset areas, ensuring greater correlation of vegetation communities in offset areas and cleared areas, including performance standards, and providing greater specificity in the conditions of approval, addressed many of the ecology issues: at [94]–[100], [104]–[107], [108];

(4) additional safeguards, consistent with a precautionary approach, should be incorporated in the conditions of approval (at [113]), including: surveys and an evaluation of the biodiversity values of the vegetation in both the offset area and the area to be cleared (at [114]); better integration of the biodiversity offset strategy with other strategies, plans and programs under the conditions of approval (at [115]); and greater specificity in providing long-term security of the offset area: at [116];

(5) with the revised offset strategy proposed and the revised conditions of approval amended by the court to include additional safeguards, there would be gains in the conservation of biodiversity and the relevant threatened species of sufficient magnitude to compensate for the loss of vegetation: at [117];

(6) water quality impacts could be adequately mitigated including by: prohibiting the discharge of mine water directly into Mammy Johnsons River (at [139]); specifying performance criteria for investigating any potentially adverse impacts on water quality, for an expanded range of contaminants (at [145]); and requiring ecotoxicity testing (at [154]); adding a monitoring point (at [160]); and requiring an automated first flush system: at [164];

(7) with appropriate conditions of approval, including a long-term study, the extension project would not be likely to impact adversely on the local Giant Barred Frog population: at [182]–[183];

(8) the revised conditions of approval would ensure that the impacts on air quality and human health would be acceptably small: at [187], [202], [204];

(9) there should be a requirement to implement additional noise mitigation measures at residences affected by rail traffic noise: at [216]–[218]; and

(10) a new condition of approval should require the study of dust emissions from laden coal trains and enable the Director-General to direct the proponent to implement additional dust mitigation measures: at [220]–[221].

Hunter Environment Lobby Inc v Minister for Planning [2011] NSWLEC 221 (Pain J)

Facts: on 15 November 2010 the Minister for Planning ("the Minister") conditionally approved Ulan Coal Mines Ltd's ("Ulan") major project application under the now repealed Pt 3A of the *Environmental Planning and Assessment Act* 1979 ("EPA Act") to consolidate its development consents into a single approval for a further 20 years and to expand its mining operations at Ulan by way of longwall and open cut mining ("the project"). This included increasing its production rate from 10 million tonnes of coal a year ("Mtpa") to 20 Mtpa. Hunter Environment Lobby Inc ("the applicant"), an objector, appealed against the decision under s 75L of the EPA Act and originally sought refusal of the project due to its environmental impacts on water, loss of biodiversity and the level of greenhouse gas emissions produced. Later the applicant sought refusal of the project because of the long-term impacts on groundwater unless conditions were imposed requiring replenishment of groundwater and greater offsetting of baseflow losses. It also proposed conditions to ameliorate impacts on biodiversity and impacts of scope 1 and 2 greenhouse gas emissions, that is, emissions which were a direct consequence of carrying out the project's activities and emissions resulting from diesel and electricity use by the project.

Issues:

(1) what was the scope of the Court's power to impose conditions under s 75J of the EPA Act if approval was granted, particularly in relation to the offsetting of greenhouse gas emissions;

(2) whether the offset of scope 1 and 2 greenhouse gas emissions should be required;

(3) whether the base flow losses to the Talbragar and Goulburn Rivers that were deemed "negligible" by the Director-General of the Department of Planning should be given a quantitative definition;

(4) whether the condition requiring the offset of base flow losses should specify that water licences should be retired permanently;

(5) whether the undisputed long-term impact on groundwater sources justified refusal of the project, or alternatively, whether Ulan should be required to remediate groundwater sources; and

(6) whether the impact on biodiversity required a greater offset area to be protested in perpetuity.

Held: approval should be granted to the project subject to amended conditions to be drafted by the parties:

(1) the power to impose conditions on a project approval conferred by s 75J(4) of the EPA Act is wide and included imposing a condition that retained practical flexibility leaving a choice as to the means by which an outcome or objective was to be met for the proponent: at [82]–[87];

(2) a condition requiring Ulan to offset scope 1 emissions should be imposed because it was within the scope and purpose of the power conferred by s 75J and was directly related to the impacts of the project: at [93]. By contrast, a condition requiring the offsetting of scope 2 emissions ought not to be imposed as these were not emissions that Ulan could entirely control: at [94];

(3) the Minister's advice on a definition of "negligible" was necessary before a condition was finalised on offsetting of base flow losses: at [170]–[171];

(4) the parties needed to redraft the condition to specify that water licences should be purchased and retired unless Ulan could provide alternative proposals for other methods of offsets within specified timeframes: at [172];

(5) the long-term groundwater impacts did not justify refusal of the project. The imposition of a condition requiring remediation of groundwater was not warranted given the general nature of the concerns raised by the applicant and the absence of any clear information that remediation was, or may become, practical and feasible: at [166]; and

(6) greater connectivity was required between the designated offset areas: at [262]–[276]. The parties' experts needed to define a biodiversity corridor linking the offset areas before approval was granted: at [277].

Casson v Leichhardt Council [2011] NSWLEC 243 (Biscoe J)

Facts: the council proposed to dedicate land in Balmain as a public road, pursuant to s 16 of the *Roads Act* 1993 ("the Act"). The subject land was an old system title cul-de-sac situated between several Torrens title lots. The land had been marked as a "lane" in an 1871 plan of subdivision, which gave rise to a presumption that the land had been dedicated to the public as a public road. However, the lane gave the visual impression of being private property, in that it was unnamed, had been paved and landscaped by the adjoining neighbours and was cut off from the general roadways by a closed gate. Decades of correspondence between the Council and the various adjoining owners past and present demonstrated a large degree of uncertainty, from all involved, as to the lane's true ownership. Section 17 of the Act allows an "owner" of the land intended for dedication to seek a declaration that the land should not be so dedicated. The applicant, an adjoining owner, claimed that she owned the lane, or part thereof, and that the Court should exercise its discretion to grant a declaration.

Issues:

(1) whether the applicant was an "owner" of the lane within the meaning of the Act, so as to have standing to seek the declaration. The following issues were relevant to ownership:

(a) whether the applicant could not own the lane because the lane had become a public road at common law by virtue of common law dedication prior to 1920;

(b) whether, if common law dedication had not occurred, the applicant owned the lane to its middle line by virtue of the middle line rule; or alternatively,

(c) whether the applicant owned the lane in its entirety by adverse possession; and

(2) if the applicant did own the land, or part thereof, whether the Court should issue a declaration that the lane should not be declared a public road.

Held: declaring that the road ought not to be dedicated:

(1) common law dedication requires the fulfilment of two conditions, which by statute must have occurred before 1920: the owner of the land offering to dedicated the land as a public road and acceptance of the proffered dedication. There was no common law dedication of the subject lane prior to 1920: at [61]–[73];

(2) the applicant owned the lane to its middle line by virtue of the middle line rule: at [14], [74]–[86]; and the alternative adverse possession claim failed:[87]–[91].

Compulsory Acquisition

Al Amanah College Inc v Minister for Education and Training [2011] NSWLEC 189 (Biscoe J)

Facts: the applicant secured development consent for the establishment of an Islamic private school for 1,200 students on land at Bass Hill, in the Bankstown local government area ("the land"). Shortly before construction was scheduled to commence the applicant was notified that the Minister was to acquire the land for public education purposes. The applicant objected to the amount of compensation offered pursuant to s 66 of the *Land Acquisition (Just Terms Compensation) Act* 1991 ("the Just Terms Act").

Issues:

(1) by which method, on the agreed basis that the land's highest and best use was as an Islamic private school, should market value of the acquired land (as adjusted) be determined:

(a) exclusively by comparison with a 2010 sale of nearby land to a company associated with the applicant that intended to develop the land for the purposes of the same Islamic private school ("the Chester Hill site"); or

(b) by comparison with sales of a number of school sites on the urban fringes of northwest Sydney; or

(c) by determining the land's residential value, which, on the respondent's argument, equated to the value of the land on its highest and best use as a private Islamic school; and

(2) whether, if the market value of the land were to be determined by reference to the land's residential value, that value should be determined on the basis of a medium density residential development, or the higher density model proposed by the applicant;

(3) whether land with potential for school use commands a premium over the price willing to be paid by the residential development market;

(4) consideration of the meaning of "complement" within the relevant local environmental plan;

(5) whether offers for comparable sales that did not result in a concluded contracts for sale were relevant;

(6) whether the subjective intention of the purchasers and bidders of the Chester Hill site were relevant;

(7) whether a valuation obtained by the Chester Hill site's mortgagee was relevant; and

(8) whether structures on the Chester Hill site should be attributed a positive value based on their value as an improvement, or a negative value based on the costs of their demolition having regard to the purchase of the land for use as an Islamic private school.

Held: determining compensation for market value at $10,885,000:

(1) in light of the various applicable planning controls and policies, a hypothetical buyer and seller at the resumption date would perceive that there was a prospect of achieving the higher density model proposed by the applicant, but that securing that development consent would carry a substantial risk. That level of risk was more appropriately reflected in a bottom up premium of 20% over the land's medium density residential value, than a top-down discount: at [66]–[68];

(2) a zone objective relevant to the land required development to "complement" the single dwelling suburban character of the area. "Complement" in this context required that the development fit in, go with, or supplement appropriately or adequately the single dwelling character of the area: at [50]–[51];

(3) the sale of the Chester Hill site was the best available comparable: at [139];

(4) evidence of offers for part of the Chester Hill site were relevant, but of less weight than evidence of concluded sales: at [73] and [95];

(5) the valuation obtained by the Chester Hill site's mortgagee and the Valuer-General's valuation should be given little, if any, weight because the authors of those documents had not complied with the Expert Witness Code of Conduct (Uniform Civil Procedure Rules 2005 r 31.23), participated in joint expert conferencing, given sworn evidence or been cross-examined. In cases where expert valuation witnesses are called, this type of evidence is generally only relevant to the historical background, non-contentious facts, and any admissions made by the parties: at [110]–[111];

(6) to the extent that the Islamic or private school market would view structures on the land as useless, no value should be attributed to those structures and the cost of demolition should be deducted. The residential improvements on the Chester Hill site were of no value to the school market beyond their rental value on a temporary basis. Despite evidence that the actual purchaser of the Chester Hill site intended to demolish the non-residential improvements, those improvements would have been of value to the school market. That value was their depreciated value: at [115], [121]–[122] and [124]–[128]; and

(7) the subjective development intention or purpose of a purchaser or offeror in relation to a comparable sale is generally irrelevant except insofar as it evidences that there were special circumstances which effect the comparability of the sale: at [116].

Al Amanah College Inc v Minister for Education and Training (No 2) [2011] NSWLEC 254 (Biscoe J)

(related decisions*: Al Amanah College Inc v Minister for Education and Training* [2011] NSWLEC 189 Biscoe J; *Al Amanah College Inc v Minister for Education and Training (No 3)* [2011] NSWLEC 258 Biscoe J)

Facts: the applicant owned land at Bass Hill, which it intended to develop for the purpose of a private Islamic school. In July 2009 the Minister notified the applicant of an intention to compulsorily acquire the land. By this point in time the applicant had incurred substantial expenses towards developing the land as a school, including securing development consent. The Court determined the market value of the land, in accordance with the *Land Acquisition (Just Terms Compensation) Act* 1991 ("JT Act") in the sum of $10,885,000: *Al Amanah College Inc v Minister for Education and Training* [2011] NSWLEC 189 (Biscoe J). Due to extenuating circumstance the applicant's claims under ss 55, 57 and 59 of the JT Act for disturbance and alternatively special value were referred, pursuant to Pt 20 r 14 of the Uniform Civil Procedure Rules 2005 ("UCPR"), to a court appointed referee (a retired judge of the Court). The referee found that most of the claims were compensable as disturbance loss pursuant to ss 55(d) and that it was unnecessary to consider the alternative claim for special value under s 57. The applicant and respondent moved, to varying degrees, to have parts of report adopted and others rejected.

