

Land and Environment Court of NSW

Judicial Newsletter

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Legislation

- **Statutes and Regulations**

Planning:

The [Native Vegetation Regulation 2013](#), commenced on 23 September 2013, repealed and remade, with some amendments, the [Native Vegetation Regulation 2005](#), to provide for:

- (a) development consent for clearing of native vegetation;
- (b) the form and content of property vegetation plans (PVPs), the variation and termination of PVPs and a register of PVPs;
- (c) the assessment of broadscale clearing, including the adoption of an Assessment Methodology for determining whether proposed broadscale clearing will improve or maintain environmental outcomes;
- (d) clearing for private native forestry;
- (e) routine agricultural management activities;
- (f) special provisions for vulnerable land; and
- (g) miscellaneous and savings and transitional matters.

The Regulation also amends the [Native Vegetation Act 2003](#) to clarify the non-rural land zones as described in a standard instrument local environmental plan to which the Act does not apply.

The [Coastal Protection Amendment \(Code of Practice\) Regulation 2013](#), commenced 15 August 2013, updates references to a Code of Practice specified in the [Coastal Protection Regulation 2011](#), which outlines requirements that must be complied with in relation to:

- (a) the placement, maintenance and removal of temporary coastal protection works;
- (b) orders to remove material, structures and temporary coastal protection works on beaches; and
- (c) the restoration of land after the removal of material, structures and temporary coastal protection works.

Local Government:

The *Local Government Amendment (Conduct of Elections) Act 2013* and the [Local Government Amendment \(Early Intervention\) Act 2013](#) commenced 25 June 2013 [see [Circular 13-30](#) from the Division of Local Government].

The [Local Government \(General\) Amendment \(Council Sewerage Systems\) Regulation 2013](#), commenced on 9 August 2013, amends the Local Government (General) Regulation 2005 to, among other things:

- (a) prohibit the discharge of roof, rain, surface, seepage or ground water into a public sewer, or a fitting connected to a public sewer, unless the discharge is specifically approved by the council, the discharge is into a public drain or a gutter of a council or the discharge is in an area of operations of Sydney Water or Hunter Water;
- (b) update a reference to a Director-General of the Government Service who is required to give concurrence to an approval to discharge trade waste (whether treated or not) into a sewer of the council and to provide that the Director-General may nominate another person to also give that concurrence;
- (c) prescribe the offences of disposing of waste into a sewer of the council without an approval and disposing of such waste contrary to the terms of an approval as penalty notice offences;
- (d) enable a council to inspect any pre-treatment devices connected to the council's sewerage system and to install meters or other devices for measuring the quality of sewage discharged from premises; and
- (e) provide that, when a council examines and tests water meters, a water meter that registers less than 4 per cent more or less than the correct quantity (rather than the current 3 per cent) is taken to correctly measure the water passing through it.

Criminal:

The [Protection of the Environment Operations Amendment \(Illegal Waste Disposal\) Act 2013](#), commenced on 1 October 2013, except for Sch 1[1], which amends s 88 of the [Protection of the Environment Operations Act 1997](#) to remove the exemption from payment of the contribution by licensees of waste facilities used for the re-using, recovering, recycling or processing of waste other than liquid waste. Regulations may be made under s 88 to provide for such exemption.

The [Criminal Procedure Amendment \(Mandatory Pre-trial Defence Disclosure\) Act 2013](#) commenced 1 September 2013, amended the [Criminal Procedure Act 1986](#) to:

- (a) expand the matters that must be disclosed by the defence and the prosecution before a trial for an indictable offence;
- (b) enable the court (and other parties with the leave of the court) to make proper comments in a trial for an indictable offence in circumstances where the accused person fails to comply with certain pre-trial disclosure requirements; and
- (c) enable the court or the jury in such circumstances to then draw such unfavourable inferences as appear proper.

As of 1 July 2013, Schedule 1.8 of the [Courts and Other Legislation Further Amendment Act 2013](#) commenced, amending the [Court Security Act 2005](#) to create a prohibition on the unauthorised transmission of sounds, images or information about court proceedings from the place where a court is sitting.

[Crimes \(Administration of Sentences\) Amendment \(Community Corrections\) Regulation 2013](#), commenced on 20 September 2013, amends the [Crimes \(Administration of Sentences\) Regulation 2008](#) to update references relating to community corrections.

Water:

[Water Sharing Plan for the Lachlan Regulated River Water Source Amendment Order 2013](#) published 28 June 2013, amended the [Water Sharing Plan for the Lachlan Regulated River Water Source 2003](#) in respect of available water determinations for access licences.

The [Sydney Water Catchment Management Regulation 2013](#), published 30 August 2013 and commenced on 1 September 2013, remade with minor amendments the [2008](#) regulation which was repealed on 1 September 2013 by s 10(2) of the [Subordinate Legislation Act 1989](#).

Mining and Petroleum:

The [Water Management \(General\) Amendment \(Extension of Transitional Period\) Regulation 2013](#), commenced 28 June 2013, extended 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 2014.

[Protection of the Environment Operations Amendment \(Scheduled Activities\) Regulation 2013](#), commenced 28 June 2013, amended Sch 1 of the [Protection of the Environment Operations Act 1997](#) to include the following activities as scheduled activities, and amended the [Protection of the Environment Operations \(General\) Regulation 2009](#) to provide for licensing fees in relation to those activities:

- (a) coal seam gas exploration, assessment and production activities; and
- (b) electricity generation activities by means of wind turbines on wind farms.

The Valuer General of NSW is conducting a [study](#) to determine the effect, if any, that coal seam gas extraction has on land valuations.

Miscellaneous:

The [Aboriginal Land Rights Amendment Act 2013](#), assented to 18 September 2013, amends the [Aboriginal Land Rights Act 1983](#) to:

- (a) clarify which functions of a Local Aboriginal Land Council (LALC) may be exercised by the Board of the LALC and to alter the provisions relating to the delegation of functions by the chief executive officer of a LALC;
- (b) alter the requirements in relation to the advertising of staff vacancies for Aboriginal Land Councils and the qualifications of persons to fill those vacancies;
- (c) clarify the provisions relating to the disqualification of a person to hold the office of a member of a LALC or NSW Aboriginal Land Council and the filling of vacancies in those offices;
- (d) change the basis on which community development levies payable in relation to certain transactions of LALCs are calculated; and
- (e) make other miscellaneous amendments aimed at improving the administration of the principal Act and of Aboriginal Land Councils.

The Act also amends the [National Parks and Wildlife Act 1974](#) to provide that land of cultural significance to Aboriginal persons vested in more than one ALC under the Act is vested in those Councils as tenants in common rather than as joint tenants.

The Act commenced on assent, except for the amendment of s 63, relating to Board members of LALCs, and the repeal of s 162(3) and s 163, relating to funding agreements and cessation of funding. Those amendments commence on 1 January 2014.

The [Growth Centres \(Development Corporations\) Amendment \(Cooks Cove Growth Centre\) Order 2013](#), published 16 August 2013, amended Sch 1 to the [Growth Centres \(Development Corporations\) Act 1974](#) to dissolve the Cooks Cove Development Corporation and establish certain land at Cooks Cove (in the Rockdale LGA) as a growth centre for which the UrbanGrowth NSW Development Corporation is responsible.

The [Subordinate Legislation \(Postponement of Repeal\) Order 2013](#), published 23 August 2013, postponed, until 1 September 2014, the repeal of a number of regulations, including the following:

- *Bail Regulation 2008*
- *Crimes (Administration of Sentences) Regulation 2008*
- *Crown Lands Regulation 2006*
- *Environmentally Hazardous Chemicals Regulation 2008*
- *Local Government (General) Regulation 2005*
- *Marine Pollution Regulation 2006*
- *Noxious Weeds Regulation 2008*
- *Petroleum (Onshore) Regulation 2007*
- *Protection of the Environment Operations (Waste) Regulation 2005*
- *Trees (Disputes Between Neighbours) Regulation 2007*

The [Local Land Services Act 2013 No 51](#) proclamation appointed 2 August 2013 as the day on which certain provisions of the [Local Land Services Act 2013](#) relating to the division of the State into regions for the purposes of the Act, interim local boards and entry into State industrial instruments or other agreements concerning certain staff, commenced.

The [Marine Parks Amendment \(Moratorium\) Act 2013](#), commenced 3 September 2013, amends the [Marine Parks Act 1997](#) with respect to zoning plans and sanctuary zones in marine parks.

As of 1 July 2013, all provisions of the [Boarding Houses Act 2012](#) have commenced. The [Boarding Houses Regulation 2013](#), published 28 June 2013 and commenced 1 July 2013, inter alia:

- (a) prescribes additional information that is to be notified about registrable boarding houses, and
- (b) prescribes certain offences under the *Boarding Houses Act 2012* and the Regulation to be penalty notice offences.

The [Contaminated Land Management Regulation 2013](#), commenced 1 September 2013, remade, with amendments providing for the indexation of certain costs and fees, the provisions of the [Contaminated Land Management Regulation 2008](#) which was repealed on 1 September 2013 by s 10(2) of the *Subordinate Legislation Act 1989*.

[Conveyancing \(General\) Amendment \(EnergyAustralia\) Regulation 2013](#), commenced 1 September 2013, prescribes EnergyAustralia NSW Pty Ltd as a prescribed authority for the purposes of s 88A of the *Conveyancing Act 1919* so that an easement without a dominant tenement may be created in favour of that corporation. Any such easement may only be created in favour of the corporation if the easement is for the purpose of, or incidental to, the supply of a utility service to the public, including the supply of gas, water or electricity.

[Conveyancing \(General\) Regulation 2013](#), commenced 1 September 2013, remade the [2008](#) regulation which was repealed by s 10(2) of the *Subordinate Legislation Act 1989*.

The [Powers of Attorney Amendment Act 2013](#) commenced 13 September 2013, along with the [Powers of Attorney Amendment Regulation 2013](#).

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

The [SEPP \(Sydney Region Growth Centres\) 2006](#) has been amended by the [SEPP \(Sydney Region Growth Centres\) Amendment \(Land Use\) 2013](#), published 13 September 2013.

The [SEPP Amendment \(Cessnock and Newcastle\) 2013](#), published 9 August 2013, redefines the maps in the [Newcastle](#) and [Cessnock](#) LEPs.

[SEPP Amendment \(North Ryde Station Precinct\) 2013](#), published 23 September 2013, amended the maps in the Ryde Local Environmental Plan 2010.

[SEPP \(Infrastructure\) Amendment \(Electricity Generating Works\) 2013](#), published 14 June 2013, amended the [SEPP \(Infrastructure\) 2007](#) in respect of works not requiring development consent.

- **Bills**

The [Crown Lands Amendment \(Multiple Land Use\) Bill 2013](#) was introduced into the Legislative Assembly on 12 September 2013, and amends the [Crown Lands Act 1989](#) to:

- (a) provide that a secondary interest (a lease, licence, permit, easement or right-of-way) can be granted in respect of Crown land that is reserved for a public purpose so long as use and occupation of the land under the secondary interest would not be likely to materially harm the use and occupation of the land for the public purpose for which it is reserved;
- (b) authorise the Minister or a reserve trust to validate the grant of a secondary interest over a Crown reserve by making such changes to the secondary interest as may be necessary to ensure that it was validly granted; and
- (c) require notice to be given to the Minister or a reserve trust before the validity of a secondary interest over a Crown reserve can be challenged in court proceedings. [\[full explanatory notes\]](#)

The [Residential \(Land Lease\) Communities Bill 2013](#), introduced into the Legislative Assembly 18 September 2013, will repeal and replace the [Residential Parks Act 1998](#), and aims to:

- (a) improve the governance of residential communities (such as caravan parks and manufactured home estates);
 - (b) set out particular rights and obligations of operators of residential communities and home owners in residential communities;
 - (c) enable prospective home owners to make informed choices;
 - (d) establish procedures for resolving disputes between operators and home owners;
 - (e) protect home owners from bullying, intimidation and unfair business practices; and
 - (f) encourage the continued growth and viability of residential communities in the State.
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The [Strata Schemes Management Amendment \(Child Window Safety Devices\) Bill 2013](#), introduced into the Legislative Assembly 18 September 2013, amends the [Strata Schemes Management Act 1996](#) to require owners corporations of strata schemes to ensure that complying window safety devices to facilitate child safety are installed on strata buildings and to provide for the enforcement of that obligation.

The [Liquor Amendment \(Kings Cross Plan of Management\) Bill 2013](#) was passed by the Legislative Assembly on 18 September 2013 and introduced into the Legislative Council for concurrence. The Bill amends the [Liquor Act 2007](#) to implement the second stage of the Government's plan of management for the Kings Cross precinct, and provides for 2 new types of banning orders and for ID scanning of patrons at high risk venues. The Bill also makes it clear that an application for a small bar licence for premises in any part of the State is not required to be accompanied by a community impact statement, or to be advertised, if the application merely involves changing from a general bar licence to a small bar licence (which have a patron capacity of 60 and do not have take-away sales) and development consent has been obtained to sell liquor during the times that the small bar licence is to operate. For further information see [Planning for small bars](#), issued by the Division of Planning and Infrastructure.

[Crimes \(Sentencing Procedure\) Amendment \(Standard Non-parole Periods\) Bill 2013](#), introduced into the Legislative Assembly on 18 September 2013, will amend the [Crimes \(Sentencing Procedure\) Act 1999](#) with respect to the setting of standard non-parole periods for offences. The amendments made by the Bill clarify the following aspects of the role of the standard non-parole period in sentencing, as a consequence of the High Court decision in *Muldrock v The Queen* [2011] HCA 39:

- (a) a standard non-parole period represents the non-parole period not for the actual offence for which an offender is to be sentenced but for an offence of the same kind that is in the middle of the range of seriousness taking into account only objective factors that affect its relative seriousness;
- (b) the standard non-parole period for an offence is to be taken into account in determining the appropriate sentence for an offender; and
- (c) in taking a standard non-parole period into account, a court is not required to make an assessment of the extent to which the seriousness of the offence for which the non-parole period is set differs from that of an offence to which the standard non-parole period is referable.

The [Crimes and Courts Legislation Amendment Bill 2013](#) was introduced into the Legislative Assembly on 18 September 2013, and will, inter alia:

- (a) amend the [Crimes \(Appeal and Review\) Act 2001](#) to clarify the time within which a prosecutor may appeal against a costs order and when a defendant may apply for the annulment of a conviction or sentence made or imposed by the Local Court;
- (b) amend the [Justices of the Peace Act 2002](#) to allow justices of the peace to certify true and accurate copies of documents; and
- (c) amend the [Oaths Act 1900](#) to make provision with respect to the taking of statutory declarations by persons who are unable to understand written English, the taking of oaths or statutory declarations for the purposes of laws and courts in jurisdictions other than NSW and the taking of affidavits made by more than one person.

• **Consultation Drafts**

The NSW Environment Protection Authority has released details of proposed new risk based licensing scheme. The amendments to the [Protection of the Environment Operations \(General\) Regulation 2009](#) propose to introduce higher administrative costs and closer regulation for environment protection licence (EPL) holders with facilities carrying higher risks or with poor compliance records. EPL holders with low risk facilities and good compliance records may face lower regulation under the scheme.

Comments are invited on the draft Regulation, the [Regulatory Impact Statement](#), and the introduction of an environmental risk-based licensing system, by Friday 1 November 2013.

The consultation period for the [State Environmental Planning Policy \(Mining, Petroleum Production and Extractive Industries\) Amendment \(Resource Significance\) 2013](#) closed on 12 August 2013.

On 2 September 2013, the State Government released draft legislation - [Cemeteries and Crematoria Bill 2013](#) - to regulate cemetery and crematorium operations across all three sectors of the interment industry. Its primary purpose is to ensure that there is sufficient land to meet current and future burial needs in NSW and that people continue to have access to a range of interment options. Submissions closed on 20 September 2013. [\[Information Sheet\]](#)

[Proposal to amend and replace weed declarations under the Noxious Weeds Act 1993](#) closes 18 October 2013 [\[explanatory notes\]](#)

- **Miscellaneous**

The NSW Parliamentary Research Service has released three Briefing Papers on the proposed planning reforms in NSW:

- NSW planning reforms: sustainable development [\[No 07/2013\]](#) [\[full paper\]](#)
- NSW planning reforms: infrastructure [\[08/2013\]](#) [\[full paper\]](#)
- NSW planning reforms: building regulation and certification [\[09/2013\]](#) [\[full paper\]](#)

The Division of Planning and Infrastructure has released the following circulars:

- Building Code of Australia 2013 – key changes [\[BS 13-003\]](#)
- The NSW Planning System and the Building Code of Australia 2013: Construction of Buildings in Flood Hazard Areas [\[BS 13-004\]](#)

Court Practice and Procedure

The Court has published a new Planning Principle concerning the impact of a proposed development on neighbouring properties, revising the planning principle originally published in *Paflburn v North Sydney Council* [2005] NSWLEC 444. The new planning principle is set out in *Davies v Penrith City Council* [\[2013\] NSWLEC 1141](#) at [116] to [121].

The Court has released new [requirements for photomontages](#) proposed to be relied on as part of expert evidence in Class 1 appeals. The new requirements apply for proceedings commenced on or after 1 October 2013.

New directions have been issued for the [provision of documents](#) for matters set down for a conciliation conference pursuant to s 34 or 34AA of the [Land and Environment Court Act 1979](#) or a mediation pursuant to s 26 of the [Civil Procedure Act 2005](#). These directions commenced on 15 July 2013.

[Uniform Civil Procedure Rules \(Amendment No 59\) 2013](#), published 7 June 2013, made further provision regarding:

- (a) offers to compromise in claims in civil proceedings; and
- (b) the consequences as to costs in accepting or rejecting such offers.

[Uniform Civil Procedure Rules \(Amendment No 60\) 2013](#), published 5 July 2013, amended [rule 4.2](#) of the [Uniform Civil Procedure Rules 2005](#) to require originating processes and other documents filed on

behalf of a person to state the email address of the solicitor representing the person or, if the person has no solicitor, the person's email address.

[Uniform Civil Procedure Rules \(Amendment No 61\) 2013](#), published 9 August 2013, amended the [Uniform Civil Procedure Rules 2005](#) to give effect to certain recommendations made by the NSW Law Reform Commission:

- (a) [Rule 42.21](#) has been amended:
 - (i) to limit the power of a court to order security for costs because the plaintiff is not ordinarily a resident of NSW to circumstances where the plaintiff resides outside of Australia;
 - (ii) to enable a court to order security for costs where there are grounds to believe that the plaintiff has divested assets with the intention of avoiding the consequences of the proceedings; and
 - (iii) to include a non-exhaustive list of matters to which the court may have regard in determining whether to order security for costs;
- (b) A new rule has been inserted to require a party who changes his or her address during the course of the proceedings to notify the court and the other active parties of the new address within a reasonable time; and
- (c) Rules [50.8](#) and [51.50](#) have been amended to enable a court to which [Part 50](#) applies and the Court of Appeal, respectively, to dismiss an appeal or cross-appeal for failure to provide security for costs.

[Uniform Civil Procedure Rules \(Amendment No 62\) 2013](#), published 9 August 2013 amended [rule 10.20](#) of the [Uniform Civil Procedure Rules 2005](#) to make it clear that the requirements set out in that rule concerning how originating processes are to be served extends to the service of amended statements of claim where the defendant to be served has not filed either a notice of appearance or notice of defence.

Court fees increased on 1 July 2013, as set out in the [Civil Procedure Amendment \(Fees\) Regulation 2013](#), published 28 June 2013, and the [Criminal Procedure Amendment \(Fees and Court Costs Levy\) Regulation 2013](#), published 21 June 2013.

Judgments

- **United Kingdom**

East Northamptonshire District Council & Ors v Secretary of State for Communities and Local Government & Anor [\[2013\] EWHC 473](#) (Admin) (Mrs Justice Lang DBE)

Facts: the East Northamptonshire District Council, English Heritage, and the National Trust ("the Claimants") applied under [s 288](#) of the [Town and Country Planning Act 1990](#) ("TCPAct") to quash the decision of an Inspector allowing an appeal by Barnwell Manor Wind Energy Ltd ("Barnwell"), the second respondent, against the decision of the East Northamptonshire District Council and granting planning permission for a wind farm development. English Heritage had a statutory obligation under the [Heritage Act 1983](#) to preserve historic buildings and promote public enjoyment and knowledge of them; in this case

it was a statutory consultee and an objector. The National Trust owned the site of Lyveden New Bield, a Grade 1 listed building, which was arguably the most significant heritage asset affected by the proposal. Initially the proposed development comprised 5 wind turbine generators, sub-station, access road, 80m anemometer, underground cabling and temporary construction facilities. In the course of its appeal the Inspector permitted Barnwell to remove from its proposal the wind turbine that was closest to Lyveden New Bield. He then granted permission for the development with 4 wind turbines. The Inspector found that there would be no significant adverse impact on users of public rights of way, no appreciable devaluation of the visitor experience to the area and no harm in ecological terms; the proposed development would harm the setting of a number of designated heritage assets however the harm in all cases would be less than substantial and reduced by the temporary nature of the planning permission (25 years) and its reversibility; the benefits that would accrue from the wind farm, being a 10MW contribution to the 2020 regional target for renewable energy, attracted significant weight in favour of the proposal; and the significant benefits of the wind farm outweighed the harm it would cause to the setting of designated heritage assets and the wider landscape.

[Section 66\(1\)](#) of the [Planning \(Listed Buildings and Conservation Areas\) Act](#) 1990 (“the P(LBCA) Act”) provided:

“In considering whether to grant planning permission for development which affects a listed building or its setting, the Local Planning Authority, or as the case may be, the Secretary of State, shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses.”

Issues:

- (1) whether the Inspector had given special regard to the desirability of preserving the settings of listed buildings as required by s 66(1) of the P(LBCA) Act;
- (2) whether the Inspector had correctly interpreted and applied planning policy on the effect of development on the setting of heritage assets; and
- (3) whether the Inspector had given adequate reasons for his decision.

Held: quashing the decision of the Inspector and directing that the appeal be re-considered:

- (1) the determination of an application for planning permission, and any appeal, was to be made in accordance with the development plan, unless material considerations indicated otherwise. The decision maker had to assess the facts and weigh the material considerations and decide whether there were considerations of such weight as to indicate that the development plan should not be accorded priority. The material considerations in this application included Government planning policies, including Planning Policy Statement 5: Planning for the Historic Environment (“PPS5”), and English Heritage policies: at [28], [29], [32];
- (2) as the proposed development affected the setting of listed buildings, consideration of the grant of planning permission had to be made in accordance with the statutory duty under s 66(1) of the P(LBCA) Act. In a case where the preservation of a listed building or its setting might conflict with the development plan, which had been given statutory priority, the duty under s 66(1) had been characterised at its lowest as a material consideration to which considerable weight should be attached. However in this application, the preservation of the setting of a listed building was not in conflict with the development plan. It was potentially in conflict with other material considerations such as national policies, which were not given the same statutory priority as the development plan: at [34], [35];
- (3) in order to give effect to the statutory duty under s 66(1), a decision maker had to give considerable importance and weight to the “desirability of preserving ...the setting” of listed buildings when weighing this factor in the balance with other material considerations. Thus, where the s 66(1) duty was in play, it was necessary to qualify Lord Hoffman’s statement in *Tesco Stores v Secretary of State for the Environment & Ors* [1995] 1 WLR 759 that the weight to be given to a material consideration was a question of planning judgment for the planning authority: at [39];
- (4) under PPS5 the Inspector was required to “weigh the public benefit of the proposal against the harm”, and to “weigh any such harm against the wider benefits of the application”. That he did. However, the

addition of the word “desirability” in s 66(1) signalled that “preservation” of setting was to be treated as a desired or sought-after objective to which the Inspector ought to accord “special regard”. That went beyond mere assessment of harm. The Inspector did not at any stage in the balancing exercise accord “special weight” or considerable importance to “the desirability of preserving the setting”, and he treated the “harm” to the setting and the wider benefit of the wind farm proposal as if those two factors were of equal importance. The Inspector erred in law by not giving effect to the duty under s 66(1) when carrying out the balancing exercise: at [44]-[47];

- (5) the Inspector’s assessment of the effect of the proposal on the setting, and in turn, on the significance, of each of the relevant heritage assets was too limited. The Inspector failed to have proper regard to the relevant planning policies, in particular in limiting his assessment to the ability of the public to understand the asset, and thus failed to consider the contribution made by the setting to the significance of the asset. The Inspector failed properly to interpret and apply the relevant planning policies on the effect of development on the setting of heritage assets. By failing properly to assess the contribution made by setting to the significance of the heritage assets, he may have failed properly to assess the overall magnitude of harm. On the balance of probabilities, it was likely therefore that the balancing exercise was flawed: at [57], [60], [65];
- (6) there was conflicting evidence before the Inspector as to whether the owner and designer of Lyveden New Bield intended the views from the lodge and garden to be of significance. The Inspector should have given a clear conclusion, with reasons, on the important controversial issue as to whether or not there were planned views, before proceeding to assess the level of harm. There was substantial doubt as to the Inspector’s reasoning and whether or not the Inspector did make an error of law. The failure to give adequate reasons contravened rule 19(1) of the [Town and Country Planning Appeals \(Determination by Inspectors\) \(Inquiries Procedure\) \(England\) Rules 2000](#), and prejudiced the Claimants as they were not able to ascertain the Inspector’s conclusions in relation to an important controversial issue, nor whether he had made an error of law: at [68]-[71]; and
- (7) it was not possible to predict what conclusion the Inspector would have come to if he had correctly applied s 66(1) of the P(LBCA) Act and the relevant planning policies, and the decision ought to be quashed and the appeal re-considered: at [74].

Wainhomes (South West) Holdings Limited v Secretary of State for Communities and Local Government [\[2013\] EWHC 597](#) (Admin) (Mr Justice Stuart-Smith)

Facts: Wainhomes (South West) Holdings Ltd (“Wainhomes”) challenged under [s 288](#) of the [Town and Country Planning Act 1990](#) (“TCPAct”) a decision of Inspector Robins dismissing an appeal against the non-determination by Wiltshire Council (“the Council”) of a proposal to build up to 50 houses on land in Purton, Wiltshire. The inquiry was undertaken on the appeal of Mr and Mrs Cornell against the Council’s non-determination of their application for planning permission. Wainhomes had an interest in the land the subject of the challenge by reason of an option agreement. Mr and Mrs Cornell, and the Council, were interested parties in the proceedings. The Inspector identified as one of the main issues in the case, whether or not there were material considerations that would outweigh the development plan presumption against development in the countryside. Central to that issue was whether or not there was a supply of specific deliverable sites sufficient to provide five years’ worth of housing against the Council’s relevant housing requirements with an additional buffer of five percent to ensure choice and competition in the market for land, as required under the National Planning Policy Framework (“NPPF”), introduced in March 2012. That issue involved consideration of whether certain strategic sites included in the Council’s draft strategy documents should be included by the Inspector when determining the supply of deliverable sites over the next five years. The Council contended that they should be included; the appellants said that they should be excluded. During the inquiry the Inspector was referred to three previous decisions which touched on the issue of inclusion or exclusion of strategic sites, which pre-dated the introduction of the NPPF. After the hearing of the inquiry, on 18 September 2012 two decisions by another Inspector (Inspector Papworth) were promulgated in relation to sites in Calne, also in Wiltshire (“the Calne decisions”). Those decisions decided, in materially identical terms, that strategic sites should be excluded from consideration of the supply of deliverable sites. The Calne decisions were sent by email on 26

September 2012 to the inspectorate by those at the time advising Mr and Mrs Cornell, however on 2 October 2012 a case officer advised that they were received too late to be considered by the Inspector. When he made his decision on 5 October 2012 Inspector Robins found against the appellants and included the strategic sites, concluding that a five year housing supply had been shown.

Issues:

- (1) whether the Inspector had failed to have regard to a material consideration namely the Calne decisions or give reasons for not following the approach taken in those cases to the five year housing land supply;
- (2) whether the Inspector had failed correctly to interpret the NPPF;
- (3) whether the Inspector gave inadequate reasons for the inclusion of strategic sites in the five year housing land supply and/or the inclusion of the sites was irrational;
- (4) whether the Inspector failed to take into account material considerations, gave inadequate reasons for concluding a five year housing supply existed or otherwise behaved irrationally in so concluding; and
- (5) whether the Inspector made a mistake or otherwise reached a conclusion based on no evidence.

Held: allowing the application:

- (1) a previous Inspector's planning decision was capable of being a material consideration, although the importance to be attached to a previous decision would depend on the extent to which the issues in the previous decision and the current decision overlapped: at [9];
- (2) [The Town and Country Planning Appeals \(Determination by Inspectors\) \(Inquiries Procedure\) \(England\) Rules 2000](#) ("the Rules") provided the procedural framework for the conducting of inquiries, including rules intended to ensure that all relevant materials upon which an Inspector would make his decision were available both to the Inspector and to other parties according to an orderly timetable. Against the eventuality that information that was material to a decision became available for the first time at a date which prevented compliance with the normal framework and rules, the Inspector had a discretion to admit materials which had not been provided in accordance with the normal procedural timetable, up to the time that he made his decision. Rule 18 made express provision for admission of material after the inquiry had been held and before the decision was made: at [10];
- (3) the Calne decisions were material that might have caused the Inspector to reach a different conclusion to that he in fact reached without taking them into account. The features of the Calne decisions that gave them particular significance were that they directly addressed the requirements of [47] of the NPPF, as Inspector Robins was required to do; the decisions identified the possibility of site specific evidence and that there had been none submitted in relation to the strategic sites in the cases determined by Inspector Papworth; the timing, and geographical relevance; and the doubts expressed by Inspector Papworth over a number of included sites and supply provisions, to reduce the number of such sites that should be regarded as deliverable: at [38];
- (4) although Inspector Robins would have been entitled to disagree with Inspector Papworth's conclusion, before doing so he would have been obliged to have regard to the importance of consistency and to give his reasons for departure from Inspector Papworth's decision: at [39];
- (5) it would have been obvious to anyone receiving and reading the email that the Calne decisions dealt with the same issues as were central to the Purton inquiry, that the decisions had been issued the previous week (and so could not have been provided earlier), and that, as very recent decisions, they were likely to address the same issues as arose in the Purton inquiry: at [40];
- (6) that being so, the principle that a decision maker ought to take into account all matters which might cause him to reach a different conclusion, and the obligation to have regard to material considerations up to the time that the decision was made, weighed heavily in favour of Inspector Robins exercising his discretion in favour of admitting the Calne decisions for consideration: at [41];
- (7) in some cases where information was submitted late there might be a tension between the need for finality and proportionate expense on the one hand and a willingness to admit evidence which had not been submitted in accordance with the normal procedural timetable under the Rules. However, there

was no material available to suggest that there was any significant tension in this case. In particular, there was no evidence to suggest that the Calne decisions would open up any new issues or indicate the need for further evidence or hearings, and on the evidence available it would have been possible for any supplementary submissions to have been made shortly and in writing. It was not realistic to suggest that it would have been necessary to re-open the inquiry or that significant delay would have been caused by taking the Calne decisions into account, and there was therefore no evidential basis upon which it could be said that it was disproportionate or contrary to the wider interests of justice for the Calne decisions to be taken into account: at [43];

- (8) the obligation on a decision maker to give reasons for his decisions, including exercises of discretion, which would or might affect the rights and obligations of parties to legal proceedings over which he was presiding was a general one that covered the exercise of Inspector Robins' discretion in this case: at [44];
- (9) there was no evidence to suggest that the Inspector, or anyone on his behalf, carried out a reasoned assessment of the materiality of the Calne decisions or whether the decisions should be admitted and taken into account: at [46];
- (10) there was no information to support the suggestion that the Calne decisions were received too late to be considered by Inspector Robins and all the available information contradicted the assertion. In the absence of any reason or other material to explain why the date of the receipt of information trumped all other relevant considerations, the reason given was unsupportable. At its lowest, there was a failure to give adequate reasons so that the reader could know why, if any reasoned balancing exercise was carried out, it led to the exclusion of the Calne decisions: at [48];
- (11) the first ground of the challenge was upheld. The decision to exclude the Calne decisions from consideration should be set aside, because the Inspector failed to exercise his discretion properly; the reason given, that the material was submitted too late for consideration, was unsustainable; and the Inspector failed to give adequate reasons for his decision not to take the Calne decisions into account: at [49]; and
- (12) the other grounds of challenge failed, because when the decision was read fairly and with the reasonable latitude appropriate to a review of such decisions, it appeared that the Inspector made no error of law, reached conclusions that were open to him to reach on the material he considered, and gave adequate reasons for his decision: at [4], [62], [64].

- **Federal Court of Australia**

Tarkine National Coalition Inc v Minister for Sustainability, Environment, Water, Population and Communities [2013] FCA 694 (Marshall J)

Facts: on 16 February 2011, the Department of Sustainability, Environment, Water, Population and Communities ("SEWPAC") received a referral from Shree Minerals Ltd ("Shree") for a proposed action under [s 68](#) of the [Environment Protection and Biodiversity Conservation Act 1999 \(Cth\)](#) ("EPBC Act"). Shree's proposed action concerned the development and operation of a magnetite and hematite (iron ore) mine near Nelson Bay River in north-west Tasmania. On 17 March 2011, the Minister of SEWPAC ("the Minister") decided that the proposed action would be assessed by environmental impact statement ("EIS") under div 6 of pt 8 of the Act. After the EIS assessment process was completed, an Assistant Secretary of SEWPAC ("the Secretary") provided the Minister with a brief on or about 9 November 2012 which recommended that the Minister approve the taking of the action, subject to conditions. On 27 November 2012, the Minister informed Shree that he intended to approve the taking of the action subject to conditions and invited comments on the proposed decision. Shree provided further comment on 5 December 2012. On 14 December 2012, the Secretary prepared a brief concerning the Minister's final decision. Among other things, it provided the Minister with a proposed revised approval decision notice for his approval and signature. The Minister published his decision on 18 December 2012 in line with the draft provided by the Secretary, approving the proposed action under [s 133\(1\)](#) of the EPBC Act. On 21 January 2012, Tarkine National Coalition Inc ("TNC"), pursuant to [s 13](#) of the [Administrative Decisions \(Judicial Review\) Act 1977](#)

(Cth), requested a statement of reasons for the Minister's decision to approve the proposed action. On 4 March 2013, the Minister sent his statement of reasons to TNC.

In satisfying the "person aggrieved" test under [s 487\(3\)](#) of the EPBC Act, TNC sought judicial review of the Minister's decision on four grounds: (1) the failure of the Minister to have regard to a mandatory consideration in [s 139\(2\)](#) of the EPBC Act, namely, the approved conservation advice for the Tasmanian Devil, in deciding whether to approve the taking of the action; (2) the decision was not authorised by s 133 of the EPBC Act because [s 134](#) of that same Act did not authorise the Minister to approve the action subject to condition 14 of the approval conditions (concerning the requirement for Shree to donate money to a program known as the "Save the Tasmanian Devil Program Appeal") or at all or otherwise involved an error of law; (3) the decision was not authorised by s 133 of the EPBC Act because the Minister acted inconsistently with articles 8 and 9 of the *Convention of Biological Diversity* ("the Biodiversity Convention") as amended and in force for Australia, contrary to s 139(1)(a)(i) of the EPBC Act, and (4) the decision was irrational or so unreasonable that no reasonable person could have so exercised the power under s 133 of the EPBC Act.

Issues:

- (1) whether the Minister failed to have regard to a mandatory consideration in s 139(2) of the EPBC Act, namely the approved conservation advice for the Tasmanian Devil;
- (2) whether, in approving the taking of the action, the Minister was entitled to attach a condition to his approval (namely, condition 14) which required Shree to donate money to a program known as the "Save the Tasmanian Devil Program Appeal";
- (3) whether the Minister acted inconsistently with articles 8 and 9 of the Biodiversity Convention contrary to s 139(1)(a)(i) of the EPBC Act, and
- (4) whether the Minister's decision was irrational or so unreasonable that no reasonable person could have so exercise the power under s 133 of the EPBC Act in such a manner.

Held: declaring that the decision of the Minister on 18 December 2012 to approve the taking of the action was invalid and of no effect, and setting aside the decision, with the Minister to pay the applicant's costs of the proceeding:

- (1) the approved conservation advice was not contained in the proposed decision brief provided to the Minister in November 2012 or in the final decision brief provided to the Minister in December 2012. It was not provided to the Minister at all for the purposes of making his decision and he did not have a copy of the document before him for any such purpose. The phrase "have regard to" is capable of different meanings depending on its statutory context. Sometimes the statutory context will require that the matter to which a decision-maker is to have regard is a fundamental element in the decision-making process. On other occasions, the matter will require mere consideration by the decision-maker, not being a fundamental element in the decision-making process. Given the Court's view of the significance of the approved conservation advice in the Minister's decision-making process in the statutory scheme, it is irrelevant for the purposes of s 139(2) that most of the material in the advice was before the Minister by other means. The EPBC Act requires the Minister to have regard to the conservation advice. This means that genuine consideration must be given to the document. The Minister's failure to have regard to the document for the purpose of making his decision is fatal to its validity. The requirement to have regard to any approved conservation advice relevant to a threatened species before approving action which may have impact on that species is a pivotal element of that system of protection: at [35], [42], [49], [59];
- (2) the Minister was entitled to attach a condition to his approval requiring Shree to donate money to a program known as the "Save the Tasmanian Devil Program Appeal". The use of an introduced population was capable of protecting, repairing or mitigating damage to the Tasmanian Devil as a threatened species notwithstanding that the Tasmanian Devil was not currently extinct in the wild: at [74];
- (3) it was not necessary to determine whether the Biodiversity Convention could be incorporated into domestic law to override what was otherwise a course open to the Minister under s 134 of the EPBC

Act. The Court rejected the submission that condition 14 was not authorised by s 134 of the EBPC Act and that it was inconsistent with Australia's obligations under the Biodiversity Convention: at [80]; and

- (4) the challenge to the Minister's decision on the grounds of irrationality or unreasonableness was, in effect, an invitation to the Court to substitute its own view of the merits of imposing condition 14. That was a decision for the Minister. It was not appropriate for the Court to intervene, unless it could be demonstrated that the decision was so unreasonable or irrational that not reasonable decision-maker could have arrived at it with condition 14 included in the approval: at [85].

