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Land and Environment Court of NSW Judicial Newsletter

Legislation

- **Statutes and Regulations**

Environmental Planning and Assessment Amendment Act 2008 — published 20 December 2010, proclaims that Schedule 4.1 [28] and [30] to the Act will commence 25 February 2011. These provisions will allow an authority who has issued an order under Division 2A of the *Environmental Planning and Assessment Act* 1979 to recover certain reasonable costs associated with the order by issuing a compliance cost notice.

Environmental Planning and Assessment Amendment Act 2008 — published 20 December 2010, proclaims that Schedule 5.2 to the Act commenced 1 January 2011. This amended the *Coastal Protection Act* 1979 to remove the need for the Minister of Planning's consent for development in coastal zones under the *Environmental Planning and Assessment Act* 1979.

Environmental Planning and Assessment Amendment Act 2008 — published 1 December 2010, commences amendments to the *Environmental Planning and Assessment Act* 1979 and the *Local Government Act* 1993 relating to complying development and bush fire prone land.

Environmental Planning and Assessment Amendment (Bush Fire Prone Land) Regulation 2010 — published 1 December 2010, amends the Environmental Planning and Assessment Regulation 2000 as follows:

(a) to extend a transitional period during which a repealed provision of the *Mining Act* 1992 (which allows mining operations to be carried out in areas the subject of a mining lease, unaffected by the *Environmental Planning and Assessment Act* 1979) continues to operate in respect of certain existing mining leases;

(b) to omit a spent aspect of the relevant transitional provision;

(c) to permit single applications for complying development certificates for development comprising the concurrent erection of new single storey or two storey dwelling houses each to be erected on existing adjoining lots;

(d) to require documents associated with complying development certificates relating to bush fire prone land to be given to the NSW Rural Fire Service and the relevant council;

(e) to ensure that bonded asbestos material or friable asbestos material is removed to the landfill site specified in the contract for that work for the purposes of applicable complying development conditions;

(f) to require a professional engineer's report for the erection or demolition of boundary walls in certain circumstances; and

(g) to permit consent authorities to consult with the NSW Rural Fire Service in certain circumstances until 20 May 2012 in relation to appropriate measures for protecting bush fire prone land.

The Department of Planning has released a Planning Circular (PS-10-028) on the changes.

Environmental Planning and Assessment Further Amendment Regulation 2010 — published 20 December 2010, amended the *Environmental Planning and Assessment Regulation* 2000 as follows:

(a) to permit existing commercial and light industrial uses of 1,000m^2 or more to be changed to certain other uses;

(b) to revoke provisions that would have made it a requirement after 1 March 2011 that all building work involving an alternative solution in respect of a fire safety requirement would need a fire safety engineer to certify that the alternative solution complied with the Building Code of Australia;

(c) to require an application for a BASIX completion receipt to be made before the issuing of an occupation certificate;

(d) to require the installation of smoke alarms in campervans, caravans, holiday vans, park vans, annexes and associated structures in which persons sleep;

(e) to increase a number of existing fees and to create a new fee for the issuing of BASIX certificates;

(f) to provide for the form of a compliance cost notice and to specify that such a notice cannot require the payment of certain costs and expenses; and

(g) to make transitional arrangements for the repeal of existing development control plans on the making of a standard instrument that applies to the land to which those plans apply.

Further information is available in a Planning Circular (PS 10-031) released by the Department of Planning.

The Environmental Planning and Assessment Amendment (Western Sydney Growth Areas—Special Contributions Area) Order 2011 - commenced 21 January 2011. The order modified Schedule 5A (1) of the *Environmental Planning and Assessment Act* 1979 in respect of land classified as "Western Sydney Growth Areas" to which special contributions apply.

The Department of Planning has special infrastructure contribution plans on exhibition for the following areas:

- Illawarra (West Lake Illawarra); and
- Lower Hunter.

Coastal Protection and Other Legislation Amendment Act 2010 — published 17 December 2010, proclaimed:

(a) 1 January 2011 as the day on which all the provisions of that Act commence (other than the provisions referred to in paragraph (b)); and

(b) 25 February 2011 as the day on which Schedule 1 [26] (to the extent that it inserts section 55ZH (2)–(5) into the *Coastal Protection Act* 1979) and Schedule 3.3 [1] and [3] to that Act commence.

The objects of the amending Act are to:

(a) encourage and promote plans and strategies for adaptation in response to coastal climate change impacts, including projected sea level rise; and

(b) promote beach amenity.