Issue:

(1) whether the referee's report should be adopted in whole or in part, or varied.

Held: adopting the referee's report:

(1) pt 20 r 24 of the UCPR empowers the Court to adopt, vary or reject a referee's report in whole or in part. Discussion of the legal principles governing the exercise of the Court's discretion to adopt, vary or reject a referee's report: at [9];

(2) legal costs compensable under s 59(a) of the JT Act do not include legal costs incurred to prevent acquisition. Even if such costs were claimable, the applicant failed to prove the necessary causal link: at [27]–[28];

(3) the referee did not reverse the onus of proof by noting that there had been neither damaging cross examination nor tenable evidence to suggest the "administrative fees" claimed as legal costs were not reasonable: at [21]–[23];

(4) the referee did not err in determining that there was "actual use" of the land as at the date of acquisition. Although the school was not operational, there was actual use of the land including the removal of fences; geotechnical work; enrolment of students; and the employment of teachers: at [36]–[44];

(5) the referee was correct to allow the applicant's claim under s 59(f) for abortive expenditure. Abortive expenditure, which does not improve the value of the land, and thus does not sound in market value, may be compensable under s 59(f). Where the dispossessed owner enters into contractual obligations prior to being notified of the compulsory acquisition and the amounts payable or paid pursuant to those obligations are converted into wasted or aborted expenditure by the compulsory acquisition, the costs are incurred, at that moment, as a direct and natural consequence of the acquisition: at [49], [52]–[55];

(6) the terms of s 59(f) do not contemplate whether a "cost" claimed gives the dispossessed owner a collateral benefit to the value to other land it may own. Once an applicant proves that the cost incurred was a "direct and natural consequence of the acquisition", as required by the terms of s 59(f), the onus shifts to the respondent to establish that if the Court were to compensate the applicant for that cost, the applicant would be overcompensated, thus the Court should adjust the amount of compensation in light of the s 54 just compensation override. The respondent did not discharge that onus: at [59]–[60]; and

(7) the referee did not err in valuing the s 59(f) cost of the demountable classrooms on a construction cost, rather than depreciated cost basis: at [64]–[65].

Bligh v Minister Administering the Environmental Planning and Assessment Act [2011] NSWLEC 220 (Biscoe J)

Facts: the Minister compulsorily acquired the rear part of three adjoining parcels of land at Leppington ("the land") on which a meat processing, wholesaling and piggery business was conducted ("the business"). The land was owned by the first and second applicants who owned and controlled the third applicant, Erolhold Pty Ltd, the operator of the business. The applicants objected to the amount of compensation offered by the Minister under the *Land Acquisition (Just Terms Compensation)* Act 1991 ("the Act");

Issues:

(1) whether the value of the business was compensable as disturbance loss under s 59(f) of the Act for the assumed extinguishment of business was its value to the owner or its market value as at the acquisition date;

(2) under the capitalisation of future maintainable earnings valuation method, what was the proper determination of the future maintainable earnings, the capitalisation rate and the years multiple.

Held: determining compensation for disturbance at $1,350,000:

(1) the disturbance loss for extinguishment of the business was its value to the owner. That was the unifying concept of resumption compensation legislation prior to the Act: at [77];

(2) s 55 exhaustively specifies the matters to which regard must be had when determining compensation, subject to the just compensation override in ss 3(1)(b) and 54, the guaranteed minimum compensation of market value of the acquired land in ss 3(1)(a) and 10(1)(a), the market value disregard in s 56, and the market value limitation in s 61: at [70];

(3) the future maintainable earnings, the capitalisation rate and the years multiple were determined: at [116],[135]; and

(4) the value to the owner exceeded market value as at the acquisition date by 25%: at [140].

Contempt

Sydney City Council v Sydney Tool Supplies Pty Ltd & Daniel Bek (No 2) [2011] NSWLEC 196 (Sheahan J)

(related decision: *Daniel Bek v Sydney City Council; Sydney City Council v Sydney Tool Supplies Pty Ltd & Daniel Bek* [2008] NSWLEC 262 Sheahan J)

Facts: a hearing was held to determine whether Mr Bek was fit to enter a guilty plea in 2009 (after entering an earlier plea of not guilty in 2008) and to stand trial for contempt of court for breach of orders to cease operating a carwash café. A psychiatric/psychological assessment was conducted in April 2009 at the request of Mr Bek's then solicitor, and doubts were raised about his fitness to plead and to stand trial while the case was part heard. Mr Bek underwent some psychometric testing in October 2009. Meanwhile the carwash café continued to operate and Mr Bek failed to appear at the majority of the hearing dates set by the Court, and for several appointments made for his further assessment. A warrant was issued for his arrest on 17 May 2011. Mr Bek was brought before the Court on 29 June 2011, provided surety, obtained a grant of Legal Aid, and underwent further assessment by experts on both sides.

Issues:

(1) whether the *Mental Health (Forensic Provisions) Act* 1990 ("the Act") applied to proceedings in the Land and Environment Court of NSW;

(2) whether Mr Bek was fit to change his plea to "guilty" in 2009; and

(3) whether Mr Bek was still fit to plead guilty and to stand trial for the breach of the 2008 orders so that the sentencing hearing, adjourned part heard in May 2009, could continue.

Held: Mr Bek was fit to plead and to stand trial:

(1) following the decision in *Director-General, Department of Environment, Climate Change and Water v Source & Resources Pty Limited; Alexander; Gordon Plath of the Department of Environment, Climate Change and Water v Source & Resources Pty Limited; Alexander* [2010] NSWLEC 235 and *Director-General, Department of Environment, Climate Change and Water v Source & Resources Pty Limited; Alexander (No 2); Gordon Plath of the Department of Environment, Climate Change and Water v Source & Resources Pty Limited; Alexander (No 2)* [2011] NSWLEC 87, and in the absence of an alternative proposed by either party, the Act did not apply and the Court had to follow the principles established at common law. These principles stated that:

   (a) a trial cannot proceed if there may be unfairness or injustice on the grounds of some mental impairment, unless a court is able to make adjustments to the conduct of the proceedings which will truly overcome any unfairness: at [32]–[33]; and

   (b) the trial must be suspended and an "inquiry" conducted on an inquisitorial, rather than an adversarial, basis into the question of fitness: at [34]; and

(2) the experts' evidence at the final hearing on the question of fitness was unanimous and Mr Bek was fit to change his plea to guilty in 2009 and remained fit for the sentencing hearing: at [67]-[69].

Environment Protection Authority v Ramsey Food Processing Pty Ltd (No 4) [2011] NSWLEC 246 (Sheahan J)

(related decisions: *Environment Protection Authority v Ramsay Food Processing Pty Ltd* [2010] NSWLEC 150 Sheahan J; *Environment Protection Authority v Ramsay Food Processing Pty Ltd (No 2)* [2010] NSWLEC 175 Sheahan J; *Environment Protection Authority v Ramsay Food Processing Pty Ltd (No 3)* [2011] NSWLEC 180 Sheahan J; *Environment Protection Authority v Ramsay Food Processing Pty Ltd* [2010] NSWLEC 23 Biscoe J)

Facts: the defendant Company had been convicted of committing a pollution offence. Instead of imposing a fine, the court ordered a mandatory audit of the offending abattoir and the placement of public advertisements. About 12 months later, the Company was found guilty of contempt of those orders, and this judgment dealt with the question of conviction and penalty. In order for the court to come to a conclusion on those questions, it was first necessary to establish whether the Company was solvent during the period in which it was to comply with the orders. The Company did not appear at any of the four hearings, but it had appeared, and been represented, in earlier class 5 proceedings in this court (before Biscoe J), as well as in Class 1 proceedings and Federal Court proceedings concerning the abattoir.

Issues:

(1) whether the prosecutor's evidence could prove beyond reasonable doubt that the Company was not insolvent, and was therefore able to, but chose not to, comply with the orders; and

(2) if the Company was solvent and thus guilty of contempt, whether that contempt was contumacious.

Held: the Company was convicted of contempt and ordered to pay a fine in the amount of $300,000 as well as the prosecutor's costs on an indemnity basis. It was found that:

(1) the evidence demonstrated that the Company could have paid, but chose not to pay, the amounts required by the earlier orders: at [100];

(2) the Company's contempt was deliberately defiant and therefore contumacious, and should be regarded at the upper end of seriousness: at [101];

(3) the court inferred that the failure of the Company to comply with the earlier orders of the court was for the financial gain of the Company, a related entity, or the ultimate beneficial owners of the Company: at [103]; and

(4) the court was required to strongly denounce the Company's conduct, and sentence in the interests of specific and general deterrence: at [105].

Criminal

Plath v Vaccount Pty Ltd t/as Tableland Timbers [2011] NSWLEC 202 (Pepper J)

Facts: Vaccount Pty Ltd trading as Tableland Timbers ("Tableland Timbers") pleaded guilty to an offence that it damaged vegetation on or in land reserved under the *National Parks and Wildlife Act* 1974 ("the Act") contrary to s 156A(1)(b) of the Act. The vegetation that was damaged comprised 503 trees and other vegetation in the Guy Fawkes River National Park ("the national park"). Tableland Timbers was aware that the private property on which they were engaged to carry out logging bordered the national park, but did not make any attempt to locate the survey markers already in place along the boundary; to remark the boundary; or to use the GPS equipment and map.

Issue:

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

Held: Tableland Timbers was convicted of the offence and fined $73,000. Tableland Timbers was also ordered to pay the prosecutor's legal costs of $47,100 and investigation costs of $2,900:

(1) objectively, the offence was of moderate gravity. The removal of, and damage to, vegetation within the national park was incompatible with the purpose of reserving land and with the objects of the Act. There was actual and potential environmental harm caused by the unlawful clearing of moderate seriousness. Tableland Timbers had control over the causes of the offence and there were practical measures available to it to prevent the harm, namely, the map and/or the GPS equipment could have been used to locate and mark the national park boundary, or the survey markers already in place along the boundary could have been located, before logging commenced. Tableland Timbers could readily have foreseen the harm caused or likely to be caused by the offence. The offence was not committed for commercial gain: at [63]–[90] and [103]–[112];

(2) the offence was committed negligently, not recklessly. This was because Tableland Timbers was aware that the private property bordered the national park and did not make any attempt to locate the survey markers already in place, to remark the boundary, or to use the GPS, but it held the honest belief that it was not harvesting in the national park at the time of the commission of the offence: at [99]–[102];

(3) subjectively, no aggravating factors were applicable. There were several mitigating factors, including that Tableland Timbers: had no prior convictions; provided assistance to the authorities; pleaded guilty at an early stage; expressed contrition and remorse; and agreed to pay the prosecutor's costs: at [115]–[126];

(4) specific deterrence was of very minor consideration in the determination of an appropriate penalty because the offence was an isolated incident for a company that had, until the commission of the offence, operated faultlessly: at [128]; and

(5) general deterrence was a necessary factor to take into account because Tableland Timbers was able to derive a profit from its unlawful clearing and the imposition of a fine must deter other companies from seeking a similar profit by trespassing into national parks: at [130].

Environment Protection Authority v Port Stephens Council [2011] NSWLEC 209 (Craig J)

Facts: the Council was charged with an offence against s 48(2) of the *Protection of Environment Operations Act* 1997 ("the POEO Act") in that from about 1 July 1999 to 7 July 2008 it occupied premises at which a scheduled activity was carried on and, at the time the activity was carried on, it did not hold a licence that authorised that activity to be carried on at those premises. It pleaded guilty to the offence on the third occasion the matter was listed before the Court.

Issues:

(1) consideration of sentencing principles, including any objective circumstances or mitigating factors; and

(2) the appropriate sentence to be imposed.