- **NSW Court of Criminal Appeal**

Shannongrove Pty Ltd v Environment Protection Authority [2013] NSWCCA 179 (Basten ACJ, Hall J, and Barr AJ)

(related decision: *Environment Protection Authority v Shannongrove Pty Ltd (No 2)* [2012] NSWLEC 202 Craig J)

Facts: Shannongrove Pty Ltd ("Shannongrove") contracted with the operator of a waste facility at Eastern Creek to take a form of sludge referred to as "liquid by-product" which resulted from the treatment of organic waste. Shannongrove collected the liquid by-product and transported it to a farm in Bringelly on which the owner ran dairy cattle. The liquid was injected into the soil as a form of fertiliser. The farm was not a "waste facility" within the meaning of that term in the [Protection of the Environment Operations Act 1997](#) ("the POEO Act") and was not licensed to receive such waste. Shannongrove was charged with transporting waste to a place that could not lawfully be used as a waste facility for that waste, contrary to [s 143\(1\)](#) of the POEO Act. The charges related to a course of conduct which was divided into two periods. The period of the first charge ran from "about 28 January 2005" until 28 April 2006; the period the subject of the second charge from "about 1 May 2006" until 5 July 2006. The trial judge accepted that almost 5,000 tonnes of liquid transported over the two periods constituted "excess process water", some 540 tonnes was "digester liquid" and the small remainder other forms of waste water, amounting in total to approximately 5,660 tonnes.

The POEO Act was amended from 1 May 2006. Prior to 1 May 2006 s143(1) provided that the person who transports waste, and, if the person is not the owner of the waste, the owner, are each guilty of the offence. Section 143(3C) provided that it is a defence if the defendant establishes that the waste transported by the defendant was not deposited by the defendant or any other person at the place to which it was transported.

The term "waste" as defined in s 143(4) prior to 1 May 2006 was:

"waste includes any unwanted or surplus substance (whether solid, liquid or gaseous). A substance is not precluded from being waste merely because it may be reprocessed, re-used or recycled"

After 1 May 2006 s 143(1) provided the offence "if a person transports waste to a place that cannot lawfully be used as a waste facility for that waste, or causes or permits waste to be so transported". The definition of "waste" was removed from s 143(4), and the definition of "waste" in the Dictionary to the POEO Act was amended, in part by inserting a new paragraph (d). The definition of "waste" in the Dictionary after 1 May 2006 was:

"waste (unless specifically defined) includes:

- any substance (whether solid, liquid or gaseous) that is discharged, emitted or deposited in the environment in such volume, constituency or manner as to cause an alteration in the environment, or
- any discarded, rejected, unwanted, surplus or abandoned substance, or
- any otherwise discarded, rejected, unwanted, surplus or abandoned substance intended for sale or for recycling, processing, recovery or purification by a separate operation from that which produced the substance, or

- (d) any processed, recycled, re-used or recovered substance produced wholly or partly from waste that is applied to land, or used as fuel, but only in the circumstances prescribed by the regulations, or
- (e) any substance prescribed by the regulations to be waste.

A substance is not precluded from being waste for the purposes of this Act merely because it can be processed, recycled, re-used or recovered.”

Shannongrove was convicted, and appealed pursuant to [ss 5AB](#) and [5AA](#) of the [Criminal Appeal Act](#) 1912.

Issues:

- (1) whether the liquids transported were no longer unwanted or surplus once loaded on the appellant’s tanker so that they did not constitute “waste” at any point during transportation during the first period charged; and
- (2) whether the definition of “waste” applicable for the second period charged was more restrictive than the earlier definition, or the definition in s 143(4) which applied to the first charge.

Held dismissing the appeal:

- (1) the language of the definitions had to be construed coherently with other provisions of the POEO Act and by reference to its objects, in accordance with general principles of statutory construction. That exercise would involve the need to have regard to variations in terminology, both within the Act at a particular time and changes made over time. The development of the current definitions from earlier legislation and the use of English language dictionary definitions were of limited value in this context. Similarly, any case had to be addressed with particular reference to the provision being considered. The authorities applying the definition of “waste” in a European Directive did so by reference to language which did not assist in construing the New South Wales Act: at [15];
- (2) statements of principle applicable to statutory construction could result in an over-sophisticated formulation with reliance on a variety of presumptions, maxims and rules. On the other hand, failure to articulate the approach being undertaken was liable to give rise to inconsistency and a lack of transparency. Although the legislative regime regulating the transport and disposal of waste was complex, it was desirable that, where possible, the language used should be construed in a manner that was reasonably accessible to those whose activities were subject to regulation: at [24];
- (3) the trial judge held, for reasons which should be accepted, that the term “waste” was specifically defined in s 143(4) prior to 1 May 2006 and accordingly the definition in the Dictionary did not apply: at [7];
- (4) in addressing the period covered by the first charge, the variation in language between the definition in s 143(4) and the definition in the Dictionary suggested that limited assistance as to the scope of s 143(4) could be obtained by a comparison with the Dictionary definition which was excluded: at [28];
- (5) viewed in isolation, the language of s 143(4) would be understood to refer to substances which were unwanted by their owner, or surplus to the needs of the owner. Whilst they might cease to be waste at some point if reprocessed, reused or recycled, the fact that such a course might be undertaken in the future by another person would not prevent the substance being waste in the hands of the owner and hence at the point at which transportation commenced: at [29];
- (6) it was proper to have regard to the full scope of the offence. A further essential element of the offence was that waste was transported “to a place” of a specified character; that required reference to the definition of a “waste facility” and the limits on the lawful use of places as waste facilities for particular waste: at [30];
- (7) throughout the two periods covered by the charges, Sch 1 Part 1 of the POEO Act contained an alphabetical listing of scheduled activities that were premises-based activities, which included “waste facilities”. Those included “land fill or application sites” within the Sydney metropolitan area. A “land fill or application site” was defined to include a waste facility used for the purpose of disposing waste to land, including disposal by “injecting the waste into the land...”. The trial judge had found that the Bringelly farmland was used in a manner which rendered it a “land fill or application site” and thus a “waste facility”, and it was common ground that the owner did not have a relevant licence: at [31]-[33];

- (8) the appellant's contention that the liquids transported were no longer unwanted or surplus once loaded on the appellant's tanker, as at that point their transportation became part of the appellant's business and the deposit of the liquids into the soil at Bringelly was accepted by the owner of the land, who there "wanted" them, had to be rejected because it could not stand with the statutory scheme. If correct, it would follow that no material, while in transit, was waste, so long as it was transported as part of a business and the intended recipient accepted it willingly. Nor did it assist to characterise the liquid as having a beneficial use when disposed of on the farmland at Bringelly: at [34];
- (9) the elements of the offence were established by transportation of waste to a place having the proscribed characteristic. Nothing in the language of s 143(1) suggested that depositing the waste was an element necessary for completion of the offence: that fact that non-deposit of the waste was a defence provided by s 143(3C), to be affirmatively established by the defendant, was consistent with that conclusion: at [38]; and
- (10) in addressing the second period charged, there was no basis for construing the new definition of "waste" as more restrictive than the earlier definition in s 143(4) which applied to the first charge. Because the language of unwanted or surplus substances, which was applied in respect of the first charge, had equal application to the second charge, the same result must follow: at [41].

Environment Protection Authority v Terrace Earthmoving Pty Ltd [\[2013\] NSWCCA 180](#) (Basten ACJ, Hall J, and Barr AJ)
(related decision: *Environment Protection Authority v Terrace Earthmoving Pty Ltd & Ors* [\[2012\] NSWLEC 216](#) Craig J)

Facts: Terrace Earthmoving Pty Ltd ("Terrace Earthmoving") undertook demolition and excavation work on building sites and removed unwanted by-products of those activities. It also carried on road-building on private land and, for that purpose, used material removed from demolition sites to form the base of a road. The Environment Protection Authority ("EPA") commenced criminal proceedings against Terrace Earthmoving and a director, alleging conduct by the company in contravention of [s 143\(1\)](#) of the [Protection of the Environment Operations Act](#) 1997 ("the POEO Act") which provides that it is an offence for a person to transport waste to a place that cannot lawfully be used as a waste facility for that waste. The conduct extended over a period from 23 November 2005 until 1 March 2007. The POEO Act was amended on 1 May 2006, relevantly to remove the definition of "waste" from s 143(4) of the POEO Act and to amend the definition of "waste" in the Dictionary to the POEO Act which applied to the offence provision from 1 May 2006.

The definition of "waste" in s 143(4) prior to 1 May 2006 was:

"waste includes any unwanted or surplus substance (whether solid, liquid or gaseous). A substance is not precluded from being waste merely because it may be reprocessed, re-used or recycled."

Section 143(3C) provides that it is a defence if the defendant establishes that the waste transported by the defendant was not deposited by the defendant or any other person at the place to which it was transported.

Separate charges were filed in respect of conduct from 23 November 2005 to 30 April 2006 and from 1 May 2006 to 1 March 2007. The trial judge found that Terrace Earthmoving had a contract with the owners of a property in Williamstown to build an internal access road, which work commenced late in November 2005 and continued until March 2007. The trial judge held that the fact that a dwelling was to be demolished or a site excavated did not have the consequence that all the material brought to ground as a result of demolition or material excavated was material that was unwanted or surplus at that site. That was because of the deliberate process of separating materials so that those identified as being unwanted or surplus were set aside and taken to a landfill site while those materials identified as serving a construction function for the purpose of the road or track were loaded separately into trucks for transport and taken to the Williamstown property. While the material was not needed on the site from which it was removed, it was capable of being reused and had value for purposes such as that for which it was in fact used, namely road base. The trial judge held that there was a need for an element of objectivity in determining whether a substance is unwanted or surplus, and identified five factors relevant for consideration being the nature of the substance, whether there is an identified demand for the substance, circumstances in which the substance is obtained and removed from its source, whether the substance is being transported to a place

at which it is intended to be used for the purpose for which demand for the substance has been shown, and the period of time that elapses after the substance is transported to the place of its intended use before it is put to that use. The trial judge concluded that he was not satisfied beyond reasonable doubt that the material transported was “waste” within the meaning of s 143. The trial judge did not formally dismiss the charges, and at the invitation of the EPA, submitted nine questions of law for determination by the Court of Criminal Appeal pursuant to [s 5AE](#) of the [Criminal Appeal Act 1912](#).

The case was heard with a companion case, *Shannongrove Pty Ltd v Environment Protection Authority* [\[2013\] NSWCCA 179](#), in which the Court held that the term “waste” refers to substances which are unwanted by their owner or surplus to the needs of the owner and that whilst they might cease to be waste at some point if processed, re-used or recycled, that fact that such a course might be undertaken after transportation would not prevent the substance being waste in the hands of the owner and hence at the point at which transportation commenced.

Issues:

- (1) whether the approach adopted by the trial judge was erroneous because it was founded on an objective assessment of whether the material transported was capable of being used for a specific purpose;
- (2) whether it was an essential element of the offence that the material be deposited, for the offence to be complete; and
- (3) whether the variations in the definition of “waste” which occurred between the first and second periods restricted the scope of the definition.

Held providing answers to questions 1-8 with some variation to their terms in order to deal with them as questions of law, concluding that it was not appropriate to answer question 9 in the present case, returning the proceedings to the Land and Environment Court, and making no order as to costs:

- (1) the correct approach was to consider whether the owner of the material at the time transportation commenced had a continuing use for the material. If the owner did not, the material was waste, at least until it was applied to a new use: at [25];
- (2) the words “unwanted” and “surplus” required reference to the state of mind of some person, and those concepts did not turn on any objective characteristic of the substance. The ordinary reading of the provision was that the relevant individual was the “owner” when transportation was arranged. That reading was confirmed by the fact that it was not only the person who transports the substance, but also the person who is the owner of the substance to be transported, and (after 1 May 2006) causes or permits it to be transported. The fact that the substance was “wanted” by the carrier, in the sense that it was part of its business to transport such material, could not render it other than waste: at [27], [28];
- (3) the fact that some waste was capable of being (re)processed, re-used or recycled suggested that at some point in time it might no longer be waste. It was necessary to determine when unwanted or surplus substances changed their character from waste to non-waste, and an indication as to when that may occur was to be found in the language of the offence-creating provision. It was an essential element of the offence that the waste was transported to a place which “cannot lawfully be used as a waste facility for that waste”. Section 143(1) prohibits transport of waste to a place other than a relevant “waste facility”, being any premises where such waste may lawfully be stored, treated, reprocessed, sorted or disposed of. The fact that a substance was being taken to a place where it would be re-used or recycled did not affect its characterisation as waste: at [30]-[31];
- (4) the section thus promoted the re-use and recycling of waste ([s 3\(d\)\(iii\)](#) of the POEO Act), and to the extent that waste material may be harmful, its processing or elimination ([s 3\(d\)\(ii\)](#) and [\(ia\)](#)). Recognition of those purposes assisted in determining whether, and if so, when, that which was waste in the hands of the former owner ceased to be waste: at [32];
- (5) the material transported was unwanted by the original owners. The fact that the material might have resulted from activities undertaken by the respondent did not change that character, nor did the mere fact that the respondent sorted them on site. There was a difference between reprocessing, re-use or recycling, prior to transportation and merely identifying material which was capable of being re-processed: at [33];

- (6) the fact that the owners of the property to which the material was transported had a use for it when it reached their property did not mean that the material ceased to be waste at some point before it reached their property: at [34];
- (7) the fact that non-deposit was described as a defence, at least in circumstances where the ordinary meaning of “transport” does not include depositing the load, spoke strongly against the proposition that depositing was an element of the offence under s 143, and the trial judge was correct to conclude that it was not: at [38];
- (8) the variations in the definition of “waste” after 1 May 2006 expanded or clarified, but did not restrict, the scope of the definition. If the elements of the first charge were made out, there being no change in the nature of the conduct of the respondent, it followed that the second charge must also be made out: at [39];
- (9) it was difficult to envisage any finding other than that the substances transported to the Williamstown property were unwanted or surplus in the hands of the owners of the land from which they were taken, but it was appropriate that the matter be returned to the Land and Environment Court for that step to be taken: at [58];
- (10) if such a finding were made, there was a further finding required, namely that the materials were not processed, re-used or recycled prior to transportation in a manner which caused them to cease to be “waste”. The fact that they were sorted into materials to be re-used at a particular place would not itself constitute that use. It would appear unlikely that any other conclusion could be reached than that the material was “waste” when it was transported to the Williamstown property, however there was no finding in those terms and it was appropriate that the trial judge deal with the factual issue: at [59];
- (11) on the assumption that the material transported was found to be “waste”, further findings in relation as to the nature of the place to which it was transported would also be required: at [60]; and
- (12) although the trial judge approached the matters on an erroneous basis in point of law, only some of the questions raised by the appellant had been determined in accordance with the answers proposed by it and question 9, to which significant attention was directed, was not answered. The appellant did not seek an order for costs, although the respondent did. In the circumstances it was not appropriate to order that either party pay costs of the other: at [62];

Environmental Protection Authority v Truegrain Pty Ltd [2013] NSWCCA 204 (Leeming JA, RA Hulme and Button JJ)

(related decisions: *Environment Protection Authority v Truegrain Pty Ltd* [2012] NSWLEC 41; *Environment Protection Authority v Truegrain Pty Ltd (No 2)* [2012] NSWLEC 41; *Environment Protection Authority v Truegrain Pty Ltd (No 3)* [2012] NSWLEC 78, Lloyd AJ)

Facts: the Environment Protection Authority (“EPA”) sought leave to appeal, pursuant to [s 5F](#) of the [Criminal Appeal Act](#) 1912 (“the Criminal Appeal Act”), in respect of three interlocutory decisions made by Lloyd AJ on 16 March, 20 March and 18 April 2012. The EPA’s principal submission was that the primary judge erred in determining that the summons filed in Class 5 of the Land and Environment Court’s jurisdiction suffered from duplicity. The EPA also challenged an order of costs against it.

At the commencement of the prosecution, the EPA had claimed by its summons, that the respondent (“Truegrain”) had committed an offence against [s 64\(1\)](#) of the [Protection of the Environment Act](#) 1979, alleging that the respondent was a holder of a licence, a condition of which had been contravened during a specified period. Through initial correspondence between the parties and subsequently by a motion, Truegrain sought further particulars in addition to those initially provided by the EPA. The EPA supplied the particulars sought. Those particulars led Truegrain to file an amended motion that the proceedings be dismissed or stayed on the basis that the charge was duplicitous. In reasons given on 16 March 2012, Lloyd AJ concluded that the summons as amplified was duplicitous, although not incurably bad, and that the EPA could elect, prior to trial, which matters alleged in the particulars it proposed to pursue. Thereafter the EPA provided three pages described as “particulars to amended summons”. The matter returned to the primary judge on 20 March 2012, when Truegrain maintained that the amended particulars continued to disclose duplicity. Lloyd AJ held that the EPA was required to elect as to which of the two

particulars it had identified it wished to pursue. By a reserved judgment following a hearing on 21 March 2012, the primary judge required the EPA to amend its summons by deleting the particulars on which it would no longer rely, and pay the defendant's costs thrown away by reason of the amendment. His Honour held that [s 68](#) of the [Land and Environment Court Act](#) 1979 ("LEC Act") was a source of power to make an order for costs and that [s 257C](#) of the [Criminal Procedure Act](#) 1986 ("Criminal Procedure Act") did not exclude the operation of s 68, which applied in proceedings in the Court's Class 5 jurisdiction. His Honour found that it was not necessary to find that exceptional circumstances relating to the conduct of the proceedings existed before costs could be awarded, in contrast with [s 257D](#) of the Criminal Procedure Act. However if s 257D were to apply, then his Honour found that it was just and reasonable to order the EPA to pay Truegain's costs.

Issues:

- (1) whether the summons was bad for duplicity;
- (2) whether allegations of carrying out storage and treatment of waste on different occasions could proceed as a single charge;
- (3) whether there was power to order costs in a summary jurisdiction confined by circumstances stated in Criminal Procedure Act;
- (4) whether there was power to order costs against the prosecutor, before determination of the trial, following the amendment of duplicitous summons; and
- (5) whether the power to order amendment on terms as to costs was a free-standing power authorising interlocutory costs orders in summary jurisdiction.

Held: upholding the primary judge's finding that the summons was duplicitous, but setting aside the costs order; allowing the appeal in part, setting aside the order for costs and otherwise dismissing the appeal:

- (1) the "basic rule" relating to duplicity sufficient for the purpose of resolving the appeal was that articulated in *Rixon v Thompson* [\[2009\] VSCA 84](#), namely that "[I]t is a basic rule of common law that no count in an indictment should charge the defendant with having committed two or more separate offences.": at [33]-[34];
- (2) the doctrine of duplicity continued to apply in the exercise of summary jurisdiction: at [40];
- (3) sections [16\(2\)](#) and [21](#) of the Criminal Procedure Act applied by reason of [s15\(1\)](#), and together with the power to order particulars, enabled the Land and Environment Court to deal with duplicity in the exercise of Class 5 summary jurisdiction: at [46];
- (4) where acts formed part of the same transaction or criminal enterprise, they could be charged in a single count, thus the general rule was that unless the allegation constituted a continuing offence or offences which were closely related amounting to the one activity, they should be separately charged: at [48]-[50];
- (5) the question whether a statute attached criminality to an on-going criminal enterprise, as opposed to a particular act, was inevitably a question of construction: at [51]-[52];
- (6) in the present case, the elements of the offence were (a) holding a licence and (b) any person contravening a condition of that licence. The critical element of the offence alleged was the failure to carry out "waste processing (non-thermal treatment) in a competent manner". The non-thermal treatment of waste included both the storage and processing of waste. Doing either of those things incompetently would amount to a breach of the condition of the Licence: at [53]-[55];
- (7) the EPA chose to advance, under the one charge, separate claims that there was incompetent storage and incompetent treatment. Those particulars disclosed more than one offence: at [56];
- (8) the true position of the EPA was that the full alleged criminality was more serious than the single charge in the summons. That was precisely the vice to which the statements made by Dixon and Evatt JJ in *Johnson v Miller* (1937) 59 CLR 467 were directed. The EPA's stance was contrary to what Evatt J said was an "essential part of the concept of justice in criminal cases": at [74];

- (9) the primary judge was wrong to conclude that s 68(1) of the LEC Act was a separate head of power to order costs, and wrong to say that it was not inconsistent with s 257C. When the question was one of inconsistency of powers in separate statutes, the first question was one of construction, and not lightly would an earlier, generally worded power be held to cut across a specific, qualified and later power. Such statutory power as the Land and Environment Court has to order costs in respect of proceedings in Class 5 of its jurisdiction is regulated by the Criminal Procedure Act: at [98]; and
- (10) nothing in the reasons of this judgment would prevent Truegain from applying for a costs order, at the conclusion of the proceedings, in the event that it could satisfy the elements of ss 257C and 257D of the Criminal Procedure Act, as regularly occurs: at [99].

- **NSW Court of Appeal**

GrainCorp Operations Ltd v Liverpool Plains Shire Council [2013] NSWCA 171 (Beazley P, Ward JA and Sackville AJA)

(related decision: *GrainCorp Operations Ltd v Liverpool Plains Shire Council* [2012] NSWLEC 143 Lloyd AJ)

Facts: in 2011 the Northern Joint Regional Planning Panel (“the Panel”), on behalf of Liverpool Plains Shire Council (“the council”), granted development consent to The Mac Services Group (“MAC”) for a “Workforce Accommodation Facility for 1,500 occupants” on land on the outskirts of Werris Creek. The development was intended to provide accommodation for “fly in fly out” workers in the mining industry in the Liverpool Plains area and surrounding regions. The accommodation and facilities were in a self contained “village” style, comprising a number of precincts in which between 3 or 4 or up to 6 one-person rooms were grouped together under a common roof as a “pod”. Each of the pod rooms consisted of a bedroom with a small ensuite bathroom, but had no cooking or laundry facilities. The development contained a commercial kitchen and restaurant with seating for up to 250 persons; a “crib” room where occupants could prepare and eat their own meals; a gymnasium, tennis courts and pool and space for outdoor recreation. Mine workers would stay in a particular pod room for the consecutive days in which they were rostered to work at the mine, would generally not be allowed to leave personal effects in the rooms during breaks between work placements, and it would not be expected that they would be allocated the same room when they returned to the village after a rostered off period. The site was zoned 1(b) General Agriculture under the [Parry Local Environmental Plan 1987](#) (“the LEP”), and in that zone development for the purpose of “residential buildings (other than dwelling-houses and units for aged persons)” was prohibited in Item 5 of the land use table. Development permitted with consent in Item 4 of the land use table included “cluster developments”, “hospitals”, “hotels”, “motels”, “multiple occupancy”, “tourist facilities”, and “units for aged persons”. There was no definition in the LEP for “residential buildings”. The Environmental Planning and Assessment Model Provisions 1980, adopted in part by the LEP, defined “dwelling-house” as “a building containing 1 but not more than 1 dwelling”, and “dwelling” as “a room or suite of rooms occupied or used or so constructed or adapted as to be capable of being occupied or used as a separate domicile”.

GrainCorp Operations Ltd (“GrainCorp”) sought a declaration that the development consent was invalid. At first instance, the application was dismissed, the primary judge finding that the proposed use did not incorporate the concept of permanence necessary to bring the development within the prohibition on “residential buildings” and concluding that the use was permissible, with consent, as an innominate use.

GrainCorp appealed. MAC also challenged by Notice of Contention certain evidentiary rulings by the primary judge. The council and the Panel entered submitting appearances.

Issues:

- (1) whether the primary judge had erred in rejecting evidence in the form of affidavits sworn, after the date of the development consent, by two senior officers of MAC as to the contractual relationships with companies in the resources sector for the provision of accommodation for its customers’ employees;
- (2) whether the composite term “residential buildings” could be read as meaning more than simply structures used for the purposes of human habitation, and carried with it the notion of a degree of permanence or settled or habitual abode; and

(3) whether the proposed development was for the purpose of “residential buildings”.

Held: allowing the appeal and setting aside the orders of the primary judge, declaring that the development consent was invalid, and ordering MAC to pay the costs of the appellant:

- (1) the rejected material was of little or no probative value in determining whether the purpose of the development was a prohibited use under the LEP, and the primary judge did not err in rejecting it. In any event it did not bear significantly on the issue for consideration, and even if it had been admitted, the conclusion as to the characterisation of the development would be the same: at [46];
 - (2) item 5 of the land use table contained a general prohibition on use for the purpose of residential buildings, subject to two express exceptions. Item 4 carved out some additional exceptions or qualifications to the prohibition by permitting (with development consent) some uses that otherwise would or might be regarded as “residential buildings”, but there was no occasion to read down the ordinary meaning of “residential building” by reference to the uses permitted by Item 4: at [64];
 - (3) there was little support one way or the other in the zone objectives as to the meaning of “residential buildings” in the context of this development: at [74];
 - (4) what could be drawn from dictionary definitions was that the appellation “residential” might in some contexts connote a degree of permanence, but could also connote an habitual or usual abode, or even a place where one lives for a time or while performing a particular purpose or function, in which respect it would not be inapt to refer to the occupation of workers during the period that they were fulfilling work functions at the mines. Moreover, reliance on a connotation of “permanence” begged the question of what degree of permanence was sufficient to bring a development within the connotation “residential building”: at [83], [84];
 - (5) the authorities relied upon by the primary judge for the conclusion that as a matter of principle a residential building had to have a degree of permanence, turned on the construction of provisions in relation to different ordinances and, in a number of instances, on the distinction between use as a residential flat building and use as a building with serviced apartments. Here the reference to “residential buildings” appeared not as a sub-set of a more general type of building but as a stand-alone term: at [100];
 - (6) on the ordinary meaning of “residential” it was sufficient that structures were used as a usual abode of people or as their abode “for a time” (in the sense of more than a fleeting stay) or even, in some of the older usages of the expression “in residence”, for the purpose of abode for a stated function. The legal basis on which one occupied a building or part of a building was irrelevant to the question whether use of the buildings was a residential use. Similarly, whether or not the individual rooms had all the facilities necessary for one to regard this as a settled or habitual abode, the overall facility in this case clearly did. The approach to the characterisation of the proposed use was on the basis that it fell within the prohibition if its use was as a settled or habitual abode: at [101]-[103];
 - (7) in considering whether the facility fell within the concept of a residential building, there were a number of features as to the intended manner of use that were irrelevant: the label attached in MAC’s template contract and code of conduct to the occupant as a “guest”; the fact that workers might be required to “check-in” and “check-out” through a reception facility or be required to comply with a particular code of conduct; whether the workers would occupy the facility under a licence due to the contractual arrangements reached between MAC and their employer; the physical characteristics of the pods such as the lack of cooking facilities; whether or not proposed occupants of the facility would call it their “home”; and whether looking at the complex from the outside one would consider it to be a residential building by the nature of its use: at [106]-[111]; and
 - (8) the purpose of the facility, in a planning sense, was to accommodate the residential needs of the mine workers and it was immaterial whether or not the workers occupied the same rooms each time they stayed at the facility. The facility would provide accommodation and living facilities for mine workers for considerable periods of time, in aggregate, over their working life at the mine, and the fact that workers would stay elsewhere during the periods when they were not at the workforce accommodation facility did not mean that during the period they were in occupation at the facility it was not performing a residential function. To the extent that the primary judge considered that the term “residential building” connoted a degree of permanence or settled abode, the proposed facility was intended to fulfil such a
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purpose for the workers. It therefore fell within Item 5 of the land use table and was a prohibited use: at [120]-[123].

K and M Prodanovski Pty Ltd v Wollongong City Council [2013] NSWCA 202 (Meagher and Leeming JJA, Sackville AJA)
(related decision: *Wollongong City Council v K and M Prodanovski Pty Ltd* [2012] NSWLEC 107 Sheahan J)

Facts: in 2005 the Wollongong City Council (“the council”) granted development consent for the “demolition of existing dwelling, service station and outbuildings, construction of mixed residential unit development comprising 24 residential units, 1 x retail, 2 x professional suites with basement parking for 51 cars”, on land comprising two adjoining lots on which stood a service station and outbuildings (Lot 1) and a dwelling (Lot 3). The original date on which the consent would lapse, 28 June 2007, was later extended to 28 June 2008. Before the consent was granted a geotechnical investigation of the land was undertaken concurrently with an environmental assessment, and those assessments were the subject of two reports prepared in June 2004. The geotechnical assessment report recommended that additional investigations be undertaken on Lot 3 and the northern part of Lot 1 following demolition and removal of trees from those areas. The conditions of consent included condition 6, which required the applicant to undertake a supplementary geotechnical investigation to better assess groundwater conditions (6.1), and a supplementary geotechnical investigation of soil and rock conditions on Lot 1 and the rear of Lot 3 “once demolition of structures is complete” (6.3); condition 13, which required submission of a final geotechnical report to the Principal Certifying Authority (“PCA”) for approval prior to the issue of the Construction Certificate; condition 55a which required the appointment of a PCA prior to commencement of work; and condition 59 which required that demolition of the service station and dwelling be carried out in accordance with the relevant Australian Standard and the requirements of the NSW WorkCover Authority. Between 21 April and 14 May 2008 demolition of the above ground structures on the land was carried out and completed. Between 19 and 24 June 2008 further geotechnical investigation work was undertaken involving the drilling of three additional boreholes, and was the subject of a further report dated 31 July 2008.

The council sought a declaration that the development consent had lapsed, on the basis that [s 95\(4\)](#) of the [Environmental Planning and Assessment Act](#) 1979 (“the EPA Act”), which requires that “building, engineering or construction work relating to the building, subdivision or work is physically commenced on the land to which the consent applies before the date on which the consent would otherwise lapse”, was not satisfied. The primary judge held that the demolition and geotechnical works were undertaken in breach of the terms of the development consent, and for that reason they did not “relate to” the building or work which was the subject of the consent, and the consent was not prevented from lapsing by reason of the works. On appeal against the granting of a declaration and orders restraining the carrying out of development in purported reliance on the consent, the appellant accepted that the demolition work was not undertaken in accordance with condition 59. The council argued that the geotechnical work was not carried out in accordance with the consent and for that reason was unlawful, on two grounds: first, that condition 6.3 required the supplementary geotechnical work to be carried out after the completion of demolition work undertaken in accordance with the consent, and secondly, because the appellant had not appointed a PCA at the time that work was undertaken.

Issues:

- (1) whether the geotechnical investigation work or part of it had been carried out in accordance with condition 6 of the development consent; and
- (2) whether the primary judge had erred in concluding that the geotechnical work did not prevent the consent from lapsing.

Held dismissing the appeal with costs:

- (1) the principles governing the construction of the consent were not in issue, and required that the meaning of the language be determined objectively having regard to the context in which the consent was issued and taking into account the fact that the consent operates in rem and is for the benefit of subsequent owners and occupiers as well as the applicant. In this case the relevant context was

provided by the June 2004 report which explained the reasons for the requirement of the further geotechnical investigation and the purpose for the imposition of conditions 6 and 13: at [23];

- (2) although condition 6 referred separately to a supplementary geotechnical investigation in cll 6.1 and 6.3, the subject matter of each investigation, and the process by which it would be undertaken, necessarily overlapped. Each would involve the drilling of boreholes. The assessment of groundwater conditions required consideration of soil and rock conditions and an investigation addressed to the latter would also provide information about groundwater conditions. For that reason the reference to a supplementary geotechnical investigation in those clauses was reasonably to be understood as being to one investigation directed to subsurface conditions, and specifically the conditions referred to in those clauses. That was consistent with the June 2004 report which contemplated that the additional investigations would address subsurface conditions generally, and with the terms of condition 13: at [29];
- (3) clause 6.3 required that the geotechnical investigation be undertaken “once demolition of structures is complete”. In that expression “once” meant “as soon as” or “when”. It did not authorise the geotechnical investigation to commence at an earlier time, and the fact that different language was used here from that in other conditions in the consent, where a temporal order of activities was required, did not provide a sufficient basis for departing from its plain meaning. Furthermore, the “demolition” referred to was the demolition that was part of the permitted development and accordingly subject to condition 59, and it did not refer to or describe the removal of the trees on the two lots: at [30];
- (4) so construed, condition 6 meant that the supplementary geotechnical investigation was required to take place after the completion of demolition works undertaken in accordance with the consent. The geotechnical works were not undertaken after the completion of demolition work in accordance with the consent. They were therefore not permitted and, for that reason, were unlawful. They could not “relate to” the development consent and the primary judge did not err in concluding that the development consent had not been prevented from lapsing by reason of those works having been undertaken: at [31];
- (5) even if condition 6 was to be understood as referring to separate investigations, the works undertaken were not part of the development as permitted and authorised. The drilling and sampling work relating to rock and soil conditions was an essential and substantial part of the work carried out. The consent did not permit the carrying out of unauthorised work as part of authorised work and the carrying out of that work in combination was prohibited: at [32]; and
- (6) to comply with certain of the conditions relating to the demolition it was necessary to appoint a PCA by the time such work was undertaken. The appellant’s failure to do so meant that those conditions were not complied with and provided an additional reason for concluding that the demolition work was prohibited. That failure did not, however, directly have the consequence that the geotechnical work could not be undertaken; that consequence followed indirectly, and from the fact that the demolition work had not been undertaken as required by the consent: at [35].

Oshlack v Rous Water [2013] NSWCA 169 (Emmett and Gleeson JJA, Preston CJ of LEC)

(related decisions: *Oshlack v Rous Water (No 3)* [2012] NSWLEC 132 Pepper J; *Oshlack v Rous Water (No 2)* [2012] NSWLEC 111 Pepper J; *Oshlack v Rous Water* [2011] NSWLEC 73 Biscoe J)

Facts: Rous Water was a county council for the purposes of [Part 5](#) of the [Local Government Act 1993 \(NSW\)](#) (“LG Act”). It was comprised of four constituent councils: Ballina, Byron, Lismore and Richmond Valley councils. As part of its operations, Rous Water would supply bulk water to areas located within the local government areas (“LGAs”) of these four councils. Rous Water, as a county council, was authorised under [s 394](#) of the LG Act to exercise the functions of a local council for the purposes of [s 24](#) of the LG Act (i.e. to provide goods, services and facilities, and carry out activities, appropriate to the current and future needs within its local community and of the wider public, subject to law). On 19 July 2006, Rous Water resolved to support in principle the decision to fluoridate the water supply of its constituent councils, where a council advised that it supported fluoridation of its water supplies. The councils of Lismore, Richmond Valley and Ballina all subsequently indicated support for fluoridation of their respective water supplies. In order for the fluoridation of the respective water supplies to occur, the construction and operation of

fluoridation plants would inevitably be required. Five fluoridation plants were proposed for construction: Clunes, Dorrroughby, Corndale, Knockrow and Marom Creek. As part of the assessment and approvals process, each proposed fluoridation plant would be required to undergo assessment under [Part 5 of the Environmental Planning and Assessment Act 1979 \(NSW\)](#) ("EPA Act"). For these purposes, Rous Water was the determining authority in respect of all proposed fluoridation plants except the proposed Marom Creek plant (for which Ballina Council was the determining authority). Another requirement was for Rous Water and Ballina Council to obtain approvals for their respective proposed fluoridation plants under the [Fluoridation of Public Water Supplies Act 1957 \(NSW\)](#) ("Fluoridation Act"). On 12 December 2007, an approval was issued to Rous Water under [s 6](#) of the Fluoridation Act to add fluorine to the water supply of the Lismore LGA ("the Lismore Approval"). On that same day, a direction was given to Rous Water under [s 6A](#) of the Fluoridation Act to add fluorine to the Richmond Valley water supply ("Richmond Valley Direction"). On 20 August 2009, an approval under s 6 of the Fluoridation Act was issued to Rous Water to add fluorine to the water supply of the Ballina LGA ("Ballina Approval") and, on 11 December 2009, an approval under s 6 of the Fluoridation Act was issued to Ballina Council to add fluorine to the Marom Creek water supply ("Marom Creek Approval"). The specified dates for commencing the upward adjustment of fluorine were respectively as follows: (a) the Richmond Valley Direction – 31 December 2008; (b) the Lismore Approval – 31 December 2008; (c) the Ballina Approval – 31 December 2010; and (d) the Marom Creek Approval – 31 December 2010.

On 11 March 2010, Rous Water received legal advice from Blake Dawson ("Blakes"). Among other things, Blakes advised Rous Water that it should seek approval for the extension of a deadline of 31 December 2008 for the commencement of the upward adjustment of fluorine to the water supply in the Lismore and Richmond Valley LGAs. A request of 22 March 2010 for an extension was refused. Rous Water then sought legal advice from Lindsay Taylor Lawyers ("LTL"), who provided written advice on 16 April 2010. That advice was attached to the papers placed before the council meeting of Rous Water on 21 April 2010. At this meeting, the advice of Blakes and LTL were both noted and the meeting approved, under s 24 of the LG Act, the construction and operation of the proposed fluoridation plants at Clunes, Dorrroughby, Corndale and Knockrow. At its meeting on 27 May 2010, Ballina Council considered the construction of the proposed fluoridation plant at Marom Creek. The papers provided to the meeting referred to directions given to Rous Water to fluoridate the public water supply to Lismore, Richmond Valley and Ballina councils, and, inaccurately, a direction to Ballina Council to fluoridate the Marom Creek water supply. At the meeting, Ballina Council approved the construction of the proposed fluoridation plant at Marom Creek.

On 28 April 2011, Biscoe J answered two preliminary questions concerning whether an activity by a water supply authority (such as Rous Water or Ballina Council) pursuant to an approval or direction under s 6 or 6A of the Fluoridation Act to add fluorine to the water supply under its control, is subject to [s 111](#) or [s 112](#) of the EPA Act. There was no appeal from this decision. However, on 16 May 2012, Pepper J (the primary judge) dismissed the substantive application challenging the respondents' decisions. After further argument on the question of costs, on 7 June 2012, the primary judge ordered the appellant to pay 75 per cent of the first and second respondents' costs. It was these two decisions that were subject to the appeal.

On the appeal, Mr Oshlack contended that the legal advice given by LTL to Rous Water was erroneous and that this legal advice influenced Rous Water and Ballina Council in making their decisions to proceed with the construction of the fluoridation plants. This, in turn, was said to cause a constructive failure, on the part of Rous Water, to exercise: (1) its power under s 24 of the LG Act to approve the construction and operation of the fluoridation plants, and (2) its duty under s 111 of the EPA Act to consider the environmental impacts of those plants. It was also submitted by Mr Oshlack that Ballina Council constructively failed to exercise its power under s 24 of the LG Act with respect to approval of the construction and operation of the Marom Creek plant, and that the exercise of the costs discretion by the primary judge miscarried.