The Department of Planning has released the following circulars:

- amendments to s 149 planning certificates related to coastal matters (PS-11-001); and
- legislative changes relating to coastal matters (PS-10-032).

Growth Centres (Development Corporations) Amendment (Sydney Metropolitan Development Authority) Order 2010 — published 17 December 2010, amended the *Growth Centres (Development Corporations) Act* 1974 by establishing certain lands in the Sydney metropolitan region as growth centres (to be known as the Redfern-Waterloo Growth Centre and the Granville Growth Centre) and to constitute a development corporation (to be known as the Sydney Metropolitan Development Authority) in respect of those growth centres.

Water Management Amendment Act 2010 — published 17 December 2010, appointed 17 December 2010 as the day on which that Act (other than Schedules 2 and 3) commenced. The object of this Proclamation was to commence amendments to the *Water Management Act* 2000 relating to the granting of access licences for environmental purposes that arise out of agreements entered into by or on behalf of the State and to the transformation of water entitlements of certain landholders in private irrigation districts or the areas of private water trusts.

The Water Management (General) Amendment (Transformation) Regulation 2010 — commenced 17 December 2010. It amended the Water Management (General) Regulation 2004 to:

(a) to provide that a person who takes water from a water source through an artificial channel (cane drain) used only for the purposes of establishing plantings of sugar cane in certain areas is exempt from the need to have an access licence for taking that water; and

(b) to make provision with respect to entitlements under the *Water Act* 1912 that authorise the taking of water from certain water sources, being entitlements that are to become access licences to which Part 2 of Ch 3 of the *Water Management Act* 2000 applies; and

(c) to provide for the creation of new access licences that authorise the taking of tidal pool water from those water sources (for which no entitlement has previously been required under the *Water Act* 1912).

The Water Management (Application of Act to Certain Water Sources) Proclamation 2010 — appointed 17 December 2010 as the date on which the following amendments to the *Water Management Act* 2000 commenced:

(a) Pt 2 of Ch 3 of the Act applies to each water source to which a prescribed water sharing plan applies in relation to all categories and subcategories of access licence for any such water source other than floodplain harvesting access licences; and

(b) Pt 3 of Ch 3 of the Act applies to each water source to which a prescribed water sharing plan applies in relation to all approvals for any such water source other than drainage work approvals, flood work approvals and aquifer interference approvals.

Prescribed water sharing plan means each of the following plans:

2. the Water Sharing Plan for the Murrah-Wallaga Area Unregulated and Alluvial Water Sources 2010;
3. the Water Sharing Plan for the Richmond River Area Unregulated, Regulated and Alluvial Water Sources 2010;
4. the Water Sharing Plan for the Towamba River Unregulated and Alluvial Water Sources 2010; and
5. the Water Sharing Plan for the Tweed River Area Unregulated and Alluvial Water Sources 2010.

The Water Sharing Plan for the Coopers Creek Water Source Amendment Order 2010 — commenced 17 December 2010. The order amended the Water Sharing Plan for the Coopers Creek Water Source 2003.

Fisheries Management Amendment (Declared Diseases and Noxious Fish) Regulation 2010 — published 17 December 2010, amended the *Fisheries Management Act* 1994 by updating the:

(a) list of diseases to which Div 4 of Pt 6 of the Act applies (that is, the diseases in relation to which the Minister may declare a quarantine area, that the intentional or reckless communication of which to fish is an offence and that the sale or depositing of fish infected with which is an offence); and

(b) species of fish that are specified as noxious fish in the Act (that is, the fish the sale or possession of which is an offence and that a fisheries officer may seize or destroy).

The *Evidence Amendment Act* 2010 commenced on 14 January 2011. The Act amended the *Evidence Act* 1995 to make further provision with respect to the privilege against self-incrimination, the unavailability of witnesses and for other purposes. [full explanatory notes]

Evidence Amendment (Prescribed State or Territory Provisions) Regulation 2011 — published 14 January 2011, amended the Evidence Regulation 2010 in respect of certificates that confer use and derivative use immunity in respect of self-incriminating evidence and information.

Uniform Civil Procedure Rules (Amendment No 39) 2010 — published 10 December 2010, amends r 36.10 of the Uniform Civil Procedure Rules 2005 (filing of cost assessors' certificates).

Protection of the Environment Operations Amendment (Environmental Monitoring) Act 2010 — commenced 1 December 2010. The Act makes provision in relation to programs to monitor the environmental impact of certain licensed activities [full explanatory notes].