Held: the defendant was convicted of the offence and fined $40,000:

(1) the site was a disused quarry. It was used by the Council to store materials intended to be recycled and also used non-recyclable material for filling with the intention of using the site for another public purpose. The material used for both purposes was from roadworks, pavement works and drainage works. The site constituted a waste facility within the meaning of Schedule 1 to the POEO Act: at [5];

(2) although actual environmental harm occurred over the course of the charge period and there was the potential for environmental harm, it was accepted by the prosecutor that the harm was at the low end of the scale. The offence was not deliberate but was a result of the failure of the Council to address the proper management of the site and also its statutory obligations. The Council could reasonably have foreseen the harm, had control over the causes and could have taken practical measures to prevent the offence: at [47]–[60];

(3) subjectively, there were no aggravating circumstances. There were several mitigating factors: s 21A(3) of the *Crimes (Sentencing Procedure) Act* 1999. The defendant had no prior convictions. The defendant expressed contrition and remorse. It completed an environmental audit of all its sites and had already taken steps to implement the measures recommended in it. Expressions of contrition and remorse took several forms. These included evidence from the General Manager and a detailed resolution of the Council itself: at [63]–[75]; and

(4) a fine of $40,000 was imposed. This figure reflected a discount of 20% for the defendant's early plea of guilty and other mitigating circumstances. In fixing this sum it was also taken into account that the Council agreed to pay the prosecutor's costs in the sum of $44,000 and investigation costs of $27,000. A publication order was also made against the defendant under s 250(1)(a) of the POEO Act: at [84]–[85].

JJ and ABS Investments Pty Limited v Environment Protection Authority [2011] NSWLEC 199 (Craig J)

Facts: JJ and ABS Investments Pty Ltd ("JJ and ABS") sought leave to appeal against the sentence imposed in the Local Court for an offence against cl 9(1) of the Protection of the Environment Operations (Clean Air) Regulation 2002 pursuant to s 33(1) of the *Crimes (Appeal and Review) Act* 2001 ("the Review Act"). Leave to appeal was sought because JJ and ABS' summons for leave was filed 60 days later than the time within which it was entitled to bring an appeal as a right pursuant to s 31 of the Review Act. JJ and ABS was the owner of a diesel truck that had been observed emitting black smoke. JJ and ABS was issued with a penalty infringement notice ("PIN") for $400. JJ and ABS disputed that the offence had been committed and Mr McMahon, a director of JJ and ABS, made representations on its behalf to the Office of State Revenue. The matter was determined by the Local Court and JJ and ABS was fined $8000. On appeal, JJ and ABS submitted that Mr McMahon's representations were only intended to exculpate JJ and ABS from liability to pay the fine, and therefore, the fine should be $400 or, alternatively, that a notice under s 161 of the *Protection of the Environment Operations Act* 1997 ("the POEOA") requiring the owner of the vehicle to repair the vehicle would have been more appropriate than a fine. JJ and ABS adduced evidence of its constrained financial position.

Issues:

(1) whether leave to appeal should be granted pursuant to s 33(1) of the Review Act;

(2) whether the penalty payable under the PIN or the mechanisms under s 161 of the POEOA were relevant to the determination of sentence; and

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

Held: allowing the appeal:

(1) it was in the interests of justice to grant leave to appeal because the delay in filing the appeal was due to it initially being filed erroneously in the District Court: at [4];

(2) the penalty payable under the PIN and the mechanisms under s 161 of the POEOA were not relevant to the determination of the sentence by the Court: at [25];

(3) the offence was of low objective gravity. The environmental harm occasioned, or likely to be occasioned, by the commission of the offence was relatively minor. However, the Court noted that in aggregate the emissions from individual diesel vehicle exhausts in the Sydney region were responsible for the lack of air quality in the region. There were practical measures available to JJ and ABS to control the emissions from its vehicle, namely, it could have got the truck serviced. Further, it could have reasonably foreseen the harm: at [26]–[27];

(4) the offence was not committed intentionally because Mr McMahon believed that he had carried out adequate maintenance on his vehicle and that it was unlikely that his vehicle was the cause of the emissions that had been observed: at [29];

(5) subjectively there were no aggravating factors applicable to JJ and ABS. The factors mitigating the penalty to be imposed included the fact that JJ and ABS had no prior convictions and that the environmental harm occasioned by the offence was not substantial: at [31]; and

(6) having regard to the objective and subjective factors of the offence and JJ and ABS' financial position, and applying the provisions of s 6 of the *Fines Act* 1996, the appropriate penalty to be imposed was a fine of $2000: at [37].

Hurstville City Council v Naumcevski [2011] NSWLEC 226 (Pepper J)

Facts: Mr Naumcevski pleaded guilty to an offence against s 125(1) of the *Environmental Planning and Assessment Act* 1979 ("the EPAA"), namely, that he carried out excavation works without development consent contrary to s 76A(1)(a) of the EPAA. The excavation was carried out on land to which a development consent for alterations and additions to an existing residential dwelling located on the land had been granted by Hurstville City Council ("the council"), but for which no construction certificate had been issued. The development consent did not permit the extent of excavation work carried out by Mr Naumcevski. The excavation totalled 109m². In his affidavit Mr Naumcevski stated that he had inspected the council approved plans and that the reason the unlawful excavation was carried out was because the plans were unclear and that "in order for the plans to result in a workable development" further excavation beyond that which was depicted was required. In his oral evidence, however, Mr Naumcevski resiled from this explanation stating that he was not aware that the excavation had taken place; that at the time the excavation took place it was not the case that the architectural plans were unclear to him; that his affidavit was no more than a reconstruction of what had occurred after the event; and that he had told the owner to obtain all relevant approvals for the works to be carried out.

Issues:

(1) whether the Court should rely on the written evidence of Mr Naumcevski, his oral testimony or neither in determining the appropriate sentence; and

(2) in considering the objective circumstances of the offence and the subjective circumstances of Mr Naumcevski, what was the appropriate sentence.

Held: Mr Naumcevski was convicted of the offence, fined $14,000 and ordered to pay the prosecutor's costs as agreed or assessed:

(1) the Court rejected the oral evidence of Mr Naumcevski. This was because his affidavit deposing to his state of mind at the time the excavation works were being carried out was incompatible with his oral testimony that he was not aware that the excavation had taken place and the language used in his affidavit did not support his explanation that it was a reconstruction of what had occurred after the event. Further, the fact that significant evidence to the effect that he was not aware of the excavation

and that he had told the owner to get all relevant approvals had been omitted from his affidavit suggested that it was a recent fabrication by Mr Naumcevski: at [36];

(2) the offence was of low objective gravity. In coming to this conclusion the Court considered that: the unlawful excavation offended against the legislative objectives of the EPAA; no actual harm was caused to the environment; the offence undermined the planning controls under the EPAA; the offence was not committed for financial gain; the harm caused or likely to be caused by the commission of the offence was reasonably foreseeable; Mr Naumcevski had complete control over the causes that gave rise to the offence because he was the principal builder on the site and the person responsible for hiring and supervising tradespeople; and there were practical measures available to Mr Naumcevski to prevent the harm, namely, he could have ensured that development consent had been obtained before commencing the excavation works and he could have made enquiries to clarify any ambiguity in the plans: [42]–[50] and [57]–[63];

(3) Mr Naumcevski committed the offence recklessly. This was because Mr Naumcevski believed that the plans for the development were not clear, but proceeded with the excavation anyway in order for the plans to result in a "workable development": at [55]–[56];

(4) subjectively, there were no aggravating factors applicable to Naumcevski. The factors mitigating the penalty to be imposed included that: he had no prior convictions; he had provided assistance to the authorities; he had pleaded guilty at an early stage; and he had agreed to pay the prosecutor's costs. Mr Naumcevski also expressed contrition and remorse in his affidavit but this was not given full weight because he had resiled from his written evidence under cross-examination: [66]–[71];

(5) it was a matter of prosecutorial discretion as to which jurisdiction proceedings were commenced. The prosector did not abuse his discretion by commencing proceedings in Class 5 of the Court's jurisdiction, and therefore, the fact that the proceedings were not commenced in the Local Court was not a mitigating factor: at [76];

(6) general deterrence was a necessary factor to take into account in the imposition of a penalty in order to ensure that others engaged in the building trade did not carry out unapproved works: at [82]; and

(7) specific deterrence was also a necessary factor to take into account in determining the appropriate penalty because of Mr Naumcevski's eagerness to depart from his sworn written testimony during his oral evidence in an attempt to deflect blame from himself: at [84].

Wakool Shire Council v Garrison Cattle Feeders Pty Ltd (No 2) [2011] NSWLEC 224 (Sheahan J)

(related decision: *Wakool Shire Council v Garrison Cattle Feeders Pty Ltd* [2010] NSWLEC 199 Sheahan J)

Facts: the defendant Company pleaded not guilty to using the subject land for the purpose of a waste facility without lawful authority, and denied that it had "*stored, treated, processed, sorted, or disposed of*" general waste, silage wrap and paunch on the land, so as to contravene s 144(1) of the *Protection of the Environment Operations Act* 1997 ("the Act"). The prosecutor did not allege that waste had been sorted on the land. The Company used the land as part of one lot comprising 1600 acres in Coonamit, in the southwest of NSW. A Council inspection was conducted on 16 January 2008, and later, on 10 November 2008, a mound was excavated on the site. The alleged offence was, therefore, charged as having taken place between those dates.

Issues:

(1) whether "*paunch*" was present on the land and could be defined as "*waste*" for the purpose of the Act and the Protection of the Environment Operations (Waste) Regulation 2005;

(2) whether the court could accept the evidence of the Council officers Williams and Thomas, and the environmental auditor Dr Thornton;

(3) whether the Company's use of the land for the storage and disposal of some material buried in pits amounts to use of the land to dispose of only "*farm waste*";

(4) whether the land was used "*for the purpose of a waste facility*" because of the conduct of a third party; and

(5) whether the characterisation of "*paunch contents*" is relevant to the determination of whether the site was used as a waste facility.

Held: the Council had failed to prove that the Company committed the alleged offence. The parties were directed to consult with each other and the Registrar to have the matter re-listed for a hearing to determine final orders and costs. It was found that:

(1) "*paunch*" is the stomach of an animal, that is comprised of "*material*" holding "*contents*", which are a by-product of slaughtering and can be combined with other substances to make fertiliser for pastures: at [39];

(2) the evidence given by the Council officers did not amount to deliberate untruthfulness, but their evidence could not wholly be relied upon. The expert evidence of Dr Thornton was accepted, but found, in some areas, to fall short of satisfying the court beyond reasonable doubt: at [138]–[139];

(3) the offending materials that were found on the site were deliberately buried (at [146]), and could be described as silage wrap and paunch, but could not be classified as "*general waste*". Rather, the materials buried were more accurately described as "*farm waste*": at [143]–[144];

(4) there was no evidence to demonstrate that the Company could be held to account for the acts or mistakes of an employee of another company, and the court was not taken to any relevant authorities to support such a submission: at [156]; and

(5) "*paunch contents*" could not be characterised as waste (at [166]), and the modest quantities of that and other materials did not bring the use of the land within the definition of a "*waste facility*": at [172].

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

(related decisions: *Director General, NSW Department of Industry and Investment v Mato Investments Pty Ltd* [2010] NSWLEC 56 (Preston CJ); *Director General, NSW Department of Industry and Investment v Mato Investments Pty Ltd (No 2)* [2010] NSWLEC 196 (Biscoe J); *Director-General, NSW Department of Industry & Investment v Mato Investments Pty Ltd (No 3)* [2011] NSWLEC 34 (Pain J))

Facts: in 2009 the Director-General of the Department of Industry & Investment ("the prosecutor") commenced Class 5 proceedings against Mato Investments Pty Ltd ("Mato"), two of its directors, Mr Bennett and Mr Ceman, and its project manager, Mr Coomes, for four offences each. Mato held development consent for an eco-tourist resort on Kunanadgee, near Corowa and work in relation to this commenced in October 2007. The prosecutor alleged that the defendants committed three offences against s 220ZD of the *Fisheries Management Act* 1994 ("FM Act") between 5 and 16 October 2007 in that they did an act causing damage to habitat of an endangered ecological community ("EEC"), the endangered species of trout cod, and the vulnerable species of silver perch, knowing that the areas concerned were habitat of that kind. The relevant habitat was the waterways in, on, or adjacent to the property including the Murray River, an unnamed creek located on the property, and the Big River Billabong. Mato was charged with instructing a contractor to carry out works on the land including removal of snags and woody debris from the waterways through its directors and project manager. The prosecutor relied, inter alia, upon the conclusive presumption in s 220ZD(2)(b) of the FM Act that the defendants knew the land concerned was habitat of the kind protected if it was established that the act or omission was a failure to comply with a development consent. The contractor responsible for snag removal was to be a witness for the prosecutor and was given immunity from prosecution but did not attend the hearing and was not contactable. The defendants were also charged with an offence under s 125 of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act") of carrying out development forbidden by s 76A(1)(b) of the EPA Act because the removal of the snags and woody debris from the waterways contravened condition 16 of the development consent. The defendants pleaded not guilty to all offences. During the hearing it emerged that two notices of determination of development consent were issued by the Corowa Shire Council ("the council") for the same development.