Issues:

- (1) whether the legal advice from LTL was erroneous;
- (2) if the legal advice from LTL was erroneous, whether this caused Rous Water and Ballina Council to constructively fail to exercise their jurisdiction under s 24 of the LG Act to approve the construction and operation of the fluoridation plants, and caused Rous Water to constructively fail to exercise its jurisdiction in accordance with its duty under s 111 of the EPA Act to consider the environmental

impacts of the construction and operation of the fluoridation plants at Clunes, Dorroughby, Corndale and Knockrow; and

(3) whether the exercise of the costs discretion by the primary judge miscarried.

Held: appeal dismissed with the appellant to pay the respondents' costs of the appeal (Gleeson JA, Emmett JA and Preston CJ of LEC):

- (1) on the proper construction of the Fluoridation Act, a water supply authority to which an approval has been granted under s 6 of that Act, is not obliged to carry out the activity that is the subject of the approval. The grant of the approval does no more than empower the water supply authority to carry out the activity. Without the approval, it would be prohibited from doing so. The legal advice, therefore, was in error in stating that Rous Water was obliged to add fluorine to the public water supply in accordance with the Lismore Approval and that its failure to do so by the date specified in the Lismore Approval (31 December 2008) caused it to be exposed to ongoing liability for offences against s 6(6) of the Fluoridation Act. The primary judge erred in finding otherwise. This ground of appeal was, therefore, made out: at [17] (Emmett JA); [105]-[127] (Gleeson JA); [209], [210] (Preston CJ of LEC);
- (2) while the legal advice was erroneous, Mr Oshlack did not establish that this erroneous legal advice caused the exercise by Rous Water of either its power under s 24 of the LG Act to approve the construction and operation of four fluoridation plants, or its duty under s 111 of the EPA Act to consider the environmental impacts of those plants, to miscarry in law, or cause the exercise by Ballina Council of its power under s 24 of the LG Act to approve the construction of one fluoridation plant to miscarry in law. Accordingly, this ground of challenge was not made out: at [18], [19] (Emmett JA); [134]-[184] (Gleeson JA); [211]-[238] (Preston CJ of LEC); and
- (3) Mr Oshlack did not establish that the primary judge's exercise of the costs discretion miscarried. Accordingly, this ground of challenge was not made out: at [20] (Emmett JA); [185]-[199] (Gleeson JA); [239] (Preston CJ of LEC).

City of Canterbury v Saad [2013] NSWCA 251 (Beazley P, Meagher and Leeming JJA)
(related decision: *Samy Saad v City of Canterbury* [2012] NSWSC 389 Nicholas J)

Facts: Mr Saad is the registered proprietor of a vacant, undeveloped block of land ("Lot 1") zoned Residential 2(a) under the relevant Planning Scheme Ordinance. Lot 1 is landlocked by public land known as Heynes Reserve and by neighbouring houses. The council is the registered proprietor of two blocks of land, Lot 7 and Lot 13, which are zoned Open Space 6(a) – Existing Recreation, and are classed as "community land" under the [Local Government Act](#) 1993 ("the LG Act"). Each of the lots is classified as a park under the council's Generic Plan of Management for Parks, and are part of Heynes Reserve. Lots 7 and 13 are used by members of the public for unstructured and informal passive and active recreation. There is a combined cycleway/walkway through Heynes Reserve which traverses Lot 13 and abuts Lot 7 and runs contiguous to the easement. Prior to the purchase by the respondent, Lot 1 was owned by the Roads and Traffic Authority ("RTA"), when Lot 1 bordered a road reservation known as the Cooks River Country Road Reservation. The road reservation was abandoned and the RTA requested that the land be rezoned. The land remained vacant as informal open space. On 18 August 2006 the Canterbury Local Environmental Plan 2005 ("the LEP") was gazetted, and amended the Planning Scheme Ordinance to provide that the council must not consent to development for the purpose of a dwelling house or dwelling on Lot 1 unless satisfied that development provides for adequate vehicular access to the land. The RTA asked the council whether it would grant an easement to provide access so Lot 1 could be disposed of on the open market, or whether the council would be interested in purchasing the land at market price. The council declined the offer to purchase the land; at the time the council was of the view that the area was well serviced with open space which was adequate for public recreation in the area. The RTA advertised Lot 1 for sale by public tender and the respondent was the successful bidder, settling in early 2008 for a purchase price of \$140,000. The respondent unsuccessfully negotiated with the owners of neighbouring properties in an effort to gain access to Lot 1, and then requested the council to grant an easement over Lots 7 and 13 so as to enable access to the property. While an easement can be granted over community land, the council had no power to grant the easement by virtue of [s 45](#) of the LG Act. The respondent applied to the Supreme Court under [s 88K](#) of the [Conveyancing Act](#) 1919 for an easement. The council

opposed the grant of the easement. The council accepted that there was no reasonably available alternative access, however contended that the easement was not “reasonably necessary” for the effective use or development of Lot 1 as required by s 88K(1), on the basis that the grant of the easement over Lot 7 would cause it to suffer the total loss of that Lot, and the combined impact on the servient tenements was significant; and contended that s 88K(2)(a) was not satisfied as the use of the dominant tenement would be inconsistent with the public interest. The council opposed the grant of the easement on discretionary grounds, including that the respondent had purchased the land knowing it was landlocked, and as a consequence had been able to purchase it at a discounted price, and there was no justification for the Court to make available a piece of community parkland for access to development on private land.

The council appealed against the decision of the primary judge to grant an easement comprising a strip of land about 2.83m wide and 32m in length leading from the cul-de-sac at the western end of the adjacent local street over Lot 7 and over portions of Lot 13 to Lot 1.

Issues:

- (1) whether the primary judge had erred in finding that there was minimal adverse impact on the council’s land by reference to the significant open space available for use by the members of the public adjacent to Lots 7 and 13, rather than confining his consideration to Lots 7 and 13;
- (2) whether the use of Lot 1 with the benefit of the easement would be inconsistent with the public interest; and
- (3) whether there had been an error in the exercise of discretion to impose an easement.

Held: dismissing the appeal with costs:

- (1) the primary judge did not err, in the particular and unusual circumstances of this case, in taking into account the surrounding community land in determining whether the grant of the easement was reasonably necessary. Lot 7 was a remnant lot of approximately 50 sqm and it was artificial to consider the burden on Lot 7 independently, since what remained of Lot 7 was a very small part, and because Lots 7 and 13 together formed part of a larger area of open space, used as parkland: at [42];
- (2) even if there was error, the outcome would be no different. On the evidence there was only a low level of use of Lot 7 for the purposes of gaining access to the greater parkland including the cycleway/walkway, and the grant of the easement over Lot 7 would not seriously impede the level of use as it was at present: at [43];
- (3) the conclusion that the grant of the easement was reasonably necessary was not only open on the evidence, it was the only conclusion available on the evidence: at [44];
- (4) a determination as to whether the grant of an easement over community land would be inconsistent with the public interest must have regard to the use or intended use of the community land and the extent to which the grant of the easement would interfere with that use: at [53];
- (5) although there would be some impact, the easement would not have a significant impact on the use of the servient tenements, and the grant of the easement over Lots 7 and 13 was not inconsistent with the public interest. The land was zoned residential and the owner of the land was entitled to utilise land in accordance with its zoning provided development consent was obtained: at [56];
- (6) further, the fact that an applicant for an easement may still have to fulfil other requirements before the land could be utilised in accordance with the zoning, such as obtaining development consent, was not a bar to the grant of an easement: at [57];
- (7) there was no error in the primary judge’s finding that the provision of an easement that permitted vehicular access to a residence on Lot 1 was entirely consistent with the public interest in the use or development of land for its designated purpose: at [58];
- (8) there was no evidence that the respondent had purchased the property at a discount in circumstances where it was purchased by way of a public tender. Although it was probable that the property would be worth more with the grant of the easement than without an easement, that would be the likely position with any property in respect of which an easement is sought. For that reason alone, as a matter of

discretion, the price paid for the property without the easement could not be a factor that militated against the grant of an easement: at [68];

- (9) it was apparent from the terms of his reasons that the primary judge had taken into account the respondent's knowledge of the landlocked nature of the property. The primary judge had held that the respondent's knowledge of the nature of the property was not a matter that was adverse to the grant of the easement, and that view was plainly open: at [69], [70]; and
- (10) the council had zoned the land "residential" knowing it was landlocked; the local ordinance required access to be provided as part of any residential development, and the easement over the council's land was the only feasible way to gain access. Rather than the easement being a "forced appropriation" of land, the zoning was such that the council must have foreseen that the land would be purchased for the very purpose for which it was zoned. The language of "forced appropriation" was a significant overstatement having regard to the minimal impact the grant of the easement would have on the servient tenements. Assuming such an argument was available on the facts of the case, any such consideration as advanced by the council was not such as to require refusal of the easement in the exercise of the Court's discretion: at [72], [73].

Bardsley-Smith v Penrith City Council [2013] NSWCA 200 (McColl and Barrett JJA, Sackville AJA) (related decision: *Bardsley-Smith & Anor v Penrith City Council* [2012] NSWLEC 79 Sheahan J)

Facts: in February 2009 the council granted development consent permitting the use of premises ("Tenancy 230") located in the Penrith SupaCenta as a "Chemist Warehouse" ("the Consent"). Under the Penrith Local Environmental Plan (Industrial Land) 1996 ("1996 LEP") uses permitted in the 4(b) Special Industry zone included "shops trading principally in bulky goods" with a gross floor area of not more than 1,000 sqm; prohibited uses included "shops (other than convenience stores, corner shops, fast food take-away restaurants, take-away food shops, shops trading principally in bulky goods ...and shops trading principally in motor vehicle parts and accessories...". The term "shop" was defined to mean "a building or place used for the purpose of selling, exposing or offering for sale by retail goods, merchandise or materials...". The [Penrith Local Environmental Plan](#) 2010 ("2020 LEP") repealed the 1996 LEP; uses permitted with consent in the IN2 Light Industrial zone included "warehouse or distribution centres", but not "shops" (other than "neighbourhood shops"). The Statement of Environmental Effects ("SEE") accompanying the development application described the proposed development as "Chemist Warehouse and Bulky Goods Distribution outlet". Tenancy 230 occupied an area of about 600sqm. An area of 262 sqm, described in the SEE as a "warehouse area", was conducted as a retail pharmacy business carrying a full range of products ordinarily found in a pharmacy by a registered pharmacist operating under the name "Chemist Warehouse Distribution Centre Penrith". The SEE identified the other uses as ePharmacy, for purchase of products by internet/mail order; Blue Cross, for dispensing and packing medications for aged care and community services; Samples Plus, an ordering system for samples offered to medical practitioners, Home Medication Review, a process for reviewing medication of patients required to take high levels of prescription or pharmacy medication; and My Home Health, being storage, display, testing and sale of items such as wheelchairs and walkers. The SEE stated in relation to the Retail Pharmacy use, described as "Pharmacy selling usual over-the-counter drugs and dispensing prescriptions", that in order for the premises to be a licensed pharmacy premises under the [National Health Act](#) 1953 (Cth) ("NH Act") "and enable all of the above uses to be licensed and operational", members of the public "must have access to the pharmacy, giving rise to an ancillary retail component within the site". Condition 1 of the Consent required that the development be implemented "substantially in accordance with the approved plans, the application form and any supporting information received with the application...". Condition 4 of the Consent, following modification in April 2009, provided "any retail sales are to be ancillary to the primary use of the premises as a distribution centre". Each of three businesses conducted on the premises, the retail pharmacy, the ePharmacy and the wholesale distribution of pharmaceutical products, was conducted by a separate entity, subject to contractual arrangements, including regular transfer of stock from the retail pharmacy to the ePharmacy. The retail pharmacy generated about one third of the revenue derived from the businesses conducted on the premises.

The appellants, who had an interest in retail pharmacies in the Penrith area, instituted Class 4 proceedings in the Land and Environment Court seeking declarations that the Consent was void and invalid and that the present use of the premises was prohibited and contrary to [s 76B](#) of the [Environmental Planning and](#)

[Assessment Act](#) 1979 (“the EPA Act”), and injunctive relief. At first instance, the primary judge rejected the challenges to the validity of the Consent and the continued use of the premises as a retail pharmacy. The appellants appealed under [s 58](#) of the [Land and Environment Court Act](#) 1979.

Issues:

- (1) whether the Consent approved the use of the premises, or part thereof, for the purposes of a “shop” and thus for a prohibited use; and
- (2) whether the continued use of the part of the premises as a retail pharmacy was for the purposes of a “shop” and therefore prohibited by both the 1996 LEP and the 2010 LEP.

Held: allowing the appeal and setting aside the orders made by the primary judge, directing the appellants to file an amended notice of appeal, directing the parties to file an agreed draft of a proposed injunction restraining the use as a retail pharmacy except to the extent that the pharmacy is used to supply members of the public with “pharmaceutical benefits” and over-the-counter drugs, remitting the matter to the Land and Environment Court, and ordering the respondents to pay the appellants’ costs of the appeal:

- (1) the approach of the primary judge in construing the Consent to determine the purpose or purposes for which the premises were to be used, taking into account the information in the plans and the SEE, was correct: at [66];
- (2) it was not permissible to undertake the task of characterisation by reference to correspondence with the council, nor to the council’s internal deliberations leading to the grant of the Consent: at [69];
- (3) the Consent had to be read as a whole, including the conditions, which included condition 4 which expressly contemplated that the premises may be used for retail sales provided that such sales were “ancillary to the primary use of the premises as a distribution centre”. That gave rise to a question of construction, which was what kinds of retail sales in the premises were “ancillary” to the primary use contemplated by the Consent: at [75], [76];
- (4) the information contained in the SEE contemplated that the premises would be used as a retail pharmacy, but only in the very limited sense for sale of over-the-counter (“OTC”) drugs and dispensing Pharmaceutical Benefit Scheme (“PBS”) items. The reason for that limitation was that [s 90\(3D\)](#) of the NH Act made the approval of the ePharmacy contingent on the premises being accessible to members of the public for the purpose of receiving pharmaceutical benefits. That Act did not make approval of the ePharmacy contingent on the premises also being used for a retail pharmacy providing a full range of pharmaceutical items to the public: at [82];
- (5) the primary judge did not err in construing [s 90\(3D\)](#) of the NH Act, however he erred in his construction of the Consent, which should be construed as permitting the use of the premises as a retail pharmacy only for the supply to members of the public of PBS items and OTC drugs: at [87];
- (6) use of the premises as a retail pharmacy limited to supply of PBS items to members of the public was essential if the premises were to be used as an ePharmacy. This was a very clear case of purposes being “inextricably bound up” with each other and incapable of severance. Use of the premises confined to supplying PBS items was clearly subordinate to the primary use of the premises as a distribution centre. The inclusion of OTC drugs in the range of products to be supplied by the retail pharmacy did not alter its character as a use subordinate to the primary purpose for which the Consent permitted the premises to be used. It followed that the Consent, insofar as it authorised the premises to be used as a retail pharmacy selling a limited range of products, did not purport to grant consent for a purpose prohibited under the 1996 LEP: at [91]-[94];
- (7) the retail pharmacy was conducted in a large, separate section of the premises comprising about 43 percent of the total floor space; it generated about \$5 million in sales per annum and could fairly be described as a large scale operation; each of the three main uses of the premises was carried on by a separate entity and while there was some interaction between those three businesses they were not conducted as a single integrated unit: at [113];
- (8) on the evidence the premises were used for at least two different purposes. One purpose was as a distribution centre including the ePharmacy. The second purpose was as a “shop” as that term was defined in both the 1996 LEP and the 2010 LEP. The use of the premises as a retail pharmacy could

not be characterised as subordinate or subservient to use as a distribution centre, and was for an independent purpose, being the large scale retailing of pharmaceutical and related products. That use was for the purpose of a “shop” and was therefore unlawful: at [118]; and

- (9) the use of the premises as a “shop” under the 1996 LEP was not use for a lawful purpose immediately before the coming into force of the 2010 LEP and continuation of the use as a retail pharmacy was not protected by [s 107\(1\)](#) of the EPA Act. Use of the premises as a retail pharmacy was prohibited under the 2010 LEP. It followed that the current use of the premises as a retail pharmacy was in breach of the EPA Act: at [122]-[123].

Valuer-General v Perilya Broken Hill Ltd [\[2013\] NSWCA 265](#) (Emmett and Leeming JJA, Preston CJ of LEC)

(related decision: *Perilya Broken Hill Limited v Valuer-General* [\[2012\] NSWLEC 235](#), Lloyd AJ)

Facts: this was an appeal by the Valuer-General (“VG”) pursuant to [s 57\(1\)](#) of the [Land and Environment Court Act](#) 1979 (“LEC Act”) from a decision of the primary judge in the Land and Environment Court (“LEC”) allowing an appeal of the respondent (“Perilya”) pursuant to [s 37](#) of the [Valuation of Land Act](#) 1916 (“Valuation Act”). The VG’s appeal was limited to a question of law. The subject of the litigation was some 3,033 hectares of land at Broken Hill whose highest and best use, as at the valuation date of 1 July 2007, was as a mine for the production of zinc, lead and silver. The VG determined the land value as \$20.9 million; the LEC allowed the appeal and determined the land value as \$4.9 million. Central to the appeal were provisions in the [Mining Act](#) 1992 (“Mining Act”) relating to royalties and the difference between “publicly owned” and “privately owned” “minerals”. Of particular relevance were the provisions in [s 284](#) which provided:

"(1) The holder of a mining lease is liable to pay royalty to the Minister on privately owned minerals recovered from the land as if those minerals were publicly owned minerals.

(2) If royalty (including any interest on royalty) is paid to or recovered by the Minister in respect of a privately owned mineral, the Minister is to pay:

- (a) seven-eighths of the amount so paid or recovered to the owner of the mineral, and
 (b) one-eighth of the amount so paid or recovered to the Treasurer for payment into the Consolidated Fund."

Issues:

- (1) whether there had been an error of law in not bringing into account the cash flow generated to the owner by [s 284\(2\)](#) of the Mining Act;
 (2) whether there had been any other error of law including failure to give reasons in the primary judge’s short reasons; and
 (3) whether there should be an order for costs of the appeal.

Held: allowing the appeal and remitting the matter for redetermination, and making no order as to costs of the appeal:

(1) the essential steps leading to the allowing of the appeal were:

- the starting point is the hypothetical unencumbered fee simple contemplated by [s 6A](#) of the Valuation Act, whose value is determined by reference to its highest and best use, namely, a mine: at [13];
- the (hypothetical) mine is appropriately valued by determining a present value of the income stream generated by the production of minerals: at [13];
- the income stream generated by that (hypothetical) mine is valued having regard to laws of general application, one of which is the Mining Act, and in particular, the provisions relating to royalties in Part 14: at [13] and [23];

- the valuation determined by the LEC reflected the *payment* of a royalty stream pursuant to s 284(1) of the Mining Act. However, although the litigation proceeded on the footing that the minerals were privately owned, the valuation did not have regard at all to the *receipt* of royalty which the owner of the fee simple would enjoy pursuant to s 284(2): at [13];
- (2) there is no a priori correct way to determine the land value. One traditional approach involves seeking out relatively contemporaneous sales of comparable properties. However, that approach is regularly not available in the case of land whose highest and best use is a mine. It has been traditional for such land to be valued by reference to the present value of the cashflow that the mine would generate. That method is available to be used as a basis to determine the s 6A land value: at [34];
 - (3) valuation regularly involves subjective judgments and must inevitably leave room for differences of opinion, however, in all cases, the methodology must conform with s 6A: at [35];
 - (4) in the case of a mine, the land value is not the present value of the mine. It is the value of an unencumbered, hypothetical mine, stripped of improvements save for land improvements, operating in accordance with State laws of general application, but not subject to conditions or restrictions deriving from the grant: at [38];
 - (5) absent any contrary agreement, in July 2007 the holder of a mining lease was obliged to pay a royalty of 4% on the value of zinc, lead and silver recovered to the Minister, and, if the mineral was not owned by or reserved to the Crown (ie "privately owned"), then its owner was entitled to receive seven-eighths of that royalty from the Minister pursuant to s 284(2) of the Mining Act: at [33];
 - (6) in this case the largest component of the income stream which the owner of the fee simple would enjoy from the hypothetical mine was a royalty pursuant to s 284(2). It was common ground that the zinc, lead and silver were to be treated as privately owned for the purpose of the exercise and that it was appropriate to bring to account the s 284(1) royalty paid by the operator: at [39];
 - (7) the royalties paid by Perilya in the financial years ended 30 June 2005, 2006 and 2007, which were ultimately reflected in the calculation of the hypothetical mine operator's margin, were substantial, and were reflected in the valuation adopted by the LEC as *expenses*. However, in the extrapolation from actual revenue and actual expenses no s 284(2) royalty was brought to account as *receipts* and therefore was not reflected in a way which could appropriately support what s 6A requires: at [67]-[71];
 - (8) there is a deal of leeway in appropriate methodologies which may be used to determine land value for the purposes of s 6A. However, it was not possible consistently with s 6A on the one hand to proceed on the basis that a s 284(1) royalty was to be paid to the State by the holder of the mining lease, but to ignore the s 284(2) royalty that was to be paid by the Minister to the land owner. Both amounts were large, and both bore directly upon the value of the hypothetical fee simple. Ignoring a cashflow which prima facie afforded some evidence of value was an error in law: at [73];
 - (9) the approach which was adopted in the LEC did not accord with what s 6A of the Valuation Act required, and had to be set aside: at [14];
 - (10) the valuation disclosed material error of law; was not some private dispute between parties, who were free to frame the issues between them and to proceed on an assumed and false basis; and would have direct effects on third parties. Accordingly, a notice of contention advanced by Perilya that the judgment should be affirmed because the calculation of the land value by reference to s 284 was inconsistent with the parties' agreed methodology, and that the VG should not be able, on appeal, to raise an argument which undermined his own Manual and his own methodology, and which went further than was ever put, did not alter the finding that the appeal should be allowed: at [80]-[86];
 - (3) the VG's other grounds of appeal, namely: that the primary judge had failed "to give reasons or proper reasons" for finding that the agreed 4% royalty rate was to be based on the notional after tax, rather than pre-tax profits; that there was no probative evidence to support the inclusion of \$10 million initial costs in the discounted cash flow analysis; and that to the extent that the schedule of calculations did not accord with the reasons of the primary judge, there was an error on a question of law, all failed: at [87]-[103];
 - (4) nothing in the reasons for judgment was intended to confine the way in which the parties could advance their positions at the rehearing and no restriction on adducing further evidence was
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appropriate. However, to the extent that the VG sought to introduce new evidence, Perilya would be free to apply for a special costs order of the hearing at first instance: at [104]-[105]; and

- (5) the principal responsibility for what occurred rested with the VG and there were other unsatisfactory aspects to the appeal. In the highly unusual circumstances of the appeal, notwithstanding the VG's success on the primary ground, there were no order as to the costs of the appeal: at [16], [106]-[108].

- **Land and Environment Court of NSW**

Judicial Review

Arnold v Minister Administering the Water Management Act 2000 (No 6) [2013] NSWLEC 73 (Biscoe J)
(related decision: *Arnold v Minister Administering the Water Management Act* [2010] HCA 3; (2010) 240 CLR 242)

Facts: the applicants were approximately 120 farmers from the Lower Murray River region who challenged the validity of the Minister's Water Sharing Plan for the Lower Murray Groundwater Source made in 2006 ("the Plan") pursuant to [s 50](#) of the [Water Management Act 2000](#) ("the 2000 Act"), and the validity of the linked Water Management (General) Amendment (Lower Murray) Regulation 2006 ("the Amending Regulation"). The respondents were the Minister who made the Plan and the State of New South Wales.

The applicants raised four grounds of judicial review: first, failure to consider mandatory relevant matters; secondly, considering a prohibited or mandatory irrelevant matter; thirdly, irrationality in reasoning and fact finding or manifest unreasonableness; and fourthly, failure of the Plan to deal with mandated matters. The applicants also raised a constitutional ground: that the replacement of bore licences under the [Water Act 1912](#) ("the 1912 Act") with aquifer access licences under the 2000 Act involved an acquisition of property other than on just terms within the meaning of [s 51\(xxxi\)](#) of the Commonwealth [Constitution](#).

Expert evidence sought to be adduced by the applicants from an hydrogeologist was objected to by the respondents, primarily on the grounds that expert evidence in judicial review proceedings is inadmissible. So as to not unduly disrupt the proceedings, this evidence was admitted subject to the respondents' objection.

Issues:

- (1) whether expert evidence was admissible in judicial review proceedings;
- (2) whether it was mandatory for the Minister when making the Plan to consider a sound and reliable hydrogeological numeric model to calculate sustainable use and recharge and whether the Minister failed to consider that matter;
- (3) whether the Minister when making the Plan had regard to a prohibited irrelevant consideration being an inter-governmental agreement's targeted reductions in water entitlements;
- (4) whether the Plan's adoption of a specified extraction limit was irrational or manifestly unreasonable because the hydrogeological model on which it was based was fundamentally flawed and because the zones in it were hydrogeologically separate from the rest of the water management areas;
- (5) whether the Minister was under a duty to have due regard to socio-economic impacts of the proposed Plan and whether he breached that duty by not assessing socio-economic impacts in a formal study or at the farm-by-farm level or in other respects;
- (6) whether the Plan was bad in form because, contrary to 2000 Act, it failed to deal with the requirements for water extraction under access licences;
- (7) whether the replacement of bore licences under the 1912 Act with aquifer access licences under the 2000 Act involved an acquisition of property other than on just terms within the meaning of [s 51\(xxxi\)](#) of the Constitution; and
- (8) whether the Plan and Amending Regulation were invalid.

Held: dismissing the application with costs:

- (1) the admissibility of evidence not actually or constructively before the decision-maker on an application for judicial review of an administrative decision depends on the ground of review, the relevant issue and the nature of the evidence: at [123]-[129]. Evidence not before a decision-maker may be admissible in relation to the ground of manifest unreasonableness: at [129];
 - (2) the expert evidence of the applicants' hydrogeologist, if admissible, would only be admissible in relation to the irrationality or manifest unreasonableness ground: at [139];
 - (a) the opinions of experts as to what the Act required (whether it was mandatory for the Minister when making the Plan to consider a sound and reliable hydrogeological numeric model to calculate sustainable use and recharge and whether the Minister failed to consider that matter) were irrelevant: at [182] and [185];
 - (b) the evidence of the applicants' expert was inadmissible insofar as it introduced a CSIRO model because that model post-dated the making of the Plan and therefore did not form part of the material available to the decision-maker, and insofar as his opinion that the adjusted Ecoseal model's extraction limit was irrational was based on the CSIRO model: at [195];
 - (3) it was mandatory for the Minister to have regard to the water management principles when making a plan, however, the Minister was not bound to *achieve* any end to which the water management principles were directed, being principles that need to be balanced to some extent: at [180]. It was clear from the evidence and the terms of the Plan itself that the Minister did consider sustainable yield and recharge. While the Minister was under a duty to have regard to the water management principles and consider recharge and sustainable yield, no duty on the Minister rose to the level of a duty to establish "a sound and reliable" groundwater model or to identify a "true and correct" recharge: at [180]-[181]. The Minister had a "duty to provide for the orderly, efficient and equitable sharing of water from the water source" and to consider that issue, however the Minister did take this into account and, moreover, considerations of equity are quintessentially matters for political decision-making and may be of a character inappropriate for judicial review, as they were in this case: at [183]-[184];
 - (4) the fact that it is mandatory for the State Water Management Outcomes Plan ("SWMOP") to have regard to inter-governmental agreements existing when it is made did not lead to the conclusion that the Minister was prohibited from having regard to a later inter-governmental agreement when making a later water sharing plan, at least if it was not inconsistent with the SWMOP. Inter-governmental agreements are not mandatory irrelevant considerations: at [190];
 - (5) the treatment of the zones within the model was not irrational or manifestly unreasonable: at [201];
 - (6) the Minister was bound to have due regard to the socio-economic impacts of the proposals considered for inclusion in the Plan, but was not under a duty to maximise the social and economic benefit to the community: at [206]-[207]. The Minister's obligation, which requires an evaluation, was to take all reasonable steps to generally promote the water sharing principles as a whole: at [207]. The statutory obligation on the Minister to have due regard to the socio-economic impacts of a proposed plan did not include a mandatory requirement to conduct a formal socio-economic study nor to consider individual impacts on a farm-by-farm basis: at [210]. The Minister fulfilled his duty to consider socio-economic impacts in a number of ways: at [216]. Contrary to a further submission by the applicants that there was a failure to have due regard to socio-economic impacts because licence holders were not consulted on whether an across-the-board cuts methodology was an option, there was no statutory duty on the Minister to consult with licence holders on this matter: at [225];
 - (7) the Plan identified requirements for water extraction under access licences, as mandated by the 2000 Act, and therefore, was not bad in form: at [235];
 - (8) the replacement of bore licences under the 1912 Act with aquifer access licences under the 2000 Act did not involve an acquisition of property other than on just terms within the meaning of s 51(xxix) of the Constitution, as per the decision of the High Court in these very proceedings: at [239]; and
 - (9) the challenge to the validity of the Plan and Amending Regulation was dismissed with costs: at [241].
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Gandangara Local Aboriginal Land Council v New South Wales Aboriginal Land Council (No 2)
[2013] NSWLEC 127 (Pain J)

Facts: these expedited judicial review proceedings challenged the appointment of an auditor under [s 153](#) of the [Aboriginal Land Rights Act](#) 1983 (“the ALR Act”) by the New South Wales Aboriginal Land Council (“NSWALC”), the First Respondent, to audit the financial accounts of the Gandangara Local Aboriginal Land Council (“GLALC”), the Applicant. The auditor, Mr Hickey, the Second Respondent, filed a submitting appearance. The NSWALC caused a process of public tendering to take place from which it selected an auditor for appointment to one or more Local Aboriginal Land Councils (“LALCs”). Mr Hickey submitted a tender to the NSWALC for appointment as auditor. That tender submission included a copy of the NSWALC’s standard Instrument of Appointment which Mr Hickey signed. On 8 March 2013, the NSWALC sent a letter to Mr Hickey advising that NSWALC had appointed him as an auditor to certain LALCs and attached an unsigned instrument of appointment. On 11 March 2013 the NSWALC wrote a letter to the GLALC outlining the steps taken in the public tender process, advising that Mr Hickey had been appointed to audit the GLALC’s financial accounts for 2012/2013, attaching the letter to Mr Hickey dated 8 March 2011 and the Instrument of Appointment. The letter of 11 March 2011 stated that the appointment of Mr Hickey was subject to Mr Hickey entering into a written services agreement with the GLALC. The GLALC wrote a letter to the NSWALC stating that the GLALC had not been able to agree to terms with Mr Hickey in relation to his appointment as auditor for the GLALC for the financial year ending 30 June 2013. The GLALC requested the NSWALC to nominate another auditor for the GLALC. The GLALC has not signed the written service agreement with Mr Hickey.

Issues:

- (1) whether the 8 March 2013 letter did not validly appoint Mr Hickey as the auditor of the financial statements of the GLALC. This gave rise to the issue of who pays the auditor appointed by the NSWALC pursuant to s 153(3) of the ALR Act;
- (2) whether the appointment of Mr Hickey under s 153(3) by the NSWALC could be, and was, conditional; and
- (3) whether the appointment was ineffective (at the outset), or no longer had any effect or operation given that the service agreement had not been executed by the GLALC.

Held: the Further Amended Summons dated 22 July 2013 was dismissed:

- (1) the obligation to have audited accounts fell squarely on the GLALC under s 153: at [68]. Nothing in the general oversight functions of the NSWALC suggested a different statutory construction to s 153(3) should be adopted. The ALR Act did not suggest at a broad level a greater level of ownership of the NSWALC in the specific function of appointing an auditor under s 153(3) suggesting it should pay the auditor: at [70]. That there are general powers to grant money to LALCs did not advance the construction of s 153(3): at [71]. The provision of auditing services continued to be to the LALC. That the appointment of the auditor was by the NSWALC did not mean that payment of the auditor followed that event: at [68];
- (2) there is no express or implied limit on the appointment power in s 153(3) conferred under the ALR Act. It was within the power of the NSWALC under s 153(3) to appoint an auditor and as part of that process specify how that function was to be discharged through the provision of terms, provided these were consistent with the objects of the ALR Act and the NSWALC’s functions: at [74]. As a necessary exercise of the appointment function it was inferred that the ALR Act did permit the NSWALC to appoint an auditor requiring fulfilment of specified terms in the conduct of his or her duties, which the auditor agrees to in accepting an appointment. That agreement was between the NSWALC and the auditor and was effected on 8 March 2013. It did not render the appointment conditional on an event occurring later: at [75]. There was no evidence that any of the bases for revocation of an appointment existed: at [77]. No basis for making the first declaration sought was made out by the GLALC: at [78]; and
- (3) it was unclear how the actions of a LALC, after an appointment had been made by the NSWALC in terms held to be valid and accepted by Mr Hickey, could in effect legally revoke the appointment. The same reasoning also applied to the second part of the declaration sought, that the appointment has

become inoperative: at [80]. No basis for making the second declaration sought by the GLALC was established: at [81].

McAuley v Northern Region Joint Regional Planning Panel [\[2013\] NSWLEC 125](#) (Craig J)

Facts: Ms McAuley sought a declaration that a development consent granted by the Northern Region Joint Regional Planning Panel (“the JRPP”) was invalid, and an order restraining the second and third respondents, the landowner and developer, from carrying out development pursuant to the development consent. The development consent (“the Consent”) authorised construction of a “transitional group home” with a group home precinct, staff accommodation precinct and a chapel precinct. The bedroom pavilion in the group home precinct comprised a two storey building with 20 bedrooms with ensuite facilities. Each floor contained a shared laundry, an external drying area and two lounge areas. Each floor was linked to the other two pavilions. A community pavilion, built over two levels, contained interview rooms, storage areas, further laundry and toilet facilities, a lounge area, meeting room, computer room and office space. These pavilions were constructed on a single concrete slab. The Consent was issued subject to the controls imposed by the [Coffs Harbour City Local Environmental Plan](#) 2000 (“the LEP”). Both the landowner and the developer also relied on the provisions of [State Environmental Planning Policy \(Affordable Rental Housing\)](#) 2009 (“the SEPP”) as an alternate source of power for the consent.

Issues:

- (1) whether the characterisation of the development as a “transitional group home” was correct:
 - (a) whether the group home was a “dwelling”;
 - (b) whether it would be occupied by persons as a single household, with or without paid supervision or care and whether or not those persons were related or payment for board and lodging was required; and
 - (c) whether the “dwelling” would be used to provide temporary accommodation for the relief or rehabilitation of people for drug or alcohol rehabilitation purposes; and
- (2) whether constructing further dwellings within the staff accommodation precinct was an ancillary use.

Held: holding that the consent validly granted and dismissing the summons:

- (1) The development was properly characterised as a “transitional group home” because:
 - (a) the elements of “dwelling” as used in the defined expression “transitional group home” were satisfied, whether reference was made to the definition in the SEPP or the LEP: at [81]. A “common sense” approach to the word “dwelling” in the definition of “transitional group home”, required its defined meaning be modified to operate harmoniously with the defined expression of which “dwelling” was but an element: at [71]. The purpose of the development was not a dwelling considered in isolation, but rather a “dwelling” constrained by and having the characteristics of the elements which the definition of a “transitional group home” required: at [106];
 - (b) a group of people would live together as a unit with sufficient commonality or community of purpose to satisfy the unifying element of a “single household”: at [74]-[75]. The bedroom pavilion contained bedrooms with ensuite facilities, shared laundry facilities, a single kitchen, dining area and lounge areas accommodate all those who would reside in the group home precinct. These were facilities necessary and appropriate to enable the clients, as a group, to enjoy self-contained living at the facility: at [77]. There was community of interest or cohesion in the residents in their common addiction and rehabilitation, and the undertaking of “domestic” chores associated with the “dwelling”: at [79]-[80]. The fact that the group home precinct was divided among three buildings did not disengage the proposed development from the definition of “transitional group home”: at [85]; and
 - (c) the manner of the occupation of the buildings and the purpose of its use, were for “temporary accommodation... for drug or rehabilitation purposes”: at [65]. While undertaking that rehabilitation program, the clients must reside at the facility. That would be the client's place of abode for three to six months... a period of residence which was consistent with “temporary accommodation”: at [78]; and

- (2) the two dwellings intended to be occupied by employees supervising residents of the “transitional group home” were ancillary to the group home purpose of use: at [109].

Injunctions

McNeill v Avalon Surf Life Saving Club [2013] NSWLEC 85 (Biscoe J)

(related decisions: *Mc Neill v Avalon Surf Life Saving Club* [2013] NSWLEC 69 Pain J; *McNeill v Avalon Surf Life Saving Club* [2013] NSWLEC 72 Sheahan J)

Facts: the applicant was self represented and had commenced two proceedings in Class 4 of the Court’s jurisdiction against Avalon Surf Life Saving Club and Pittwater Council (“the council”). The applicant sought an urgent interlocutory injunction to stop demolition, in particular, of certain walls, and to reinstate a demolished wall of the Avalon Surf Life Saving Club building. This was the third motion in three weeks by the applicant seeking an interlocutory injunction to stop demolition of the Avalon Surf Club building. The two earlier motions were unsuccessful.

The applicant’s main ground for an urgent interlocutory injunction was on the basis of a change in circumstances since the matter was last before the Court, namely, that certain internal walls of the clubhouse had recently been demolished whereas the development consent approved plans called for them to be retained, and that there was a threat of demolition of more walls that were required to be retained by those plans. Evidence was tendered by the council to show that modified approved plans indicated that the internal walls of the building no longer had to be retained.

Issues:

- (1) the applicable principles on repeated motions for an interlocutory injunction;
- (2) whether development consent plans which required internal walls to be retained had been modified so as to permit them to be demolished; and
- (3) (for completeness, although not raised in submissions and not apparently pressed) whether changes made by the council to the Avalon Beach Management Plan to allow a restaurant and café in the surf club building should be “rescinded or reversed” (and that consequential stop work orders should be made).