Protection of the Environment Operations (Clean Air) Amendment (Emissions Standards) Regulation 2010 — published 24 December 2010, amended the Protection of the Environment Operations (Clean Air) Regulation 2010 to provide that emergency standby plant comprising a stationary reciprocating internal combustion engine to generate electricity is exempt from the air impurity standards relating to nitrogen dioxide and nitric oxide, if the generator is used for less than 200 hours per year.

Brigalow and Nandewar Community Conservation Area Amendment Proclamation 2010 — commenced 24 December 2010, adds certain land to Zones 1 and 3 of the Community Conservation Area established by the *Brigalow and Nandewar Community Conservation Area Act* 2005.

Plantations and Reafforestation Amendment Act 2010 – commenced 1 January 2011. The amendments to the *Plantations and Reafforestation Act* 1999 are set out in the explanatory notes.

Plantations and Reafforestation (Code) Amendment Regulation 2010 — published 10 December 2010, amends the Plantations and Reafforestation (Code) Regulation 2001 to make:

(a) provision in respect of fire roads and other bush fire hazard reduction measure on plantations;

(b) further provision for the regulation of plantation operations, including in respect of roads, soil, drainage, water, the preservation of vegetation and record keeping; and

(c) other miscellaneous changes in respect of plantations.

The *Rural Fires Amendment Act* 2010 — commenced 7 December 2010. It amends the *Rural Fires Act* 1997 to provide for the designation of neighbourhood safer places and other purposes [full explanatory notes].

The *Sydney Olympic Park Authority Amendment Act* 2010 — commenced 13 December 2010. The Act amends the *Sydney Olympic Park Authority Act* 2001 to make provision with respect to:

(a) noise management at major events carried on at Sydney Olympic Park;

(b) the functions of the Sydney Olympic Park Authority in relation to residential facilities; and

(c) for other purposes [full explanatory notes].

Local Government Amendment (Environmental Upgrade Agreements) Act 2010 – assented to 29 November 2010, will amend the *Local Government Act* 1993 to make provision for environmental upgrade agreements [full explanatory notes].

Planning Appeals Legislation Amendment Act 2010 – assented to 29 November 2010, will provide a new streamlined way for the Land and Environment Court to resolve disputes concerning applications for the construction of detached single dwellings and dual occupancies (including subdivisions), or alterations or additions to such dwellings or dual occupancies: The objects of the Act are to:

(a) re-enact, with modifications, uncommenced provisions of the *Environmental Planning and Assessment Amendment Act 2*008 establishing rights to reviews of decisions by councils to reject development applications without determining them;

(b) re-enact, with modifications, uncommenced provisions of that Act establishing rights to reviews of decisions by councils relating to applications to modify development consents and to provide for appeals to the Court with respect to decisions about such reviews;

(c) require the Court to order an applicant who amends a development application on an appeal to pay the costs of the consent authority that are thrown away as a result of the amendment;

(d) provide for mandatory conciliation proceedings to be conducted by the Court in relation to proceedings relating to appeals about development applications for specified development and for determination by a Commissioner of the Court if no agreement is reached in conciliation proceedings;

(e) repeal uncommenced provisions of the *Environmental Planning and Assessment Amendment Act* 2008 relating to planning arbitrators; and

(f) make consequential amendments and repeals and provisions of a savings and transitional nature.

[full explanatory notes]

Courts and Crimes Legislation Further Amendment Act 2010 — assented to 7 December 2010 will, among other changes, amend the *Civil Procedure Act* 2005 to introduce new pre-litigation requirements in the Supreme Court [full explanatory notes].

Crimes (Sentencing Procedure) Amendment Act 2010 — assented to 7 December 2010, will amend the:

(a) *Crimes (Sentencing Procedure) Act* 1999 and various other Acts to implement certain recommendations of the Sentencing Council;

(b) *Crimes (Sentencing Procedure) Act 1999* to provide for the aggregation of sentences; and

(c) and for other purposes [full explanatory notes].