Issues:

(1) in relation to the three offences under s 220ZD of the FM Act, whether the prosecutor proved beyond reasonable doubt that:

(a) snag removal occurred in the offences period (element 1);

(b) habitat of the EEC, trout cod and silver perch were present at the site at the time of the offences and removal of snags from the Murray River including the Big River Billabong and the unnamed creek during the offences period caused damage to the habitat of the EEC, trout cod and silver perch (element 2);

(c) the defendants caused the contractor to remove the snags the subject of the offences (element 3); and

(d) the defendants had knowledge about the presence of the relevant habitats (element 4); and

(2) in relation to the offence under s 125 of the EPA Act, whether the prosecutor proved beyond reasonable doubt that a development consent was in force during the offences period and that condition 16 was breached as a result of the snag removal carried out at Kunanadgee.

Held: the prosecutor did not prove all elements of the offences beyond reasonable doubt:

(1) in relation to the three offences under s 220ZD of the FM Act:

(a) element 1 was proved. The prosecutor firmly established that a very large quantity of snags was removed in the offences period from the Murray River, including the Big River Billabong, and from the unnamed creek: at [95]–[98];

(b) element 2 was proved. The Murray River, including the Big River Billabong, and unnamed creek were habitat for the EEC, trout cod and silver perch: at [142], [153] and [156]. Damage to habitats of the EEC, trout cod and silver perch were caused by the snag removal in the offences period: at [169];

(c) element 3 was not proved against Mr Bennett or Mr Coomes but was proved against Mr Ceman and Mato:

(i) The prosecutor was responsible for calling all available material witnesses unless there were good reasons for not doing so. In the absence of the contractor's evidence there was a significant gap identifying why he gave the instructions to the workers to clear snags from the waterways. The prosecutor bore the onus of proving its case beyond reasonable doubt and the absence of the contractor in particular substantially compromised the prosecutor's ability to do so: at [421]. Mr Smit, a representative of one of the joint venture parties which set up Mato was a further potential witness who appeared to be important but did not give evidence and was not formally interviewed: at [422]. No *Jones v Dunkel* inference arose from the absence of these potential witnesses, rather that was taken into account in assessing whether there was reasonable doubt about the defendants' guilt: at [426];

(ii) in the case of Mr Bennett, the prosecutor did not bring forward any direct or indirect evidence that he had any role in instructing the contractor beyond participating in shareholders' meetings where there was discussion of employing a contractor to do clean-up work on site which included removing dead logs from existing tracks. In the absence of any evidence from the contractor and Mr Smit it was unlikely that the prosecutor could prove that Mr Bennett instructed the contractor. Arguably the prosecutor failed at the outset in relation to proving the liability of Mr Bennett personally: at [427]. In any event, the prosecutor did not establish a necessary element of the offences of causing damage to habitat in relation to Mr Bennett personally, that he

caused the removal of the snags by the contractor. Mr Bennett was not guilty of the three offences alleging damage to habitat: at [467];

(iii) Mr Coomes' evidence that he did not instruct the contractor to remove snags from the waterways was accepted and given the absence of the two potential witnesses, his evidence of key conversations and meetings with them was not contradicted. Therefore, the prosecutor did not prove beyond reasonable doubt that Mr Coomes caused the contractor to carry out the removal of snags: at [487]. As this element of the offences was not established, the three offences alleging damage to habitat could not succeed against Mr Coomes: at [488];

(iv) the prosecutor proved beyond reasonable doubt that Mr Ceman caused the contractor to remove snags from the unnamed creek but did not prove that he caused the contractor to remove snags from the Murray River: at [454];

(v) the prosecutor established that Mato caused the contractor to engage in the snag removal on the basis of Mr Ceman's actions: at [499];

(d) element 4 was not proved against Mr Ceman because the conclusive presumption of knowledge of habitat in s 220ZD(2)(b) did not operate (see (2) below), and there was no evidence that Mr Ceman otherwise had the requisite knowledge. Consequently he was not guilty of the three offences alleging damage to habitat: at [566]. Therefore Mato could not be guilty of the offence alleging damage to the unnamed creek on the basis of Mr Ceman's actions as the requisite knowledge was not established. It was also not guilty of the three offences alleging damage to habitat: at [566]; and

(2) in relation to the offence under s 125 of the EPA Act, the version of the notice of determination of development consent which reflected the council's resolution approving the development application was not the version notified under s 81(1) of the EPA Act to the applicant, Mr Bennett. Therefore the development consent did not commence and there was no development consent in force as required by the EPA Act in the offences period. Consequently, there could not have been a breach of condition 16 giving rise to a breach of the EPA Act in the offences period: at [561]. The finding that there was no operative development consent during the offences period meant that the conclusive presumption in s 220ZD(2)(b) did not apply: at [563].

Director-General of the Department of Environment, Climate Change and Water v Walker Corporation Pty Ltd (No 2) [2011] NSWLEC 229 (Preston CJ)

Facts: in April 2006, Walker Corporation contracted a company to clear vegetation on three lots owned by Walker at Appin. The then Director-General of the Department of Environment, Climate Change and Water ("DECCW") instituted proceedings in the name of her office against Walker in respect of an offence against s 12 of the *Native Vegetation Act* 2003 ("the NV Act") for clearing native vegetation. Walker pleaded not guilty, contending that the proceedings were not validly instituted or maintained by a proper person, and that the prosecutor did not establish each of the elements of the offence beyond reasonable doubt. It also sought to rely on the defence that the native vegetation cleared was only regrowth.

Issues:

(1) whether the Director-General was authorised to institute the proceedings under s 14 of the *Criminal Procedure Act* 1986 and whether the proceedings were validly maintained after DECCW was abolished;

(2) whether native vegetation was cleared;

(3) whether Walker was liable for the clearing by being the landholder of premises on which clearing was carried out and/or by authorising the clearing;

(4) whether the clearing was carried out in accordance with a development consent or a native vegetation plan; and

(5) whether the cleared vegetation was only non-protected regrowth, hence attracting the defence in s 12(3) of the NV Act.

Held: finding the defendant guilty of the offence as charged:

(1) use of the name of the office of the prosecutor in the summons did not cause the proceedings to be invalidly instituted. The abolition of the office of Director-General of DECCW after proceedings were instituted did not cause the summons to become defective. Hence, the proceedings were validly maintained. In any event, s 16(2) of the *Criminal Procedure Act* operated to prevent objection being taken to any defect in the name of the prosecutor. For the sake of good order, the Court amended the summons to state the prosecutor's proper name: at [10], [18], [20], [43], [53]–[55], [57];

(2) vegetation was cleared on the three lots between April and October 2006 (at [59], [76], [80]) and this vegetation was native within the meaning of s 6(2) of the NV Act: at [84], [86];

(3) Walker was taken to have carried out the clearing as the landholder of the land on which the native vegetation was cleared because, under s 44 of the NV Act, it was not shown that Walker did not cause or permit the carrying out of the clearing: at [105], [107], [110], [111]. Walker was also vicariously liable as it directly authorised the act of clearing: at [119], [125];

(4) the clearing had not been authorised by way of a development consent or a property vegetation plan: at [127], [129]; and

(5) the defence in s 12(3) of the NV Act was not established. Walker did not establish that the cleared vegetation had regrown following an earlier act of clearing or disturbance; that the native vegetation cleared did not include excluded regrowth under s 9(4) of the NV Act; that the cleared native vegetation had regrown since 1 January 1990 (as per the definition of "regrowth" in s 9(2) of the NV Act); and that the cleared vegetation comprised only regrowth: [145], [146], [149], [151], [178].

Environment Protection Authority v Austar Coal Mine Pty Ltd [2011] NSWLEC 252 (Preston CJ)

Facts: Austar operated an underground coalmine near Pelton. The treatment of sewage from an on-site bathhouse involved applying liquid effluent to a grassed transpiration area. The transpiration area was located directly over a piped section of Bellbird Creek. On 29 July 2010, the effluent that had been applied to the transpiration area seeped into the piped section of Bellbird Creek. The incident caused white foam and elevated levels of detergent, nutrients and faecal matter along approximately 2km of Bellbird Creek. Austar pleaded guilty to having committed an offence against s 120(1) of the *Protection of the Environment Operations Act* 1997 ("POEO Act") of polluting waters. The parties agreed that it was appropriate for the Court to make an order under s 250(1)(e) of the POEO Act that Austar pay a specified amount to a specified environmental organisation for the purposes of a specified project, coupled with a publication order in lieu of a fine.

Issue:

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

Held: the defendant was convicted as charged and ordered to pay the Hunter-Central Rivers Catchment Management Authority $75,000 to be used for the Mount View Corridor Threatened Species Habitat Rehabilitation Project; to publicise the conviction; and to pay the prosecutor's legal costs and investigation costs:

(1) the actual likely harm to the environment was found to be low because the actions taken by Austar to contain the pollution and to flush the creek had the effect of mitigating environmental harm: at [17], [21], [22]:

(2) the risk that effluent applied to the transpiration area could seep into the piped section and thereby pollute waters in the creek was foreseeable, and there were practical measures that Austar could have taken to prevent the harm, including by conducting an environmental audit of the septic system: at [27], [29], [30].

(3) two prior penalty notices issued by the EPA did not demonstrate that Austar had a continuing attitude of disobedience to the law: at [39];

(4) Austar entered a plea of guilty at the first reasonable time for the entering of a plea, which warranted the maximum discount of 25 per cent for the utilitarian value of Austar's guilty plea: at [40];

(5) Austar expressed genuine contrition and remorse and provided assistance to the Office of Environment and Heritage in investigating the incident. Austar also agreed to pay the prosecutor's legal costs and investigation costs in the total amount of approximately $42,000: at [41], [42], [45]; and

(6) the project proposed by the prosecutor was superior to that proposed by Austar in terms of the greater and more certain environmental outcomes; the greater and more certain accountability of the Catchment Management Authority; and the independence of the project from Austar (not being on the Austar site): at [60].

Great Lakes Council v Spalding [2011] NSWLEC 257 (Preston CJ)

Facts**:** Mr Spalding had used a shed erected on his land for the purposes of a wholesale nursery as a dwelling house by letting the premises to tenants under a Residential Tenancy Agreement for six months without obtaining development consent. The use of the premises as a dwelling house was contrary to s 76A(1)(a) of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act"). Mr Spalding had pleaded guilty to an offence against s 125(1) of the EPA Act.

Issue:

(1) Determination of the appropriate sentence to be imposed for the offence.