Held: in dismissing the applicant’s motion with costs:

- (1) an applicant for an interlocutory injunction must establish that there is a serious question to be tried and that the balance of convenience favours the grant of the interlocutory injunction. Generally, an applicant must also give the usual undertaking as to damages (defined in [r 25.8 Uniform Civil Procedure Rules](#) 2005) as the price for obtaining the interlocutory injunction: at [4];
- (2) when, as in the present case, a court is confronted with repeated motions for substantially the same interlocutory injunction, the overriding principle is “that the court should do whatever the interests of justice require in the particular circumstances of the case” (citing *Nominal Defendant v Manning* [2000] NSWCA 80). Generally, however, an unsuccessful applicant for interlocutory relief is precluded from repeating the application, on the ground of abuse of process, if the evidence put before the Court is the same and the circumstances have not materially changed: at [5];
- (3) where an unsuccessful applicant for an interlocutory injunction makes a second application on the basis of evidence reasonably available but not put forward on the earlier application, that does not, without more, amount to an abuse of process, but the applicant faces serious and self-created risks of an adverse exercise of judicial discretion: at [5];
- (4) an applicant who, having failed on one application for an interlocutory injunction, makes a second application when there is insufficient new evidence to justify the second application, faces the risk that an indemnity costs order will be made against the applicant in respect of the second application and that an order will be made that the costs of the second application be assessed forthwith: at [7];
- (5) the modified approved plans permitted the demolition of the internal walls; at [9];
- (6) an injunction seeking “rescinding or reversing” of changes to the Avalon Beach Management Plan had been raised in the two previous unsuccessful motions and therefore it seemed inappropriate for it to be raised yet again; it was unclear what breach (if any) of the [Environmental Planning and Assessment Act](#) 1979 this was said to be relevant to (since under s 123 the applicant only has standing to seek an

order to remedy or restrain a breach); and an interlocutory injunction framed in terms of (or to the effect of) rescinding or reversing changes to the Plan would be inappropriate: at [13]; and
(7) the Court was not satisfied that there was a serious question to be tried: at [14].

Criminal

North Sydney Council v Perini (No 2) [2013] NSWLEC 91 (Pepper J)

(related decision: *North Sydney Council v Perini* [2012] NSWLEC 239 Pepper J)

Facts: Mr Peter Perini was prosecuted pursuant to [s 125\(1\)](#) of the [Environmental Planning and Assessment Act](#) 1979 (“the EPA Act”) by North Sydney Council (“the council”) for undertaking building works on his property in Neutral Bay contrary to an existing development consent granted on 8 November 2007. Mr Perini pleaded guilty to the offence.

Mr Perini had carried out various works between 24 December 2008 and 11 September 2009 that were not in accordance with the approved plans in the consent. Of these unlawful works, five aspects were primarily in contest in the proceedings, namely, the construction of an in-ground swimming pool and a pool equipment room; a reduction in the splay or chamfer at the north eastern corner of the dwelling which affected the amenity of the neighbouring property; an increase in height of the garage by 300mm and its relocation; an increase in depth of excavation across the dwelling’s footprint; and an increase in the height of the dwelling associated with a changed roof structure. In making each of the changes, Mr Perini stated that he had relied heavily on the advice of his architect and private certifier to the effect that either the changes did not require approval or if they did, it would be forthcoming.

On 1 August 2011, Mr Perini lodged a development application with the council to retain the pool and a building certificate application was made to retain the collar constructed above the garage. Mr Perini commenced Class 1 proceedings with respect to each of these applications after their deemed refusal by the council. On 10 August 2012, pursuant to a successful s 34 conciliation, Tuor C approved the development application subject to certain agreed amended conditions. On 29 August 2012, the Commissioner directed the council to issue a building certificate regularising the swimming pool and the collar structure above the garage.

Issues:

- (1) what Mr Perini’s state of mind had been when authorising each of the contested deviations from the development consent;
- (2) whether, in the circumstances, it was appropriate to make an order under [s 10](#) of the [Crimes \(Sentencing Procedure\) Act](#) 1999 (“CSP Act”) that no conviction be recorded; and
- (3) if not, what was the appropriate penalty to impose in view of the objective circumstances and the subjective mitigating features personal to Mr Perini.

Held: Mr Perini was convicted and fined \$28,000 and a costs order was made:

- (1) the actual environmental harm caused was low, but the offence nevertheless derogated from the legislative objects and system of development control under the EPA Act: at [135]–[137];
- (2) the construction of the pool and pool equipment room was authorised by Mr Perini with the knowledge that approval had not, and would not, be obtained. However, the evidence was more equivocal regarding Mr Perini’s state of mind with respect to undertaking each of the other deviations from the approved plans: at [138]–[149];
- (3) despite the foreseeability of the harm, Mr Perini’s control over the causes, the availability of practical measures to avoid any harm and Mr Perini’s state of mind, the offence was overall of low objective gravity having regard to the limited environmental harm caused: at [133]–[161];
- (4) relevant subjective considerations included Mr Perini’s early guilty plea, lack of prior criminality, good character, limited expression of remorse, unlikelihood of re-offending, and cooperation with the council. Together these entitled Mr Perini to a 30% sentence discount: at [162]–[183] and [204];

- (5) a s 10 order under the CSP Act was not appropriate having regard to the mandatory factors in s 10(3) of that Act because: the offence could not be considered trivial given the extensive nature of the unlawful works; Mr Perini's reliance on the advice of his architect and a private certifier did not override the fact that, by his own concession, he knew approval was required for construction of the pool and he was reckless or negligent with respect to at least one other aspect of the unlawful works, namely, the changes to the splay; despite his reliance on his architect and the private certifier, Mr Perini accepted that he had ultimate control over the works; Mr Perini alone stood to benefit from the unlawful works; and it was not clear that Mr Perini's remorse was entirely genuine given his unwillingness to demolish the impugned works and his attempts, instead, to regularise them after the event: at [172] and [193]–[203]; and
- (6) a conviction and a fine was therefore the appropriate penalty in all of the circumstances: at [203]–[204].

Environment Protection Authority v Ravensworth Operations Pty Ltd [2013] NSWLEC 92 (Sheahan J)

Facts: Ravensworth Operations Pty Ltd ("Ravensworth") was charged under [s 128\(2\)](#) of the [Protection of the Environment Operations Act](#) 1997 ("the POEO Act") in relation to the emission of dust from dragline operations, for failing to carry on an activity by such means as necessary to prevent or minimise air pollution where no standard or rate had been prescribed.

At first instance the matter was heard in the Local Court at Singleton. The defendant contended that a standard or rate had been prescribed for the emission of dust, and raised that contention as a preliminary question, which if answered in the affirmative, would be determinative of the proceedings. The Magistrate answered the question in the affirmative, finding that a standard or rate had been prescribed, and dismissed the proceedings.

An appeal was brought by the Prosecutor, in the Class 6 jurisdiction of the Land and Environment Court, on the ground that the Magistrate had erred in answering the preliminary question in the affirmative, and the appellant raised a threshold question that the appeal did not raise "a question of law alone", under [s 42\(2B\)\(b\)](#) of the [Crimes \(Appeal and Review\) Act](#) 2001.

On the Threshold Question:

- (1) whether the class 6 appeal involved a "question of law alone".

Held: the appeal was competent, as the ground was capable of being posed without express reference to the factual matters specific to the activities being carried out at the Ravensworth/Narama mine: at [47]

On the appeal itself:

The appellant's proposed construction of s 128 of the POEO Act was that subsection (1) applied to emissions of air pollution for which there was a measurable standard or rate, and subsection (2) applied to emissions for which there was no measurable standard. Further, the prescribed test method, TM-15, was capable of measuring dust only from stationary sources, and the fugitive nature of the emission of dust from dragline operations meant that it was incapable of being measured under TM-15, creating a legislative lacuna, as a standard or rate was prescribed, but it could not be measured.

[The Protection of the Environment Operations \(Clean Air\) Regulation](#) 2002 ("Clean Air Regulation") prescribed standards of concentration for the emission of air impurities, and also some relevant test methods. Neither the POEO Act nor the Clean Air Regulation defined the relevant test method, TM-15, though it was defined in a document entitled 'Approved Methods', and was an approved method, that was selected via an administrative process, and applied only to stationary sources that emitted solid particles of air pollution.

Issues:

- (1) whether the Magistrate erred in answering the preliminary legal question in the affirmative; and
(2) whether in answering the preliminary legal question in the affirmative a legislative gap was created.

Held: appeal dismissed:

- (1) the administrative process of selecting a test method, which measures only stationary/point sources was not capable of confining the ambit of relevant sections of the POEO Act and the Clean Air Regulation: [94];
- (2) in the absence of proven necessity the Court should not read additional words into legislative provisions: [94]; and
- (3) no gaps were evident in the regulatory scheme: [95]

Willoughby Council v Vlahos [\[2013\] NSWLEC 71](#) (Craig J)

Facts: the defendant pleaded guilty to an offence against [s 125](#) of the [Environmental Planning and Assessment Act](#) 1979 (“the EPA Act”). The owners of the land, Mr and Mrs Vlahos senior, sought development consent to demolish an existing dwelling and construct a new two storey dwelling with garage and swimming pool. Accompanying the development application were plans showing the location of a large Casuarina tree in the rear yard, and at least one letter from a neighbour expressing displeasure at the location of the tree. The tree was a significant specimen and in good health, being about 16m in height with a canopy spread of 16m to 18m. Development consent was granted by the council in August 2010 with two conditions requiring the protection and retention of the tree during construction. The defendant, the son of the landowners, was engaged as the site supervisor for the development. He was a builder who had held a licence for nine years. The defendant arranged for, and supervised, the removal of the Casuarina tree. The offence was a strict liability offence. Following the offence, a modified consent was obtained which required the planting of replacement trees. That planting has taken place and a positive covenant has been registered on title to secure protection of those trees.

Issues:

- (1) the seriousness of the offence with which the defendant had been charged;
- (2) relevant sentencing considerations and whether [s 10](#) of the [Crimes \(Sentencing Procedure\) Act](#) 1999 (“the CSP Act”) should be applied to the offence; and
- (3) the penalty to be imposed for committing the offence.

Held: the defendant was convicted of the offence as charged, fined \$12,500 and ordered to pay the prosecutor’s costs as agreed or assessed:

- (1) the offence was in the low to moderate range of objective seriousness: at [41]. Offences against s 125 of the EPA Act are indicated to be very serious due to the maximum penalty of \$1.1 million: at [26];
- (2) the loss of the tree involved the direct environmental impact from that loss, as well as harm to the community by infringing the aims and objectives of the Willoughby Local Environmental Plan 1995. That Plan included an objective to conserve and enhance the tree resources and landscape quality of the area; an objective which was clearly offended by what occurred: at [30];
- (3) there is an expectation that those given the benefit of carrying out activities pursuant to consents in a professional capacity do so strictly in accordance with the requirements of whatever licence, authority, permit or consent they are given so as to ensure that breaches to consents do not occur: at [38]; and
- (4) the commission of a strict liability offence such as that found under s 125 of the EPA Act will rarely engage the provisions of s 10 of the CSP Act: at [42]. The triviality of an offence is a factor to consider when exercising discretion under s 10. The present offence was anything but trivial: at [45]. There were no extenuating circumstances surrounding the offence; it was deliberate and conscious, as the defendant was aware of the conditions of consent requiring protection and retention of the tree: at [45]. Discretion under s 10 was not exercised: at [47].

Environment Protection Authority v Du Pont (Australia) Ltd [\[2013\] NSWLEC 98](#) (Pepper J)

(related decision: *Environment Protection Authority v Du Pont (Australia) Ltd (No 2)* [\[2013\] NSWLEC 99](#) Pepper J)

Facts: the prosecutor, the Environment Protection Authority (“the EPA”), brought a charge of land pollution pursuant to [s 142A](#) of the [Protection of the Environment Operations Act](#) 1997 (“the POEO Act”) against Du Pont (Australia) Ltd (“Du Pont”). The summons alleged that between 4 April and 18 May 2011, a pollutant escaped from Du Pont’s Girraween premises so that Du Pont introduced, or caused the introduction of, a pollutant onto the land. The alleged pollutant was the active ingredient in a herbicide, namely metsulfuron methyl (“MSM”), released in the form of a dust. MSM is a selective and systemic herbicide and is very toxic to susceptible plants. Du Pont holds an environmental protection licence for chemical production at its Girraween factory, which comprises two plants: a dry flow plant and a formulation and granulation plant (“the F&G plant”). There was no direct evidence of MSM release and the case was entirely circumstantial. Du Pont pleaded not guilty and a four week hearing was fixed. On the first day of the hearing, the parties raised a preliminary legal question seeking determination of the proper construction of s 142A of the POEO Act. The parties agreed that this was to be informed by two possible factual scenarios: first, that the dust was emitted into the atmosphere from “control equipment” (the F&G plant stack) due to a licensed activity; and second, that the dust escaped by other means and entered the atmosphere as airborne particulates. Section 142A made it an offence to pollute land including to “cause or permit” land to be polluted and imported the definition of “land pollution” in the Dictionary. Du Pont submitted that releasing MSM laden dust that was then blown or settled on soil, vegetation, buildings and objects was not capable of constituting “land pollution” because it could not satisfy the phrase “or otherwise introducing into or onto the land” which was said to require direct action.

Issue:

- (1) what was the proper construction of s 142A of the POEO Act, in particular what was the meaning of the phrase “or otherwise introducing into or onto, the land” in the definition of “land pollution” and did this require a direct, positive and controlled act.

Held: either factual scenario was capable of attracting criminal liability under s 142A of the POEO Act:

- (1) the aim of statutory construction is to ascertain the legislative intention by reference to the language of a statute read as a whole. The modern approach emphasises the centrality of the text: at [46]–[52];
- (2) the offence of land pollution could be compared and contrasted with the offences of air pollution and water pollution, also located in Ch 5 of the POEO Act. But the fact that Du Pont’s conduct could give rise to other offences, such as air pollution offences, was irrelevant to the task of interpreting s 142A. There was no absolute division between the three pollution offences and neither the schema of Ch 5, nor the structure of the licensing regime under the POEO Act, required a narrow definition of “land pollution”. The objective legislative intention of including the different pollution and licensing offences was to cover a wide range of conduct with the potential to harm the environment. Moreover, the fact that the definition of “water pollution” had been expanded to include the act of placing a pollutant where it could fall, descend, be washed, be blown or percolate into water, and the absence of this limb from the “land pollution” definition, was not determinative given the separate promulgation and evolution of these two definitions and the respective pollution offences: at [23]–[34] and [89]–[104];
- (3) the escape into the atmosphere of MSM dust could not constitute “placing” it onto land according to the ordinary meaning of “placing”, and so could not satisfy that limb of “land pollution”: at [53]–[54];
- (4) the term “introducing” was much wider in scope covering both direct and indirect acts. This conclusion was supported by textual, purposive and extrinsic considerations. The ordinary dictionary definition of “introducing” encompassed indirect modes of action and could therefore cover the emission of dust into the atmosphere that ultimately falls onto the land. The intervention of uncontrolled acts such as wind or gravity did not change this. It would be perverse if a defendant could escape liability for land pollution by the intervention of a random climatic event and nothing warrants importing a requirement for control, which would undermine the strict liability nature of the offence. Furthermore, Parliament made it clear that indirect introduction of matter into or onto land was intended by using the words “or otherwise”, which are words of wide import and of expansion not limitation: at [55]–[75];

- (5) the word “cause” in the extended definition of “land pollution” was to be given its common sense meaning and the causal act or omission did not need to be the immediate or sole cause: at [76]–[88];
- (6) a purposive interpretation also supported an expansive definition of land pollution because the POEO Act aimed to eliminate pollution at source and maximise environmental outcomes: at [105]–[106]; and
- (7) the canon of construction concerning penal statutes was “one of last resort”. In any case, properly construed there was no ambiguity in the definition so as to engage that rule: at [107]–[110].

Environment Protection Authority v Du Pont (Australia) Ltd (No 2) [\[2013\] NSWLEC 99](#) (Pepper J)

(related decision: *Environment Protection Authority v Du Pont (Australia) Ltd* [\[2013\] NSWLEC 98](#) Pepper J)

Facts: the prosecutor, the Environment Protection Authority (“the EPA”), brought a charge of land pollution pursuant to [s 142A](#) of the [Protection of the Environment Operations Act 1997](#) (“the POEO Act”) against Du Pont (Australia) Ltd (“Du Pont”). The summons alleged that between 4 April and 18 May 2011, a pollutant escaped from Du Pont’s Girraween premises so that Du Pont introduced, or caused the introduction of, that pollutant onto the land. The alleged pollutant was the active ingredient in a herbicide, namely metsulfuron methyl (“MSM”), released in the form of a dust. MSM is a selective and systemic herbicide and is very toxic to susceptible plants. Du Pont holds an environmental protection licence for chemical production at its Girraween factory, which comprises two plants: a dry flow plant and a formulation and granulation plant (“the F&G plant”). There was no direct evidence of MSM release and the case was entirely circumstantial. Du Pont pleaded not guilty and a four week hearing was fixed. On the first day of the hearing, a preliminary legal question arose regarding the proper construction of s 142A of the POEO Act. The EPA foreshadowed that the charge would not be pursued if this question was answered in line with the narrow interpretation of “land pollution” proposed by Du Pont. Following the question being answered favourably to the EPA, the EPA then made an application to amend the summons to change the charge period so as to replace “4 April to 18 May 2011” with “1 February 2011 to 30 October 2011”. The reason given was so that the charge captured all emissions that could account for the damage the subject of the charge. The application was supported by an affidavit from the EPA’s principal solicitor advising on the matter. It was opposed by Du Pont.

The EPA’s evidence was that the charge had been framed on the basis that if the MSM detected on the land emanated from Du Pont’s factory, then it had escaped around the time of the manufacture of products in the F&G plant containing 60% or 75% MSM during a production run (“campaign”) in the period March/April 2011. The timing was said to be based on Du Pont’s responses to statutory notices of preventative action and to provide information and/or records that were issued by the EPA in late 2011, as well as an interview with a Du Pont employee regarding the March/April 2011 campaign. Then, on 15 June 2013, the EPA received Du Pont’s objections to its evidence and one category of objection was the relevance of post incident sampling by the EPA to the effect that it was impossible to discern what part of MSM identified in any sample was referable to campaigns of products containing MSM that occurred before, during or after the charge period. Cross-examination of the EPA solicitor revealed that he had in fact been aware of other campaigns of herbicide products, albeit containing lower concentrations of MSM, outside the March/April 2011 window. Cross-examination also revealed that expert evidence was “critical” in the EPA’s case and the assembled expert reports all focused on the possible release of MSM during March/April 2011 from the F&G plant and that the EPA had no intention of leading any further expert evidence.

Issue:

- (1) whether to allow the EPA to amend the summons to expand the charge period.

Held: application to amend the summons dismissed:

- (1) pursuant to [s 68\(1\)](#) of the [Land and Environment Court Act 1979](#) the Court has power at any stage of proceedings to order amendments to be made, including to a summons, which are “necessary in the interests of justice”. Power to allow amendments in Class 5 proceedings also arises from Pt 75 r 6 of the [Supreme Court Rules 1970](#) and Pt 19 of the [Uniform Civil Procedure Rules 2005](#), which apply by virtue of r 5.2 of the Land and Environment Court Rules 2007. The power also covers amendment of particulars, provided the substance of the charge remains unchanged: at [4]–[11]; and

- (2) it would not be in the interests of justice to allow the amendment. First, it would change the substance of the charge because it would incorporate new campaigns of different products containing MSM at different locations than those understood by all parties to be the alleged source of the fugitive MSM dust so that the charge would be significantly enlarged in its factual scope. Second, the decision on the charge period was not the result of oversight by the EPA, but a forensic decision. Third, no cogent explanation had been given for the delay in bringing the application to amend, which was only foreshadowed one calendar day prior to the commencement of the proceedings. Fourth, it would be largely futile because all the expert evidence filed was referable to the charge period as framed in the summons and no further expert evidence was to be obtained. Fifth, prejudice and unfairness to Du Pont could result, and delay in the proceedings was probable, as Du Pont would need to reconsider its position. Finally, the EPA's stated position was that if the amendment was refused, the prosecution would nevertheless proceed and thus the public interest would not be impinged: at [27]–[30].

Harrison v Harris [2013] NSWLEC 105 (Pepper J)

Facts: the defendant, Mr Ronald Harris, pleaded guilty to an offence under [s 91K\(1\)](#) of the [Water Management Act](#) 2000 (“the WM Act”) in that, on 22 July 2009, he intentionally or recklessly interfered with or disconnected metering equipment that had been installed in connection with a water supply work at his property near Hay (“the property”). The property had two main sources of water: surface water from the Murrumbidgee River and groundwater. Surface water was extracted from the River using a number of pumps, one of which was the subject of these proceedings. Mr Harris was the licence holder of 17 water access licences and 15 works approvals issued under the WM Act. One water access licence (“WAL”) and one approval covering the pump in question, were linked so that water taken and used pursuant to the WAL could only be taken in accordance with the works approval. The offence involved tampering with the meter on that pump. Mr Harris admitted to having inserted a steel rod inside the pump’s discharge pipe, which prevented the water meter impellor from turning and meant that water was discharging but neither of the two attached meters was operating. Thus water was being taken but the volume was not being recorded. State Water Officers discovered the problem and alerted officers from the prosecutor, the NSW Office of Water (“NOW”), who investigated. Mr Harris admitted to having tampered with the meter at least once before. He stated that he was filling the house dam, which had a capacity of two to three megalitres (ML) but that the channel between the dam and the River had to fill first, requiring 100 to 150 ML, before the water would reach and fill, the house dam. An estimated 30 to 40 ML of water were extracted during the period in which the meter was disabled. Mr Harris contended that he had a right to extract the water to fill the house dam pursuant to his “basic landholder right” under s 52 of the WM Act.

Section 364A of the WM Act set out the matters that the Court had to consider when sentencing, in addition to those listed in [s 21A](#) of the [Crimes \(Sentencing Procedure\) Act](#) 1999. The aggravating factors that were contested and required consideration by the Court pursuant to [s 364A](#) of the WM Act were: the market value of any water unlawfully taken; the impact of the offence on other persons’ rights; and whether the offence was committed during a severe water shortage. At the time of the offence the relevant Water Sharing Plan for the Murrumbidgee River was suspended under the WM Act by a Ministerial Order issued in 2006 on the basis that the catchment was in a severe water shortage. The River remained in drought conditions until February 2010 when the suspension was lifted.

Issues:

- (1) whether [s 52](#) of the WM Act permitted Mr Harris to take the water pursuant to his “basic landholder right”, and if so, whether he had taken the water purely for “domestic consumption” purposes;
- (2) whether the market value of the water taken was such as to constitute an aggravating factor;
- (3) whether the offence had been committed during a “severe water shortage”;
- (4) whether the offence was aggravated by constituting a planned or organised criminal activity;
- (5) whether the offence had affected other persons’ water rights; and
- (6) what was the appropriate penalty given the objective circumstances and the subjective mitigating features personal to Mr Harris and in view of the lack of any prior prosecutions under this provision.

Held: the defendant was convicted and fined \$28,000, of which half was directed to be paid to the prosecutor. A publication order and a costs order were also made:

- (1) even if the multiple parcels of land owned by Mr Harris were held to constitute a single “landholding”, the evidence disclosed that he intended to use some of the water from the channel for irrigation purposes not, as permitted under s 52 of the WM Act, for domestic consumption. Furthermore the evidence disclosed that Mr Harris had committed the offence intentionally in order to fill his dam without being debited for that water: at [59]–[99];
- (2) the offence was not, however, aggravated by constituting a planned or organised criminal activity because although Mr Harris committed the offence intentionally, which involved some level of planning, there was no evidence to permit a finding beyond reasonable doubt that the planning exceeded what would ordinarily be expected of an offence of this kind or that he had deliberately concealed the rod, and he had interfered with the meter only once before: at [148]–[152];
- (3) the environmental harm caused by the offence was low, given the negligible volume of water taken relative to the total water assets in the River, but harm was caused to the regulatory regime by the commission of the offence. This was a regime created to protect and manage a vital and scarce resource, namely, water. The system of ordering and measuring water taken allowed the NOW to monitor and control the taking of water, manage the flow of the river, lessen negative impacts on the environment, and ensure the equitable sharing of water. The negligible extraction would nevertheless have little effect on the water allocation to other licence holders: at [100]–[114];
- (4) given a recent flooding event in the Murrumbidgee Valley and the increased capacity of local dams, the area was no longer in a severe water shortage as a matter of fact, but was in drought, when the offence was committed: at [115]–[128];
- (5) using the temporary trading price, the market value of the water taken was estimated at between \$5,130 and \$6,840, which the Court found was not of significant monetary value. The temporary trading price was used rather than the higher permanent trading price, because no definition of “market value” was provided in the WM Act; no reliable methodology was provided to the Court for combining the two approaches; an approach analogous to the “desirous purchaser” test used in land valuation matters was considered appropriate; and the taking of the water was a singular event and not a permanent assignment of Mr Harris’ water rights: at [129]–[140];
- (6) Mr Harris could have reasonably foreseen the harm, had practical measures available to him to avoid the harm, and had full control over the causes: at [141]–[147];
- (7) balancing these considerations, overall the offence was of low objective gravity: at [153]; and
- (8) relevant subjective considerations included Mr Harris’ early guilty plea, his good character, his cooperation with authorities, his lack of prior convictions, the reduced likelihood that he would re-offend, and his good prospects of rehabilitation. Whether Mr Harris had demonstrated genuine remorse was more equivocal and this factor was given less weight. This was because, although he expressed some remorse in interviews with the NOW, he had never actually apologised for his unlawful act and while his affidavit explained the circumstances and offered a reason for the commission of the offence, it did not contain any statement of contrition. Overall, a discount of 30% for mitigating factors was applied. General and specific deterrence were also important sentencing considerations in the context of this offence and the statutory regime of the WM Act: at [154]–[174].

Environment Protection Authority v Forestry Commission of NSW [\[2013\] NSWLEC 101](#) (Pepper J)

Facts: the Forestry Corporation of New South Wales (“Forestry NSW”) (which replaced the former Forestry Commission) pleaded guilty to two offences arising from bush fire hazard reduction burn activities that occurred between 25 May 2011 and 13 July 2011. The first was an offence of polluting waters contrary to [s 120\(1\)](#) of the [Protection of the Environment Operations Act](#) 1997 (“the water pollution offence”). The second was an offence of contravening a condition of a threatened species licence contrary to [s 133\(4\)](#) of the [National Parks and Wildlife Act](#) 1974 (“the licence breach offence”). The hazard reduction burn was carried out within three forestry compartments in the Mogo State Forest and affected areas in proximity to the tidal waters of three creeks and their tributaries, which drained to the ocean. Under marine parks

legislation, the affected waters were part of the Batemans Marine Park and two affected creeks were also zoned within the Waterfall Creek Sanctuary Zone, while a third affected creek was part of the Batemans Bay Habitat Protection Zone.

As a result of the hazard reduction burn, an unknown quantity of ash, charcoal and sediment, which are prescribed matters under the [Protection of the Environment Operations \(General\) Regulation 2009](#), entered the waters and continued to do so until Forestry NSW installed erosion control measures. This constituted the water pollution offence. The licence breach offence involved the contravention of condition 5.7(a) of Forestry NSW's licence under Pt 6 of the [Threatened Species Conservation Act 1995](#) which prohibited specified forestry activities in a "protection zone (hard)", including bush fire hazard reduction activities. In this case, a "protection zone (hard)" was the area five metres from the top of the bank of any incised channel. The hazard reduction burn that occurred between 25 May 2011 and 13 July 2011 was ignited at certain locations within the "protection zones (hard)" of the relevant affected creeks.

Issue:

- (1) what was the appropriate penalty to impose for each offence in view of the objective circumstances and the subjective mitigating features personal to Forestry NSW.

Held: the defendant was convicted, ordered to pay the prosecutor's legal and investigation costs, and fined \$28,000 for the water pollution offence and \$7,000 for the licence breach offence, with the total monetary penalty to be directed towards an environmental improvement project:

- (1) while the maximum penalties were \$1 million for the water pollution offence and \$22,000 for the licence breach, the offences committed were not in the worst category of case: at [108]–[112];
- (2) the environmental harm caused included the entry of prescribed matters into the affected waters, burnt estuarine vegetation in affected areas, non-permanent increases in turbidity and nutrient loads, and localised smothering effects. However, overall the environmental harm was low: at [118]–[131];
- (3) Forestry NSW's state of mind in committing the licence breach offence could be characterised as negligent. Moreover, Forestry NSW could have reasonably foreseen the harm, had practical measures available to it to avoid the harm, and had full control over the causes. Therefore, on balance, the offences were of low to moderate objective gravity: at [132]–[151];
- (4) Forestry NSW's early guilty plea, its cooperation with authorities, its demonstrated remorse, and its agreement to pay the legal and investigation costs operated to mitigate the sentence imposed. Moreover, Forestry NSW had taken a number of steps to prevent a recurrence and to address organisational failings that had led to the commission of the offences, including the implementation of more rigorous corporate planning and training procedures for burn planning. This reduced the likelihood that Forestry NSW would re-offend: at [75] and [156]–[170];
- (5) conversely, Forestry NSW had a significant record of prior convictions to be taken into account: at [113]–[118] and [154]–[155];
- (6) overall, a discount of 33% for mitigating factors was considered appropriate: at [172]; and
- (7) the totality principle was relevant to reduce the total penalty imposed: at [188]–[192].

Hunters Hill Council v Gary Johnston [2013] NSWLEC 89 (Craig J)

Facts: the defendant pleaded guilty to an offence against [s 125](#) of the [Environmental Planning and Assessment Act 1979](#) ("EPA Act"). Mr Johnston, the landowner, carried out development otherwise than in accordance with a consent granted by the Prosecutor, contrary to [s 76A\(1\)\(b\)](#) of the EPA Act. Development consent was obtained to construct a large contemporary two storey dwelling with outdoor pool and spa. A condition of that consent required that four mature hoop pine trees be protected and retained during the development. The trees were substantial specimens, ranging between 20m and 22m in height, with each tree having a canopy spread ranging between 7m and 9m. The cluster of trees was readily visible from surrounding properties, the Parramatta River and the Gladesville Bridge. The approved plans, including landscape plans, showed the hoop pines as being retained. Development consent was granted despite the height of the proposed dwelling exceeding development standards, as the positioning of the trees would screen the proposed dwelling from the water and surrounding vantage points. In contravention of the

conditions of consent, the defendant arranged for a contractor to cut down three of those four hoop pine trees and lop the branches of the fourth from the stem in preparation for its removal. The building site was within a foreshore scenic protection area, conservation area and in the vicinity of heritage items.

Issues:

- (1) the objective gravity of the offence;
- (2) the subjective circumstances relevant to the offence;
- (3) consistency in sentencing; and
- (4) the penalty to be imposed for committing the offence.

Held: defendant convicted of the charge, fined the sum of \$40,000 and ordered to pay the Prosecutor's legal costs:

- (1) removal of the four trees had a substantial impact that was objectively harmful: at [70]. Not only was their significant landscape contribution to the property and its environs lost, their removal defeated an important environmental objective of their retention, namely the beneficial effect identified by the Defendant's consultants in mitigating the impact of the new dwelling: at [70];
- (2) cutting down the trees, contrary to the conditions of development consent, was antipathetic to both the planning system ordained by the EPA Act and also the specific controls imposed by the Local Environmental Plan: at [73]. The harm occasioned by the defendant's removing of the trees was substantial: at [74];
- (3) the objective seriousness of the offence was mid-range: at [88]. The actions of the defendant involved a deliberate and intentional breach of the development consent: at [77]. Those actions were taken in circumstances where he was aware that the consent required retention of those trees: at [81]; and
- (4) the defendant's lack of prior convictions, his previous good character, his plea of guilty and the fact that he forfeited a bond of \$20,000 to the Prosecutor were considered as mitigating factors: at [105].

Chief Executive, Office of Environment and Heritage v Leda Management Services Pty Ltd [\[2013\] NSWLEC 111](#) (Pain J)

Facts: the Defendant pleaded guilty to the charge that at or near Tweed, it committed an offence against [s 156A](#) of the [National Parks and Wildlife Act](#) 1974 ("the NPW Act"), in that it caused damage to vegetation and/or soil on land reserved under the Act or acquired under Part 11 of the NPW Act ("the offence"). Particulars of the offence in the summons include that the Defendant cleared vegetation on the edge of Blacks Creek, and damaged soil on the bed and banks of Blacks Creek which is located in the Cudgen Nature Reserve.

Issue:

- (1) the appropriate sentence for the offence.

Held: the Defendant was convicted of the offence, was fined the sum of \$32,500, ordered to rehabilitate the land under [s 200](#) of the NPW Act at cost of \$100,000 to \$150,000, ordered to publish notices under [s 205](#) of the NPW Act, and to pay the Prosecutor's costs:

- (1) the offence was of low to medium objective gravity given the nature of the offence, the significant harm to the environment in a nature reserve even if relatively short term due to the likelihood of successful rehabilitation, the low level of criminality in the commission of the offence being mistaken rather than negligent (at [42]); that the harm caused was foreseeable and the Defendant had control over the causes giving rise to the offence: at [43];
- (2) the fine was reduced by 35 per cent in light of the mitigating factors, which were that there was no record of previous convictions, early guilty plea, contrition and remorse and assistance provided by the Defendant to law enforcement authorities: at [48];
- (3) no element of specific deterrence was necessary: at [54];

- (4) the facts of this case are less serious than *Plath v Vaccourt Pty Ltd t/as Tableland Timbers* [2011] NSWLEC 202 and *Chief Executive, Office of Environment and Heritage v Coffs Harbour Hardwoods Sales Pty Ltd* [2012] NSWLEC 52 in large part because the offences in both were committed for financial gain and were negligent, unlike this matter. The level of environmental harm caused was similar to *Coffs Harbour Hardwoods* in terms of the extent of the area cleared: at [61]; and
- (5) a fine was imposed given the objective seriousness of the offence taking into account the subjective circumstances outlined. The appropriate amount was \$50,000 discounted by 35 per cent to \$32,500. An order for rehabilitation should also be imposed as provided for under s 200. A publication order should also be imposed. To respond to the Defendant's submissions that a rehabilitation order was sufficient punishment given the cost it was observed that it is desirable for rehabilitation to occur wherever possible. The prompt offer of rehabilitation and its likely success was taken into account in the Defendant's favour in relation to the extent of environmental harm caused under s 194(1)(a), in relation to measures to be taken to mitigate harm under s 194(1)(c) and in relation to the Defendant's demonstrated contrition and remorse. An appropriate penalty had been imposed to reflect these matters: at [69].

Pittwater Council v Gerard [2013] NSWLEC 112 (Biscoe J)

Facts: this was an appeal by a Council prosecutor from the Local Court's dismissal of a summary charge that the defendant (an owner builder) carried out development other than in accordance with development consent because of alleged non-compliance with a sediment control condition. The council had granted the defendant development consent for demolition of existing structures and construction of a new dwelling at the subject site, subject to conditions. Condition D7 provided: "Sedimentation and erosion controls are to be effectively maintained at all times during the course of construction and shall not be removed until the site has been stabilised or landscaped to the Principal Certifying Authority's satisfaction". Condition C8 provided, inter alia, for an Erosion and Sediment Management Plan to be submitted to the Accredited Certifier or Council. The plan contemplated by condition C8 was certified, submitted to and accepted by the council and indicated that the sediment controls comprised a silt fence and hay bales across the driveway, and sand socks in the gutter between the driveway and a council stormwater pit. In a site visit by a council officer in July 2011, mud was seen on the driveway and gutter, sedimentary controls were not across the driveway and muddy water was observed in the council stormwater pit. The council brought proceedings in the Manly Local Court alleging that the defendant failed to comply with condition D7 of the consent in that sediment controls were not effectively maintained. The Magistrate at the Local Court found that the council had not adequately discharged its onus of proving beyond reasonable doubt that there was a non-compliance with the development consent conditions. The summary charge against the defendant was dismissed. The council appealed on three grounds: (1) the Magistrate erred in not finding that the sedimentation and erosion controls were required to be effectively maintained "at all times" in accordance with condition D7 of the consent; (2) as a result, based on the evidence before him, specifically the photographic evidence, the Magistrate erred in not finding there was a breach of the terms of the Consent for the development of the site; and (3) as a result, the Magistrate's finding that "Council has not adequately discharged its onus of proving beyond reasonable doubt that there was a non compliance with condition D7, condition C8 and the ancillary conditions referred to in DA115/09" was in error.

Issues:

- (1) construction of appeal limitation;
- (2) construction of the development consent condition; and
- (3) whether there was error on a question of law alone or in the Local Court's decision that the council had not discharged its onus of proving that the condition was not complied with.

Held: dismissing the appeal:

- (1) an appeal in Class 6 of the Court's jurisdiction is limited to "a ground that involves a question of law alone": at [2], [20];
- (2) this excludes an appeal on a mixed question of law and fact: at [2];
- (3) an appeal will fail if the appellate court is satisfied that an error of law did not affect the result: at [2];

- (4) the Magistrate would have erred in law in not construing condition D7 as requiring that sediment controls were to be effectively maintained at all times during the course of construction, however a contention such as that was doubtful given that the Magistrate quoted condition D7: at [20];
- (5) the site plan that the council accepted as complying with condition C8 contemplated that sediment may reach and flow down the gutter because it provided for sediment control devices in the form of sand socks in the gutters downhill from the driveway and uphill from the stormwater pit. Given that context, the object of condition D7 was that the sediment controls be effective to prevent sediment entering the stormwater system. Under condition D7 the sediment controls had to be maintained at all times to give effect to that object in the context of this development consent: at [20];
- (6) condition D7 was to be construed as contemplating the temporary displacement of sediment control devices to the extent reasonably required to permit trucks to enter and leave the driveway to remove demolished material and to deliver construction material: at [20];
- (7) the Magistrate was correct in concluding that the council had not discharged its onus of proving non-compliance with condition D7 beyond reasonable doubt because on the evidence there was reasonable doubt as to whether the muddy water in the stormwater pit had come from the subject site: at [21]; and
- (8) there may have been a breach of condition C7 even if sediment had not yet entered the stormwater system if the sediment controls had not been effectively maintained at all times so as to be capable of giving effect to the object of preventing sediment entering the stormwater system. However this had not been proved beyond reasonable doubt: sediment controls were present on the site, condition D7 permitted the hay bales and silt fence to be temporarily relocated to permit trucks to enter and exit, and minor displacement and partial flattening of one sand sock did not amount to a breach: at [22].