Criminal Procedure Amendment (Forum Sentencing Program) Regulation 2010 — published 3 December 2010, amended the Criminal Procedure Regulation 2010 as follows:

(a) to remove the requirement that a person may only participate in the forum sentencing program if the person has not previously been sentenced to a term of imprisonment;

(b) to exclude from the ambit of the sentencing program certain offences under the *Drug Misuse and Trafficking Act 1985*, the *Road Transport (Driver Licensing) Act 1998*, the *Road Transport (Safety and Traffic Management) Act 1999* and the *Summary Offences Act 1988*;

(c) to allow the program to be conducted in respect of the offence of affray and certain robbery offences under the *Crimes Act 1900*;

(d) to require the program administrator to ascertain whether a victim wishes to participate in a forum and to communicate the victim's wishes to the court, and to require the court to consider the victim's wishes in this regard in determining whether to make a forum participation order in respect of the offender;

(e) to require a relevant police officer to provide a victim's contact details to the program administrator (to enable the program administrator to ascertain whether the victim wishes to participate in a forum) within 72 hours of the program administrator requesting those details; and

(f) to require the program manager to notify the court if he or she forms an opinion that an offender who has been referred to the program is no longer suitable to participate in the program or if a victim withdraws his or her consent to participate in a forum and the program manager forms an opinion that the withdrawal will frustrate the purpose of a forum.

Criminal Case Conferencing Trial Further Amendment (Extension) Regulation 2010 — published 10 December 2010, extends the operation of the trial scheme established under the *Criminal Case Conferencing Trial Act* 2008 to proceedings in respect of an indictable offence for which a court attendance notice was filed on or after 1 May 2008 but before1 July 2011. Currently such a court attendance notice must be filed before 1 January 2011 for the trial scheme to apply.

Court Suppression and Non-publication Orders Act 2010 – assented to 29 November 2010, provides for the making of suppression and non-publication orders by courts [full explanatory notes].

Privacy and Government Information Legislation Amendment Act 2010 – commenced 1 January 2010. The Act establishes the Information and Privacy Commission by the merger of the Office of the Information Commissioner and privacy NSW [full explanatory notes].

The Government Information (Public Access) Amendment Subsidiary Agencies) Regulation 2010 – published 3 December 2010, declares certain bodies to be part of the Department of Industry and Investment for the purposes of the *Government Information (Public Access) Act* 2009.

Mining Amendment Act 2008 — commenced 15 November 2010, transferred to the Land and Environment Court the jurisdiction to hear and determine proceedings for offences under Part 17A of the *Mining Act* 1992.

Mining Regulation 2010 — published 5 November 2010, remade the Mining Regulation 2003, with some changes.

- **Consultation Drafts**

Civil Procedure Amendment (Supreme Court Representative Proceedings) Bill 2010 Consultation draft 12 Oct 2010. The object of this Bill is to amend the *Civil Procedure Act* 2005 to provide for a statutory regime based (with some modifications) on the provisions of Part IVA of the *Federal Court of Australia Act* 1976 of the Commonwealth for the conduct of proceedings of a representative nature in certain actions and proceedings in the Supreme Court. The provisions are modified where necessary to fit in with New South Wales law and practice. In addition, provisions are included:

(a) to make it clear that representative proceedings may be brought on behalf of a limited group of identified individuals; and

(b) to make it clear that representative proceedings may be taken against several defendants even if not all group members have a claim against all the defendants; and

(c) to enable the Supreme Court to order the cy-pres application of the undistributed part of a fund created by a defendant to reimburse injured group members.

For further information see the Lawlink website Legislation and Policy Division.

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

The SEPP (Major Development) 2005 was modified by the following:

- SEPP (Major Development) Further Amendment (Three Ports) 2010 — published 21 January 2011, modified the list of sites in the Newcastle LGA that are state significant sites;
- SEPP (Major Development) Amendment (Calderwood) 2010 — published 14 January 2011, declared the Calderwood site to be a state significant site;
- SEPP (Major Development) Amendment (Huntlee New Town Site) 2010 — published 21 December 2010, designates the Huntlee New Town site as a state significant site;
- SEPP (Major Development) Amendment (Barangaroo) 2010 — published 16 December 2010, amended the maps and development conditions for Barangaroo;
- SEPP (Major Development) Amendment (Transfer of Planning Controls) 2010 — published 12

November 2010, removes the Potts Hill Reservoir, Doonside Residential Precinct, Bloomfield, Illawarra Regional Business Park and Caritas sites from the list of state significant sites; and

- SEPP (Major Development) Amendment (State Significant Sites—South Wallarah Peninsula) 2010 — published 5 November 2010, designates the South Illawarra Peninsula as a state significant site.