Held: convicting Mr Spalding of the offence, imposing a fine of $7,500 and ordering payment of the prosecutor's costs:

(1) Mr Spalding's actions of carrying out development without first obtaining consent undermined the system of planning and development control. The maximum penalty for the offence of $1.1 million is the public expression of the seriousness of the offence, however a broad spectrum of conduct can give rise to an offence under s 125(1): at [35]–[36];

(2) the commission of the offence did not cause actual harm to the environment or human health and safety. It did pose some potential risk of harm to human health and safety by reason of its non-compliances with the Building Code of Australia. However, the potential risk of harm was not substantial and hence did not constitute an aggravating factor for the purposes of s 21A(2)(g) of the *Crimes (Sentencing Procedure) Act* 1999: at [37]–[41];

(3) although an offence against s 125(1) is a strict liability offence, the offender's state of mind in committing the offence can increase the seriousness of the offence. Mr Spalding knew that erecting and using a dwelling house without development consent was illegal but deliberately chose to let it to a tenant at commercial rent. The commission of the offence intentionally and for a profit increased the objective seriousness of the offence: at [42]-[43] and [54]–[55];

(4) the subjective circumstances taken into account in determining the penalty to be imposed included Mr Spalding's lack of prior convictions for environmental offences, his early guilty plea, his cooperation with the Council upon being informed of the illegality and his remorse for his actions: at [56]-[59];

(5) the Court was required under s 6 of the *Fines Act* 1996 to take into account the financial means to pay a fine of the offender. Mr Spalding was unemployed, had been forced to sell most of his assets and had suffered financial loss by devaluation: at [61]–[62]; and

(6) a fine of $20,000 was appropriate. This amount was discounted 25 per cent to take account of the utilitarian value of Mr Spalding's early guilty plea. The available information concerning Mr Spalding's financial means indicated he was unable to pay an amount of $15,000 in addition to an order for costs which the Council estimated might be in the range of $35,000 to $40,000. In these circumstances, the fine was reduced to $7,500: at [69], [71]–[72].

Injunctions

Save Our Figs Inc v General Manager Newcastle City Council [2011] NSWLEC 207 (Biscoe J)

Facts: the applicant sought an interlocutory injunction to restrain Newcastle City Council and its General Manager from causing the removal or destruction of 14 iconic fig trees in Laman St, Newcastle. In July 2011 the council resolved to remove and replant the fig trees pursuant to s 88 of the *Roads Act* 1993. On 25 August 2011 a motion to rescind the July resolution failed. The Premier subsequently offered to provide an independent arborist to consider the removal of the trees. However, the General Manager stated that he was "obliged" to implement the July resolution and made preparations for the removal of the trees. The applicant sought an urgent interlocutory injunction to restrain the work. The respondents gave undertakings not to commence works until the final determination of the interlocutory injunction application.

Issues:

(1) whether there was a serious question to be tried, namely, was it arguable that the General Manager, in fulfilling his responsibility to implement council resolutions "without undue delay" pursuant to s 335(1) of *Local Government Act* 1993, was bound to consider various matters to which the Premier's offer was relevant and failed to do so;

(2) was it arguable that the General Manager misconstrued the requirement that council resolutions be implemented "without undue delay";

(3) whether the balance of convenience favoured the applicant;

(4) whether the applicant had to give an undertaking as to damages; and

(5) whether the applicant's conduct warranted the Court not exercising its discretion to enjoin the respondents.

Held: granting the interlocutory injunction and expediting proceedings for final hearing:

(1) an injunction preventing the General Manager from commencing works to implement the resolution would not put the General Manager in breach of s 335: at [42];

(2) there was a serious question to be tried in that it was arguable that s 335 imposed an implied obligation on the General Manager to consider the relevant public interest. Arguably, the Premier's offer was a factor in the public interest and the General Manager did not consider it: at [53]–[55]. However, the argument was not strong: at [56];

(3) the balance of convenience marginally favoured the grant of interlocutory relief for a relatively short time on the basis of a final hearing within three weeks: at [74]–[75];

(4) pursuant to r 4.2(3) of the Land and Environment Court Rules 2007 the applicant was not required to provide the usual undertaking as to damages: at [71]–[72];

(5) the evidence did not support the conclusion that the proceedings were an abuse of process: at [76]–[77]; and

(6) involvement in peaceful protest was insufficient reason not to exercise the Court's discretion in favour of the applicant: at [78].

Costs

Blacktown City Council v Wilkie (No 11) [2011] NSWLEC 216 (Pepper J)

Facts: the Court ordered the solicitor for the second respondent, Mr George Minas, to show cause as to why he should not be ordered to pay the wasted costs incurred by Blacktown City Council ("the council"), as a result of a sentence hearing for contempt proceedings having to be vacated on 18 October 2011 due to Mr Minas' failure to appear at Court. Mr Minas was the solicitor on the record for the second respondent

but had stated to the Court that he had not been formally retained by Mr Floyd and that he was "just helping him out". The contempt proceedings had a long history and had been adjourned a number of times in order for the second respondent to comply with orders of the Court to file and serve his evidence and submissions.

The Court has the power to order costs personally against a legal practitioner pursuant to s 99 of the *Civil Procedure Act* 2005 ("the CPA") if the costs were incurred "improperly" or "without reasonable cause" in circumstances where the legal practitioner was responsible. Rule 7.29 of the Uniform Civil Procedure Rules 2005 ("the UCPR") states that "a solicitor who ceases to act for a party in any proceedings may file notice of the change and serve the notice on the parties".

Issue:

(1) whether a wasted costs order should be made against a solicitor who did not appear at a hearing but who remained on the record.

Held: making no order for costs:

(1) the decision to cease to act for the second respondent was not made by Mr Minas, but rather it was made by the second respondent. In those circumstances Mr Minas did not need to comply with r 7.29 of the UCPR: at [36];

(2) Mr Minas, however, could have filed and served a notice of termination pursuant to r 7.27(3) of the UCPR: at [38];

(3) a solicitor on the record has duties to both the court and his or her client. However, a solicitor's duty to the court is "paramount" or "overriding", irrespective of whatever terms of retainer have been agreed to between a solicitor and his or her client: at [41] and [55];

(4) given that Mr Minas remained the solicitor on the record, despite his claim that he was "just helping out", it was incumbent upon Mr Minas to attend Court on 18 October 2011 in order to inform the Court that his instructions had been withdrawn. This could have avoided the time of the Court being wasted and the time and costs of the council being wasted: at [42]–[43];

(5) however, Mr Minas' conduct in failing to appear on 18 October 2011 was not "improper" or "without reasonable cause" pursuant to s 99(1)(b) of the CPA. This was because Mr Minas had his instructions withdrawn from him by the second respondent at short notice and upon receiving this information, he immediately had taken some steps, albeit inadequate, to contact both the council and the Court to inform them that he might not be appearing: at [53]; and

(6) Mr Minas' conduct nevertheless attracted criticism in circumstances where he was frequently late for direction hearings and failed to comply with orders of the Court: at [55].

Practice and Procedure and Orders

Mathews v The Uniting Church in Australia Property Trust (NSW) [2011] NSWLEC 198 (Craig J)

Facts: the applicant sought to set aside a subpoena to produce documents. The subpoena was directed to an expert witness who had sworn an affidavit in support of the applicants' case.

Issues:

(1) whether "conduct money" was required to be tendered at the time of service to secure compliance with the subpoena; and

(2) whether the subpoena constituted an abuse of process in terms of irregular issue of the subpoena, "fishing" and lack of forensic purpose.

Held: motion dismissed:

(1) the obligation imposed by Uniform Civil Procedure Rules 2005 ("UCPR") r 33.6(1) to tender conduct money at the time of service of a subpoena in order to secure compliance by the recipient applies only

to a subpoena to attend to give evidence. It does not apply to a subpoena to produce documents. The recipient of a subpoena to produce documents has a right to seek an order for the costs and expenses of production pursuant to UCPR r 33.11: at [23];

(2) issue of the subpoena was not irregular by reason of the return date not having been fixed "by an order of the Court". The subpoena was issued and the return date inserted into the document by an "Issuing Officer" pursuant to UCPR r 33.2: at [29];

(3) issue of the subpoena did not involve an abuse of process as it was "on the cards" that the documents sought would throw light on the recipient's evidence which, on its face, was central to the applicants' claims: at [35];

(4) the description of documents required did not involve an abuse as it was "not unreasonable to believe" that documents identified did exist and were likely to be in the possession of the recipient of the subpoena: at [41];

(5) the subpoena did not involve "discovery" as the documents were sufficiently described to avoid the need for judgment on the part of the recipient as to their relevance to a matter raised in the proceedings: at [48].

Jeray v Blue Mountains City Council [2011] NSWLEC 218 (Moore AJ)

Facts: the applicant was involved in two separate proceedings, which were set for hearing over ten days and four days each (back-to-back) with pre-hearing directions before the trial judge. On the day before the pre-hearing directions the applicant sent a letter to the Registrar of the Court by facsimile, in which he said he was unable to attend "the directions and main hearings scheduled for the above case" because he was suffering from a medical condition. Attached to the letter was a medical certificate in which the details of the medical condition were redacted.

The applicant did not attend the pre-hearing directions. However, orders were made for the letter and medical certificate sent by the applicant to be treated as a Notice of Motion to vacate the hearing dates in both matters, with directions for the applicant to file and serve evidence in support of the motion. A hearing date was also allocated for the hearing of the motion to vacate.

The respondents opposed the motion to vacate.

Issues:

(1) whether the hearing dates should be vacated; and

(2) whether the medical evidence attached in the letter was sufficient evidence for the vacation of hearing dates.

Held: in dismissing the application to vacate the hearing dates;

(1) the evidence in support of the application was inadequate as the factual foundation of the medical evidence was not revealed in the certificate: at [9];

(2) the certificate had not been written with any particular care in relation to considerations for a court in vacating hearing dates fixed: at [10]; and

(3) the applicant could have been represented by an agent at the application to vacate and could be at the hearing: at [11].

Al Amanah College Inc v Minister for Education and Training (No 3) [2011] NSWLEC 258 (Biscoe J)

(related decisions*: Al Amanah College Inc v Minister for Education and Training* [2011] NSWLEC 189 Biscoe J; *Al Amanah College Inc v Minister for Education and Training (No 2)* [2011] NSWLEC 254 Biscoe J)

Facts: pursuant to the *Land Acquisition (Just Terms Compensation) Act* 1991 ("JT Act"), the applicant objected to the amount of compensation offered for land compulsorily acquired by the Minister at Bass Hill.

The Court determined the amount of compensation payable: *Al Amanah College Inc v Minister for Education and Training* [2011] NSWLEC 189 (Biscoe J); *Al Amanah College Inc v Minister for Education and Training (No 2)* [2011] NSWLEC 254 (Biscoe J). The applicant sought an order that the respondent pay the applicant the remaining amount of compensation owed within seven days. The applicant claimed to be prejudiced by any delay in payment because the claimable statutory rate of interest was less than the actual rate of interest on the loan to finance a replacement property.

Issues:

(1) whether the Court had power to order the payment of compensation for compulsory acquisition within a specified time; and

(2) if the court did have such power, whether the order should be made.

Held: ordering payment of compensation within 21 days:

(1) a determination of compensation under the JT Act is a "judgment" within the meaning of s 3 of the *Crown Proceedings Act* 1988: at [5];

(2) the Court has power to order the time by which compensation must occur: at [8]; and

(3) it was appropriate to order payment within a specified time given the prejudice to the applicant. In light of the practical difficulties in effecting payment, being the closure of the relevant government departmental offices over the traditional holiday period, it would be unreasonable to order compensation to be paid within seven days: at [13]–[14].

Council of the City of Sydney v Oaks Hotels & Resorts (NSW) No.2 Pty Ltd (No. 2 re Harmony); Council of the City of Sydney v Oaks Hotels and Resorts (NSW) No.2 Pty Ltd (No. 2 re Maestri) [2011] NSWLEC 234 & 235 (Sheahan J)

(related decisions: *Council of the City of Sydney v Oaks Hotels and Resorts (NSW) No.2 Pty Ltd* [2010] NSWLEC 181 Sheahan J; *Council of the City of Sydney v Oaks Hotels and Resorts (NSW) No.2 Pty Ltd* [2010] NSWLEC 182 Sheahan J)

Facts: the respondent company was using various units in the residential unit blocks "Harmony" and "Maestri", as serviced apartments without development consent. The proceedings were stood over until related class 1 proceedings had been resolved. The class 1 proceedings concerned whether development consent should be granted for the use of certain units as serviced apartments. In relation to the building Maestri, the class 1 appeal was dismissed. In relation to the building Harmony, the appeal was upheld, and a number of units were approved for use as serviced apartments. On the hearing to determine the outcome of the class 4 proceedings, the Council alleged in each case a continued breach of consent, and sought a restraining order and costs. The respondent argued that, because relevant parties (namely the owners of the units) were not joined to the proceedings, the court should not make orders that would affect their rights or interests.