EPA v Land Foam Australia Pty Ltd [\[2013\] NSWLEC 128](#) (Biscoe J)

Facts: the defendant, Land Foam Australia Pty Ltd, had pleaded guilty to one charge that it committed an offence against [s 48\(2\)](#) of the [Protection of the Environment Operations Act 1997](#) ("POEO Act") in that it occupied premises at which a scheduled activity was carried out when it did not hold an environment protection licence ("EPL") under the POEO Act that authorised that activity to be carried on at the premises. The "scheduled activity" involved the use of toxic substances (Toluene Diisocyanate (TDI) and Methylene Chloride (MeCl)), as defined in Schedule 1 to the Act, to manufacture foam. Under the POEO Act there was a "period of grace" in which it was not an offence for the defendant to use these toxic substances without an EPL. The period of grace was for nine months from 29 May 2008 to 28 February 2010, plus, if an EPL application was made by 28 February 2010, the further period before the application was finally determined. Thus, if the defendant had lodged an EPL application by 28 February 2010, it would not have committed the offence. The defendant did not lodge the EPL application until after the period of grace had expired because it did not know about the period of grace. Neither did the EPA or Mr Mullane (a planning consultant for the defendant at the time). An EPA officer, during the period of grace, repeatedly and erroneously told Mr He (the defendant's controlling shareholder, director and person in charge of operations) that the defendant was then committing an offence by using these toxic substances without an EPL, sent the defendant a warning letter for doing so in October 2009 and unlawfully issued the defendant with a penalty infringement notice on 23 December 2009, which the defendant paid. The defendant made an EPL application to the EPA on 24 May 2010, and an EPL was granted on 2 December 2010.

Issue:

- (1) what was the appropriate sentence.

Held: fining the defendant \$3,500, which was reduced by 15 per cent for the utilitarian value of the plea of guilty and rounded to \$3,000, and ordering the defendant to pay the prosecutor's costs as agreed or assessed:

- (1) the offence would not have been committed except for extraordinary circumstances for which some responsibility should be shouldered by the EPA, Mr John Mullane and the local council. These

extraordinary circumstances greatly reduced the objective seriousness of the offence. They were to be considered in light of the fact that Mr He does not speak English: at [16];

- (2) part of the extraordinary circumstances was the EPA officer's and Mr Mullane's ignorance of the period of grace and consequently, their failure to inform the defendant of that critical fact. If the defendant had known about the period of grace, it would have taken the simple step of lodging an EPL application by 28 February 2010, thus automatically extending the period of grace until final determination of the application, whereby this offence would not have been committed. In the circumstances the EPA and Mr Mullane bore some responsibility for the defendant's ignorance of the period of grace and for the defendant's consequential failure to take the simple step of making an EPL application by 28 February 2010: at [20]-[25];
 - (3) a further extraordinary circumstance was the failure of the EPA to follow its procedure of first sending a warning letter to an alleged offender; then (if the conduct continued) issuing a penalty infringement notice; and finally (if the conduct continued) commence proceedings. Because the EPA officers were ignorant of the existence of the period of grace, the EPA wrongly followed the first two procedures during the period of grace. Had it followed those procedures not then but after the period of grace, then there would be a substantial prospect that these proceedings would not have been commenced because by the time those two procedures had run their course the EPL would have been issued: at [26];
 - (4) the final extraordinary circumstance concerned the conduct and delay of the local council in relation to the defendant's development application ("DA"). An EPA officer told the defendant during the period of grace that an EPL could not issue unless the council granted development consent. The defendant, with the assistance of Mr Mullane, lodged a DA with the council in October 2009. In the period from October 2009 to February 2010, the council chopped and changed as to whether the defendant's DA was designated development. Had the council not done so, there would have been a substantial prospect that the development consent would have been granted before expiry of the period of grace on 28 February 2010, with the consequence that an EPL would have issued much earlier than it was, and quite possibly by expiry of the period of grace on 28 February 2010: at [27]-[28];
 - (5) it was not proved that the commission of the offence caused actual harm to the environment, however there was some potential harm to the environment: at [53]-[54];
 - (6) the defendant could have prevented the potential harm arising from the offence by ceasing to operate until it had an EPL. This would probably have caused the defendant to go into liquidation or its business to collapse. Given the extraordinary circumstances analysed earlier, this would have been a harsh result: at [55];
 - (7) the potential harm arising from the defendant continuing operations was foreseeable: at [56];
 - (8) the defendant had control over the causes that gave rise to the offence in that it could have ceased operating: at [57];
 - (9) the defendant had financial reasons for continuing to operate and thereby committing the offence in the charge period; namely, not to go into liquidation, not to close down and not to lose customers and skilled employees: at [58];
 - (10) in principle, an offence such as this undermined the integrity of the regulatory system, however, in the extraordinary circumstances of this case, those responsible for administering and advising as to the regulatory system bore some responsibility for the occurrence of the offence: at [59];
 - (11) the defendant committed the offence intentionally: at [60];
 - (12) the extraordinary circumstances of the case led to the conclusion that this offence by the defendant was of low objective seriousness; and there was little need for general deterrence and no need for personal deterrence: at [61], [62];
 - (13) there was no prior record of criminal conviction: at [63];
 - (14) insofar as Mr He may be regarded as the defendant's directing mind and will, he impressed the Court as a person of very good character who sincerely intended to abide by the law in the future. The defendant, through Mr He, convincingly demonstrated sincere remorse: at [64], [65];
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- (15) the defendant had pleaded guilty about a year after the prosecutor's evidence was served and after seven mentions and two interlocutory hearings. The utilitarian value of the plea was assessed as a 15 per cent discount on sentence: at [66];
- (16) the defendant cooperated with the prosecution in agreeing on a statement of facts and did not contest the prosecution's submission that it should be ordered to pay the prosecutor's costs: at [67]; and
- (17) the appropriate penalty was a fine. In determining the amount of the fine, it was taken into account that the defendant would have to pay the prosecutor's costs, which would have been substantial given the extent of the prosecutor's evidence and the interlocutory disputation. Having regard to the extraordinary circumstances the amount of the fine was to be very much smaller than otherwise would be the case: at [70].

Thaler v Cooma Monaro Shire Council [2013] NSWLEC 126 (Biscoe J)

Facts: the appellant appealed against a conviction by the Local Court for failing to comply with conditions of a development consent. The matter was before the Court for directions on a threshold issue raised by the respondent prosecutor as to whether the appeal was incompetent. The prosecutor contended that the appeal was incompetent because the appellant was convicted in his absence and therefore under the [Crimes \(Appeal and Review\) Act 2001](#) required leave to appeal (ss 31(1A), 32(1)) but was out of time for applying for leave to appeal (s 32(4)). At the Local Court, after unsuccessfully applying to the Magistrate to recuse himself on the ground of bias, the appellant had said to the Magistrate: "I will not participate in those hearings because I will not have you hear it. You are not applying the principles of justice". The Magistrate replied: "I have noted the papers that Mr Thaler refuses to participate in the hearings. On that basis I will proceed ex parte...". The appellant remained in court and apparently at the bar table. The Magistrate proceeded to receive the prosecution evidence and submissions. Whilst the Magistrate was then delivering ex parte reasons for judgment, the appellant interrupted and the Magistrate responded by saying: "You refused to participate in the hearing and I've allowed you to remain at the table as a courtesy, but if you interrupt in the delivering of the judgment then I would have to ask you to leave". The Magistrate then concluded his reasons for judgment and convicted and fined the appellant. The prosecutor contended that in those circumstances the appellant was convicted in his "absence".

Issue:

- (1) whether defendant was convicted in his "absence".

Held: the appellant did not require leave to appeal:

- (1) the Macquarie Dictionary (4th ed) defines "absence" as "a state of being away", and "absent" as "not in a certain place at a given time; away". The Oxford English Dictionary (2nd ed) defines "absence" as "the state of being absent or away (from any place)", and "absent" as relevantly "being away, withdrawn from, or not present": at [5];
- (2) the words "in the person's absence" in ss 31 and 32 bear a meaning that accords with the dictionary definitions: at [6];
- (3) clear words in a penal statute affecting criminal liability should not be interpreted by giving them a wider scope: at [7];
- (4) in ordinary parlance, the defendant was present, not absent, when convicted. Although refusing to "participate", he remained at the bar table throughout: at [7]; and
- (5) the defendant was not convicted in his absence and therefore did not require leave to appeal: at [8].

Chief Executive, Office of Environment and Heritage v Newbigging [2013] NSWLEC 144 (Sheahan J)

Facts: the defendant was charged under s 12 of the [Native Vegetation Act 2003](#) ("the NV Act"), in that he cleared native vegetation otherwise than in accordance with a development consent, granted in accordance with the Act, or a property vegetation plan. The defendant entered an early plea of guilty.

The defendant, in partnership with his wife, owned multiple farming properties. "Spring Tank", the property the subject of the charge, was located near Peak Hill and was purchased by the defendant for his two sons. The defendant was the manager of the property and admitted sole responsibility for carrying out the clearing with his own bulldozer and machinery. The partnership practise "controlled traffic farming" or "tramline" farming on all their properties, using large machinery, satellite guidance and auto steer to maximise cropping and manage soil compaction. The defendant admitted to clearing the vegetation the subject of the charge in order to (better) use controlled traffic farming on "Spring Tank", but had also submitted that another reason for clearing the vegetation was for occupational health and safety. The prosecutor alleged that the defendant cleared 60.6ha of vegetation including mature Yellow Box woodland and Inland Grey Box trees. The defendant was involved in community organisations such as Landcare groups, the Rural Fire Service and Local Show Society, but had previously obtained consent to clear vegetation for another property. His capacity to pay a substantial fine was the subject of evidence from the family accountant.

Issue:

(1) what was the appropriate sentence to be imposed.

Held: fining the defendant \$160 000 reduced by a 30% discount to \$112 000:

- (1) the clearing of the trees impacted on the Barking Owl foraging habitat and a wide range of local species. Vegetation connectivity was lost, a 200 year old tree was cut down and direct and indirect harm to the environment was established: at [59]-[60];
- (2) the defendant should have foreseen the risk of harm to the environment, particularly given his involvement in community groups such as Landcare: at [67];
- (3) the defendant had full control over the cause of the offence, and used his own equipment to carry it out: at [69];
- (4) the offence was one of moderate objective gravity: at [71];
- (5) both general and specific deterrence were relevant: at [76]-[77];
- (6) the defendant agreed to pay the Prosecutor's costs amounting to \$45,000: at [80];
- (7) the information before the Court in relation to the defendant's capacity to pay the fine was inadequate: at [83]; and
- (8) the defendant led little evidence in mitigation of the charge: at [85]-[88].

Mouawad v The Hills Shire Council; Mouawad v The Hills Shire Council [2013] NSWLEC 165 (Pepper J)

Facts: Mrs Ninoska and Mr Paul Mouawad ("the appellants") were prosecuted by the Hills Shire Council ("the council") in the Local Court pursuant to [s 169](#) of the [Protection of the Environment Operations Act 1997](#) ("the POEO Act") in their capacity as sole directors respectively of Frontier Civil (Australia) Pty Ltd ("FCA") and Frontier Civil Engineering Pty Ltd ("FCE") for contravening [s 143](#) of the POEO Act for unlawfully transporting waste to a place that could not lawfully be used as a waste facility. The waste was transported to a site in Annangrove by FCA employees using FCE trucks under an oral agreement between the two companies. The arrangement was for the transport of clean topsoil, however, some of the truckloads of material taken to the Annangrove site were found to be demolition and excavation waste comprising soil, clay, rock, bricks, plastic, concrete, glass and asbestos. Each company was also prosecuted for the offence. Each of Mrs Mouawad, Mr Mouawad, FCA and FCE were convicted and fined. Pursuant to [s 31](#) of the [Crimes \(Appeal and Review\) Act 2001](#), Mr and Mrs Mouawad appealed their convictions, sentences and the costs orders imposed in the Local Court. Such an appeal proceeds by way of rehearing.

Issues:

- (1) what were the elements of the offence created by [s 143\(1\)](#) of the POEO Act;
- (2) who bore the onus of proving that a site could not lawfully be used as a waste facility;

- (3) whether the evidence proved that Mr Mouawad, through FCE, was vicariously liable for the transportation of the waste carried out by FCA as FCE's agent;
- (4) whether the evidence established that the Annangrove site was being used as a "waste facility";
- (5) whether a lawful authority was required for use of the Annangrove site as a waste facility and, if so, whether such an authority existed;
- (6) whether the sentences imposed upon the appellants were excessively severe; and
- (7) whether the costs orders made against the appellants were excessively severe.

Held: the appeals were dismissed. Mr and Mrs Mouawad were convicted and fined \$15,000 and \$9,000 respectively:

- (1) before the Court could consider whether a place could not lawfully be used as a waste facility, it had to first determine whether the place to which the waste was transported could in fact be characterised as a waste facility; at [43]–[53];
- (2) a dual onus applied, whereby the prosecutor bore the onus of proving beyond reasonable doubt that lawful authority was required to use the Annangrove site as a waste facility. Once that was proved, the onus shifted to the appellants to establish on the balance of probabilities that they held a lawful authority for that purpose: at [54];
- (3) FCE, and therefore Mr Mouawad as FCE's sole director pursuant to s 169 of the POEO Act, was vicariously liable for the criminal acts of its agent, FCA, acting within the scope of its authority, for the act of transporting the waste to the Annangrove site. The close proximity of the relationship between the two corporate entities, together with other evidence, established the relevant agency relationship: at [54]–[118];
- (4) the appellants conceded that the material transported was "waste" as defined in the POEO Act because the material was, at its point of departure, an "unwanted" or "surplus" product from demolition and excavation works. It did not lose that characteristic upon arrival at the Annangrove site for re-use: at [119]–[134];
- (5) the waste was deposited into piles on the Annangrove site, with the result that the site could properly be characterised as a "waste facility" insofar as it was "used for the storage", if not the "disposal", of waste in accordance with the definition of "waste facility" under the POEO Act. It was erroneous to attempt to determine this question on the basis of the site's characterisation as a residential property for land use planning purposes under the [Environmental Planning and Assessment Act](#) 1979: at [41]–[42] and [135]–[142];
- (6) there was no lawful authority for the Annangrove site to be used as a waste facility because no environmental protection licence under the POEO Act existed in respect of the activity carried out at that site, and development consent was required for this use but had not been obtained: at [143]–[159];
- (7) despite the foreseeability of the harm, the appellants' control over the causes, and the availability of practical measures to avoid any harm, the offences were overall of low objective gravity having regard to the limited environmental harm caused and the fact that the offences had been committed unintentionally. Relevant subjective circumstances were limited to the fact that the harm caused was not substantial and the appellants' lack of any previous convictions: at [160]–[186]; and
- (8) a fine was the appropriate penalty in all of the circumstances. No evidence was provided in support of displacing the costs orders made in the Local Court. However, in fixing the amount of the penalties imposed, the Court took into account the costs of the appeals and, to avoid imposing double punishment, the fact that both FCE and FCA had been fined in the Local Court: at [187]–[202].

Aboriginal Land Claims***New South Wales Aboriginal Land Council v Minister administering the Crown Lands Act (Limbri)***
[\[2013\] NSWLEC 67](#) (Pain J)

Facts: the NSW Aboriginal Land Council appealed against the refusals of two land claims, ALC 8734 and ALC 8736, under s 36(6) of the [Aboriginal Land Rights Act](#) 1983 (“the ALR Act”). The land the subject of ALC 8734 was reserved from sale for future public requirements (Reserve 96464), in accordance with s 28 of the [Crown Lands Consolidation Act](#) 1913 (“CLC Act”). Licence 305371, granted under s 34 of the [Crown Lands Act](#) 1989 (“CL Act”), applied to the whole of the land within ALC 8734. Part of the land the subject of ALC 8736 was reserved from sale for public recreation (Reserve 86431), in accordance with s 28 of the CLC Act. The remaining part of the land the subject of ALC 8736 was reserved from sale for future public requirements (Reservation 96423), in accordance with s 28 of the CLC Act. Licence 305371 applied also in respect of part of the land the subject of ALC 8736. The balance of the land claimed in ALC 8736 was subject to Permissive Occupancy 1967/25 for the purpose of grazing. The Applicant did not contest that there had been actual use or occupation of the lands subject to ALC 8734 and ALC 8736.

Issues:

- (1) on the date ALC 8734 was made was the whole of the claimed land, being land subject to Reservation 96464 (for future public requirements), lawfully used or occupied pursuant to Licence 305371, and therefore not “claimable Crown lands” within the meaning of s 36(1) of the ALR Act; and
- (2) on the date ALC 8736 was made was that part of the claimed land, being land subject to Reservation 96423 (for future public requirements), lawfully used or occupied pursuant to Permissive Occupancy 1967/25, and therefore not “claimable Crown lands” within the meaning of s 36(1) of the ALR Act.

Held: appeal upheld, and directing the Minister to transfer the lands claimed in Aboriginal Land Claims 8734 and 8736 in fee simple to Tamworth Local Aboriginal Land Council:

- (1) the proper construction of the scheme for the management of Crown land in the CL Act suggests that the reservation of land for future public requirements is a reservation for a public purpose and that is a current purpose not a purpose that will eventuate in the future: at [75]. As the Applicant submitted, applying the usual meaning of the words “future”, “public” and “requirements”, the purpose of the reservation is the beneficial setting aside of land for the needs of the people or the community, pending the identification of appropriate future use or uses which conform with that purpose. That setting aside is of immediate benefit. The Minister’s submission that the purpose of the reservation of future public requirements is inchoate or indeterminate was not accepted. What is undetermined is the use or uses to which such land can be put in order to achieve that purpose: at [76]. The reasoning in *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council (Goomallee)* [\[2012\] NSWCA 358](#) at [26] suggests by inference that the reservation for future public requirements is for a current purpose which constrains the purpose for which the land can be used. At [26] Basten JA identifies that the scope of the power to grant a licence does not depend on the use of the land, actual or potential, under the licence. Rather, it depends on the terms of the restraint imposed by the reservation which identify the purpose for which land can be used, not the manner in which the land could be used: at [81]; and
- (2) the Minister submitted that the grant of the permissive occupancy and the licence for the purpose of grazing was ancillary to, incidental to or in furtherance of the reservation of the lands for future public requirements. While *Goomallee* did not consider this precise argument, a number of observations by Basten JA suggest that it cannot be correct. The stated purpose of the permissive occupancy and licence is grazing, similar to findings in *Goomallee*. The licence in *Goomallee* also had a number of land management provisions relating to weed and feral animal control but that was not considered to alter its overall purpose of grazing at [28]. His Honour held that the licence permitted grazing and not any other purpose and identified a number of clauses in the licence similar to those in this case. His Honour concluded that the licence was for the private purposes of the grazier: at [92]. An important part of the reasoning in *Goomallee* dealt with the Minister’s submission that the appropriate test was whether the use for grazing was inconsistent with the purpose of the reservation for public recreation. This argument was not accepted by Basten JA at [25] - [27] on the basis that it was not appropriate to

identify the scope of the power to grant the licence by the use of the land under the licence. The power depended on the terms of the restraint imposed by the reservation. Those terms did not refer to the manner in which the land could be used but the purpose. That suggests another reason why, applying the reasoning in *Goomallee* to this part of the Minister's case, it did not succeed. That *Goomallee* was considering a reserve for public recreation does not suggest the reasoning does not apply to a reserve for future public requirements given that both are a public purpose: at [93].

Development Appeals

Blakeney v Mosman Municipal Council [2013] NSWLEC 100 (Craig J)

Facts: a development application was lodged seeking to construct a vehicle ramp on public land in order to gain access to a property known as 22B Burran Avenue, Mosman ("the Site") and a platform for car parking. The property lacks frontage to a formed public road but has a right of way over adjoining land. The right of way allows general passage of vehicles as well as motor vehicle parking, as the land has no car parking area. The steepness of the land currently prevents vehicles moving onto the site from the right of way. The rear of the Site has an area with a gentle fall which is the area proposed for the vehicle parking. The application proposed access to the site along an unformed section of a road known as Stanton Road, Mosman. That unformed road represents an extension to a formed and sealed road with the same name which was accepted prior to the hearing by all parties as a public road. The unformed road is vegetated by native trees, exotic species and weeds with a stairway constructed through it from Burran Avenue down to the unformed section of Stanton Road, and provides pedestrian access to Edwards Beach. The application sought consent to provide parking on the Site and construction of access to it along the unformed road. That application was refused by Mosman Council and the landowner appealed to the Court pursuant to [s 97](#) of the [Environmental Planning and Assessment Act](#) 1979 ("EPA Act").

Issues:

- (1) whether development consent should be granted under [s 80\(1\)](#) of the EPA Act;
- (2) whether the Court had power to exercise the function of the Council to grant consent under [s 138](#) of the [Roads Act](#) 1993 ("Roads Act") for construction of the access road to the Site along the unformed road;
- (3) application of [s 39\(2\)](#) of the [Land and Environment Court Act](#) 1979 ("the Court Act"); and
- (4) whether the unformed road was a public road within the meaning of the Roads Act.

Held: appeal dismissed and development application refused:

- (1) while the provision of car parking and a hardstand area for vehicle manoeuvring was likely to be achievable in the south-eastern portion of the Site, notwithstanding shortcomings in the plans, it was the proposed driveway along the unformed section of Stanton Road providing vehicular access to the Site that was unsatisfactory and justified refusal of the application: at [81];
- (2) the form, length, height and levels of the driveway and its associated structures led the Court to conclude that it did not meet the objectives of the Zone: at [83]. The impact of the driveway and its inconsistency with the values of the public open space in which it is proposed to be located would not be mitigated by the landscape treatment proposed by the applicant's expert: at [83];
- (3) the construction of the proposed driveway would be inconsistent with the planning principles identified in cl 13 of the [Sydney Regional Environmental Plan \(Sydney Harbour Catchment\)](#) 2005: at [84]. The proposed structure failed to reinforce the dominance of landscape over built form as expressed in cl 6.4(1) of the [Mosman Local Environmental Plan](#) 2012: at [85];
- (4) the Court has power to exercise the function of the council to grant consent under s 138 of the Roads Act: at [60]. The provisions of s 39(2) of the Court Act do not require a coincidence of relevant considerations by the original decision maker when exercising discretions under different sources of power in relation to the same subject matter: at [58]; and

- (5) the evidence of local residents as to their observations of user over many years together with the evidence from records of the council demonstrated that the unformed section of Stanton Road has been dedicated as a public road at common law: at [51]. That evidence satisfied the requirements of [s 249](#) of the Roads Act so as to lead to the conclusion that the section of road is a public road within the meaning of that Act: at [51].

Civil Enforcement

Lane Cove Council v Ross (No 14) [\[2013\] NSWLEC 87](#) (Pepper J)

(related decisions: *Lane Cove Council v Ross* [\[2012\] NSWLEC 153](#) Pepper J; *Lane Cove Council v Ross (No 2)* [\[2012\] NSWLEC 160](#) Pepper J; *Lane Cove Council v Ross (No 3)* [\[2012\] NSWLEC 171](#) Pepper J; *Lane Cove Council v Ross (No 4)* [\[2012\] NSWLEC 191](#) Pepper J; *Lane Cove Council v Ross (No 5)* [\[2013\] NSWLEC 17](#) Pepper J; *Lane Cove Council v Ross (No 6)* [\[2013\] NSWLEC 74](#) Pepper J; *Lane Cove Council v Ross (No 7)* [\[2013\] NSWLEC 76](#) Pepper J; *Lane Cove Council v Ross (No 8)* [\[2013\] NSWLEC 77](#) Pepper J; *Lane Cove Council v Ross (No 9)* [\[2013\] NSWLEC 78](#) Pepper J; *Lane Cove Council v Ross (No 10)* [\[2013\] NSWLEC 79](#) Pepper J; *Lane Cove Council v Ross (No 11)* [\[2013\] NSWLEC 81](#) Pepper J; *Lane Cove Council v Ross (No 12)* [\[2013\] NSWLEC 82](#) Pepper J; *Lane Cove Council v Ross (No 13)* [\[2013\] NSWLEC 80](#) Pepper J; *Ross v Lane Cove Council* [\[2012\] NSWLEC 1364](#) Dixon C)

Facts: the applicant, Lane Cove Council (“the council”), commenced Class 4 proceedings against the respondent, Mr Raymond Ross, for breach of a development consent contrary to [s 76A\(1\)\(a\)](#) of the [Environmental Planning and Assessment Act 1979](#) (“the EPA Act”) seeking a declaration that the works had not been carried out in accordance with the consent, an injunction and relief in the form of orders for demolition and reinstatement of the development in accordance with the consent. Mr Ross had obtained development consent on 2 April 2008 for alterations to an existing dwelling at Northwood. Between late 2008 and 2009, he commenced works pursuant to that consent but, during construction, carried out various works that were unauthorised including: excavation of a large subfloor area; construction of a double garage, a vehicular passageway, a balcony, a concrete stair and a lift shaft; deletion of several windows; removal of an internal access staircase; deletion of the external rear stairs; lowering of windowsill heights; concreting of the rear yard; and construction of a 2.5m high concrete block wall. The council rejected a s 96 modification application to approve the works in July 2012.

At an earlier hearing on 13 August 2012, Mr Ross had conceded that the works had resulted in changes to the original approval and the Court found that Mr Ross had breached s 76A(1)(a) of the EPA Act and ordered an injunction. Proceedings on the remaining prayers for relief were adjourned so that the council could consider a second s 96 application lodged by Mr Ross. The council’s Independent Hearing and Assessment Panel refused that application on 2 October 2012. Mr Ross appealed this refusal. The Class 1 appeal was heard before Dixon C on 18 and 19 December 2012. Mr Ross discontinued that appeal. In January 2013, a building certificate application was lodged. On 12 March 2013 it was refused by the council. The Class 4 proceedings were then fixed for resumed hearing on 27 May 2013. Despite several applications for adjournment and a recusal application made by Mr Ross, the proceedings continued. Mr Ross withdrew from the proceedings pleading ill health, and the remainder of the proceedings were heard ex parte. Mr Ross was no longer the registered owner of the property at the time.

Issues:

- (1) whether the Court should order demolition and reinstatement in accordance with the consent;
- (2) whether the change in ownership was a sham transaction designed to avoid the relief sought by the council; and
- (3) whether the relief should be ordered despite the fact that Mr Ross was no longer the property owner.

Held: demolition and reinstatement was ordered together with a costs order made in favour of the council:

- (1) the evidence of the council’s experts indicated that demolition was technically and structurally feasible subject to recommendations for additional support to a portion of the beam on the western edge of the

west facing balcony and installation of either carbon fibre reinforcing or beams under the slab at the eastern end of the second floor: at [39]–[59];

- (2) the Court rejected Mr Ross' arguments that the merits of the awnings had not been assessed and that their removal would have structural implications. The Court held that there had been ample opportunity to appeal against the refusal to issue a building certificate and that the Court was able to consider the same matters. There was thus utility in determining the Class 4 matter: at [60]–[81];
- (3) on the balance of probabilities there was insufficient evidence to conclude that the change in ownership could be characterised as a sham: at [83]; and
- (4) the discretion under s 124 of the EPA Act is wide. It was sufficient that Mr Ross carried out the unlawful works and continued to actively control the works. Thus, despite the change in ownership, orders for demolition and reinstatement could be ordered against Mr Ross: at [82]–[85]; and
- (5) in weighing up all the factors, including the non-technical nature of the unauthorised works, the not insignificant impact of the unapproved works on the privacy and amenity of the neighbours, uncertainty about the structural soundness of the unauthorised development, the viability of removing the unlawful works, Mr Ross' cavalier and obstructive conduct throughout the proceedings, and the fact that Mr Ross had won a private advantage for himself, the Court exercised its discretion to order demolition and reinstatement in accordance with the approved structure, taking into account the minor variations recommended by the council's experts: at [85]–[94].

Easements

Moorebank Recyclers Pty Ltd v Liverpool City Council (No 2) [\[2013\] NSWLEC 93](#) (Biscoe J)

(related decisions: *Moorebank Recyclers Pty Ltd v Liverpool City Council and Anor* [\[2013\] NSWLEC 33](#) Sheahan J, *Moorebank Recyclers Pty Ltd v Liverpool City Council (No 3)* [\[2013\] NSWLEC 95](#) Biscoe J)

Facts: Moorebank Recyclers Pty Ltd ("Moorebank") applied under [s 88K](#) of the [Conveyancing Act](#) 1919 for the grant of easements of carriageway and for construction, maintenance and use, subject to a term that the owner of the servient tenement give landowner's consent to the lodging of an application for approval under Part 3A or consent under Part 4 of the [Environmental Planning and Assessment Act](#) 1979 ("EPA Act"), to construct and use ramps to connect the applicant's land to a future road bridge or abutment so as to enable the applicant to obtain vehicular access for development of its land. The ancillary term was the principal matter in dispute.

The first respondent, Liverpool City Council ("the council") owned the land to be burdened by the proposed easements. The second respondent, Tanlane Pty Ltd ("Tanlane"), owned land used for industrial purposes adjoining the Moorebank land and had gained development consent to build a roadbridge running from Brickmakers Drive (the only public road access available), over Moorebank and council land to its land. Tanlane had been granted an easement to construct and use the roadbridge over the Moorebank land.

The council, supported by Tanlane, was prepared to consent to the proposed Moorebank easements provided that a Part 4 owner's consent term was imposed and not an unqualified Part 3A owner's consent term. Under Part 4, council would be the consent authority determining the application for the easements. Under Part 3A (since repealed), the Planning Assessment Commission ("PAC") would be the approval authority as delegate of the Minister

As at the time of the hearing Moorebank had a pending major project application to develop its vacant and unused land for a materials recycling facility ("MRF") under the transitional provisions of Part 3A of the EPA Act. Completion of assessment of the Part 3A application was dependent on Moorebank satisfying one of the Director-General's requirements ("DGRs") under Part 3A that suitable arrangements had been made to secure access to the site, including written evidence of the relevant landowner's consent for the proposed site access work. These proceedings were aimed at satisfying that DGR thereby opening the way to PAC to determine Moorebank's Part 3A MFR application.

The only means of access to the Moorebank land was by means of ramps connecting Moorebank's land to the future road bridge.

A central underlying issue was both respondents' opposition to Moorebank's proposed MRF. A further underlying issue was Tanlane's concern that the owner of the Moorebank land not hinder, interfere or prejudice rights under the Tanlane easement for construction or use of the road bridge.

Issues:

- (1) whether the easements were reasonably necessary for effective use or development of the applicant's land;
- (2) whether a term of the easements should be imposed that the owner of the burdened land give land owner's consent to lodging of an application for works on and use of the burdened land either under Part 3A, or Part 4, or both Part 3A and Part 4 of the EPA Act; and
- (3) the relationship between s 88K and planning laws.

Held: orders would be made under s 88K granting the claimed easements on terms including: (a) an owner's consent term for the making by Moorebank of any application for approval or consent for the ramps (whether under Part 3A or Part 4); and (b) a term that the ramps design is to be sufficient to accommodate access ramps to and from the servient tenement having a specified load bearing capacity; and listing the matter for the following day for the purpose of making final orders:

- (1) section 88K raises five questions: (1) is the proposed easement "reasonably necessary for the effective use or development" of the applicant's land: s 88K(1)? (2) Is the Court satisfied that the use of the applicant's land "will not be inconsistent with the public interest": s 88K(2)(a)? (3) Is the Court satisfied that the owner of the servient tenement can be adequately compensated for any loss or other disadvantage that will arise from imposition of the easement: s 88K(2)(b)? (4) Is the Court satisfied that the applicant has made all reasonable attempts without success to obtain the easement or an easement having the same effect: s 88K(2)(c)? (5) If the preceding four preconditions are established, should the Court exercise its discretion to impose an easement?: at [103];
- (2) the grant of an easement is also the grant of such ancillary rights as are reasonably necessary for its exercise or enjoyment, including, where appropriate, a right to written consent by the owner of the burdened land to the lodgement of any application for construction and use of works in the manner contemplated by the easement. Such an ancillary right is implied in a statutory grant of an easement. In a s 88K application, it is appropriate, to avoid any doubt or dispute, to grant it expressly as a term of the easement: at [9];
- (3) section 88K should be construed in accordance with the principle of statutory construction that statutes enacted by the same legislature are to be construed so far as possible to operate in harmony and not in conflict. It is harmonious to construe s 88K as far as possible so that it does not require determination or consideration of matters that are required to be determined or considered by an approval authority under State planning laws: at [116];
- (4) an applicant under s 88K will not necessarily fail unless it accepts a respondent's proposed easement. Within reason, an applicant is entitled to select between alternative courses. The court's power extends to changing the easement proposed by the applicant, including so as to ensure that it complies with s 88K(1). The court is not bound by a competing easement proposed by the respondent. The court has a discretion as to the scope and terms of any easement imposed and is not constrained by any party's proposal: at [124];
- (5) the council's submission that the easements were not reasonably necessary because Moorebank could accept an offer made by Council during the proceedings was rejected: at [123]-[124];
- (6) the respondents' submission that Moorebank's proposed MRF was not "effective development" was answered by the fact that the easements were reasonably necessary for all reasonable uses of the Moorebank land (leaving aside whether they include an MRF): at [126];
- (7) if this approach was wrong and it was necessary to consider s 88K(1) by reference to the proposed MRF, then the threshold test in *Moorebank Recyclers Pty Ltd v Tanlane Pty Ltd* [2012] NSWCA 445 would apply in determining whether the MRF is an "effective use and development", namely, it would be sufficient to show that the proposed development is "appropriate to the area": at [127]. This called for an evaluative judgement: at [128];

- (8) having regard to numerous factors, an MRF was held to be appropriate to the area and therefore an effective use and development: at [128]-[132], [138]-[161];
- (9) the test under s 88K(2)(a) that the Court be satisfied that use of the applicant's land "will not be inconsistent with the public interest" is less exacting than a test of "will be in the public interest" or "will be consistent with the public interest" and was satisfied in this case: at [162]-[166];
- (10) all reasonable attempts had been made by Moorebank to obtain the easements or easements having the same effect, but had been unsuccessful: at [167];
- (11) compensation for the proposed easement had been agreed and was appropriate: at [168];
- (12) the Court was satisfied that the discretion to grant the easement in favour of Moorebank should be exercised: at [169]; and
- (13) Tanlane had a sufficient equity for an order that its easement be registered before the registration of Moorebank's easement or for an order restraining Moorebank, before Tanlane's easement is registered from exercising any rights in relation to the easements save for requiring council's landowner's consent: at [170]-[175].

Valuation

Storage Equities Pty Ltd v Valuer-General [\[2013\] NSWLEC 137](#) (Craig J)

Facts: Storage Equities Pty Ltd ("the Company") objected to the land value determined by the Valuer-General in respect of two commercial properties in Ultimo for 2009, 2010 and 2011. A large warehouse-style building is erected on each property and both buildings are used as a self-storage facility. Dissatisfied with the determination of those objections, the Company appealed to the Court pursuant to [s 37](#) of the [Valuation of Land Act](#) 1916 ("the Valuation Act") seeking the Court's determination of land value at each base date as it has power to do under [s 40\(1\)\(b\)](#) of the Act. The parties did not agree upon the land values to be determined by the Court in place of those determined by the Valuer-General. At each base date of 1 July, both properties were zoned Residential B under the [Sydney Local Environmental Plan](#) 2005 ("the LEP"), and both buildings are listed as heritage items in Sch 9 to the LEP. Each party was directed to prepare and exchange expert valuation evidence, and the reports reflected valuations determined by reference to the analysis and application of comparable sales. The expert valuers derived their land values by applying the provisions of [ss 6A\(1\)](#) and [14G](#) of the Valuation Act, the latter provision being engaged as the properties were 'heritage restricted'. Section 6A(1) provides that "the land value of land is the capital sum which the fee-simple of the land might be expected to realise if offered for sale on... reasonable terms and conditions as a bona-fide seller would require..." The only point of difference between the parties was whether the land value should include goods and services tax (GST). The Company submitted that the land value should exclude GST and the Valuer-General submitted that the land value should include GST.

Issues:

- (1) whether the capital sum which land is expected to realise on sale includes GST.

Held: appeal allowed and values determined:

- (1) the test of "land value" must focus upon the words of s 6A(1) of the Valuation Act: at [22]. Both parties accepted that in determining the "value of land", the relevant principles to be applied are those articulated in the judgment of the High Court in *Spencer v The Commonwealth of Australia* [\[1907\] HCA 82](#): (1907) 5 CLR 418, and a passage of particular importance states (at 432) the test of value of land is to be determined, not by inquiring what price a man desiring to sell could actually have obtained for it on a given day, i.e. whether there was in fact on that day a willing buyer, but by inquiring "What would a man desiring to buy the land have had to pay for it on that day to a vendor willing to sell it for a fair price but not desirous to sell?": at [23];
- (2) the determination of value is to be made as if the land was converted to cash or money by reason of the hypothetical sale contemplated by the section. The land, so converted, necessarily reflects that sum of money that secures the entitlement of the purchaser to a transfer of title. The amount paid by

the purchaser is the sum "realised" by the vendor on the transaction regardless of any component of that sum that the vendor may be liable to pay as a consequence of receiving it: at [41];

- (3) unity of 'value' is only achieved if the capital sum realised is the sum required to be paid by the purchaser to the vendor to secure a transfer of title: at [45]; and
- (4) expressed in the language of s 6A(1) of the Valuation Act, the capital sum that each parcel of land is expected to realise on sale includes GST: at [54].

Practice and Procedure and Orders

Figtree Reserve Pty Limited v Goulburn Mulwaree Shire Council [2013] NSWLEC 65 (Pain J)

Facts: Goulburn Mulwaree Shire Council ("the council") filed a Notice of Motion dated 3 December 2012 seeking an order that the Class 1 appeal be set aside as it was filed outside the 12 month time limit specified in [s 97](#) of the [Environmental Planning and Assessment Act](#) 1979 ("the EPA Act"). At issue was whether the council's Notice of Determination of refusal of the Applicant's development application ("DA") for a basalt quarry in Towrang was valid.

A letter from Laterals Planning to council attached the DA and supporting documentation for a proposed quarry at Towrang. The DA received by council described the applicant as "Figtree Reserve Pty Ltd C/- Laterals Planning PO Box 1326 Goulburn" and was signed by Peter Miller on behalf of the Applicant, Figtree Reserve Pty Ltd and the owners, Millerview Constructions Pty Ltd and Figtree Reserve Superannuation Fund. On 20 September 2011 council refused consent to the DA. On 26 September 2011 the Council sent notice of its determination of the DA by prepaid post to "Millerview Constructions Pty Ltd C/- Laterals Planning..." On 30 September 2011 Keith Allen of Laterals Planning emailed the notice of determination to Peter Miller. On 3 October 2012 James Miller, sole director of Figtree Reserve Pty Ltd, wrote to council stating that the Applicant was dissatisfied with the determination "received by our office on 5 October 2011." On 10 October 2012 the Class 1 Application was filed. Under heading "Details of Application" the Applicant referred to the "notice of determination dated 26 September 2011 (received on 6 October 2011)."