The SEPP (Infrastructure) 2007 was amended by the following:

- SEPP (Infrastructure) Amendment (Miscellaneous) 2010 — published 17 December 2010, amends the SEPP in respect of exempt and complying development; and
- SEPP (Infrastructure) Amendment (Telecommunications) 2010 — published 3 December 2010, modifies the SEPP as explained in a Planning Circular (PS_10_026) released by the Department of Planning

The SEPP (Urban Renewal) 2010 commenced on 15 December 2010. The aims of the Policy are:

(a) to establish the process for assessing and identifying sites as urban renewal precincts;

(b) to facilitate the orderly and economic development and redevelopment of sites in and around urban renewal precincts; and

(c) to facilitate delivery of the objectives of any applicable government State, regional or metropolitan strategies connected with the renewal of urban areas that are accessible by public transport.

Further information on the SEPP, including precinct maps, issued by the Department of Planning is available through this link.

The Codes SEPP 2008 was amended by the following:

- SEPP (Exempt and Complying Development Codes) Amendment (Additional Codes) 2010 — published 1 December 2010, amends the Codes SEPP 2008 as outlined in Planning Circular (PS_10_27) released by the Department of Planning; and
- SEPP (Exempt and Complying Development Codes) Amendment (Exclusions and Variations) 2010 — published 19 November 2010, varies the land to which the Codes SPP applies.

SEPP (Sydney Region Growth Centres) Amendment (Marsden Park Industrial Precinct) 2010 — published 18 November, amends SEPP (Sydney Region Growth Centres) 2006, to include the Marsden Park precinct.

State Environmental Planning Policy No 15—Rural Landsharing Communities Amendment 2010 — published 14 January 2011 added Nambucca to the list of sites to which SEPP 15 applies.

SEPP (Sydney Drinking Water Catchment) 2011 — published 21 January 2011, is a new SEPP that aims to:

(a) provide for healthy water catchments that will deliver high quality water while permitting development that is compatible with that goal;

(b) provide that a consent authority must not grant consent to a proposed development unless it is satisfied that the proposed development will have a neutral or beneficial effect on water quality; and

(c) support the maintenance or achievement of the water quality objectives for the Sydney drinking water catchment.

The Department of Planning has released a planning circular (PS-11-002) on the new SEPP.

SEPP (Mining, Petroleum Production and Extractive Industries) Amendment 2010 — published 10 December 2010, amends the SEPP (Mining, Petroleum Production and Extractive Industries) 2007.

The Department of Planning has released a Planning Circular (PS 10-030) on amendments to the exempt and complying development provisions in the Mining SEPP.

- **Bills**

These Bills were pending before Parliament was prorogued and have therefore lapsed:

- Environmental Planning and Assessment Amendment (Maintenance of Local Government Consent Powers) Bill 2010;
- Water Mangement Amendment (Bulk Water Charges) Bill 2010;
- Environmental Planning and Assessment Amendment (Boarding Houses) Bill 2010; and
- Threatened Species Conservation Amendment (Ecological Consultants Accreditation Scheme) Bill 2010.

- **Miscellaneous**

Recent Briefing Papers published by the NSW Parliamentary Library Research Service include:

(a) Plantation Forestry in NSW: Regulatory Regimes and Future Prospects – full briefing paper and summary; and

(b) Regulation of the Coal Seam Gas Industry in NSW.

The Department of Planning has released:

(a) Metropolitan Plan for Sydney 2036;

(b) A Planning Circular (PS 10-029) that outlines changed to the Infrastructure SEPP and other EPIs;

(c) Discussion paper on the review of the Affordable Rental Housing SEPP; and

(d) Standards for Bush Fire Hazard Reduction Works in SEPP 14 – Coastal Wetlands;

Judgments

High Court of Australia

Jemena Gas Networks(NSW) Limited v Mine Subsidence Board [2010] HCATrans 332 (Gummow, Hayne and Heydon JJ)

The facts and issues in this matter are summarised in Volume 2 Issue 3 of the Land and Environment Court Newsletter, July 2010.

Held: special leave granted on 10 December 2010.

Aktas v Westpac Banking Corporation Limited [2010] HCA 47 (French CJ, Gummow, Hayne and Heydon JJ)

Facts: on 4 August 2010, the High Court delivered judgment allowing an appeal by Mr Aktas and made consequential orders, including an order that Westpac pay Mr Aktas' costs in that Court and liberty to re-list the appeal for further orders in respect of interest if interest was agreed. No re-listing was sought by the parties. Five weeks later Westpac filed a summons seeking to vary the cost order to permit it to pay some but not all of the costs of the appeal. At the time of the variation was sought, the Court's orders had not yet been authenticated. Westpac made no submission in support of the costs order it subsequently sought either before the Court of Appeal or in the High Court. Similarly, it did not foreshadow any application for any special costs order.