Issues:

(1) whether certain units in the Harmony building were still being used as serviced apartments, in contravention of the development consent;

(2) whether joinder of the unit owners was necessary for the court to determine all matters in dispute in the proceedings (see r 6.24 of the *Uniform Civil Procedure Rules* 2005);

(3) whether joinder of the unit owners would contravene the overriding purpose of the *Civil Procedure Act* 2005 for the just, quick and cheap resolution of proceedings; and

(4) whether a party should be joined only if or because orders were sought against it.

Held: the respondent is restrained from using relevant units in Harmony and Maestri as serviced apartments for stays was of less than 7 nights, and advertising or leasing the premises for that purpose. The respondent was to pay the applicant's costs for both proceedings. It was found:

(1) in the Harmony building, the company had continued to make certain units available as serviced apartments for one night stays, in contravention of the consent: at [2011] NSWLEC 234 at [66]; and

(2) the unit owners would not be "*directly affected*" by any orders that the court was likely to make against the respondent, because the issues at the heart of the proceedings were between the Council, and that company, which acted as an agent on behalf of the unit owners: at [2011] NSWLEC 234 at [57]–[58] and [2011] NSWLEC 235 at [51]–[52].

Kennedy v Stockland Developments Pty Limited (No 3) [2011] NSWLEC 249 (Pepper J)

(related decisions: *Kennedy v Stockland Developments Pty Limited* [2011] NSWLEC 185 Biscoe J and *Kennedy v Stockland Developments Pty Limited (No 2)* [2011] NSWLEC 186 Sheahan J)

Facts: Mr Kennedy sought that an ex parte injunction granted on 31 October 2011 be dissolved and that a consequential order for costs be set aside ("the orders"). The injunction restrained unauthorised members of the public entering upon the development site controlled by Stockland Developments Pty Limited ("Stockland"). On 1 November 2011, Sheahan J dismissed an application by Mr Oshlack, acting as an agent on behalf of Mr Kennedy, to join Anglican Retirement Villages to the proceedings and to set aside the orders. Mr Kennedy submitted that on 1 November 2011 Mr Oshlack was not given a chance to be heard on the setting aside of the orders. The Court delivered an ex tempore judgment on 16 December 2011. Before the judgment was entered the Court revised its reasons in relation to the application of 36.16(2)(b) of the Uniform Civil Procedure Rules 2005 ("the UCPR"). Rule 36.16(2)(b) of the UCPR states that the Court may set aside or vary a judgment or order after it has been entered if it has been given or made in the absence of a party. Rule 36.16(3A) of the UCPR provides a time limitation of 14 days after the judgment or order is entered for the filing of a notice of motion for the setting aside of a judgment or order under subrule (1). The notice of motion to set aside the orders was filed outside the 14-day limitation period.

Issues:

(1) whether the Court had the power to revise its earlier ex tempore judgment before it was entered;

(2) whether the terms of the injunction were too wide;

(3) whether the circumstances had materially changed since the granting of the injunction;

(4) whether the issuing of the injunction impermissibly infringed a common law right of free speech and a common law right to protest;

(5) whether onus was on the respondent to demonstrate to the Court that the injunction should be maintained;

(6) whether the Court had the power to set aside a costs order made in the absence of Mr Kennedy under r 36.16(2)(b) of the UCPR where the notice of motion was filed outside the time limit contained in r 36.16(3A); and

(7) whether the proceedings were brought in the public interest.

Held: dismissing the application:

(1) in a civil trial the appropriate test for determining whether an alteration to Court's ex tempore judgment is permissible is whether the change is one of substance in fact. The Courts reasoning in respect of r 36.16(2)(b) of the UCPR did not constitute the primary reason for declining to set aside the orders and therefore the change was not one of substance in fact: at [3]–[4];

(2) alternatively, because the orders had not been entered, the Court had an inherent jurisdiction to set aside the judgment where it had proceeded on a misapprehension as to "the relevant law", namely, the application of r 36.16(2)(b) of the UCPR: at [5] and [7]–[9];

(3) the time limitation in r 36.16(3A) does not apply to r 36.16(2)(b) of the UCPR. The Court may exercise its discretion to set aside a judgment made in the absence of a party any time after it is entered under r 36.16(2)(b): at [81]–[83];

(4) Mr Kennedy was not denied procedural fairness in the granting of the injunction because it was appropriate to grant the injunction on an ex parte basis given that the protest was ongoing, Stockland was incurring financial loss and the protestors were putting their safety at risk: at [54]. Further, the Court did not accept that Mr Kennedy was not given an opportunity to be heard on 1 November 2011 on the setting aside of the orders because Mr Oshlack was an experienced participant in proceedings in the Court and would have sought an opportunity to be heard had he elected to do so: at [56];

(5) the terms of the injunction were not too wide because to limit its application to just Mr Kennedy would thwart its purpose, namely, to stop protestors from coming onto the development site: at [58];

(6) the circumstances had not materially changed since the granting of the injunction. The Court did not accept that Sheahan J was not aware of the cultural significance of the development site at the time the injunction was granted and that the protests were of limited duration. The Court inferred that the only reason the protests had not resumed was because of the injunction remained in place: at [59]–[60] and [63];

(7) the cases relied upon by Mr Kennedy did not stand as authority for the proposition that there exists at common law in Australia a right to free speech or a right to protest. In any event, the Court noted that the injunction did not prevent any member of the public from protesting on public land: at [68]–[69];

(8) the Court did not accept that the authority relied on by Mr Kennedy stood for the proposition that the onus was on Stockland to demonstrate why the injunction should continue. However, even if this conclusion was incorrect, financial and safety concerns warranted the injunction remaining in place: at [72]–[73];

(9) the Court declined to set aside the costs order because Mr Kennedy had already had an opportunity to set aside the orders on 1 November 2011 and to grant Mr Kennedy another opportunity to do so would impermissibly infringe the principle of the finality of litigation. Further, Mr Kennedy was not able to demonstrate the merits of some alternative order, namely, that there be no order as to costs because the proceedings were brought in the public interest: at [85]; and

(10) the issues raised by Mr Kennedy were not of sufficient general importance to satisfy the "something more" requirement for the proceedings to be classified as being brought in the public interest. In addition, there were countervailing circumstances that meant Mr Kennedy should pay Stockland's costs, namely, that Mr Kennedy unreasonably pursued a second application to set aside the orders and persisted with points that had little merit: at [98]–[99].

New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act [2011] NSWLEC 233 (Pain J)

Facts: the Minister administering the Crown Lands Act ("the Minister") made an oral application at the outset of the hearing for the disqualification of an acting commissioner on the basis of apprehended bias. The acting commissioner, in his capacity as counsel, and the Minister's counsel, were actively involved in Federal Court native title proceedings on opposing sides.

Issues:

(1) whether apprehension of bias established in relation to an acting commissioner.

Held: application dismissed:

(1) the test in *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337 (the *Ebner* test) applied to all administrative decision-makers, including in relation to the role of acting commissioners in Aboriginal land rights cases of assisting and advising the Court in its adjudication under s 37(3) of the *Land and Environment Court Act* 1979: at [3];

(2) It was relevant to identify the distinction between the role of an acting commissioner (who shall not adjudicate) and that of a judge under s 37(3): at [5]; and

(3) the fair-minded lay observer was assumed to know generally about the nature of the adversarial process, the professional and impartial role of barristers engaged on behalf of parties in such a process

and the different role of an acting commissioner as an advisor to a judge in a land rights case. Applying he *Ebner* test, apprehension of bias was not made out in relation to the acting commissioner: at [7].

Aboriginal Land Rights

La Perouse Local Aboriginal Land Council v Minister Administering the Crown Lands Act [2012] NSWLEC 5 (Sheahan J)

Facts: In March 2009 the decision was made to close Malabar Police Station and divest the site, which accommodated two buildings, being the police station and an associated duty officer's house ("the site"). On 30 June 2009 the Police Station was closed to the public with officers relocating to other police stations. The site was prepared for a proposed sale in September 2009, including cancellation of utilities and removal of police files and signage. On 27 July 2009 the La Perouse Local Aboriginal Land Council ("the claimant") lodged a claim for the site ("ALC 18488") under the *Aboriginal Land Rights Act* 1983 ("the Act"). The proposed auction was cancelled, and directions were issued to use the site. Arrangements were made to clean the premises, services were restored and security measures introduced, and officers were instructed to visit the site daily and record their attendances in a register. The register was in evidence and had entries between 25 September 2009 to 6 December 2009, and between 31 May 2010 to 12 August 2010. On 18 September 2009 the then Minister for Police and local Member of Parliament appeared before the NSW Parliament's General Purpose Standing Committee No 3 and was questioned about the closure of Malabar Police Station, stating that it had been closed on 1 July 2009 and that representations would not be made to have it reopened. An extract of a Hansard record of that meeting was admitted over objection. Between 3 and 6 December 2009 traffic police and other officers attended briefings, meal breaks and de-briefs at Malabar Police Station during a four day police operation ("Operation Silva") involving the Australian Golf Open. On 8 December 2009 ALC 18488 was refused. On 17 February 2010 the claimant lodged another claim, ALC 24210. That claim was refused on 4 March 2010, and the claimant appealed under s 36(6) of the Act.

Issue:

(1) whether site was "not lawfully used or occupied" as at the date of the claim, so as to be "claimable Crown lands".

Held: upholding the appeal and directing that the land subject of the claim be transferred to the claimant:

(1) use or occupation beyond a notional degree was required: at [65];

(2) many of the visits by officers prior to Operation Silva had to be characterised as miniscule or insignificant as they involved officers providing access to the site for cleaning and service staff: at [67];

(3) the use of the site for Operation Silva had to be considered in light of the directives of senior officers that it be utilised to defeat the land claim, and it had not been suggested in any of the evidence that a decision had been made not to proceed with divestment: at [68];

(4) there was a lack of evidence post Operation Silva, and around the time ALC 24210 was made, of the site being used or occupied beyond a notional degree. It was not until police became aware of the claim that visits to the site were noted in the register on a regular basis, and there was no evidence of any plans or intentions to use the site for policing purposes developing or materialising during that period: at [69];

(5) the Minister had failed to discharge the onus to establish use and occupation: at [72]; and

(6) while the tender of the Hansard extract was accepted, it could have limited weight in the circumstances: at [81].

Development Appeals

Roberts v Blue Mountains City Council [2012] NSWLEC 2 (Pepper J)

(related decision: *Roberts v Blue Mountains City Council* [2005] NSWLEC 699 Watts C)

Facts: Mr Roberts appealed against the refusal by the Blue Mountains City Council ("the council") to be satisfied that the requirements of deferred commencement conditions of a development consent granted by the Court on 7 December 2005 for the subdivision of land ("the consent") had been fulfilled ("the decision"). The condition imposed in the consent the subject of the appeal related to the amendment of the adopted plan of management ("POM") for the Darks Common Reserve in regard to the creation and maintenance of Asset Protection Zones ("APZs") ("the condition"). The Darks Common Reserve Trust ("the Trust") had ensured temporary de facto compliance with the requirement of the condition for the provision of additional APZs by carrying out bush fire hazard reduction works required by the Rural Fire Service. When the appeal initially came before the Court for hearing, the Senior Commissioner raised with the parties the utility of hearing the appeal if, as was contended by the council, the consent had already lapsed by reason of the asserted failure by Mr Roberts to comply with the conditions of consent. Accordingly, the proceedings were relisted for hearing before a judge of the Court.