Issues:

- (1) whether the Class 1 application was filed within time;
- (2) whether the notice of determination issued by the council was valid; and
- (3) if the notice was valid, when the 12 month appeal period expired. This depended on when the notice was delivered in accordance with [s 153\(2\)](#) of the EPA Act.

Held: the Class 1 application dated 10 October 2012 was set aside:

- (1) section 81(1) provides for post-determination notification of an applicant of the determination of a DA. [Clause 100](#) of the [Environmental Planning and Assessment Regulation](#) 2000 ("EPA Regulation") specifies what must be in a notice. The council issued a notice of determination dated 26 September 2011 which complied with cl 100(1)(a), (c), (c1), (j), (2) of the EPA Regulation. Clause 100 does not require the name of the Applicant to be stated in the notice. The DA referred to Figtree Reserve Pty Ltd as the Applicant with the contact address as Laterals Planning at an identified post office box. The reference to Millerview as the recipient of the notice, care of Laterals Planning, was the only irregularity identified in the notice of determination. The council accepted the reference to Millerview Constructions Pty Ltd was an error: at [35]. The notice did comply with cl 100 and did not contain a legally relevant error: at [36]; and
- (2) the actual date of receipt of the notice of determination was not material given the deeming provision in [s 153\(2\)](#) of the EPA Act. The relevant act of posting by the Council was to Laterals Planning. This occurred on 26 September 2011. If the date of delivery was in the ordinary course of post the relevant date was 27 September 2011 allowing one day relying on the affidavit of a postal officer at Goulburn Post Office. He deposed that post is generally delivered the next working day if addressed correctly and with correct postage. Alternatively, [s 76](#) of the [Interpretation Act](#) 1987 allows four days. Under

either approach the 12 months commenced from 27 or 30 September 2011. This appeal should have been commenced by 2 October 2012. The 12 month appeal period expired before 10 October 2012 when the Class 1 application was filed: at [43].

Ironlaw Pty Ltd v Wollondilly Shire Council (No 2) [2013] NSWLEC 146 (Craig J)

Facts: Ironlaw Pty Ltd (“Ironlaw”) lodged a development application on 2 July 2012 with the council seeking development consent to construct and operate a waste transport station and resource recovery centre in Bargo. The application had not been determined by council. A Class 1 Application was filed on 7 September 2012 pursuant to [s 97\(1\)\(b\)](#) of the [Environmental Planning and Assessment Act 1979](#) (“the EPA Act”). Ironlaw sought to exercise its right to bring proceedings pursuant to that section on the ground that the application was, by that date, deemed to have been refused by the council pursuant to [s 82\(1\)](#) of the EPA Act. After contentions were put on by council, Ironlaw accepted that the application was for designated development, and commissioned an environmental impact statement (“EIS”) which it provided to council. The council filed a motion on 1 February 2013 seeking to have the proceedings summarily dismissed, submitting that the appeal was incompetent because at the time at which the proceedings were commenced there was no “properly constituted” development application because the requirement of [s 78A\(8\)](#), that the application be accompanied by an EIS, was not satisfied. Absent that EIS accompanying the development application, the council submitted that there had not been a development application “lodged” to engage [cl 113\(2\)](#) of the [Environmental Planning and Assessment Regulation 2000](#) (“the EPA Regulation”) and thus the operation of [s 82\(1\)](#) of the EPA Act. The council therefore said that the statutory condition precedent for commencing proceedings was not satisfied.

Issues:

- (1) whether the appeal under [s 97\(1\)\(b\)](#) of the EPA Act should be dismissed;
- (2) whether the development application had been “lodged” to engage the provisions of [s 82\(1\)](#) of the EPA Act and [cl 113](#) of the EPA Regulation;
- (3) whether absence of an EIS at the time of commencing the appeal rendered the appeal incompetent;
- (4) the operation of the assessment period and “stop-the-clock” provisions in the EPA Regulation; and
- (5) whether the Court could make a nunc pro tunc order deeming the appeal to have been filed at the expiration of the deemed refusal period from the time of providing the council with an EIS.

Held: motion dismissed:

- (1) the appeal was competent. At the time of filing that appeal, there was a development application lodged with the council that had lawfully engaged the provisions of [s 97\(1\)\(b\)](#) of the EPA Act as the application was deemed to have been refused by operation of [s 82\(1\)](#) of that Act;
- (2) apart from the language of [cl 113\(2\)](#) of the EPA Regulation, [cll 51](#) and [54](#) identified those circumstances where a deemed refusal period identified in [cl 113](#) ceases to run and so deny any entitlement to appeal in reliance upon [s 97\(1\)](#) of the EPA Act. Although an EIS was required before determination of the development application could lawfully be undertaken that did not detract from the fact that a development application had been “lodged” within the meaning of [cl 113\(2\)](#): at [68];
- (3) the combined operation of [ss 97\(1\)\(b\)](#), [82\(1\)](#) of the EPA Act and [cl 113\(2\)](#) of the EPA Regulation ensured that there was a mechanism for determination of a development application where there was delay on the part of a consent authority beyond those periods which the legislature confirmed appropriate for the consent authority to respond to or determine a development application that had been lodged: at [69];
- (4) the circumstance where a development application was “incomplete” did not render the application “ineffective” to engage the provisions of [s 97\(1\)\(b\)](#) of the EPA Act, where the consent authority had not exercised a power under [cl 51](#) of the Regulation to reject the application: at [71];
- (5) Ironlaw’s appeal properly engaged the provisions of [s 82\(1\)](#) of the EPA Act: at [74]. Having regard to the legislative and regulatory scheme, the development application was valid and was effective to

found an entitlement to appeal under s 97(1)(b) of the EPA Act when filed on 7 September 2012: at [81];

- (6) providing an EIS in sufficient time to enable the requirements of s 79 of the EPA Act to be observed involved the undertaking of an administrative step. The critical time for an EIS to be available to a consent authority was the time of determination of the application, qualified by the fact that a determination could not be made unless the EIS had been made available to the consent authority or the Court, exercising the functions of the consent authority, to enable public exhibition: at [73]; and
- (7) in light that the appeal was competent to proceed, it was strictly unnecessary to determine the alternative nunc pro tunc order submission. The Court did not have power to make an order to the effect that proceedings are within jurisdiction by reason of events that have occurred since those proceedings were commenced, notwithstanding that at the time of commencement of the proceedings, the Court's jurisdiction was not lawfully engaged: at [94].

Manderrah Pty Ltd v Woollahra Municipal Council (No 2) [2013] NSWLEC 115 (Pepper J)

(related decision: *Manderrah Pty Ltd v Woollahra Municipal Council* [2013] NSWLEC 27 Pain J)

Facts: this was an application by Manderrah Pty Ltd ("Manderrah") to strike out contentions in a Statement of Contentions filed by the second respondent, Mr Giles Edmonds, in Class 1 proceedings concerning a development application to construct residential units. Mr Edmonds was a third party objector who had sought, and been granted, joinder as a respondent party to the proceedings pursuant to s 39A of the Land and Environment Court Act 1979 ("the LEC Act"). Joinder was granted on the basis that Mr Edmonds sought to raise two specific contentions associated with the development application, namely, groundwater and traffic issues, both of which were not adequately addressed by the first respondent, Woollahra Municipal Council. Joinder was granted by the Acting Registrar on that basis. A review of the Acting Registrar's decision by Pain J upheld that decision. However, later when Mr Edmonds served a copy of his Statement of Contentions it became clear that he sought to agitate all of the issues relied upon by all parties.

Issue:

- (1) whether it was unfair to the original parties to allow Mr Edmonds, as the joined party, to participate in the proceedings by agitating all issues rather than confining him to those forming the basis of the joinder.

Held: the additional contentions in Mr Edmonds' Statement of Contentions were struck out:

- (1) although the joinder was not made on terms confined in any way by the Court, the history of the proceedings indicated that the joinder application was premised exclusively by Mr Edmonds on the need to address the issues of traffic and groundwater. It was only these two issues that were addressed by Manderrah in opposing the joinder application and by the Court in exercising its discretion to accede to the application. Similarly, only those two issues formed the basis of the review before Pain J: at [2], [6]–[24] and [34];
- (2) since proceedings in Class 1 merit appeals are commenced by way of originating process, the claim is not thereby particularised. Instead, the scope of the proceedings are framed by a respondent in its Statement of Contentions. The Court's power to strike out contentions is not limited, however, to the relevant rules in the Uniform Civil Procedure Rules 2005 which give the Court a power to strike out claims or pleadings that are an abuse of process, but also includes the case management powers of the Court pursuant to ss 56 to 61 of the Civil Procedure Act 2005 ("the CP Act"): at [26]–[28];
- (3) the principles for joinder under s 39A of the LEC Act are well established. They recognise the role of public participation and the limited third party appeal rights under the Environmental Planning and Assessment Act 1979, but that a multiplicity of parties is undesirable: at [31]–[32];
- (4) unlike a 'Double Bay Marina' order pursuant to s 38(2) of the LEC Act, once joined as a party, Mr Edmonds enjoyed full rights of participation in the proceedings on all issues and was entitled to rights of appeal; to cross-examine any witness on any issue; and to take the benefit, or shoulder the burden, of any costs order. However, this did not preclude a finding in Manderrah's favour: at [33];

- (5) the only bases for permitting joinder were the issues of groundwater and traffic. It was the confined nature of these issues that meant that no undue additional expense or time would be incurred by permitting the joinder of Mr Edmonds. To permit him to rely on the additional contentions would be to subvert s 39A(a) of the LEC Act. It would also subvert s 39A(b) because it was neither in the interests of justice nor in the public interest for Mr Edmonds to raise new contentions at such a late stage, and given that neither Manderrah nor the council were afforded the opportunity to address them in resisting his joinder application. The Court must be able to have confidence in the veracity of representations made by third parties seeking joinder: at [34]–[36];
- (6) there was no delay in bringing the application of a kind to justify Manderrah's application being refused: at [37];
- (7) the argument that Mr Edmonds was seeking to do formally what a resident objector could do informally did not assist him, but instead reinforced the conclusion that only limited prejudice would flow to Mr Edmonds if the strike out application was successful: at [38]; and
- (8) to allow the hearing to proceed on the Statement of Contentions filed by Mr Edmonds would be unfair to Manderrah and would result in additional hearing time and costs, contrary to the overriding purpose in s 56 of the CP Act. It would not be "just", "quick" or "cheap". It would not be "just" because of Mr Edmonds' conduct before the Acting Registrar and Pain J; it would not be "cheap" because the parties would be put to the expense of formally responding; and it would not be "quick" because additional time would be needed to deal with all of the matters: at [3] and [39]–[40].

Agricultural Equity Investments Pty Ltd v Westlime Pty Ltd [\[2013\] NSWLEC 122](#) (Pepper J)

Facts: by notice of motion filed on 14 May 2013, the applicant to Class 4 proceedings, Agricultural Equity Investments Pty Ltd ("AEI"), sought to set aside a notice to produce and two subpoenas to produce, all relevantly identical and dated 6 May 2013, issued by the first respondent, Westlime Pty Ltd ("Westlime"). The second respondent, Parkes Shire Council ("the council"), was not an active participant on the notice of motion. The notice and subpoenas sought the production of documents relating to various planning consents relating to the operation of the London Victoria Mine ("the mine") in Parkes and an exploration licence issued to AEI for exploration at the mine.

The substantive judicial review proceedings were commenced by AEI on 5 November 2012 challenging a modified consent to operate the mine granted by the council on 21 April 2009 ("the 2009 approval"), which permitted Westlime to extract non-mineral rock from the mine and adjacent areas. On 7 August 2012 the council granted Westlime a further modification approval ("the 2012 approval"), which authorised Westlime's prospective tenant, Big Island Mining Pty Ltd, to process mineral ore at a processing plant at the mine. The summons filed by AEI sought a declaration that the 2012 approval was invalid and an order that it be set aside on the basis that the 1988 consent was spent prior to the 2009 approval. Points of claim were filed by AEI on 11 February 2013, now challenging the validity of both the 2009 and 2012 approvals. An application for leave to amend the summons to seek relief in respect of the 2009 approval was filed, which for various reasons did not occur until 20 March 2013. That date was five days after Pt 59 of the [Uniform Civil Procedure Rules](#) 2005 ("the UCPR") came into force, so that [r 59.10\(1\)](#), imposing a three month time limitation from the date of a decision within which to bring proceedings for judicial review, was alleged by Westlime to bar the proposed amendment as being out of time.

Westlime's opposition was formulated on two grounds: first, leave to extend time for the amendment of the summons should not be granted pursuant to the Court's discretion conferred by [r 59.10\(2\)](#) of the UCPR; and second, leave to amend should not be granted pursuant to an exercise of the Court's general discretion under [s 64](#) of the [Civil Procedure Act](#) 2005 ("CPA"). Westlime contended that the documents sought in the notice and subpoenas were relevant to the factors affecting the discretion in [r 59.10\(3\)](#) of the UCPR and to the discretion under [s 64](#) of the CPA, particularly to the question of when AEI should have become aware of Westlime's 2009 application upon the exercise of reasonable diligence. Westlime also contended that it would suffer practical and financial prejudice by the amendment.

Issue:

- (1) whether Pt 59 of the UCPR applied retrospectively to a decision of the council made in 2009;

- (2) if so, whether time would be extended to permit the summons to be amended under r 59.10(2);
- (3) whether s 64 of the CPA precluded the Court exercising its discretion to extend time because of the delay in challenging the 2009 approval; and
- (4) whether the 6 May notice and subpoenas served any legitimate forensic purpose having regard to the discretion to be exercised pursuant to r 59.10(2) of the UCPR or s 64 of the CPA.

Held: the notice to produce and the two subpoenas were set aside:

- (1) in accordance with the presumption against retrospectivity of statutes, Pt 59 of the UCPR did not apply retrospectively and therefore r 59.10(1) of the UCPR did not apply to the 2009 approval and leave to amend the summons to challenge that decision could not be denied on the basis that AEI was out of time. [Rule 59.1\(2\)](#) of the UCPR provides that Pt 59 does not apply to proceedings commenced before “the commencement of this Part”. Pt 59 did not prevent amendment of the summons because the proceeding was filed on 5 November 2012. Therefore, the notice and subpoenas had no relevance and should be set aside: at [23]–[28];
- (2) the Court went on to consider whether, if the preceding analysis were incorrect, it would exercise its discretion to extend time under r 59.10(2), taking into account the r 59.10(3) factors, to amend the summons. It held that the circumstances warranted an extension of time. There had been no unreasonable delay. A challenge to the 2009 approval was foreshadowed in AEI’s points of claim and in correspondence. The relevant delay was, at its least, the delay between the coming into effect of Pt 59 on 15 March 2013 and the filing of the application for leave to amend on 20 March 2013, or at its greatest, the delay between the filing of the summons on 5 November 2012 and the filing of the application on 20 March 2013. It could not be the delay between the making of the 2009 decision and the commencement of the proceedings because during this period there was no relevant delay for the purpose of Pt 59 of the UCPR. The alleged delay only crystallised once a time limit within which to commence proceedings was established. Prior to this, there was no period within which a challenge to the 2009 approval had to be made: at [29]–[31] and [44]–[53];
- (3) for the same reasons as stated above, the Court would not refuse leave to extend the summons in the exercise of its discretion pursuant to s 64 of the CPA. There was no unreasonable delay in filing of the application to amend, considering the applicant’s unchallenged evidence explaining the reasons for the delay and given that the relevant delay was only short as noted above. Moreover, it was difficult to conceive how the documents sought could assist in determining the reasons for any delay relating, as they would, to the approvals rather than the intervening period: at [58]–[65]; and
- (4) the notice to produce and subpoenas had not been sought for a legitimate forensic purpose. A subpoena must be framed in terms that enable it to be positively established that a legitimate forensic purpose is served. The test is whether the documents could materially assist on an identified issue or throw light on the issues in the proceedings, or, whether there is a reasonable basis beyond speculation that the documents would assist. In this case, the notice and subpoenas could not materially assist on an identified issue in the application for leave to amend and it could not be said that there was a reasonable basis beyond speculation that the documents would assist. Moreover, Westlime sought “all documents” held by AEI in relation to the modification of the 1988 consent by both the 2009 and 2012 approvals. Such a broad scope indicated that Westlime was on a fishing expedition or, alternatively, that the notice and subpoenas were an attempt to obtain discovery. Neither of these was a legitimate forensic purpose. The assertion by Westlime that AEI’s purpose was to exert commercial pressure on Westlime and its prospective tenant could not assist. Moreover, it was the council’s documents that were germane to the issue and these had already been provided. Therefore, time ought not be extended in the exercise of the Court’s discretion: at [31]–[57].

Regional Express Holdings Ltd v Dubbo City Council (No 2) [\[2013\] NSWLEC 113](#) (Biscoe J)

Facts: proceedings had been brought by Regional Express Holdings Ltd (“REX”) against the council for judicial review of two decisions of the council. The council owned and operated Dubbo Airport (“the Airport”) and REX was a regular passenger transport operator at the Airport. The first decision the subject of challenge was a decision to conduct security screening services at the Airport on a full cost recovery basis to be charged to all regular passenger transport operators using the Airport. The second decision

was a decision to adopt a fee to be charged to those airlines for the security screening services. This was a motion by the REX under [r 59.10](#) of [Uniform Civil Procedure Rules 2005](#) (“UCPR”) for an order extending time to commence judicial review proceedings, an order under [r 59.9](#) for the council to provide reasons for its decisions, and an order to amend the summons. The respondent contested the first two orders and consented to the third. The first decision was on 22 October 2012, the second decision was on 25 February 2013; the new Part 59 of the UCPR commenced on 15 March 2013, and the summons was filed on 23 May 2013. If [r 59.10](#) of the UCPR applied, an extension of time to 23 May 2013 was required for commencement of the proceedings in respect of the first decision but not for the second decision. REX had given the council the notice provided for in [r 59.9\(2\)](#) of the UCPR, however the council had replied that it had three objections to an order for a statement of reasons: (1) the applicant was prevented from challenging the first decision of the council by [Rule 59.10\(1\)](#); (2) the second decision of the council was based upon and was explicable by reference to the reports it received concerning the adoption of the screening fee; and (3) the challenge(s) to the decision(s) of the council depended on issues of process, and not substance, and it would therefore not assist the Court to have a statement of the reasons.

Issues:

- (1) whether Part 59 of UCPR applied retrospectively to an earlier administrative decision;
- (2) whether an order under [r 59.9](#) for the respondent to provide reasons for its decision should be made; and
- (3) whether an order to amend the summons should be made.

Held: finding that an extension of time for judicial review of the first decision was not required, and if it were, it would have been granted; ordering provision of reasons; and by consent, granting leave to amend the summons:

- (1) in considering whether to extend time, the factors listed in [r 59.10\(3\)](#) are not exhaustive. The weight to be given to relevant factors will depend on the circumstances of the particular case and may require the court to carry out a balancing exercise: at [7];
- (2) as regards the factor referred to in [r 59.10\(3\)\(c\)](#), a claimant cannot fairly be criticised for failing to take action before he knew or, by exercising reasonable diligence, should have known that there was anything to take action about: at [7];
- (3) there is a presumption against retrospectivity of statutes, to which statutes merely affecting procedure are an exception. Where a period for taking legal action is limited by statute, it is a rule of construction that the statute should not, unless it is clearly intended, be given a retrospective operation to deprive a person of the opportunity of instituting an action which is otherwise within time. If it were given a retrospective operation, it would operate so as to impair an existing substantive right – the right to bring a claim – and such an operation could not be said to be merely procedural. However, if there is still a proper opportunity to commence the action despite the coming into effect of the new limitation period, the operation of the statute will be regarded as procedural: at [13];
- (4) in accordance with the principles above, [r 59.10](#) did not apply retrospectively to the first decision, therefore an extension of time was not required. Otherwise its effect would have been to deny completely the right of REX to proceed without an extension of time: at [14];
- (5) although [r 59.1\(2\)](#) provides that Part 59 does not apply to proceedings commenced before the commencement of Part 59, it does not follow that the [r 59.10\(1\)](#) time limit always applies to proceedings commenced afterwards: the above principles apply to such proceedings: at [14];
- (6) if this finding was in error and an extension of time was required for judicial review of the first decision, the Court would grant an extension of time to the date of filing of the summons for the following reasons: (a) it would be an injustice for the retroactive operation of [r 59.10](#) to completely bar judicial review of the first decision, particularly as this was not a lengthy delay in the context of this legislative scheme; (b) REX had a particular financial interest in challenging the first decision; (c) there was no apparent possible prejudice to other persons caused by the passage of time if the relief were to be granted, other than to council in relation to its security screening revenue for a comparatively short period; (d) there was a public interest in the decisions to conduct security screening services at the Airport, to recover the costs thereof from the airline operators, and to spread the cost across all their

passengers; and (e) the substantive issues raised are important to REX, the other transport operator, and the council: at [15];

- (7) the Court is empowered to order a statement of reasons under r 59.9 of the UCPR, r 4.3(b)(iv) of the [Land and Environment Rules](#) 2007 and the Court's [Practice Note – Class 4 Proceedings](#) at [14]: at [16]-[18];
- (8) the council's first objection to providing reasons fell away due to the earlier finding that r 59.10 did not apply to the first decision but that, if it did, the Court would extend time under r 59.10(2). As to the council's second objection, if its reasons for the second decision were reflected in something in the reports it received, that could be said when providing a statement of reasons: at [22];
- (9) the council's third objection suggested that a statement of reasons could not provide any useful information relevant to the grounds of challenge. That submission was incorrect at least in that there was a challenge on the basis of a failure to consider mandatory relevant considerations under ss 610F(1) and 610D(1) of the [Local Government Act](#) 1993. Second, there was no reason to suppose that a statement of reasons would be irrelevant to the challenge based on infringement of the rules of procedural fairness because those rules have a flexible quality depending upon such matters as the context and circumstances in which the decision is made, which may be illuminated by the reasons for the decision. Third, it would be a Catch 22 to say (although it is not said in this case) that disclosure of reasons should not be ordered unless unlawfulness of reasoning is pleaded when such pleading is impossible unless the reasons are ordered to be disclosed. The purpose of these requirements include enabling the existence of a legal error made by the decision-maker to be more readily perceived than otherwise might be the case and to engender confidence in the community that the decision-maker has gone about their task lawfully: at [23];
- (10) if a "floodgates" consideration was necessary, as identified in *Vincent Land Pty Ltd v Hyder Consulting Pty Ltd* [2012] NSWLEC 105, no such risk was present in this case because the applicant was represented by competent lawyers, was directly affected by the decision, and the summons set out the relief claimed in detail and provided more than the barest of bases for challenging the decision: [24];
- (11) the Court was not reluctant to exercise the discretion to order disclosure of reasons merely because the public authority is a collegiate body such as a local council: at [25];
- (12) the council was ordered to serve on the applicant a written statement of the reasons for its decisions and such reasons were to be to the best of the knowledge, information and belief of the respondent or the person providing the statement on its behalf: at [27]; and
- (13) by consent REX was granted leave to amend its summons: at [26].

***Australia and New Zealand Banking Group Ltd v Apollo Valley Pty Ltd* [2013] NSWLEC 108 (Craig J)**

Facts: Australia and New Zealand Banking Group Ltd ("ANZ") sought to extend the operation of a caveat over a water access licence under [Sch 1A](#) of the [Water Management Act](#) 2000. ANZ had lodged a caveat to protect its equitable interest in the water access licence held by Apollo Valley Pty Ltd ("Apollo"). That interest arose from its unregistered mortgage over the licence and its registered fixed and floating charge over the assets and undertaking of Apollo. ANZ commenced the proceedings after receiving a notice from the Registrar General that the caveat would lapse within 21 days after that notice unless the Court ordered the extension of the caveat. The power of the Court to extend the period of the caveat following notice is found in cl 8(c) of Sch 1A. The lapsing notice was issued by the Registrar General because a dealing had been lodged with the Minister that had triggered the requirement to give notice to ANZ. Apollo contracted to sell the licence to Budgewah Pastoral Co Pty Ltd ("Budgewah") and was paid the purchase price for that licence. No transfer of the licence had been registered, no doubt due to the existence of the caveat. ANZ sought to join Budgewah to the proceedings as the relief sought by ANZ affected Budgewah. The evidence revealed that there was a substantial sum of money that remained owing to ANZ under the loan facility provided to Apollo, the sum being secured over assets of Apollo including the licence. ANZ sought to extend the caveat by 8 days to assist in resolving the controversy between the parties.

Issues:

- (1) whether the operation of the caveat to ANZ should be extended in the circumstances;
- (2) whether the proceedings had been commenced in the correct Class of jurisdiction; and
- (3) whether Budgewah ought to be joined as a second respondent to the proceedings.

Held: operation of caveat extended:

- (1) the Court was satisfied that it is appropriate to extend the operation of the caveat: at [13]. There was both a serious question to be tried and the balance of convenience favoured an extension for that period: at [13];
- (2) the proceedings were commenced in Class 4 of the Court's jurisdiction. However, [s 18\(a3\)](#) of the [Land and Environment Court Act](#) 1979 ("the Court Act") provided that proceedings brought under Sch 1A to the [Water Management Act](#) are proceedings that are assigned to Class 2 of the Court's jurisdiction. The present proceedings, having been brought under Sch 1A of the latter Act, clearly fell within s 18(a3) of the Court Act. The proceedings should therefore properly have been commenced in Class 2 of the Court's jurisdiction: at [14];
- (3) the correct assignment of proceedings to the Class identified in the Court Act has significance beyond the assignment of a proceeding number: at [15]. That significance includes the manner in which the proceedings are to be conducted and the way in which evidence may be received, pursuant to [s 38](#) of the Court Act: at [15]. [Sections 56A](#) and [57](#) of the Court Act limit the rights of appeal from a decision made in Class 2 to a decision made on a question of law: at [15]. If the proceedings were properly commenced in Class 4 however, the proceedings would restrict the constitution of the Court to a judge and an appeal would be an all-grounds appeal to the Court of Appeal: at [15];
- (4) it is important that matters are assigned to the correct class of jurisdiction: at [16]. Pursuant to [s 31\(2\)\(b\)](#) of the Court Act, the Court ordered that proceedings be taken to have commenced in Class 2 of the Court's jurisdiction conformably with s 18(a3) of the Court Act: at [17]; and
- (5) the Court granted leave to ANZ to join Budgewah as a second respondent to the proceedings: at [17].

Fivex Pty Ltd v Valuer-General [\[2013\] NSWLEC 114](#) (Craig J)

Facts: Fivex Pty Ltd ("Fivex") appealed from the Valuer-General's determination of the land value of its property in Double Bay for three consecutive years. The subpoena the subject of the motion ("the June motion") issued to Fivex requested several documents in the Schedule including: the names and telephone numbers of tenants, floor level of the tenants, terms of leases, outgoings, income for the building and other related matters. In the June motion, Fivex sought an order setting aside a further subpoena issued by the Valuer-General on two bases. The first basis was that there was no legitimate forensic purpose to be served by the production of the documents sought. The second basis was that the terms of the document were so uncertain as to constitute a fishing expedition, and do not identify documents sought in the manner required by Pt 33 [r 33.3\(4\)\(a\)](#) of the [Uniform Civil Procedure Rules](#) 2005 ("UCPR"). The Valuer-General argued that the documents sought in the subpoena were relevant to the valuation method proposed to be addressed in evidence at the final hearing.

Issues:

- (1) whether it was likely that the documents would materially assist on an identified issue;
- (2) whether the documents requested in the subpoena were sought for a legitimate forensic purpose; and
- (3) whether the documents were properly identified in the terms of the subpoena.

Held: subpoena not upheld in its present form:

- (1) having regard to the nature of the documents sought and the manner in which the material obtained from them was intended to be used, there was a reasonable basis beyond speculation that those documents would likely provide material assistance on the issue of valuation proposed to be addressed by the Valuer-General: at [20];

- (2) the first ground of challenge to the subpoena, that it had no legitimate forensic purpose, was not upheld: at [21]. How and in what amount the land value should be determined was the central issue in the proceedings: at [21];
- (3) the Schedule to the subpoena was inadequate to identify the documents sought as required by r 33.3(4) of the UCPR: at [23]. It had the hallmarks of a fishing expedition: at [23]. The Court would not uphold the subpoena in its current form: at [23]; and
- (4) in order to determine the dispute concerning tenancy documents finally, conformably with [s 56](#) of the [Civil Procedure Act](#) 2005, the Court afforded the opportunity for the Valuer-General to request and for Fivex to provide such documents as identified by the Valuer-General as falling within the 'generic description of tenancy documents': at [26]. The Court directed that the Valuer-General identify in writing, and provide to Fivex, the tenancy documents that it sought to have produced for the purpose of preparing its valuation evidence, and that Fivex provide the documents requested for inspection: at [27].

Sutherland Shire Council v Benedict Industries Pty Ltd [\[2013\] NSWLEC 121](#) (Biscoe J)

Facts: this was a motion by the prosecutor council in criminal proceedings in class 5 of the Court's jurisdiction for directions for the filing of supplementary evidence in chief and for consequential amendment to its case. The defendant was charged with injuring bushland vegetation and carrying out prohibited development. After the prosecutor served the first round notice of prosecution case ([s 247E Criminal Procedure Act](#) 1986), the defendant requested and received written confirmation from the prosecutor that the evidence served "is the only evidence which the prosecutor proposes to adduce at the hearing of the proceedings as to guilt". This was the evidence that at that time the prosecutor proposed to adduce at the hearing. But having later received the defendant's second round [s 247K](#) notice of the defence response, the prosecutor proposed to also adduce the supplementary evidence to meet matters in that response. On the occasion that the Court made the [s 247I](#) second round disclosure orders (8 March 2013), the defendant entered a plea of not guilty to each charge. In the defendant's subsequent second round [s 247K](#) notice of the defence response, the defendant objected to the admissibility of parts of the prosecution's affidavit evidence, and it also disputed facts in the prosecutor's statement of facts as to the authenticity of a council resolution and the accuracy of cadastral boundaries overlaid on aerial images. In order to meet the defendant's objections to admissibility and disputation of those facts, the prosecutor gave notice of its intention to re-list the proceedings to seek directions for an amended timetable incorporating as an initial step the filing of supplementary evidence-in-chief by the prosecutor and an amendment to the [s 247E](#) notice of the prosecution case.

Issues:

- (1) whether, in the context of the case management provisions of the Criminal Procedure Act, it was permissible for a prosecutor to file supplementary evidence-in-chief aimed at meeting the defendant's objections to the admissibility of part of the prosecutor's evidence and the defendant's dispute of some facts in the prosecutor's statement of facts;
- (2) whether the prosecutor required leave of the Court to file the supplementary evidence; and
- (3) if the prosecutor did require leave to file the supplementary evidence, whether the Court should grant leave.

Held: granting leave to file the supplementary evidence and ordering the prosecutor to pay the defendant's costs thrown away as a consequence of its proposed orders:

- (1) leave of the Court was required to file the prosecutor's supplementary evidence. The Court has power to control and supervise the conduct of criminal proceedings, including so as to prevent unfairness. In an appropriate case, this extends to refusing to permit a prosecutor to lead evidence that is otherwise relevant and admissible, for example if the evidence would cause the defendant to suffer irreparable prejudice, or prejudice which could only be cured by an order that the Court is not willing to make, such as for an adjournment of the hearing: at [27];

- (2) leave to file the supplementary evidence should be granted: at [2];
 - (3) an aim of Division 2A of the Criminal Procedure Act, is to narrow the issues to those that are genuinely in dispute: at [5];
 - (4) there is nothing in Division 2A which mandates that the evidence in the prosecution case cannot be supplemented after the second round [s 247J](#) prosecution's notice is served. Sections 247J, [247O](#), [247V](#) and [247N](#) suggest that it can, for they contemplate continuing disclosure including any further evidence that the prosecutor proposes to adduce. Under s 247O there is a continuing obligation on the parties to comply with the requirements for "preliminary disclosure" imposed by Division 2A until the defendant is acquitted or sentenced or the prosecution terminated. Accordingly, if anything occurs after preliminary disclosure that would have affected that preliminary disclosure if it had occurred before preliminary disclosure was made, it must be disclosed to the other party "as soon as practicable": at [17];
 - (5) the prosecutor was not in breach of ss 247E or 247J, such as to attract the sanctions in s 247N, by seeking to file supplementary evidence-in-chief because at the time it gave notice under those sections it identified the evidence it then proposed to adduce. It did not form an intention to adduce the supplementary evidence until later: after and in response to the defendant's objections to admissibility of evidence and dispute of facts: at [29];
 - (6) in requiring notice of objections to admissibility of evidence and disputation of facts prior to the hearing, Division 2A equates criminal proceedings with the usual practice in civil proceedings. Indeed, it goes further in that it requires objections to be notified at an earlier point in time than is the usual practice in civil proceedings. That being the legislative scheme a defendant cannot generally complain of unfairness or prejudice if a prosecutor, who has acted in good faith, seeks to file supplementary evidence at a relatively early stage of the proceedings to meet the defendant's objections to the admissibility of parts of the prosecutor's evidence. In such a case, the defendant has received fair notice: at [31];
 - (7) the exercise of the Court's supervisory discretion to grant leave to file supplementary evidence has regard to the particular circumstances. It is a matter of fact and degree. If, for example, the only supplementary evidence that a prosecutor proposes to adduce is a curriculum vitae to prove the expertise of a proposed expert witness whose evidence the defendant has objected to because of lack of evidence of expertise, there should generally be no difficulty in exercising the discretion in favour of allowing such supplementary evidence to be filed. On the other hand, for example, if a defendant did not receive fair notice of supplementary prosecution evidence such that it would be unfairly prejudiced in a way that was irremediable, or not remediable by an order that the Court would countenance (for example, adjournment of the hearing), then that might be a powerful factor influencing the Court not to allow the supplementary evidence to be filed: at [32];
 - (8) on discretion, it was true that the prosecutor was taking advantage of the defendant's disclosure to "patch up" the prosecution case. But it was not doing so because its earlier evidence was grossly deficient nor had it acted in bad faith, and its ability to do so was the product of the statutory scheme. The proposed evidence was supplementary to that already filed. Although it was substantial and the defendant had not yet had the opportunity to analyse it in detail, the defendant could and should be protected in that regard by a timetable that would give it a fair opportunity to analyse it in detail. The defendant would incur additional costs, but the defendant can and should be protected by an order, which the prosecutor proposed, that protects it in respect of costs thrown away: at [34]; and
 - (9) where a prosecutor amends, the Court is empowered to award costs against the prosecutor under [s 68](#) of the [Land and Environment Court Act](#) 1979: *Environment Protection Authority v Truegain Pty Ltd (No 3)* [2012] NSWLEC 78. It was fair that the prosecutor, as it proposed, should pay the defendant's costs thrown away as a consequence of its proposed orders: at [25].
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Harrison v Harris (No 3) [2013] NSWLEC 140 (Pepper J)

(related decision: *Harrison v Harris* [2013] NSWLEC 105 Pepper J)

Facts: Mr Ronald Harris had pleaded guilty to an offence under s 91K(1) of the *Water Management Act* 2000 of intentional or reckless interference with metering equipment installed in connection with a water supply work at his property near Hay. On 17 July 2013 the Court convicted Mr Harris, imposed a fine, ordered Mr Harris to pay the prosecutor's legal costs ("the costs order") and ordered Mr Harris to publish a notice in two newspapers disclosing his conviction and the penalty imposed ("the publication order"). At the sentence hearing Mr Harris had agreed to the making of the publication order but not as to its terms. On 14 August 2013 Mr Harris sought a temporary stay of the costs order and the publication order pending an appeal. Proposed grounds of appeal were provided to the Court on the stay application. The parties were unable to agree on the applicable legal principles governing the granting of a stay of orders made in the Court's summary criminal jurisdiction.

Issues:

- (1) whether the Court had the power to stay the costs order and the publication order, and if so what was the appropriate test; and
- (2) whether the Court should exercise its discretion to grant a stay of the publication and costs orders.

Held: stay application dismissed:

- (1) it was not necessary that a specific quantum of costs be ordered to enliven r 15 of the *Criminal Appeal Rules*, which provides for the suspension of payment pending an appeal where a court has ordered a person "to pay money as a penalty or for costs". That provision gave the Court the power to stay the costs order: at [26]–[28];
- (2) r 15 of the *Criminal Appeal Rules* was inapplicable to the publication order because it was not an order "to pay money as a penalty". Section 5AA of the *Criminal Appeal Act* 1912 applied to an appeal to the Court of Criminal Appeal from a decision of the Court in its summary jurisdiction. As a matter of statutory construction, a "publication order" did not fall within the definition of "sentence" in that Act, but the making of a publication order was an aspect of the sentence imposed because it was embedded as an element in the quantification of the nominated fine and could thus be reviewed on appeal. The Court therefore had the power to stay the publication order: at [32]–[47];
- (3) the principles in the case of a stay application in the Court's criminal jurisdiction were not those applicable to a grant of bail pending an appeal. The applicable principles on a stay application before a Court exercising summary criminal jurisdiction in New South Wales were those operating in civil appeals. Thus it was not necessary to demonstrate any special or exceptional circumstances. It was sufficient to demonstrate a reason or an appropriate case to warrant the exercise of discretion in an applicant's favour, although prima facie a successful party was entitled to the benefit of the judgment. The onus was on the applicant to demonstrate a proper basis for a stay and the mere filing of an appeal was not, of itself, sufficient. The seriousness of the findings, the public interest, and the harm to the applicant if the stay were refused and whether the applicant had an arguable case on appeal were relevant factors. If there was a risk that the appeal would prove abortive if a stay was not granted, a court would normally exercise its discretion to grant a stay: at [14]–[24];
- (4) a stay of the costs order was not warranted because: Mr Harris' prospects of overturning the costs order were remote, given such orders were routine and Mr Harris had tacitly accepted the making of such an order at the sentence hearing; the taking effect of any costs assessment was not likely to occur for some time; although additional fees would be occasioned by the costs assessment process, no attempt had been made to quantify how burdensome these might be; and costs assessment being routine, this could not, without more, justify a stay: at [25]–[31]; and
- (5) a stay of the publication order was not warranted because Mr Harris' claim that it would have an adverse impact on his reputation and so render any appeal nugatory was diminished by the adverse publicity that had already appeared in the media following the judgment. Indeed, the publication of the Court ordered notice could assist in correcting certain errors contained in the published articles. Other factors were that: Mr Harris had agreed to a publication order, the only matter of controversy being the inclusion of an additional sentence explaining his reason for committing the offence so that the best he

could hope for on appeal was the inclusion of that sentence; the subject matter of the appeal would not be rendered nugatory by the notices; and the public interest warranted compliance with the publication order to achieve the required element of general deterrence: at [49]–[60].