Issue:

(1) did the Court have the power to vary the costs orders made; and

(2) ought Westpac be permitted to seek a different costs order to that made.

Held: refusing to vary the costs orders:

(1) the Court had the power to vary the costs order made by it. The exercise of the jurisdiction to reopen a judgment and grant a rehearing was not confined to circumstances in which the applicant can show that, by accident and without fault, the applicant has not been heard. But the jurisdiction is to be exercised "with great caution" having regard to the public interest and the finality of litigation: at [5] and [6]; and

(2) Westpac had ample opportunity to foreshadow its application for a special costs order were it unsuccessful. To the extent that the costs order made was premised on some misapprehension by the Court as to the correct facts, it was to be attributed solely to Westpac not having raised those facts earlier: at [7].

Minister for Immigration and Citizenship v SZJSS [2010] HCA 48 (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ)

Facts: the applicant and his wife applied for a protection visa claiming that the applicant, a school teacher who also owned a shop, feared persecution from the government of Nepal and the Maoists during the civil war in Nepal. The Refugee Review Tribunal accepted that "school teachers" and "business people" were "particular social groups" and that the applicant had been forced to participate in Maoist training camps. However, during the period the applicant had been in Australia the civil war had ended and the social and political conditions had changed. The Tribunal decided to give "no weight" to three letters relied upon by the applicant and described certain evidence given by him as a "baseless tactic". The Federal Magistrates Court dismissed an application for judicial review; the Federal Court on appeal found that the Tribunal had fallen

into jurisdictional error because it failed to give "proper, genuine and realistic consideration" to the letters and because of its use of the term "baseless tactic", and that its reasons gave rise to a reasonable apprehension of bias.

Issues:

(1) whether the Tribunal fell into jurisdictional error by choosing to give no weight to the letters produced by the applicant and by describing the giving of certain evidence as a "baseless tactic"; and

(2) whether, in characterising the applicant's central claim that as a school teacher he was singled out for harassment as a "baseless tactic", the reasons of the Tribunal revealed a pre-judgment of a critical issue.

Held: allowing the appeal and setting aside the decision of the Federal Court:

(1) the weight to be placed on the letters was a question upon which reasonable minds might come to different conclusions. The Tribunal's preference for other evidence could not be said to constitute a failure to take into account a relevant consideration, nor could it be said to be a failure to respond to a substantial argument: at [35];

(2) understood correctly, the use of the expression "baseless tactic" did not give rise to any jurisdictional error: at [39]; and

(3) the expression "baseless tactic" was used by the Tribunal in its reasons as part of its rejection of the claim that the applicant was at risk in Kathmandu as a teacher. As such, it did not provide any foundation for the contention that a central but contestable issue was pre-judged by the Tribunal: at [44].

NSW Court of Criminal Appeal

Southon v Gordon Plath on behalf of the Department of Environment and Climate Change [2010] NSWCCA 292 (Beazley JA, Kirby and Johnson JJ)

(related decision: *Gordon Plath on behalf of the Department of Environment and Climate Change v Vurlow; Gordon Plath on behalf of the Department of Environment and Climate Change v Hockey; Gordon Plath on behalf of the Department of Environment and Climate Change v Southon* [2009] NSWLEC 102 Pain J)

Facts: the appellants, who are the respective proprietors of three adjoining rural/residential parcels of land situated in Dulguigan near Murwillumbah in norther New South Wales ("the land"), were each charged with an offence against the *National Parks and Wildlife Act* 1974, s 118A(2) in that each had harmed plants forming part of an endangered ecological community known as the "Swamp Sclerophyll Forest on Coastal Floodplains of the NSW North Coast, Sydney Basin and South East Corner Bioregions" (the Swamp Sclerophyll EEC). The harm alleged to have been caused by each was that he had cut down trees on his land which formed part of the Swamp Sclerophyll EEC. An essential element of the charge was that the vegetation which had been cut down formed part of the Swamp Sclerophyll EEC.

The prosecutor withdrew the charges on 18 June 2009, after a report by the appellants' soil expert, Dr Hazelton, had been tendered in evidence. The trial judge then dismissed the summons whereupon the appellants made an application for costs under the *Criminal Procedure Act* 1986, s 257C. Her Honour refused that application. The appeal was brought under the *Criminal Appeal Act* 1912, s 5AB from her Honour's refusal to make the costs orders sought by the appellants following the withdrawal of the prosecution and her Honour's dismissal of the summons.