Section 95(6) of the *Environmental Planning and Assessment Act* 1979 ("the EPAA"), in conjunction with cl 111 of Sch 6 to that Act, imposed a maximum five year time limit from the date of the grant of the consent within which satisfaction of the deferred commencement conditions was to occur. Section 83 of the EPAA provided that the consent became effective and operated from the date of the decision. However, s 80(3) of the EPAA provided that a development consent could be granted subject to a condition that the consent was not to operate until the applicant satisfied the consent authority as to any matter specified in the condition.

Issues:

(1) absent satisfaction of the deferred commencement conditions, when did the consent lapse; and

(2) whether there had been sufficient compliance with the condition to entitle Mr Roberts to proceed with the development.

Held: dismissing the appeal:

(1) absent satisfaction by Mr Roberts of the deferred commencement conditions, by operation of cl 111 of the EPAA the consent granted on 7 December 2005 lapsed on 7 December 2010: at [30];

(2) however, by the combined operation of ss 80(3) and 83 of the EPAA, there was utility in the Court hearing the appeal because upon the grant of a deferred commencement development consent, the consent was effective but not operative until such time as the deferred commencement conditions had been complied with to the satisfaction of the consent authority: at [31];

(3) the effect of Mr Roberts commencing proceedings on 6 December 2010 was that the consent was suspended pending the determination of the appeal: at [35];

(4) it was not enough that practical compliance with the condition had been achieved by the provision of the APZs by the Trust, literal compliance with the condition by the amendment of the POM was required. This was because the objective intention behind the imposition of the condition was to deliver certainty to the RFS that a suitable APZ would be created and would continue to be maintained by enshrining the APZ in the POM: at [52]–[55];

(5) the fact that the required amendment to the POM was generically expressed did not derogate from the obligation on Mr Roberts to comply with condition: at [58];

(6) the POM had not been amended, and therefore, the Court was not satisfied that the condition of the consent had been fulfilled: at [63]; and

(7) the consent therefore lapsed on 7 December 2010: at [63].

Section 56A Appeals

Hurstville City Council v Goreski [2011] NSWLEC 188 (Sheahan J)

(related decision: *Goreski v Hurstville City Council* [2010] NSWLEC 1288 Brown C)

Facts: this was an appeal by the Council pursuant s 56A of the *Land and Environment Court Act* 1979. The Goreskis sought approval from Council to demolish an existing dwelling, construct a two-storey dual occupancy, and subdivide it into two Torrens Title lots. Council refused the development application ("DA"). The relevant objectives in the Hurstville Local Environmental Plan 1994 ("LEP") concerned zoning and dual occupancies. The site was of sufficient width but insufficient area to satisfy the objectives of the clause relating to dual occupancies, and in order for the DA to be approved, dispensation under the State Environment Planning Policy No. 1 ("SEPP 1") was required. Brown C upheld the Goreskis' Class 1 appeal, and the Council then appealed that decision on four grounds. The first ground was conceded: that is, the Commissioner was incorrect in finding that strict compliance with a development standard was unreasonable and unnecessary where the proposed development was permissible on the site and satisfied all requirements except the objection under SEPP 1. The third ground was pressed only insofar as it related to the second ground.

Issues:

(1) although ground 1 was conceded, it was still necessary for the Court to determine whether Brown C was erroneous in first, extending the objective of the LEP beyond the street of the subject property; and second, in referring to dual occupancies in surrounding streets ("ground 1"): at [65]–[66];

(2) whether the Commissioner erred by failing to consider the precedent effect of upholding a SEPP 1 objection ("ground 2"): at [5] and [86];

(3) whether the Commissioner had erred when considering SEPP 1 by reversing the onus of establishing that an objection was well founded ("ground 3"): at [5];

(4) whether the Commissioner asked himself the wrong question in relation to the LEP objectives by referring to permissibility as it related to SEPP 1, rather than considering the development standard itself ("ground 4"): at [71]–[72]; and

(5) if an appeal on one or more of the four grounds was successful, whether the matter should be remitted to Brown C for determination, or another Commissioner of the Court: at [109].

Held: the appeal by the Council was allowed on the basis of the conceded ground 1, but was otherwise dismissed and the matter was remitted to Brown C:

(1) although the Commissioner correctly identified that the applicable LEP objective was relevant to consider (at [68]), Brown C erroneously construed and applied this objective, and in doing so, asked himself the wrong question and thereby committing an error of law: at [69];

(2) the issue of precedent was not a principal issue that Brown C was expressly required to consider pursuant to the LEP, SEPP 1, or the development standards. The issue of precedent was, therefore, not wholly relevant to the consideration of the SEPP 1 objection: at [104];

(3) it was unnecessary to consider ground 3 because to do so would not provide assistance in determining the other grounds of appeal: at [107];

(4) the Council failed to demonstrate that Brown C relied solely on permissibility as a basis for concluding that the applicable objective was met. Rather, Brown C referred to permissibility as one of many factors to be considered: at [85]; and

(5) the Council's submissions that Brown C had displayed a lack of impartiality, that the matter could be distinguished from the authorities in that it was based on SEPP 1 rather than a DCP, and that the Goreskis wanted the matter remitted to Brown C because they anticipated he would again decide in their favour, could not be accepted. The Council thus failed to demonstrate the necessity for an exclusionary remitter order: at [131]–132].

O'Donnell v Sutherland Shire Council [2011] NSWLEC 184 (Pain J)

(related decision: *O'Donnell v Sutherland Shire Council* [2011] NSWLEC 1007 Pearson C)

Facts: the appellants appealed under s 56A of the *Land and Environment Court Act* 1979 against the refusal of two modification applications made under s 96 of the *Environmental Planning and Assessment Act* 1979. In 2005 Sutherland Shire Council granted development consent to the appellants for the construction of a single storey boatshed and ancillary works. The Sutherland Shire Local Environment Plan 2000 ("LEP 2000") that applied at the time did not define "boatshed" and contained a definition of "ancillary development". By the time of the modification applications the Sutherland Shire Local Environmental Plan 2006 ("LEP 2006") had replaced LEP 2000. It included a definition of "boatshed" as a single storey building or structure associated with a dwelling and did not have a definition of "ancillary development". LEP 2006 also included a prohibition on foreshore building in cl 17(7) with exceptions provided for in cl 17(8) and (9). It was agreed that the structure as built was two storey. One modification application sought consent for the as constructed height and pitching point of the roof and the second sought consent for the addition of a toilet and shower facilities.

Issues:

(1) whether the Commissioner erred in applying the definition of "storey" in LEP 2006;

(2) whether the Commissioner erred in finding that modifications could not be approved under LEP 2006;

(3) whether s 109B applied to allow the modifications; and

(4) whether the Commissioner's merits review was vitiated by legal error.

Held: appeal dismissed:

(1) whether the boatshed approved in 2005 was a single or two storey structure was a question of fact and could not be raised in a s 56A appeal: at [25]. Nevertheless, there was no demonstrated error in the application of the definition of "storey": at [26]. And the alleged error had no vitiating impact: at [27];

(2) there was no error in the Commissioner's findings that the modifications could not be approved under cl 17 of LEP 2006 because the structure was not a boatshed as defined under LEP 2006 and did not fall within the exceptions to the prohibition on foreshore building: at [35]–[40];

(3) the Commissioner was correct in finding that s 109B did not apply in the circumstance where the 2005 development consent was not prohibited and could still be implemented to enable approval of the modifications: at [50]; and

(4) no legal error vitiating the Commissioner's merits assessment was established. The structure as seen was two storey and the Commissioner's observations on the view were consistent with it: at [60].

Svedas v Council of the City of Sydney [2011] NSWLEC 215 (Pepper J)

(related decision: *Svedas v Sydney City Council* [2010] NSWLEC 1323 Morris C)

Facts: this was an appeal pursuant to s 56A of the *Land and Environment Court Act* 1979 ("the LECA") against the decision of a commissioner concerning an appeal pursuant to s 97(1)(b) of the *Environmental Planning and Assessment Act* 1979 ("the EPAA") against a deemed refusal by the Council of the City of Sydney ("the council") of a development application ("the DA"). The DA was for the demolition of buildings comprising two existing dwellings internally connected and the construction of a nine-storey mixed-use development. The proceedings before the Commissioner required the determination of two issues: first, whether consent should be granted for the demolition of the existing buildings; and second, if so, whether consent should be granted for the proposed replacement buildings. The Commissioner dismissed the appeal and refused to grant development consent.

Issues:

(1) whether the Commissioner failed to take into account a mandatory relevant consideration;

(2) whether the Commissioner failed to determine principally contested issues at the hearing;

(3) whether the Commissioner made findings of fact based on no evidence;

(4) whether the Commissioner failed to give reasons;

(5) whether there was a denial of procedural fairness;

(6) whether the Commissioner ought to have separately approved development consent for the demolition of the existing buildings pursuant to s 80(4) of the EPAA; and

(7) whether the matter should be remitted to the Commissioner or some other commissioner.

Held: allowing the appeal:

(1) cl 1.13 of the City of Sydney Heritage Development Control Plan 2006 ("HDCP") was a mandatory relevant consideration: at [33];

(2) the Commissioner erred in law by failing to refer to cl 1.13 of the HDCP in her reasons, instead referring to the planning principle in *Helou v Strathfield Municipal Council* [2006] NSWLEC 66. This was because the test for demolition in *Helou* was not coincident with the test in cl 1.13, due to the fact that cl 1.13 imposed a less onerous burden on the appellant. It was, therefore, incumbent upon the Commissioner to expressly have regard to the clause in order to consider whether it ought to apply to the development proposal: at [40], [54] and [56];

(3) due to the Commissioner's failure to consider cl 1.13 of the HDCP, the Commissioner failed to determine the principally contested issue of the disparity between the requirements of the HDCP and the requirements of the planning principle in *Helou* in respect of demolition: at [61]–[62];

(4) the Commissioner did not fail to determine the principally contested issue of the economic feasibility of the retention of the existing buildings because she determined that the appellant had failed to persuade her that retention of the buildings imposed an unreasonable economic burden upon it: at [63]–[65];

(5) the Commissioner did not make findings of fact in respect of which there was no evidence in finding that the appellant had not satisfied her that the upgrading of the two dwellings, if subdivided, was not economically feasible. At most, the Commissioner's finding was premised on an incorrect statement of the evidence, which did not give rise to an error of law: at [75]–[79];

(6) the reasons for the rejection of the submission that the value of the property, if subdivided, would make the upgrading economically unviable, which were based on the valuation and sales evidence and were informed by the absence of any evidence that the value of the property would increase were subdivision to occur, even if incorrect or illogical, constituted adequate reasons: at [88]–[89];

(7) the appellant was not denied procedural fairness or an opportunity to be heard in circumstances where it proceeded on an assumption, based on an exchange with the Commissioner, that the Commissioner would determine the economic viability of the works on the basis that the land was not subdivided, when the issue of subdivision was again raised in closing submissions and the appellant was afforded an opportunity to comment on it but chose not to: at [101]–[103];

(8) although the Commissioner did not specifically refer to the request pursuant to s 80(4) of the EPAA for separate consent for the demolition of the buildings, it was clear that she had considered the substance of the request and refused to grant consent: at [108]–[110]; and

(9) the decision was not infected with anything more than error, therefore, the matter should be remitted to the Commissioner for redetermination: at [119].

Solotel Pty Ltd v Woollahra Municipal Council [2011] NSWLEC 219 (Biscoe J)

(related decision: *Solotel Pty Ltd v Woollahra Council* [2011] NSWLEC 1210 Moore SC)

Facts: the council refused a development application for intensification of use of the Paddington Inn, primarily to increase the maximum permissible number of patrons from 300 to 700. On appeal the Senior Commissioner refused the development application on the basis that the increased patron numbers would

create unacceptable amenity impacts on the surrounding community. The applicant appealed on a question of law pursuant to s 56A of the *Land and Environment Court Act* 1979.