Wollondilly Shire Council v Foxman Environmental Development Services Pty Ltd (No 8) [2013]

[NSWLEC 168](#) (Pepper J)

(related decisions: *Wollondilly Shire Council v Foxman Environmental Development Services Pty Ltd (No 5)*; *Foxman Environmental Development Services Pty Ltd v Wollondilly Shire Council* [2013] [NSWLEC 68](#) Pepper J; *Wollondilly Shire Council v Foxman Environmental Development Services Pty Ltd (No 7)*; *Foxman Environmental Development Services Pty Ltd v Wollondilly Shire Council (No 2)* [2013] [NSWLEC 157](#) Pepper J)

Facts: by notice of motion the first and second respondents, Foxman Environmental Development Services Pty Ltd (“Foxman”) and Mr Phillip Foxman respectively, sought an order revoking, varying, supplementing or replacing, in whole or in part, orders made by the Court in *Wollondilly (No 5)*. The third respondent, Botany Building Recyclers Pty Ltd (“BBR”) was subsequently joined in the application. The applicant to the principal proceedings (*Wollondilly (No 5)*), Wollondilly Shire Council (“the council”), was successful in those proceedings in obtaining declaratory, injunctive and remedial relief against the respondents (collectively, “the Foxman entities”) under the [Environmental Planning and Assessment Act](#) 1979 (“the EPA Act”), the [Protection of the Environment Operations Act](#) 1997 (“the POEO Act”), and the [Water Management Act](#) 2000 for breaches of those Acts arising from the unlawful deposit of a large amount of fill material, contaminated with asbestos and lead, on land owned by Foxman. The Foxman entities sought to vary the orders made in *Wollondilly (No 5)* pursuant to order 13 of those orders which granted liberty to apply “for any further or other orders (including orders revoking, varying, supplementing or replacing these orders, in whole or in part, upon sufficient cause, such as, but not limited to, unforeseen or changed circumstances being shown)”. Specifically, the Foxman entities sought to vacate the three orders requiring the removal of the material, asserting that changed circumstances on the site and updated site contamination guidelines relating to asbestos waste meant onsite containment was now the safest option. The orders were to be replaced with orders requiring rehabilitation and management of the waste onsite.

Issues:

- (1) whether the Court had the power to make the orders within the scope of the liberty to apply; and
- (2) if so, whether sufficient cause had been demonstrated for the Court to exercise its discretion to make the orders proposed.

Held: respondents’ application dismissed with costs:

- (1) the principle of the public interest in the finality of litigation ran counter to any construction of the liberty to apply that permitted the Court to reopen, vary or set aside final orders. Liberty to apply was limited to matters associated with the implementation of final orders, including matters of machinery. It did not permit a party to reopen its case or to seek a fresh adjudication of issues that had already been finally determined. The power to reopen a final order or set aside a judgment operated only in “limited” or “exceptional circumstances”. The scope of liberty to apply was limited to orders for the ‘working out of the order’ granting the principal relief or to dealing with facts and circumstances that had arisen only since the original order was made: at [11]–[20] and [27]–[43];
- (2) the scope and effect of the order granting liberty to apply must be viewed through the prism of [s 56](#) of the [Land and Environment Court Act](#) 1979 (“the LEC Act”), which enshrined the finality of a decision of the Court, together with [s 56](#) of the [Civil Procedure Act](#) 2005: at [21]–[26];
- (3) the Court did not have the power to entertain the proposed orders because they sought to reopen and revisit issues of liability already determined by the Court in the principal proceedings: at [44]–[45]; and
- (4) even if that conclusion was incorrect, the Court would have nevertheless declined to exercise its discretion to vary the orders because the Foxman entities had not demonstrated “sufficient cause”. The endorsement of new national guidelines for the assessment of site contamination, in particular with respect to the management of asbestos, and the fact that no major instability had occurred to the fill areas on the land, were not sufficient to warrant reopening the Court’s conclusions. The expert

evidence with respect to the management of asbestos contaminated waste did not overwhelming support the proposal for onsite retention and the respondents' evidence did not address the question of lead contamination. In addition, geotechnical evidence indicated that there was significant instability of the fill. The orders proposed were also inconsistent with the Court's findings of fact and law and with other relief granted, including injunctive relief, and findings that the material was waste, that the land was being unlawfully used as a "waste facility" under the POEO Act, and that the land was being used as a "land filling operation" without development consent, contrary to [s 76A](#) of the EPA Act: at [46]–[63].

Save Little Manly Beach Foreshore Inc v Manly Council [\[2013\] NSWLEC 155](#) (Biscoe J)

Facts: this was a motion by the respondent, Manly Council ("the council"), for orders that the applicant in judicial review proceedings provide security for the Council's costs, failing which the proceedings be stayed. The orders were sought pursuant to [r 42.21](#) of the [Uniform Civil Procedure Rules](#) 2005 ("the UCPR"). The motion was heard on the eve of the trial, which was commencing the following day. The substantive proceedings concerned a contention by the applicant that council resolutions to sell two parcels of land at Manly were prohibited due to the subject land being "community land" under the [Local Government Act](#) 1993.

Issue:

(1) whether the orders sought in the council's notice of motion for security for costs should be made.

Held in dismissing the motion:

- (1) pursuant to UCPR [r 59.11](#), the Court has no power to order security for costs in judicial review proceedings except in exceptional circumstances, and there were no exceptional circumstances in this case: at [11]–[12];
- (2) secondly, the proceedings were brought in the public interest, and there was more, such that it was appropriate to exercise the discretion under [r 4.2\(2\)](#) of the [Land and Environment Court Rules](#) to decline to order security: at [13]–[16]; and
- (3) thirdly and alternatively, an order for security for costs should be refused in the general discretion of the Court under UCPR [r 42.21\(1\)](#), having regard in particular to the fact that the proceedings involved a matter of public importance, the timing of motion, and whether an order for security would stifle the proceedings: at [17].

Contempt

Waverley Council v Tovir Investments Pty Ltd & Rappaport (No 4) [\[2013\] NSWLEC 88](#) (Biscoe J)

(related decision: *Waverley Council v Tovir Investments Pty Ltd & Rappaport (No 3)* [\[2013\] NSWLEC 35](#) Biscoe J)

Facts: this was a sentencing for contempt of court. Each respondent had been adjudged guilty of contempt of court for contravening court orders restraining the respondents from using two properties known as 6 Kent Street Waverley and 34 Imperial Avenue Bondi, or causing or permitting them to be used, for the purpose of "backpackers accommodation" as defined in the Waverley Local Environmental Plan 1996 ("the LEP").

Issues:

- (1) the relevance of mental state when sentencing; and
- (2) the appropriate sentence for each respondent.

Held: fining the first respondent \$40,000 and fining the second respondent \$4,000, and ordering the respondents to pay the council's costs:

- (1) the second respondent's psychological state was a consideration when sentencing him: at [13];

- (2) the following ten factors (from *Wood v Staunton (No 5)* (1996) 86 A Crim R 183) are relevant to sentencing for contempt: at [17]:
 - (1) the seriousness of the contempt proved;
 - (2) whether the contemnor was aware of the consequences to himself of what he did;
 - (3) the actual consequences of the contempt on the relevant trial or inquiry;
 - (4) whether the contempt was committed in the context of serious crime;
 - (5) the reason for the contempt;
 - (6) whether the contemnor has received any benefit by indicating an intention to give evidence;
 - (7) whether there has been any apology or public expression of contrition;
 - (8) the character and antecedents of the contemnor;
 - (9) general and personal deterrence; and
 - (10) denunciation of the contempt;
 - (3) those factors required some adaptation in a case such as the present due to a difference in circumstances: at [18];
 - (4) the [Crimes \(Sentencing Procedure\) Act](#) 1999 (“the CSP Act”) applies by analogy to civil contempts and the purposes for which a court may impose a sentence on an offender are listed in [s 3A](#) of the CSP Act: at [18];
 - (5) there is a significant overlap between the sentencing factors identified in *Wood v Staunton* and the sentencing factors set out in the CSP Act: at [17]-[19];
 - (6) the proven contempts were of moderate seriousness: at [20]-[23];
 - (7) the respondents were aware of the consequences of the conduct constituting the contempt: at [24];
 - (8) the consequences were those of which the Court had found the respondents to be aware: at [25];
 - (9) a reason for the first respondent’s contempt was that it was desirable from a commercial perspective, however, due to a lack of evidence, the Court was not prepared to make a finding of the reasons for the second respondent’s contempt : at [26]-[28];
 - (10) there was evidence of contrition by both respondents: at [29];
 - (11) the respondents were of good character and there was no evidence of any relevant antecedents for either respondent: at [30];
 - (12) there was no need for personal/specific deterrence because there was no likelihood of re-offending. General deterrence was a significant factor as there is a particular need for general deterrence in relation to the unlawful use of residential properties for the purposes of backpackers accommodation because this type of unlawful use of residential land occasions particular community concern and the unlawful use can be difficult to prove: at [32];
 - (13) denunciation of unlawful conduct involves, substantially, the denunciation inherent in the punishment itself: at [33];
 - (14) caution is to be exercised in comparing sentences passed in different factual contexts. The parties did not refer to any comparable case: at [34];
 - (15) after taking into account the first respondent’s further liabilities for its own and the council’s legal costs of the proceedings, its net assets were about \$267,000. There was no evidence as to the personal financial position of Tovir’s shareholders and directors or of Michael Rappaport. The Court was not satisfied that Tovir and Michael Rappaport did not have the financial capacity to pay the fines proposed to be imposed on them: at [35];
 - (16) the first respondent was fined a total of \$40,000 apportioned equally between its contempt in relation to both premises: at [36];
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- (17) the second respondent was fined \$4,000 to be apportioned equally in the same way as the first respondent. The fine that would otherwise have imposed on the second respondent was heavily reduced because of the psychologist's evidence that due to his fragile and precarious mental state a heavy fine would impact negatively on his rehabilitation and his goal to become a productive and "normal" member of society: at [36];and
- (18) the respondents were ordered to pay the applicant's costs: at [37].

Costs

Hume Coal Pty Ltd v Alexander (No 4) [\[2013\] NSWLEC 106](#) (Sheahan J)

(related decisions: *Hume Coal Pty Ltd v Alexander* [\[2012\] NSWLEC 267](#) Sheahan J; *Hume Coal Pty Ltd v Alexander (No 2)* [\[2012\] NSWLEC 278](#) Craig J; *Hume Coal Pty Ltd v Alexander (No 3)* [\[2013\] NSWLEC 58](#) Sheahan J)

Facts: the plaintiff ("Hume") held a statutory licence granted under the [Mining Act](#) 1992 ("Mining Act"), which authorised prospecting over at least 89 square kilometres in the Southern Highlands. Hume entered into an access arrangement with Mr Koltai for prospecting to be carried out on his property ("the Koltai land"). Access to the Koltai land was via a right of carriageway over a neighbouring property, owned by the defendants, Mr and Mrs Alexander. The defendants and others from the community set up a blockade on the right of carriageway. A restrictive covenant over the Koltai land and surrounding properties restricted commercial and industrial activity.

Hume brought and was successful in class 8 proceedings before the Court, enforcing rights under a validly granted exploration licence and access agreement made by consent with the landowner.

Costs of both the interlocutory (applications for injunction and expedition) and substantive proceedings were reserved. Hume filed a Notice of Motion ("NOM") that the usual costs orders should apply, namely costs should follow the event.

The Alexanders contended that the class 8 proceedings should be regarded as "public interest" proceedings and that each party should bear its own costs. They contended that the "public interest" nature of the proceedings arose at three levels: local, community and statewide: the local level related to other properties affected by similar covenants; the community level related to the interest in the Southern Highlands community of the region's amenity being protected from the environmental effects of coal mining activity; and the statewide level related to the proper interaction between the Mining Act and the private property rights of citizens.

Issues:

- (1) whether the substantive proceedings could be classified as "public interest" litigation; and
- (2) if so, whether an order for costs, other than the usual order should be made.

Held: ordering the defendants to pay costs;

- (1) the defendants wished to vindicate their own opposition to mining activity in the area and had a personal and private interest in the litigation: at [38];
- (2) the proceedings could not be categorised as "public interest" proceedings: at [47]; and
- (3) the plaintiff was entitled to costs of the proceedings and costs of the NOM: at [47]-[48].

Anderson v Lake Macquarie City Council [\[2013\] NSWLEC 96](#) (Preston CJ)

(related decision: *Anderson v Lake Macquarie City Council* [\[2013\] NSWLEC 1038](#) Morris C)

Facts: Lake Macquarie City Council ("the council") issued an order under [s 124](#) of the [Local Government Act 1993](#) ("LG Act") to Mr Anderson requiring him to demolish and remove a concrete seawall constructed on Crown land adjoining Mr Anderson's land. Mr Anderson appealed under [s 180\(1\)](#) of the LG Act against

the order to the Court. On the appeal, the Court (Morris C) upheld the appeal and revoked the order. Morris C held that the Court did not have the power to confirm the order by exercising any of the powers in s 180(4) of the LG Act because a precondition to the giving of the order under [s 126](#) of the LG Act had not been satisfied. Morris C held that the order was in respect of Crown land that was a reserve within the meaning of [Pt 5](#) of the [Crown Lands Act 1989](#) (the land had been reserved from sale for the public purpose of public recreation). Section 126 of the LG Act provided that an order under s 124 may not be given "in respect of", amongst other land, "a reserve within the meaning of Part 5 of the *Crown Lands Act 1989*", without the prior written consent of the Minister responsible for administering the LG Act. Section 126 further provided that Minister must not give his or her consent in respect of such a reserve until after the Minister had consulted with the Minister administering the Crown Lands Act. Morris C found that this precondition had not been met. Morris C further found that, as the Court was exercising the functions and discretions of the Council ([s 39\(2\)](#) of the [Land and Environment Court Act 1979](#)), the Minister's consent needed to have been obtained but had not been. Accordingly, Morris C held that she could not confirm the order made and the order must be revoked.

Mr Anderson sought, by notice of motion, an order that the Council pay his costs of the appeal, arguing that a costs order pursuant to [r 3.7](#) of the [Land and Environment Court Rules 2007](#) ("the Rules") was fair and reasonable in the context of the current proceedings. Two grounds were advanced in support of the costs order: first, that the Council had acted unreasonably in circumstances leading up to the commencement of proceedings by giving an order under s 124 in respect of a reserve within the meaning of Pt 5 of the *Crown Lands Act 1989* without complying with the condition precedent in s 126 of the LG Act of obtaining the prior written consent of the Minister, and secondly, that the Council had maintained a defence to the appeal where the defence did not have reasonable prospects of success and where to maintain the defence was unreasonable as the failure of the Council to have obtained the written consent of the Minister under s 126 of the LG Act meant that the Council's defence to the appeal against the order was hopeless and doomed to fail. The Council submitted that the Court should make no order as to costs, arguing that it was not fair and reasonable for a costs order to be made in the circumstances.

Issue:

- (1) whether it was fair and reasonable for the Council to pay Mr Anderson's costs of the appeal brought under s 180(1) of the LG Act.

Held: Notice of motion for costs dismissed with Mr Anderson to pay the Council's costs on his notice of motion for costs: at [40];

- (1) it is not fair and reasonable for a costs order to be made in the circumstances of this appeal. First, the issue concerning non-compliance with s 126 of the LG Act was only one of the issues raised and contested on the appeal. The Council and Mr Anderson also put in issue other questions of fact and law that related to the requirements of item 28 of the table to s 124 of the LG Act. These included that the concrete seawall constructed on the Crown reserve was causing damage to a public place because of its effect on the natural ecosystem and processes of the foreshore of Lake Macquarie, and that Mr Anderson was a person to whom an order could be given because he was entitled to the benefit of the structure as the owner of the adjoining allotment. All of these issues, both legal and factual, were tried together, with a site view and two-day hearing conducted. Mr Anderson could have applied, but did not apply, for the question of non-compliance with s 126 of the LG Act to be dealt with separately or as a preliminary issue under [r 28.2](#) of the [Uniform Civil Procedure Rules 2005](#). The Commissioner's decision was not in favour of Mr Anderson on any issue other than the question of failure to comply with the requirement for Ministerial consent made under s 126 of the LG Act: at [27]-[32];
- (2) in circumstances where all issues, legal and factual, were heard and determined at the hearing over 2 days, it may not be fair and reasonable to order the party that was unsuccessful on only one issue (which occupied a fraction of the hearing) to pay all of the costs of the party that was successful on that one issue but not on all other issues. The hearing on that one issue in this case took 10 or so minutes out of a two-day hearing: at [33];
- (3) secondly, the Council's argument that s 126 of the LG Act did not apply to an order under s 124 of the LG Act given to an owner of private land adjoining a Crown reserve was not so unarguable as to make the Council's conduct in making the s 124 order in the first place without having obtained Ministerial

consent under s 126, or defending the appeal against the order, so unreasonable as to fall within r 3.7(3)(c) or (f) of the Rules: at [35]-[37]; and

- (4) ordinarily, costs follow the event for a costs application, notwithstanding that such an application is made within proceedings in Class 2 of the Court's jurisdiction. This is because they involve a separate question, of a different nature, to the issues involved in the substantive Class 2 appeal. It was fair and reasonable for Mr Anderson to pay the Council's costs of his unsuccessful application for costs: at [39].

Ross v Lane Cove Council [2013] NSWLEC 109 (Biscoe J)

(related decisions: *Ross v Lane Cove Council* [2012] NSWLEC 1364 Dixon C, *Lane Cove Council v Ross (No 4)* [2012] NSWLEC 191 Pepper J, *Lane Cove Council v Ross (No 14)* [2013] NSWLEC 87 Pepper J)

Facts: the respondent Council was seeking its costs in a discontinued planning appeal by the applicant in Class 1 of the Court's jurisdiction. In a letter to the applicant of 16 May 2012, the council had contended that the applicant had carried out works to a dwelling house other than in accordance with an existing development consent. Council required a written undertaking within 24 hours to submit to the council a modification application under s 96 of the *Environmental Planning and Assessment Act* 1979 ("EPA Act"). The applicant responded on 17 May 2012. In a letter to the applicant of 23 May 2012, the council (a) noted that in his letter of 17 May the applicant had undertaken only to seek a building certificate (under s 149D of the EPA Act) whereas the council had requested a s 96 modification, (b) contended that the former was likely to be inadequate for proper assessment by the council, and (c) "urged" him to proceed by way of a s 96 application. Council subsequently commenced Class 4 proceedings against the applicant in respect of the unauthorised works seeking declaratory and injunctive relief and a demolition order. In August 2012 Pepper J made declarations that alterations and additions to the dwelling house had been carried out not in conformity with the development consent and in breach of s 76A(1)(a) of the EPA Act, issued an injunction, and adjourned the remainder of the summons until (inter alia) Council had an opportunity to consider and assess the applicant's s 96 modification application lodged earlier that month. Council subsequently refused the s 96 modification application. The applicant appealed against the refusal: those Class 1 proceedings were the subject of this judgment. Inconsistently with the position the council had taken in its May 2012 letters to Mr Ross, the council filed a Statement of Facts and Contentions in which it contended that the proposed development the subject of the modification application would not be "substantially the same" as that which was approved by Council. A conciliation of the s 96 modification appeal before a Commissioner of the Court occurred on 18 December 2012. It did not resolve the application and the Commissioner proceeded to hear the application on 18 and 19 December 2012. During the December hearing comments by the Commissioner caused Mr Ross to become concerned that the Commissioner might accept the council's contention that his proposal was not substantially the same as the development originally approved. Consequently, he amended his s 96 application by deleting the constructed concrete awnings as indicated in amended plans. It was his intention at that time to lodge a separate building certificate application for the concrete awnings because they could then be considered on their merits and not be affected by the s 96 requirement that the modified development be substantially the same as what was originally approved. Even though he deleted the concrete awnings, the council continued to contend, unsuccessfully, that the residual development as proposed was not substantially the same and significant time was spent on this issue at the December hearing. After an adjournment, the hearing resumed before the Commissioner on 29 January 2013. The applicant was self-represented (unlike the December hearing). The transcript suggested that the Commissioner and Mr Ross were at cross purposes as to whether the concrete awnings had been removed from the s 96 application, as it appears they were. The applicant understood (rightly or wrongly) from what the Commissioner said that rather than remove the concrete awnings from the application, he would be required to demolish the concrete awnings as a condition of any modified consent. He considered that this was a significant change of circumstances. Until then he had understood the merits of the awnings could be considered as part of the consideration of a building certificate application, and that no condition would be imposed requiring their removal. Instead he thought they would simply be removed from the s 96 application. He therefore discontinued the s 96 proceedings. In June 2013 Pepper J made an order in the Class 4 proceedings that within 90 days Mr Ross demolish or cause to be demolished the unauthorised works and rebuild or reinstate the property in accordance with the development consent.

Issues:

- (1) whether the respondent should be awarded its costs in the discontinued appeal by the applicant; and
- (2) (although not pressed) whether a relevant consideration under [r 3.7\(3\)\(c\) Land and Environment Court Rules 2007](#) (“LECR”) is that an applicant, as a result of his own illegal acts in carrying out unapproved development, brings an application seeking to regularise them.

Held in finding that it was not fair and reasonable to award costs against Mr Ross:

- (1) costs in Classes 1, 2 and 3 of the court’s jurisdiction are governed by r 3.7(2) of the LECR: at [2];
 - (2) a no discouragement principle underlies the no costs rule in planning appeals: at [5];
 - (3) under the current costs regime, in Classes 1, 2 and 3 of the court’s jurisdiction there is no presumption that a discontinuing applicant should pay the respondent’s costs. On the contrary, r 3.7(2) of the LECR contains a presumptive rule that there should be no order for costs on discontinuance of class 1, 2 or 3 proceedings subject to one exception, namely, where the Court considers the making of the costs order “is fair and reasonable in the circumstances”: at [9];
 - (4) if there was no reasonable basis for a planning appeal, that would be a strong circumstance supporting a costs order against the discontinuing applicant: at [10];
 - (5) if an applicant, in the light of evidence that has emerged during the proceedings or by an “amber light” by the presiding Commissioner, decides that the resultant increased risks of litigation are such that a planning appeal should be discontinued, that may be a circumstance weighing against ordering the discontinuing party to pay the costs of the other party; at [10];
 - (6) had the submission been pressed that the no-discouragement principle cannot have the same weight when an applicant, as a result of his own illegal acts in carrying out unapproved development, is given the opportunity to bring an application seeking to regularise them, it would have been rejected: at [11];
 - (7) past unlawful use is not a relevant issue in determining whether a prospective consent should be granted or a modification allowed: at [11];
 - (8) past unlawful use is also not sufficient, of itself, to support a conclusion that the applicant has acted unreasonably in circumstances leading up to the commencement of the proceedings within the meaning of r 3.7(2)(c). The “circumstances leading up to the commencement of the proceedings” do not include the factual basis on which proceedings are brought (such as the existence of unauthorised works) but are concerned with the more direct conduct of a party conducting the proceedings, such as effectively inviting the proceedings: at [11];
 - (9) the council must bear a measure of responsibility for inviting the applicant to take s 96 proceedings and then, when he did so, repudiating the invitation. It was a reasonable inference that otherwise the applicant would have commenced building certificate proceedings which would have avoided the problem that arose and this costs application: at [32];
 - (10) at the January hearing Mr Ross understood, rightly or wrongly but not unreasonably from what the Commissioner said, that rather than remove the concrete awnings from the s 96 application, he would be required to physically remove (ie demolish) the concrete awnings as a condition of any s 96 approval that might be granted and that this would prejudice a building certificate application in respect of the concrete awnings: at [33];
 - (11) with the deletion of the concrete awnings from the application in December, the applicant substantially succeeded in the proceedings. It was not reasonable that he should be ordered to pay the council’s costs of proceedings in which the council had substantially failed and which it had invited, merely because the applicant discontinued the proceedings because of the understanding he acquired at the January hearing: at [34]; and
 - (12) it was not fair and reasonable in the circumstances to order Mr Ross to pay the council’s costs, nor, in the circumstances would it be fair and reasonable to make a costs order in relation to the council’s notice of motion: at [36]-[37].
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Fullerton Cove Residents Action Group Incorporated v Dart Energy Ltd (No 3) [\[2013\] NSWLEC 152](#) (Pepper J)

(related decision: *Fullerton Cove Residents Action Group Incorporated v Dart Energy Ltd (No 2)* [\[2013\] NSWLEC 38](#) Pepper J)

Facts: the applicant, Fullerton Cove Residents Action Group Incorporated (“Fullerton”), brought judicial review proceedings with respect to a pilot coal seam gas exploration project approval against Dart Energy Ltd (“Dart”), the first respondent, and the New South Wales Department of Trade and Investment, Regional Infrastructure and Services (“the Department”), the second respondent. Fullerton unsuccessfully sought a declaration that the approval granted by the Department under [Pt 5](#) of the [Environmental Planning and Assessment Act](#) 1979 (“the EPA Act”) was invalid and of no effect by reason of a failure to comply with ss 111 and 112 of that Act. Costs were reserved. Following the judgment, Fullerton made an application that there be no order as to costs on the basis that the litigation was brought in the public interest, relying on [r 4.2](#) of the [Land and Environment Court Rules](#) 2007 (“LEC Rules”). Dart did not oppose the making of this order. However, the Department did and sought its costs.

Issues:

- (1) whether the litigation could be characterised as being brought in the public interest;
- (2) whether the Court should exercise its discretion to make no order as to costs; and
- (3) whether the Department should pay Fullerton’s costs of the costs application.

Held: each party to bear its own costs of the proceedings and Department to pay Fullerton’s costs of the costs hearing:

- (1) the applicable legal principles on the question of whether litigation can be characterised as having been brought in the public interest pursuant to r 4.2 of the LEC Rules were those contained in *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 3)* [\[2010\] NSWLEC 59](#); (2010) 173 LGERA 280 even though that was a case in Class 8 of the Court’s jurisdiction, including the three-step test outlined therein: at [25]–[35];
- (2) the evidence tendered by Fullerton established that Fullerton was genuinely concerned about the potential impacts of the pilot program on water quality, aquifers, and the ecological communities dependant on the nearby RAMSAR wetlands. Fullerton’s purpose was clearly the environmental protection of the Fullerton Cove area. Although the litigation was commenced primarily on behalf of Fullerton, it had support from other local communities. Fullerton had no private or financial interest in the outcome of the proceedings. The proceedings could therefore be characterised as in the public interest: at [36]–[59];
- (3) the Department’s submissions about the small membership of Fullerton and the confined geographical nature of the pilot program were rejected. First, the membership was not small. Fullerton comprised 28 members and there was interest in the litigation beyond the Fullerton Cove area. Proceedings brought by a single individual can be characterised as having been brought in the public interest. Nor did the limited duration of the pilot program and the small geographical area preclude the proceedings from being characterised as in the public interest in view of the potential risk to endangered ecological communities, listed wetlands, and aquifers extending beyond Fullerton Cove: at [65]–[68];
- (4) the proceedings raised novel matters of general importance including questions of jurisdiction, the admissibility of expert evidence under [s 111](#), and whether [s 112](#) of the EPA Act involved a jurisdictional fact: at [69]–[77];
- (5) there were no countervailing considerations or disentitling conduct by Fullerton. Fullerton’s pursuit of the litigation could not be described as unmeritorious and the fact that Fullerton was not successful in the proceedings was not in itself disentitling conduct. It was therefore appropriate that there be no order as to costs: at [78]–[83]; and
- (6) in view of Fullerton’s attempts to negotiate with the Department to avoid the costs hearing and given its success, it was appropriate to order that the Department pay Fullerton’s costs of the costs hearing: at [84]–[92].

Pet Carriers International Pty Ltd v Botany Bay City Council (No 2) [2013] NSWLEC 150 (Preston CJ)

(related decisions: *Pet Carriers International Pty Ltd v Botany Bay Council* [2013] NSWLEC 1077 Brown C; *Botany Bay City Council v Pet Carriers International Pty Ltd* [2013] NSWLEC 147 Preston CJ)

Facts: Pet Carriers International Pty Ltd (“Pet Carriers”) brought two appeals against Botany Bay City Council (“the council”). The first appeal was brought under [s 97](#) of the [Environmental Planning and Assessment Act 1979](#) (“EPA Act”) against the refusal by the council of a development application (“DA”) to use a building for a pet transportation business. The second appeal was brought under [s 121ZK](#) of the EPA Act against an order issued by the council under [s 121B](#) of the EPA Act to Pet Carriers to cease the use of the building for a pet transportation business. The Court (Brown C) upheld the first appeal and granted development consent for the pet transportation business, and upheld the second appeal and revoked the council’s order. The council appealed against the Commissioner’s decisions on questions of law under [s 56A](#) of the [Land and Environment Court Act 1979](#), but these appeals were dismissed by the Court (Preston CJ). Pet Carriers submitted that it was fair and reasonable for the council to pay Pet Carriers’ costs of the appeals heard and disposed of by the Commissioner. Thus, Pet Carriers sought a costs order under [r 3.7](#) of the [Land and Environment Court Rules 2007](#) (“the Rules”).

Issue:

- (1) whether it was fair and reasonable for the council to pay Pet Carriers’ costs of the appeals heard before and disposed of by the Commissioner.

Held: notices of motion for costs dismissed with Pet Carriers to pay the council’s costs in relation to Pet Carriers’ notices of motion for costs: at [19]:

- (1) the characterisation of the purpose of the development, although determinative of the proceedings if the Court determined that it was prohibited, was not preliminary to, but instead involved an evaluation of the merits of the DA. There was a factual dispute as to the proper classification of the purpose of the development. That factual dispute was also relevant to the evaluation of the merits of the DA. The characterisation of the purpose of the development was undertaken at the time of, and as part and parcel of, the determination of the DA in the appeals. The circumstances, thus, did not fall within [r 3.7\(3\)\(a\)](#) of the Rules: at [14];
- (2) the council’s contention that the development was prohibited was fairly arguable. The fact that the Commissioner did not accept the council’s contention, and on the appeals against the Commissioner’s decisions on questions of law the Court (Preston CJ) also rejected the contention, did not gainsay the finding that the contention that the development was prohibited was fairly arguable. Therefore, the council’s defence of the appeals could not be regarded as not having reasonable prospects of success or otherwise being unreasonable so as to fall within [r 3.7\(3\)\(f\)](#) of the Rules: at [15]; and
- (3) it was also relevant that Pet Carriers’ appeals were partly due to Pet Carriers’ conduct of carrying on its development without first obtaining development consent. The council was justified in issuing an order under [s 121B](#) of the EPA Act directing Pet Carriers to cease its illegal use. The council had also received complaints from neighbours about the noise and parking problems. Pet Carriers appealed that order but it could only succeed on that appeal if it obtained development consent. Hence, Pet Carriers applied for such consent, and upon being refused by the council, appealed to the Court to obtain such consent. It was incumbent on Pet Carriers to show that the use was permissible and could be carried on in an environmentally acceptable manner so that consent could and should be granted. The council’s conduct in these matters, therefore, could not be said to be unreasonable: at [16].

Peabody Pastoral Holdings Pty Limited v Mid-Western Regional Council [2013] NSWLEC 86 (Preston CJ)

(related decision: *Wilpinjong Coal Pty Ltd v Mid-Western Regional Council*; *Ulan Coal Mines Ltd v Mid-Western Regional Council* [2012] NSWLEC 277 Preston CJ)

Facts: Peabody Pastoral Holdings Pty Ltd (“Peabody”) owned around 120 parcels of rateable land within the local government area of Mid-Western Regional Council (“the council”). On 17 July 2012, the council issued declarations under s 520(1) of the *Local Government Act* 1993 (“LG Act”) re-categorising Peabody’s land, which had, in previous rating years, been categorised variously as “farmland” and “residential”, to be “mining”, subcategory “mining coal” for rating purposes. On 22 October 2012, Peabody applied under s 525(1) of the LG Act to the council for a review of the declarations that Peabody’s lands were within “mining – mining coal” and nominated various other categories which Peabody considered the land should be within. On 3 and 10 December 2012, the council, under s 525(5) of the LG Act, notified Peabody of its decisions to decline Peabody’s applications to change the categories of the lands to those categories nominated by Peabody and to declare the categorisation of the lands as “mining – mining coal”. On 28 December 2012, Peabody lodged three Class 3 applications in the Land and Environment Court (“the Court”) appealing under s 526(1) of the LG Act against the declarations under s 525 of the LG Act in respect of three parcels of rateable land. Those parcels of rateable land were: (1) a 10 ha parcel of land at 112 Araluen Road, Wollar, which Peabody nominated as “residential”; (2) a 0.2 ha parcel of land at 3 Barnett Street, Wollar, which Peabody nominated as “residential”; and (3) a 4,375 ha parcel of land (made up of 160 lots) at 1066 Barigan Road, Barigan, which Peabody nominated as “farmland”. The appeals were case managed by the Court from the first return of the Class 3 applications, and the appeals were listed for hearing for 8 days commencing on 27 May 2013.

After Peabody had filed and served affidavit evidence of the occupiers of each of the three properties, the council advised, on 23 May 2013, that it no longer maintained for a categorisation other than the categories contended for by Peabody with respect to the properties. On the first day of the hearing of the appeals, on 27 May 2013, by consent, the Court made orders declaring that: (1) the parcel of land at 112 Araluen Road, Wollar, be categorised as “residential”; (2) the parcel of land at 3 Barnett Street, Wollar, be categorised as “residential”; and (3) the parcel of land at 1066 Barigan Road, Barigan, be categorised as “farmland”. Each declaration matched the categories previously nominated by Peabody on 28 December 2012, and was to take effect from 1 July 2012. After the Court made these declarations, Peabody applied for an order that the council pay Peabody’s costs of the proceedings, submitting that the council’s conduct before and/or during the proceedings rendered it fair and reasonable for the Court to make an order for costs in its favour pursuant to r 3.7(2) of the *Land and Environment Court Rules* 2007 (“the Rules”). Peabody also submitted that the unreasonableness of the council’s conduct in the proceedings was of such a degree that costs should be awarded on an indemnity basis, and that it was fair and reasonable for the council to pay Peabody’s costs of the application for costs. The council disputed each of the grounds cited by Peabody in support of the making of a costs order.

Issues:

- (1) whether the council’s conduct before and/or during the proceedings was so unreasonable as to render it fair and reasonable for the Court to make an order for costs in Peabody’s favour;
- (2) whether the council’s conduct could be characterised as so unreasonable as to warrant an order for costs on an indemnity basis; and
- (3) whether it was fair and reasonable for the council to pay Peabody’s costs of the application for costs.

Held: it was fair and reasonable for a costs order to be made against the council. However, there was no justification for ordering costs on an indemnity basis. It was also fair and reasonable for the council to pay Peabody’s costs on the application for costs:

- (1) the council adopted a construction of s 517 of the LG Act which was in error and applied this erroneous construction to make its decisions to re-categorise, decline to change category, and defend the appeals: at [36];
- (2) the council’s approach to categorisation of the parcels of land was based on five factors: (a) the land was affected by noise from the Wilpinjong Coal Project mine; (b) the noise affected land was owned by Peabody which is a mining company or a subsidiary of a mining company; (c) the purpose for which Peabody acquired the land concerned the noise affection by the mine; (d) conditions of the project approval for the mine required Peabody to acquire land affected by noise exceeding specified criteria if

requested by the noise affected landowner; and (e) even if the land was not used for a mining purpose, it was held for a mining purpose. None of these factors supported categorisation of Peabody's three properties as mining under s 517 of the LG Act: at [59], [60];

- (3) the three properties the subject of the appeals were not physically used by Peabody for a coal mine. The only potential use of the land for a coal mine was as a sensitive noise receiver located in proximity to a coal mine. The affectation of land by adverse impacts such as noise from land on which a coal mine is operated does not cause the affected land to be used for the purpose of a coal mine. Virtually all uses of land have external impacts to varying degrees (e.g. pollution sourced from land used for farmland, mining, residential or business purposes). Such externalities do not result in the land subject to the externalities being used for the purpose of the activity that causes the externalities. Land that is affected adversely, such as from noise impacts, by an open cut coal mine is not used for the purpose of a coal mine. Affectation of land is to be distinguished from use of land: at [61]-[63];
- (4) a change in ownership of land (e.g. a coal mining company purchasing or leasing land used by the previous owner for residential purposes) does not, by itself, cause a change in the purpose for which land is used for categorisation under s 517 of the LG Act: at [64]-[66];
- (5) the acquisition of noise affected land for an intended purpose does not, by itself, cause the acquired land to be used for the coal mine. First, a mere intention to use land that is to be acquired for a purpose that is different to the purpose for which the land is currently being used is not sufficient to effect a change of use of the land for that purpose upon acquisition. Only when the acquired land is devoted to use for the different purpose for which it was acquired can there be a change in the purpose of the use. The intended purpose of the use of the land must be manifested by the commencement of some activity on the land. Secondly, the grant of approval for a mine with a condition entitling noise affected landowners to require acquisition of their land if the noise exceeds certain criteria does not effect any change in the purpose of the use of the land subject to the condition. Thirdly, any subsequent acquisition of noise affected land pursuant to such a condition also would not, by itself, cause a change in the purpose of the land acquired – it simply causes a change in ownership. Fourthly, any acquisition of noise affected land in order to secure the benefit of not having to comply with conditions of a project approval requiring that the noise generated by the mine not exceed certain criteria for that land also does not thereby affect the use of the acquired land: at [72]-[76];
- (6) the definition of "mine" in the [Dictionary](#) of the LG Act does not extend the concept of the use of land to include the holding of land for a mining purpose. First, the word "mine" where twice occurring in s 517(1) of the LG Act does not carry with it the meaning of "mine" contained in the Dictionary to the LG Act. The word "mine" as appearing, on the one hand, in the Dictionary and, on the other, in s 517(1), are directed to different concepts: the former is directed to what particular types of land will be a mine whereas the latter is concerned with the purpose of the use of the land. Secondly, the word "mine" in s 517(1) is qualified by the adjectives "coal" or "metalliferous", whereas the Dictionary definition of "mine" has no such qualification. Thirdly, s 517(1) is only concerned with whether the dominant "use" is for a coal mine, while the defined word "mine" in the Dictionary is concerned with the use of land for mining purposes as well as the holding of land for mining purposes. The concepts of the use of land and the holding of land are different. The legislature defined "mine" in the Dictionary using both the concepts of use and holding of land but, by contrast, only identified in s 517(1) the criterion of use, not holding, of land for a coal mine or metalliferous mine. This must be seen to be deliberate. Fourthly, the adjective "dominant" that qualifies "use" in s 517(1) cannot sensibly be applied to a holding of land. The council was in error in considering that the mere holding by Peabody of the properties in question was sufficient to enable categorisation of the properties as mining under s 517 of the LG Act: at [78]-[92];
- (7) the unavailability of all of the evidence that Peabody later filed and served at the time the council made its decisions and defence to the appeals was not causative of the council making the decisions and defence that it did: at [93]-[98];
- (8) the council's decisions to re-categorise Peabody's lands as mining, decline to change the category of the lands from mining, and defend on the appeals the categorisation of the lands as mining were incorrect on the law and the facts and were sufficiently unreasonable to provide a foundation for making a costs order against the council under r 3.7(2) of the Rules. Peabody was put to the expense of bringing the appeals against the council's declarations when it ought not to have had to do so and in prosecuting the appeals until just before the hearing because of the council's conduct in unreasonably continuing to defend the appeals: at [99]; and

- (9) however, these reasons do not provide a justification for ordering costs on an indemnity basis rather than the usual party/party basis: at [101], [102]. It was also fair and reasonable for the council to pay Peabody's costs of the application for costs: at [103].