Issues:

(1) did the trial judge fail to give genuine, proper and realistic consideration to relevant matters in exercising her discretion not to award costs; and

(2) was the decision of the trial judge manifestly unreasonable?

Held: dismissing the appeal:

(1) the defendants bore the onus of establishing that the prosecutor unreasonably failed to investigate or investigate properly any relevant matter of which it was aware or ought reasonably to have been aware which suggested that the accused person might not be guilty or for any other reason the proceedings should not have been brought: at [57];

(2) the evidence disclosed that the prosecutor did not unreasonably fail to investigate or investigate properly something of which it was aware or oguth to have been aware which suggested that the defendants might not be guilty or that for any other reason the proceedings ought not to have been brought. There was no failure by the prosecution to investigate properly the composition of the soils which it knew or ought to have known were not alluvial soils: at [69];

(3) merely because the prosecution's expert evidence failed to undermine the defendants' expert evidence in respect of soil merely meant that the prosecutor would not be able to prove beyond reasonably doubt that that aspect of the charge. But this of itself did not prove that the prosecutor unreasonably failed to investigate a matter of which it was aware or ought to have been aware: at [75];

(4) the fact that the trial judge did not set out in detail the deficiencies in the prosecutor's expert soil evidence did not mean that she had failed to give full and proper consideration of the evidence or to the nature and degree of the deficiencies in the prosecution case: at [78]-[79];

(5) although recent amendments to the *Criminal Procedure Act* 1986 applying to the Supreme and District Court do not apply to the Land and Environment Court, "their enactment reflects the fact that the traditional approach, where an accused person could hold back such evidence until the defence case was underway, no longer reflects the law in this State with respect to trials for the most serious crimes": at [83]; and

(6) where, as was the case here, an accused person holds back from the prosecution an expert report until after the prosecution had closed its case, this would operate strongly against that person in any subsequent application for costs by that accused person: at [85].

NSW Court of Appeal

Zhang v Zemin [2010] NSWCA 255 (Spigelman CJ, Allsop P, McClellan J)

(related decision: *Zhang v Zemin* [2008] NSWSC 1296 Latham J)

Facts: Zhang, ("the applicant"), a member of Falun Gong in China, sought damages for acts of torture, assault, false imprisonment and wrongful arrest alleged to have been committed in China between 1999 and 2000, by or on behalf of the former President of the People's Republic of China ("PRC"), the Falun Gong Control Office and a member of the Politburo of the Communist Party of China ("the respondents"). The Attorney-General of the Commonwealth was joined and was granted a declaration that the President and member of the Communist Party of China were immune from the jurisdiction of the Court under the provisions of the *Foreign States Immunities Act* 1985 (Cth). The applicant appealed.

Issues:

(1) when should jurisdictional issues be decided;

(2) whether the applicant was permitted to rely on the *Immunities Act* to prove service and then raise an issue of whether the Act applied to the respondents;

(3) whether principles of international law could be used to interpret Australian statutes; and

(4) whether immunity could exist under the *Immunities Act* for civil claims alleging acts of torture as an exception based on international law.

Held: relevantly dismissing the appeal:

(4) an issue of jurisdiction should be determined as a preliminary matter: at [33], [157] and [174];

(5) it is not appropriate for the status of the respondents to be challenged on appeal when the applicant had relied on their status under the *Immunities Act* at first instance to prove service. To raise an issue of their status on appeal was fundamentally inconsistent with the way the proceedings were conducted in the lower court: at [57]-[59], [157] and [174];

(6) an Australian court must apply an Australian statute in accordance with its terms, even if doing so may conflict with a principle of international law. Where there is an ambiguity in an Australian statute it is permissible to interpret it in accordance with Australia's international obligations, including rules of customary international law: at [125] and [128]; and

(7) the terms of s 9 of the *Immunities Act* "except as provided by or under this Act …" did not permit an exception based upon international law, such as an exception based on torture being contrary to a rule of *jus cogens*: at [130] and [164].