Issues:

(1) whether the Senior Commissioner had failed to consider all mandatory relevant considerations pursuant to s 79C(1) of the *Environmental Planning and Assessment Act* 1979, in particular:

   (a) the public interest in increasing the patron numbers of the hotel, which he had found to be well managed; and

   (b) the suitability of the site for the proposed development;

(2) whether the Senior Commissioner had erred in law in the "test" he applied for determining whether to permit the proposed intensification of use, namely, that no increase in patron numbers was permitted unless any resultant increase in antisocial behaviour was "so trifling as to be unobservable or imperceptible"; and

(3) whether the Senior Commissioner had reached a conclusion that was not based on probative evidence.

Held: dismissing the appeal:

(1) the absence of explicit reference to s 79C(1) was not significant. It was inferred from the Senior Commissioner's reasons that he had considered those provisions: at [18]. In relation to s 79C(1), the Senior Commissioner:

   (a) did not err in not addressing the public interest in not increasing patron numbers because that was not in contention before him; and

   (b) the Senior Commissioner did address the suitability of the site for the proposed development;

(2) the Senior Commissioner did not adopt the alleged incorrect test or any particular test, rather he found that an increased number of patrons would generate perceptible antisocial behaviour that would unreasonably impact on the amenity of neighbouring residents. This finding was a direct application of s 79C(1)(b): at [24]. The Senior Commissioner's decision was not inconsistent with the decisions of other commissioners concerning intensification of hotel use, and in any event, each determination turned on its facts: at [25]; and

(3) there was probative evidence upon which the Senior Commissioner made the finding that increased patronage would increase the incidence of antisocial behaviour: at [34]–[37].

Tricon Services Group Pty Ltd v Manly Council (No 2) [2011] NSWLEC 253 (Preston CJ)

(related decision: *Tricon Services Group Pty Ltd v Manly Council* [2011] NSWLEC 1271 Brown ASC)

Facts: Tricon lodged a development application with Manly Council ("the Council") to construct a commercial/residential building at North Steyne, Manly. The council refused consent and on appeal consent was refused. Tricon appealed against the decision of the Commissioner under s 56A(1) of the *Land and Environment Court Act* 1979 ("the Court Act"), arguing that the Commissioner had misconstrued the building height provisions of the Business Zone Development Control Plan (DCP). The DCP contained section "1.2 Building Heights" which stated:

(1) The maximum wall height of a building, shall not exceed 15 metres except where:

   (i) a lesser or greater height is specified on the height control map; or

   (ii) a lesser or greater height provides a better relationship to adjoining development in terms of fulfilling the Council's townscape objectives;

   (iii) the Council agrees to the addition of plant rooms, lift overruns, pitched roofs or the like.

Issues:

(1) whether a decision on a question of law, express or implied, could be identified as required under s 56A(1) of the Court Act;

(2) whether the Commissioner misconstrued section 1.2 of the DCP; and

(3) whether the Commissioner took into account irrelevant considerations

Held: upholding the appeal and remitting the matter to the Commissioner:

(1) the Commissioner's construction and application of the height control provisions in the DCP involved errors on decisions on questions of law: at [11], [60];

(2) section 1.2 imposed a prohibition on the maximum wall height of a proposed building exceeding 15 m that applied except where one of the circumstances in paras (i) to (iii) existed. If one of the circumstances did exist, the prohibition on the maximum wall height exceeding 15 m did not apply: at [43];

(3) the circumstances in para (i) to (iii) concerned building height and not wall height. This means that the height that might result from the existence of any circumstance in para (i) to (iii) cannot be substituted a s a new maximum wall height for the 15 m specified in cl 1: at [46]–[47];

(4) the Commissioner had erred in that he considered that the heights specified in the height control map for the site (which were maximum building heights) became the maximum wall heights of the building instead of the 15 m specified in cl 1. An error flowing from this was the substitution of the maximum wall height of 15 m specified in cl 1 with the height specified in the height control map, and then the evaluation of whether an opportunity should be afforded to the proposed building to increase or reduce that height so as to provide a better relationship to adjoining development in terms of fulfilling the Council's townscape objectives: at [54]–[55]; and

(5) The Commissioner also erred in considering extraneous matters. Other planning considerations, including the impacts on proposed views, were not relevant to the task under para (ii) of cl 1 of determining the height that provides a better relationship to adjoining development: at [56].

Commissioner Decisions

Westfield Limited v Sutherland Shire Council [2011] NSWLEC 1333 (Tuor C)

Facts: the applicant operates a multi level shopping centre at Miranda. In 1990 the council approved extensions to the shopping centre, which included a condition that the car parking area be available on an unrestricted basis for employees and visitors. In 2009 consent was given to expand the shopping centre and increase the on site parking to 5,180 car spaces. The applicant applied to modify the conditions of the 1990 and 2009 consents to remove the requirement that parking be unrestricted, to enable the introduction of controlled parking with a fee for long stay visitor and staff parking. The applicant sought consent for a development application to install a car park control system including boom gates, ticket machines and signage. The applicant proposed to introduce a fee for visitor parking after the first two hours, and to allocate separate areas for staff parking with 900 spaces and a parking fee of $4.00 per day for those spaces.

Issues:

(1) whether there should be 900 or 1000 spaces allocated for staff and tenants;

(2) whether the proposal to charge a fee for visitor and staff parking would result in the displacement of parking into the surrounding streets and have unacceptable economic and social impacts; and

(3) whether the court had power to regulate the amount or details of a fee.

Held: allowing the appeals:

(1) 900 spaces should be dedicated to staff parking, with a survey within 6 months of operation to ascertain the number of staff using it and a survey of the surrounding streets to determine the level of displacement into surrounding streets: at [34];

(2) the power to regulate a fee extended only as far as necessary to mitigate likely impacts: at [66];

(3) the court could not regulate the amount of the fee and it therefore had to be satisfied that the fee regime would not result in displacement of cars into surrounding streets. The fee regime had to set a fee free period which would enable the majority of shoppers to park on site and complete their shopping: at [75];

(4) the proposed two hour free parking was not an adequate period to mitigate the potential for shoppers to park in surrounding streets or re-enter. In order to achieve the objective of preventing staff parking in prime locations and limiting long stay parking the fee needed only to apply within the minimum staff shift and be greater than any fee charged to staff, and that could be achieved by providing three hours free parking for shoppers: at [76]; and

(5) to mitigate the potential for staff to park in surrounding streets it was reasonable that no fee be charged for the period of the minimum shift, plus a reasonable period to walk to and from the parking space, and staff parking should be available for a minimum period of four hours: at [79].

Geelan v Sutherland Shire Council [2011] NSWLEC 1375 (Brown ASC)

Facts: in July 2010 the council approved a development application for alterations and additions to an existing dwelling, swimming pool and cabana, at Burraneer, subject to a condition that “no works to the east of the existing dwelling (red line shown on the approved plans) approved in this application”. The applicant subsequently sought consent for works to the east of the dwelling including alterations to the existing cabana, pool extensions, an open form pergola and raised deck, timber path, elevated ground floor outdoor terrace, stairs, raised planter boxes, first floor balcony extension, raised floor level of the existing boatshed, raised deck and spa, balustrading, cantilevered planter boxes, works to the eastern façade of the boatshed, roof extension, and privacy screen structures. The site was traversed by a foreshore building line (FBL) and cl 17 of the Sutherland Local Environmental Plan 2006 (the LEP) applied. Clause 17(7) provided that a building could not be erected and work could not be carried out on land between a FBL and a waterway. Clause 17(8) provided that consent could be granted to any alteration (not being an addition) to an existing dwelling that was forward of the FBL, or erection of or alteration or addition to “excluded works, which were defined in cl 17(10). Clause 17(9) provided that consent could be granted to the erection of a dwelling or addition to an existing dwelling if the consent authority considered the objectives of cl 17, and was satisfied that the new dwelling or addition would not be erected any further forward of the FBL than any existing dwelling, would not dominate the locality, and the natural qualities of the foreshore were retained or restored as far as practicable.

The majority of the site, including most of the dwelling house, was located between the FBL and the foreshore. The alterations and additions to the dwelling house were almost completed at the time of the site inspection. There was no dispute that some walls shown on the approved plans as remaining had been removed and new walls erected in the position of the original walls, and that the form of the building remained the same as shown on the approved plans. The parties’ planning experts agreed that some of the proposed works were “excluded building or work” within cl 17(10), and that some works were additions to the existing dwelling house and had to be considered under cl 17(9). They disagreed as to whether the proposed cantilevered planter boxes, and the works to the eastern façade of the boatshed were “excluded building or works”.

Issues:

(1) whether the proposed works were permissible;

(2) whether the proposed works were acceptable having regard to the objectives of cl 17 and the specific matters in cl 17(9) of the LEP.

Held: approving the proposed alterations and additions subject to some modifications:

(1) there was an "existing dwelling" on the land so as to satisfy cl 17(9)(b)(i) of the LEP: at [23];

(2) the open deck formed part of the "existing dwelling" at [37];

(3) the consideration under cl 17(9) should not be taken in isolation of the site and its context. In this case there was already a significant breach of the FBL, and the foreshore area had already been cleared of vegetation and reinstatement to a pristine natural environment was impractical. A sensible and practical approach would be to ensure that the proposed works did not create an unacceptably greater tension with the objectives of cl 17(9) than currently existed: at [48]; and

(4) the roof extension should be reduced in size, the elevated ground floor outdoor terrace and associated stair should be removed, the spa should be no more than 300mm above the raised deck and screened, the privacy screen structures should be removed and that on the northern elevation replaced with a light weight privacy screen: at [49].

Hamilton v Sutherland Shire Council [2012] NSWLEC 1015 (Fakes C)

Facts: the council issued an Emergency Order No 21 under s129 of the *Local Government Act* 1993 ("the Act") requiring the applicants to selectively prune a large *Angophora costata* to remove six branches and retain the remaining tree. A council officer had inspected the tree in response to a complaint and found that the tree was dead or dying, was habitat for native wildlife, and that falling branches may pose a risk to the health and safety of neighbouring residents. The applicants appealed under s 180 of the Act seeking orders that works be carried out to remove and dispose of the tree. The site was located within zone 1 Environmental Housing ("Environmentally Sensitive Land") under the Sutherland Local Environmental Plan 2006 ("the LEP"), and was located within the council's Core Greenweb area as defined in the Sutherland Shire Development Control Plan 2006. It was common ground that the tree was stable.

Issues:

(1) whether the tree provided habitat;

(2) whether cl 56(5) of the LEP applied so that permission was not required to remove the tree on the basis that the tree was dying or dead and not required as habitat of native fauna.

Held: modifying the order to require the applicants to carry out biodiversity assessments:

(1) there was at least one hollow on the eastern side of the tree. Hollows provide habitat for a wide range of fauna and loss of hollow bearing trees is a Key Threatening Process listed in Sch 3 of the *Threatened Species Conservation Act* 1995. The tree provided habitat: at [56], [57];

(2) a hollow bearing tree in a Core Greenweb area was an important component of such an area and as such could be said to be required as the habitat of native fauna. Clause 56(5) of the LEP did not apply to the tree and permission was required for its removal: at [61];

(3) the absence of proof of current use was not sufficient to establish that the tree did not contain habitat, as habitat was the area that fauna may occupy: at [63];

(4) the precautionary principle was activated, and it was appropriate to require retention of the trunk and hollow on the basis that hollows provide habitat and that the removal of the trunk was not necessary on safety grounds: at [73], [76];

(5) it was appropriate to require the applicants to organise and pay for ecological surveys over a period of 12 months to determine the future of the trunk and inform any decisions on the installation of alternative habitat: at [78].

Court News

- The Court notes with great sadness the death of The Hon Mahla Pearlman AO, former Chief Judge of the Court.
- The Court farewells Ms Jan Murrell who has retired as a Commissioner.
- The Court welcomes Ms Leonie Walton as the new Acting Registrar, commencing 7 November 2011.
- The Court welcomes Ms Susan O'Neill as a Commissioner of the Court, commencing 30 January 2012.
- The Court welcomes Mr Alex Holtom who has commenced in the Registry as an Operational Assistant.