[Note: Application for leave to appeal from this decision refused with costs: *Mid-Western Regional Council v Peabody Pastoral Holdings Pty Ltd* [\[2013\] NSWCA 322](#)]

Mining

Gold and Copper Resources Pty Ltd v Minister for Energy and Resources [\[2013\] NSWLEC 66](#) (Pain J)

Facts: Gold and Copper Resources Pty Ltd ("Gold and Copper") challenged the renewal of exploration licence EL 3856 by the Minister through his delegate on 14 March 2011 to Newcrest Mining Limited ("Newcrest"). This was the seventh renewal of EL 3856 granted to Newcrest by the Minister acting through his delegate, Mr New. On 24 March 2009, Newcrest lodged an application for the renewal of EL 3856. The application sought renewal of 43 units for two years. On 2 June 2009, a Department minute paper documented the consideration of Newcrest's application for the renewal of EL 3856. On 10 July 2009 a further Department minute paper detailed the Department's recommendation to renew EL 3856 for 60 months. On 2 February 2011 the Exploration Titles Committee meeting recommended the renewal of EL 3856 over 43 units for 60 months. On 11 February 2011 a letter was written by Ms Wanda Moore, Western Region Titles for the Director General of the Department. It stated that the application for renewal had reached the stage where the licence may be renewed. It also noted that units j and z had been included in the description because of the shift in coordinates as a result of the move from Australian Geodetic Datum ("AGD") to the Geocentric Datum of Australia ("GDA"). On 14 March 2011 EL 3856 was purportedly renewed until 20 May 2014 by Mr New, the Minister's delegate.

Issues:

- (1) whether there was power to renew EL 3856 under [s 114\(1\)\(a\)](#) of the [Mining Act](#) 1992 ("Mining Act") for five years when the period sought in the application was for two years;
- (2) whether there was satisfaction of special circumstances by the Minister's delegate to enable renewal over more than half the area over which EL 3856 was previously in force as required by [s 114\(6\)](#) of the Mining Act;
- (3) whether the decision to approve the renewal was invalid because Newcrest included false or misleading information in its application; and
- (4) whether there was a breach of [s 114\(5\)](#) of the Mining Act which requires that area not previously under an exploration licence cannot be included in its renewal.

Held: making an order in the nature of certiorari that the decision by the Minister to renew EL 3856 made on 14 March 2011 be quashed; remitting Newcrest's application for a renewal of EL 3856 dated 24 March 2009 to the Minister to be determined according to law; granting a declaration that no part of unit j or unit z of Canberra Block 1284 was the subject of EL 3856, and a declaration that the renewal application lodged by Newcrest in respect of EL 3856 on 24 March 2009 was yet to be finally determined by the Minister:

- (1) there was power to renew EL 3856 under [s 114\(1\)\(a\)](#) for five years. Section 114(1) requires that an application be considered by a decision-maker before renewing an authority (here a renewal of an exploration licence). The power to issue the authority resides solely in subsection (1). Subsection (3) is a limit on the exercise of the power in subsection (1). There was no other source of power to consider. The inferred limit on the power in subsection (1) by virtue of a period of time specified in an application contended for by Gold and Copper bore no relation to the types of statutory powers considered in *Anthony Hordern and Sons Limited v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 or *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* [\[2006\] HCA 50](#); (2006) 228 CLR 566: at [56]. The Respondents' construction was more reflective of the actual text of [s 114\(1\)](#), (3), (4) and (6). Subsections (3) and (6) provided the only express limits on the

renewal power of the Minister. Gold and Copper's construction required additional words to be inferred, which was generally impermissible when construing legislation: at [59];

- (2) no satisfaction of special circumstances by the Minister's delegate under s 114(6) was established. The *Carltona* principle applies to a person in the position of a Minister of the Crown. The principle did not apply to Mr New as a delegate of the Minister: at [91]. Consequently, the obligation to achieve a state of satisfaction fell on Mr New and he was not entitled to rely on knowledge of others in the department as inferentially giving rise to his satisfaction: at [93]. There was no evidence of what Mr New considered at the time he was exercising the Minister's delegation in February/March 2011 and therefore whether in 2011 he achieved the state of satisfaction he was required to achieve by virtue of the delegation he held: at [94];
- (3) the decision was not vitiated by reason of information provided by Newcrest. The Mining Act imposed a duty on Newcrest not to provide false or misleading information in support of its application to renew. A conclusion that the unamended Mining Act imposed such a duty by inference did not mean that Gold and Copper succeeded in the absence of evidence establishing bad faith or at least deliberateness in making the misleading statement on the part of Newcrest. An assertion that Newcrest must have known the statement was misleading at the time that it was made in the report of Mr Kitto would not suffice: at [121]. The incorrect statement was not proven to be material to the decision of the delegate: at [127]; and
- (4) a breach of s 114(5) was established in relation to unit z. An application was made for the restoration of land excluded by reason of the change from the AGD to the GDA system pursuant to [Sch 6 Pt 6 cl 70\(5\)](#) of the Mining Act in April 2000 by Newcrest. The geologist's report sent in support of the application referred in broad terms to the Cadia east area which was distant from unit z. The Department responded in the negative to Newcrest's request in April 2000 referring particularly to Fig 3. That figure did not include unit z: at [143]. Eleven years later on 11 February 2011 an officer of the Department advised Newcrest that the renewal area would include unit z. In the absence of any documents on the Departmental files which identified the basis on which the officer, assuming she was a delegate of the Minister, determined that she was satisfied of the matters in cl 70(5), the inference reasonably arose that there was nothing before the officer to enable a conclusion that significant evidence of valuable mineral deposits existed in relation to that portion of unit z in dispute and she was therefore not so satisfied: at [144].

Section 56A Appeals

The Hills Shire Council v Sales Search Pty Ltd [\[2013\] NSWLEC 103](#) (Biscoe J)

(related decision: *Sales Search Pty Ltd v The Hills Shire Council* [\[2013\] NSWLEC 1052](#) Morris C)

Facts: this was an appeal under [s 56A](#) of the [Land and Environment Court Act](#) 1979 ("Court Act") against a decision of a Commissioner granting Sales Search Pty Ltd ("Sales") development consent to demolish existing structures and construct a two storey boarding house containing 33 rooms in Carlingford, and allowing Sales' appeal against Hills Shire Council's refusal of the development application. A boarding house is an innominate permissible development in the applicable 2(a3) residential zone under the [Baulkham Hills Local Environmental Plan](#) 2005 ("LEP"). The council submitted unsuccessfully before the Commissioner, and submitted in this appeal, that the proposed use was not a boarding house but an "apartment building" or "commercial premises", both of which are prohibited in that zone under the LEP. The LEP defined "apartment building" as "a building containing 3 or more dwellings where each dwelling does not necessarily have direct access to private open space at natural ground level"; "dwelling" as "a room or suite of rooms occupied or used, or so constructed or adapted as to be capable of being occupied or used, as a separate domicile"; and "commercial premises" as "a building or place used as an office or for other business or commercial purposes but, in the Table to clause 13, does not include a building or place elsewhere specifically defined in this clause or a building or place used for a land use elsewhere specifically defined in this clause".

Issues:

- (1) whether the Commissioner erred in failing to characterise the proposed development as an “apartment building” as defined in the LEP;
- (2) whether the Commissioner erred in failing to characterise the proposed development as “commercial premises” as defined in the LEP;
- (3) whether in consequence of either of the above questions the Commissioner erred in not finding that the proposed development was prohibited under the LEP; and
- (4) whether the decision of the Commissioner should be affirmed on a ground other than that relied on by the Commissioner, namely that the proposed development was permissible with consent pursuant to Division 3 of [State Environment Planning Policy \(Affordable Rental Housing\) 2009](#) (“SEPP”).

Held: varying the conditions of the development consent in accordance with the conditions annexed to the judgment, and otherwise dismissing the appeal:

- (1) an appeal under s 56A of the Court Act is limited to questions of law. The proper characterisation of a proposed use, which is the focus of the appeal, is a jurisdictional fact and therefore raises a question of law: at [5];
- (2) resolution of issue 1 turned on identification of precisely what development was proposed and whether it came within the LEP definition of “apartment building” rather than the concept of a “boarding house”: at [10];
- (3) the parties agreed during the hearing that the council would abandon the apartment building ground on the basis that additional conditions of the consent were imposed to the effect of those in *Warlam Pty Ltd v Marrickville Council* [2009] NSWLEC 23, namely, prohibiting installation and use of cooking facilities in the rooms. Council agreed this would suffice to establish that the development was not an “apartment building” as defined in the LEP: at [18]. Power to vary the conditions imposed was found in s 56A(2)(b) of the *Land and Environment Court Act*: at [19];
- (4) the LEP definition the word “used” means used by occupiers of the building or place, not by the landlord to derive rent. Boarders in a boarding house do not use the building as “an office or for other business or commercial purposes, therefore it did not fit the definition of “commercial premises”; at [26];
- (5) if this was wrong, and “used” in the definition includes used by the landlord to derive rent, this is qualified by the specified purposes of the use “as an office or for other business or commercial purposes”. They do not encompass all letting purposes. “Office” does not include a boarding house or other residential accommodation. The adjectives “business or commercial” take their hue from the word “office” and do not include a boarding house or other residential accommodation: at [26];
- (6) the development was not “commercial premises” and was not a prohibited use, rather, it was a boarding house, which is a permissible use: at [27];
- (7) it was unnecessary to consider the respondent’s contention that the development was alternatively permissible under the SEPP: at [28]; and
- (8) the council was ordered to pay 20 per cent of Sales’ costs, apportioned to reflect the commercial premises issue that Council had lost. Otherwise there was no order as to costs: [29].

Modern Motels Pty Ltd v Fairfield City Council [2013] NSWLEC 138 (Preston CJ)

(related decision: *Modern Motels Pty Ltd v Fairfield City Council* [2013] NSWLEC 1075 Brown C)

Facts: Modern Motels Pty Ltd (“Modern Motels”) made a development application (“DA”) under [s 78A](#) of the [Environmental Planning and Assessment Act 1979 \(NSW\)](#) (“the EPA Act”). The proposed development would, if approved, have involved construction and use of two buildings for takeaway food premises and associated works (e.g. parking and drive through facilities). The site on which the development was proposed to be carried out was an L-shaped parcel of land known as 161-167 Hume Highway, Lansvale. The site had a 20 metre frontage to the Hume Highway and around 97 metres frontage to Chadderton Street, and surrounded a service station on the corner of the Hume Highway and Chadderton Street. The

proposed development provided for vehicular access to the land from both the Hume Highway and Chadderton Street. The vehicular access from the Hume Highway would have been indirect in that it would have been via a right-of-way over the adjoining service station land. Vehicular access to the land from Chadderton Street would have been both direct (e.g. by a new two-way driveway to be constructed at the northern end of the development site) and indirect (e.g. from an existing driveway on the service station land closer to the corner of Chadderton Street and the Hume Highway, and then along a driveway running in a westerly direction parallel to the northern boundary of the service station land). As the Hume Highway was a classified road, the consent authority – Fairfield City Council (“the council”) – was required to have regard to the relevant criteria in cl [101\(2\)](#) of the [State Environmental Planning Policy \(Infrastructure\) 2007](#) (“the Infrastructure SEPP”) when making its decision on the DA. Clause 101, which concerned development with frontage to a classified road, provided as follows:

“(1) The objectives of this clause are:

- (a) to ensure that new development does not compromise the effective and ongoing operation and function of classified roads, and
- (b) to prevent or reduce the potential impact of traffic noise and vehicle emission on development adjacent to classified roads.

(2) The consent authority must not grant consent to development on land that has a frontage to a classified road unless it is satisfied that:

- (a) where practicable, vehicular access to the land is provided by a road other than the classified road, and
- (b) the safety, efficiency and ongoing operation of the classified road will not be adversely affected by the development as a result of:
 - (i) the design of the vehicular access to the land, or
 - (ii) the emission of smoke or dust from the development, or
 - (iii) the nature, volume or frequency of vehicles using the classified road to gain access to the land, and
- (c) the development is of a type that is not sensitive to traffic noise or vehicle emissions, or is appropriately located and designed, or includes measures, to ameliorate potential traffic noise or vehicle emissions within the site of the development arising from the adjacent classified road.”

The DA was deemed refused by the council pursuant to [s 82](#) of the EPA Act. Modern Motels appealed to the Land and Environment Court under [s 97](#) of the EPA Act against the deemed refusal of its DA. The appeal was dismissed by the Court (Brown C). Modern Motels subsequently appealed against Brown C’s decision under [s 56A](#) of the [Land and Environment Court Act 1979 \(NSW\)](#), submitting that the Commissioner erred in law in interpreting cl 101(2) of the Infrastructure SEPP. This submission was made on the basis that the Court could not grant consent under c 101(2) of the Infrastructure SEPP because vehicular access would be provided partly by the Hume Highway and not wholly by Chadderton Road. In contrast, the council contended that the Court, exercising the functions of the consent authority, could not grant consent to the proposed development because it could not be satisfied of the preconditions in cl 101(2) of the Infrastructure SEPP which applied to the proposed development as the Hume Highway was a classified road. Modern Motels also submitted that it would be fair and reasonable in the circumstances of this case for a costs order to be made under [r 3.7](#) of the [Land and Environment Court Rules 2007](#) (“the Rules”) in its favour to the extent of half of its costs on the appeal.

Issues:

- (1) whether the Commissioner erred in his construction of cl 101(2) of the Infrastructure SEPP and thus made an error of law in reaching his decision to refuse the DA; and
- (2) whether it was fair and reasonable for a costs order to be made in favour of Modern Motels to the extent of half of its costs on the appeal.

Held: appeal allowed. The decision and orders of the Commissioner were set aside, and the matter was remitted to him for determination in accordance with the decision of the Court: at [54]:

- (1) the Commissioner did not err in construing cl 101(2)(a) as requiring in this case that vehicular access be provided by Chadderton Road, being a road other than the classified road of Hume Highway, but he did err in his construction of the requirement that such vehicular access be “where practicable”: at [19];
- (2) clause 101(2)(a) has two components: first, the desired outcome (“vehicular access to the land is provided by a road other than the classified road”) and, secondly, an acceptance that the achievement of that desired outcome is only “where practicable”. The desired outcome is to be interpreted as meaning that vehicular access to the land is not to be provided by the classified road but instead by a road other than the classified road. There are a number of indications in the text and context of cl 101 favouring this construction. First, the words “other than” in cl 101(2)(a) operate to exclude the classified road as the road from which vehicular access to the land is to be provided. Secondly, this construction of cl 101(2)(a) promotes the first objective in cl 101(1), namely to “ensure that new development [on the land] does not compromise the effective and ongoing operation and function” of the classified road. Thirdly, and in any event, the matters in cl 101(2)(b) may still be relevant even if there is no vehicular access to the land provided by the classified road. The Commissioner did not err in construing cl 101(2)(a) as requiring vehicular access to the land to be provided by Chadderton Street and not by the Hume Highway: at [21]-[35];
- (3) however, this construction only deals with that part of cl 101(2)(b) addressing the desired outcome; it does not address that part of the clause concerning whether the desired outcome is practicable. The Commissioner either did not ask himself the question of whether the outcome of providing all vehicular access by Chadderton Street was practicable or misdirected himself as to the question of practicability under cl 101(2)(a). Either way involved an error of law: at [36]-[47]; and
- (4) in all of the circumstances, it would not be fair and reasonable to make an order for costs. The error of law upon which the appellant had succeeded was not central to its appeal. The central ground of appeal did not concern the component of cl 101(2)(a) of “where practicable”, but rather the component of the desired outcome. The large part of the parties’ written and oral submissions concerned the component of the desired outcome and not the component of “where practicable”: at [53].

Maygood Australia Pty Ltd v Willoughby City Council [\[2013\] NSWLEC 142](#) (Pepper J)

(related decision: *Maygood Australia Pty Ltd v Willoughby City Council* [\[2013\] NSWLEC 1127](#) Tuor C)

Facts: Maygood Australia Pty Ltd (“Maygood”) appealed from a Commissioner’s decision reviewing the deemed refusal of Maygood’s development application (“DA”) by the respondent, Willoughby City Council (“the council”), under [s 97](#) of the [Environmental Planning and Assessment Act 1979](#) (“the EPA Act”). The basis for the appeal was that the Commissioner had committed an error of law by misconstruing cl 1.8A of the [Willoughby Local Environmental Plan 2012](#) (“the 2012 LEP”). The council filed a submitting appearance save as to costs in the appeal.

Maygood’s DA sought consent to refigure a ninth level and add a tenth level to an approved residential apartment building. Maygood appealed the council’s deemed refusal on 19 December 2012. On 31 January 2013, the 2012 LEP was gazetted, repealing the Willoughby Local Environmental Plan 1995 (“the 1995 LEP”), which provided for a maximum height limit of nine stories. Under the 2012 LEP the additional floor would have been permitted. The 2012 LEP contained a savings provision in cl 1.8A stating: “If a development application has been made before the commencement of this Plan in relation to land to which this Plan applies and the application has not been finally determined before that commencement, the application must be determined *as if this Plan had not commenced*” (emphasis added). On 4 March 2013 the council determined the DA by refusal and Maygood appealed this decision to the Court.

In the appeal, the council relied on an earlier decision of the Court in *Alamdo Holdings Pty Limited v The Hills Shire Council* [\[2012\] NSWLEC 1302](#) to submit that no weight should be given to the 2012 LEP because the application of cl 1.8A deemed it irrelevant. In dismissing the appeal, the Commissioner followed *Alamdo* and determined the DA as if the 2012 LEP “had not commenced” and assessed the development against the 1995 LEP standards against which the development was not compliant. In

determining the State Environmental Planning Policy No 1 – Development Standards objections, the Commissioner had regard to the 2012 LEP, but held that the objections were not well founded.

Issues:

- (1) what was the proper construction of cl 1.8A of the 2012 LEP; and
- (2) whether Maygood should receive its costs of the appeal.

Held: appeal allowed and decision of Tuor C set aside:

- (1) *Alamdo* should not be followed, on the bases that, first, the words "as if this Plan had not commenced" did not mean 'as if this Plan had not existed'. No such proscription was mandated by the change in terminology, having regard to the text, scope and purpose of the clause. Clause 1.8A of the 2012 LEP was a deeming provision that fictitiously set the 2012 LEP back to a point in time immediately before its commencement, at which time it was a "proposed instrument" and must be considered pursuant to [s 79C\(1\)\(a\)\(ii\)](#) of the EPA Act. It was thus a mandatory relevant consideration, assuming public consultation and proper notification had occurred. Second, no legislative intention had been evinced to abrogate the reasoning in *Terrace Tower Holdings Pty Ltd v Sutherland Shire Council* [\[2003\] NSWCA 289](#); (2003) 129 LGERA 195, where the NSW Court of Appeal had held that an analogous transitional provision, read with [s 79C\(1\)\(a\)\(ii\)](#) of the EPA Act, required that proper regard be given to draft instruments that had been exhibited but not yet commenced. Third, the Commissioner's construction of cl 1.8A would effectively give either that clause, or [s 79C\(1\)\(a\)\(ii\)](#) of the EPA Act, no work to do and such a construction should be avoided. Fourth, the Commissioner's construction of cl 1.8A would result in absurdity or irrationality. If, by reason of cl 1.8A, the 2012 LEP was not a proposed instrument under [s 79C\(1\)\(a\)](#) because it had in fact commenced, it was an irrelevant consideration; but, if it had not commenced, it was a mandatory consideration under [79C\(1\)\(a\)](#). Such an irrational construction should be avoided. Fifth, even if the 2012 LEP was not a proposed instrument, the 2012 LEP was a matter that was relevant to "the public interest" and had to be considered pursuant to [s 79C\(1\)\(e\)](#) of the EPA Act. Alternatively, even if the 2012 LEP was not a mandatory consideration, it was still a matter to which the consent authority could nevertheless have regard: at [28]–[36]; and
- (2) the conduct of the council before the Commissioner and on appeal was not such that it would be fair and reasonable in all the circumstances to displace the normal rule contained in r 3.7 of the Land and Environment Court Rules 2007 that each party pay its own costs, and award Maygood its costs: at [38]–[43].

Botany Bay City Council v Pet Carriers International Pty Ltd [\[2013\] NSWLEC 147](#) (Preston CJ)

(related decisions: *Pet Carriers International Pty Ltd v Botany Bay Council* [\[2013\] NSWLEC 1077](#) Brown C and *Pet Carriers International Pty Ltd v Botany Bay City Council (No 2)* [\[2013\] NSWLEC 150](#) Preston CJ)

Facts: Pet Carriers International Pty Ltd ("Pet Carriers") brought two appeals against Botany Bay City Council ("the council"). The first appeal was brought under [s 97](#) of the [Environmental Planning and Assessment Act 1979](#) ("EPA Act") against the refusal by the council of a development application to use a building for a pet transportation business ("the development consent decision"). The second appeal was brought under [s 121ZK](#) of the EPA Act against an order issued by the council under [s 121B](#) of the EPA Act to Pet Carriers to cease the use of the building for a pet transportation business ("the council order decision"). The Court (Brown C) upheld the first appeal and granted development consent for the pet transportation business, and upheld the second appeal and revoked the council's order. The council appealed against the Commissioner's decisions on questions of law under [s 56A](#) of the [Land and Environment Court Act 1979](#). In the appeal against the development consent decision, the council identified two errors of law. The first was that the Commissioner erred in holding that the proposed development was for the nominate permissible purpose of "commercial premises" rather than the innominate prohibited purposes of "airport-related land use" and/or "air freight forwarder" under the applicable Botany Local Environmental Plan 1995 ("LEP 1995"). The second was that the Commissioner denied the council procedural fairness by not imposing a proffered condition that was not in dispute in granting development consent. In the appeal against the council order decision, the council identified one

error of law, being that the Commissioner erred in holding that the proposed development was permissible rather than prohibited.

Issues:

- (1) whether the Commissioner erred in holding that the proposed development was for the nominate permissible purpose of “commercial premises” rather than the innominate prohibited purposes of “airport-related land use” and/or “air freight forwarder”; and
- (2) whether the Commissioner denied the council procedural fairness by not imposing a proffered condition that was not in dispute in granting development consent.

Held: appeals dismissed with the council to pay Pet Carriers’ costs of each appeal: at [122]:

- (1) in this case, the relevant inquiry was whether Pet Carriers’ proposed development was within a purpose of development that may be carried out with development consent and not one that is prohibited. Relevantly, this required determining whether the proposed development was to be characterised as being for the nominate permissible purpose of “commercial premises” and not for any innominate prohibited purpose, such as “airport-related land use” or “air freight forwarder”. The Commissioner, in characterising the purpose of the proposed development, did not directly undertake this inquiry. Instead, he endeavoured to establish the category of purpose into which the proposed development should be seen as falling and formulated a description for that purpose, namely “pet transportation business”. Such a purpose was not one specified by LEP 1995. In this regard, the Commissioner diverted himself from the correct inquiry. Nevertheless, the Commissioner then proceeded to determine whether that purpose of pet transportation business fell within the purpose of “commercial premises” or the purpose of “airport-related land use”, both of which terms were specified in LEP 1995. In the end, therefore, the Commissioner did undertake the correct inquiry: at [33], [34];
- (2) the Commissioner did not err on a question of law in characterising the proposed development as being for the nominate permissible purpose of “commercial premises” and not for the innominate prohibited purpose of “airport-related land use”: at [35]-[46]. In the alternative, the Commissioner did not err in characterising the proposed development as only being for nominate permissible purpose of “commercial premises”, as opposed to for two independent purposes, one the permissible purpose of “commercial premises” and the other the prohibited purpose of “airport-related land use” or “air freight forwarder”. The circumstances of the case before the Court could be distinguished from a number of the existing authorities in this area of law. This included, first, cases involving a purpose which is a genus and one or more species of purposes falling within that genus and, secondly, cases where development could be seen to be for two or more different purposes, one being permissible and the others being prohibited: at [47]-[93]. Each case will turn on the terms of its own facts and the relevant environmental planning instrument and land use table: at [54];
- (3) it may be accepted that, as a general rule, if a Commissioner or Judge hearing a Class 1 appeal is to determine the proceedings by reference to matters beyond the issues identified by the parties, then procedural fairness requires that the parties be given notice of those additional matters and accorded the opportunity to be heard upon them. This is because ordinarily, the Court determines the proceedings on the substantive issues joined between the parties. If, however, the Court considers that there are issues additional to those joined between the parties that need to be considered, procedural fairness requires the parties to be notified and given an opportunity to be heard in relation to the additional matters: at [101]; and
- (4) the Commissioner, in not imposing a draft condition proffered by the council in its draft conditions, did not fail to accord procedural fairness to the council. The fundamental reason is that the council did not raise as an issue in the proceedings the necessity or desirability of imposing a condition limiting the duration of the consent to 12 months from the date of issue with the consequence that any continuation of the use would require the making and approval of a fresh development application. The council filed and served its statement of facts and contentions, originally on 9 October 2012 and amended them on 14 December 2012. None of the contentions raised this issue, and the council could have had no legitimate expectation that the Commissioner would impose a condition of that nature and with that consequence, which had not been expressly raised as an issue in the proceedings, or that the Commissioner would not decline to impose such a condition without first giving the council an

opportunity to call evidence and make submissions in support of imposition of the condition: at [102], [103], [117].

Imbree v Sutherland Shire Council [2013] NSWLEC 145 (Sheahan J)

(related decisions: *Imbree v Sutherland Shire Council* [2012] NSWLEC 1293, *Imbree v Sutherland Shire Council (No 2)* [2012] NSWLEC 1298, Moore SC)

Facts: the applicants' two development applications to Sutherland Shire Council were refused, and both refusals were appealed in the Class 1 jurisdiction of the Court. The Senior Commissioner dismissed the appeals, and the applicants appealed.

The applicants' development applications sought the subdivision of one lot into two, the erection of a building on the newly created lot, additions and alterations to, and partial demolition of, an existing dwelling, and construction of a swimming pool. The [Sutherland Shire Local Environment Plan 2006](#) ("SSLEP") restricts development to land between a property's foreshore building line ("FBL") and the waterway. Clause 17 of the SSLEP specifically deals with building or works on land traversed by a FBL. The location of the FBL was of central importance to the proceedings before the Senior Commissioner and the subsequent appeal. The location of the FBL was relative to the location of the deemed mean high water mark ("HWM"). Under cl 17(6) the deemed HWM was the high water mark shown on any plan registered before 24 April 1980. Under cl 17(3) the FBL is a line that is parallel to, and 20 metres from, the deemed HWM.

The Senior Commissioner construed the SSLEP as plotting the deemed HWM for the applicants' land in a factually absurd location, due to an error in the measurements of the side boundaries on the relevant plan registered before 1980. The error had been rectified on a newly surveyed (2011) deposited plan, but the Senior Commissioner determined that the later surveyed plan could not be relied upon because it had not been registered before 24 April 1980.

Issue:

- (1) whether, in both appeals, the Senior Commissioner had misconstrued cl 17(3) and incorrectly interpreted the meaning of "deemed mean HWM", as defined in cl 17(6);
- (2) whether, in both appeals, the Senior Commissioner had failed to give reasons for his construction of cl 17(3) and 17(6); and
- (3) whether the Senior Commissioner had failed to give reasons for his being satisfied that the proposed additions were "further forward" than the foreshore building line.

Held: dismissing the appeal and reserving costs:

- (1) the words of cl 17 of the SSLEP were unambiguous and took on their ordinary meaning. The Senior Commissioner correctly construed the relevant plan, which on its face exhibited no inconsistency or error. As such, the applicants were confined to the deemed HWM as depicted on the relevant current plan: at [61]-[63];
- (2) the Senior Commissioner did not expressly exclude the note in cl 17, nor did he err in construing the provisions of cl 17 in finding the location of the HWM at the end of the side boundaries of the property: at [67], [73], [79] and [82];
- (3) the 2011 redefined deposited plan did not create a "residual HWM" as contended by the applicants, as the appropriate plan was the deposited plan registered before 24 April 1980: at [86]; and
- (4) the Senior Commissioner correctly construed cl 17, and any shortcomings in his reasoning were not substantial enough to vitiate the decision: at [101]-[102].

Commissioner Decisions

Davies v Penrith City Council [\[2013\] NSWLEC 1141](#) (Moore SC)

Facts: Mr Davies applied to Penrith City Council (“the council”) for permission to build a three-car carport with portion of the structure (providing cover for two vehicles) being in front of two existing garages with a third car space being to the side of the existing dwelling, but connected to and forming part of the single structure. The double carport in front of the garages proposed a flat roofed structure built within the setback between the dwelling and the street, and extending 5 m in front of the portion of the dwelling closest to the street. This structure, some 6 m wide, was proposed to be set back only 2 m from the front property boundary. The council's Development Control Plan (“DCP”) prohibited such structures in the front setback. In addition to the non-compliance with the DCP prohibition, the council also raised issues of the appropriateness of the proposed element of the structure in front of the building line as being inconsistent with the streetscape and character requirements in the council's controls. The council refused Mr Davies' application.

Mr Davies disputed the streetscape impact and character issues, relying on a number of other carport structures in front setbacks in his suburb as demonstrating that such structures were not inappropriate. Mr Davies also relied on the fact that his wife suffered a disability and needed to be able to access a vehicle undercover and that the proposed carport structure in front of the building line would permit this to occur. In advancing this proposition, Mr Davies effectively invoked the concept of necessity set out in the second dot point of the planning principle in *Pafburn v North Sydney Council* [\[2005\] NSWLEC 444](#) dealing with the reasonableness of development proposals.

The matter was set down for a conciliation conference pursuant to [s 34AA](#) of the [Land and Environment Court Act](#) 1979 (“the Court Act”). During the course of the conciliation process and confirmed by the council's barrister during the course of the hearing, the council did not object to the third element of the proposed carport that was to the side of the existing dwelling and behind the building line, and had always been prepared to grant consent to a structure of that limited nature. The council agreed that, if the elements of the structure in front of the building line were rejected, it would be appropriate to uphold the appeal to the limited extent of granting development consent confined to the element of the proposed carport structure beside the dwelling and behind the building setback line. Mr Davies indicated that, if the whole structure was not considered acceptable, he did wish to receive a development consent on that limited basis.

Mr Davies had engaged a planning consultant, Mr Ross Creighton, as his agent to undertake an appeal against the refusal. At the first directions hearing, the Assistant Registrar granted leave pursuant to [s 63\(2\)](#) of the Court Act for Mr Creighton to act as agent solely for the purposes of the directions hearing, and made further agreed directions including a direction that there be no expert evidence in the proceedings. The Senior Commissioner found that Mr Creighton had purportedly acted as Mr Davies' agent after the conclusion of the directions hearing, and was responsible for the filing and serving of an expert witness statement by a consultant planner (less than two working days prior to the conciliation conference) contrary to the agreement that there be no such evidence.

The conciliation was terminated and during the subsequent Court hearing, Mr Davies became represented by a barrister on a direct access brief and the matter proceeded to determination without expert planning evidence being permitted.

Issues:

- (1) whether Mr Creighton should be granted leave to act as agent for Mr Davies;
- (2) whether the planning principle in *Pafburn v North Sydney Council* [\[2005\] NSWLEC 444](#) should be revised;
- (3) whether the proposed structure elements in front of the building line complied with the character and locality controls; and
- (4) whether the existing carport structures in the locality relied upon by Mr Davies provided any basis for setting aside the prohibition on carport structures in the front setback.

Held: finding that it would be appropriate to grant development consent for that small portion of the proposed structure that was setback behind the facade and to the north of the existing dwelling:

- (1) Mr Creighton's behaviour was unacceptable and he should be refused leave to act as an agent in the proceedings: at [74] and [91];
- (2) the planning principle in *Pafburn v North Sydney Council* [2005] NSWLEC 444 should be revised to remove reference to "necessity" and thus avoid the possibility of its interpretation on an anthropocentric basis: at [116] to [121];
- (3) the other structures relied upon by Mr Davies as providing a basis for setting aside the provisions of the DCP forbidding such structures did not provide him any assistance, as those structures were either built without development consent or approved under a planning regime that did not prohibit such structures and/or were too remote from his dwelling to provide any contextual assistance for the present application: at [133];
- (4) Mr Davies' proposed carport, to the extent that it was in front of the building line of his dwelling, was unacceptable in a streetscape and locality character context: at [140] and [148];
- (5) the appeal should be upheld but solely to the extent of permitting the limited carport structure that the council had indicated was acceptable; at [53] and [149]; and
- (6) that which had been achieved by the appeal was no more and no less than would have been approved by the Council had such a limited application been made to it: at [153].

***Webster v Muswellbrook Shire Council* [2013] NSWLEC 1146 (Hussey C)**

Facts: the applicant appealed under [s 97](#) of the *Environmental Planning and Assessment Act* 1979 ("the EPA Act") against the council's refusal of a development application for the installation of a manufactured home on a property in Sydney Street Muswellbrook to create a detached dual occupancy. The site is located within the Hunter River floodplain with dual frontages to Sydney Street and the Hunter River. The site is zoned R1 General Residential under the [Muswellbrook Local Environmental Plan](#) 2009 "LEP", and is within a designated "High Hazard Flood way" under the Muswellbrook Development Control Plan ("the DCP"). The flood modelling showed an initial flow path occurring along Sydney Street with a subsequent breakout of the Hunter River, which caused a "Low Flow Island" effect on the site of the proposed new dwelling. The NSW Floodplain Development Manual 2005 noted at G9.5:

"The formation of islands in the floodplain during a flood is a potentially dangerous situation. ... People trapped on the island and their rescuers will be placed at undue risk. Thus, the development of land that becomes isolated prior to ultimate inundation needs to be considered with great care."

Issues:

- (1) whether the flood risk to life and property was acceptable due to the land being located within/adjacent to the floodway;
- (2) precedent in terms of similar development opportunities being available for several nearby properties;
- (3) compatibility with adjoining development; and
- (4) public interest.

Held: dismissing the appeal:

- (1) there was an unacceptable level of risk because:
 - (a) the new dwelling was to be erected 1.5m above the natural ground level and in the event of evacuation residents would have to leave the "flood island" via Sydney Street through a high hazard area;
 - (b) even though the warning time was in the order of 7 hours, residents would need to be aware that flooding would first enter the property from Sydney Street, not the river, and if departure was delayed evacuation would be compromised;

- (c) if evacuation was required in the dark, particular arrangements should be made, and it could not be left for a condition of consent requiring a subsequent evacuation plan;
 - (d) in any case such a condition that evacuation relied on a private plan was contrary to SES practice, and the approach of a “shelter in place” design to avoid evacuation was not detailed to the Court: at [48];
- (2) the effect of the flood runners in the vicinity of the site identified in the flood mapping, which were categorised as high hazard floodways and which surrounded the site, was that they influenced the hydraulic category of the land in question, and the site should be classified as within the high hazard floodway: at [49]; and
- (3) the proposal did not satisfy the LEP and DCP aims and objectives for development located within the floodplain: at [54].

Sheer Property Group Pty Ltd & Anor v Randwick City Council [2013] NSWLEC 1168 (Fakes C)

Facts: the applicants appealed under [s 97\(1\)](#) of the [Environmental Planning and Assessment Act](#) 1979 (“the EPA Act”) against the refusal by Randwick City Council to grant consent to alterations and additions to 2 two-bedroom semi-detached dwellings in Mount Street Coogee and their conversion into four units (2 two-bedroom and 2 one-bedroom). The site was located in an area zoned for multi-dwelling housing and residential flat buildings. An earlier proposal that included front of building parking had been rejected by the Design Review Panel.

Issue:

- (1) whether a deficiency of 2-3 off-street parking spaces would adversely impact on the parking opportunities for existing residents and visitors having regard to the existing demand for on-street parking.

Held: upholding the appeal subject to the inclusion of a condition of consent pertaining to car sharing:

- (1) the proposal was a relatively modest conversion of an existing older style dwelling which, on a strict application of the Randwick Development Control Plan 2012 (“RDCP 2012”), would generate 3 parking spaces at most: at [49];
- (2) the site was constrained by its topography and setbacks, and the streetscape character was such that parking forward of the building line was undesirable: at [50];
- (3) limited weight was placed on varying parking survey data, some of which indicated that most if not all of the demand would be met in the immediate vicinity: at [55];
- (4) there was an unambiguous emphasis on sustainable transport options and strategies in RDCP 2012 including the addition of a ‘Note’ in the parking rates table anticipating car share facilities as a viable alternative for multi-unit developments in some circumstances, particularly in areas with higher density and ready access to public transport, such as the site: at [56]-[59]; and
- (5) the applicants proposed to make an application for a car share pod/ parking space adjacent to the site the membership of which would be available to anyone but specifically to six occupants of the proposed development for a minimum of five years, and for the inclusion of such as a condition of consent: at [60].