Kelly v Mosman Municipal Council [2010] NSWCA 370 (Campbell JA)

(related decisions: *Mosman Municipal Council v Kelly* [2007] NSWLEC 90 Jagot J, *Mosman Municipal Council v Kelly (No 2)* [2008] NSWLEC 229 Lloyd J, *Mosman Municipal Council v Kelly (No 3)* (2009) 167 LGERA 91; [2009] NSWLEC 92 Biscoe J, *Mosman Municipal Council v Kelly (No 6)* [2010] NSWLEC 20 Biscoe J)

Facts: Mosman Municipal Council ("the council") sought an order for the demolition of a garage structure which it contended had been erected outside the scope of the development approval. The council was unable to serve the proceedings on Mr Kelly and thus an order for substituted service was made. Substituted service was complied with and orders were made *ex parte* for the demolition of the garage structure. The orders were not complied with and the council filed a notice of motion alleging contempt of court. Mr Kelly sought to set aside the *ex parte* judgment. The orders were not set aside on the basis that Mr Kelly had no reasonable prospect of success. However, they were varied to allow Mr Kelly greater time to comply with the orders. Mr Kelly failed to comply with the extended timetable. The council filed a second notice of motion alleging that Mr Kelly was in contempt of court. Mr Kelly was found guilty of contempt. Mr Kelly was fined $20,000 and a monthly fine of $5,000 so long as the demolition order continued not to be complied with, suspended till 1 July 2010. Mr Kelly filed an intention to appeal. At all times Mr Kelly was represented by either a barrister or by an agent, Ms Lydia Williams.

Issues:

(1) whether Ms Lydia William should be granted leave to appear as Mckenzie friend for Mr Kelly until such time as a legal representative is appointed;

(2) whether the Court should refer Mr Kelly to the registrar for referral to a barrister or solicitor on the Pro Bono Panel for legal assistance;

(3) whether an extension of time in which to seek leave to appeal should be granted;

(4) whether the matter of Kelly v Mosman Municipal Council (2010/411246) in the NSW Supreme Court, Equity Division should be linked to this matter in the Court of Appeal and be heard prior to the appeal; and

(5) whether the decisions of the Land and Environment Court should be stayed.

Held: allowing limited aspects of the motion:

(1) Ms Williams was permitted to appear as a McKenzie friend on the motion. It was not appropriate to grant Ms Williams leave to appear as a McKenzie friend on an indefinite basis though. The right of someone to appear as a McKenzie friend is a matter that should be in the control of the particular court that is hearing any particular application to enable it to revoke the order if circumstances arise: at [7];

(2) in determining whether a referral to the Pro Bono Panel should be made, the Court is to consider the grounds of the appeal: at [20];

(3) there were no reasonable grounds to grant a pro bono referral in relation to the decision that the development was illegal and was required to be demolished by Jagot J and then confirmed, but with an extended timetable, by Lloyd J. Nor should these decisions be stayed, or an extension of time to appeal granted: at [21]-[40] and [61];

(4) it was appropriate to make a limited referral to the Pro Bono Panel concerning the matter of contempt in consideration of the comparatively small compass of the matters where a penalty of significant kind had been visited upon Mr Kelly and when he was an aged pensioner: at [55];

(5) insofar as an appeal remained on foot concerning the orders imposing a penalty it was appropriate that those orders be stayed until the matter had been fully heard: at [57]; and

(6) there was no occasion to delay the hearing of the present appeal while the proceedings in the Equity Division were on foot. Even if it were correct that the Council had committed all the breaches of duty as alleged by Mr Kelly, the duty of a citizen is to obey a court order that requires him or her to take some particular action: at [59].

Hooper v Port Stephens Council [2010] NSWCA 368 (Tobias JA, Handley and Sackville AJJA)

(related decision: *Hooper v Port Stephens Council (No 2)* [2010] NSWLEC 112 Pain J)

Facts: the appellant challenged the validity of a development consent to erect a dwelling house granted by Port Stephens Council ("the Council") to the second respondent. Pain J rejected the appellant's submissions that the proposed building contravened the 9m height limit in the Residential 2(a) zone under the Port Stephens Local Environmental Plan 2000 ("the LEP"), and the requirement in part B6.7 of the Development Control Plan 2007 ("the DCP") that development in the Residential 2(a) zone "must not exceed two storeys". The LEP defined "height" to mean "the maximum height of the building measured vertically from the natural ground level or the finished ground level of the completed building, whichever is the lower".

Issues:

(1) whether the height of the building was above 9m and therefore prohibited; and

(2) whether the requirement in the DCP that development not exceed two storeys was a mandatory requirement.

Held: dismissing the appeal with costs:

(1) the construction of the definition of "height" adopted by Pain J, namely that the building height was to be measured vertically from the highest point to the natural ground level or the finished ground level whichever was the lower, in the same vertical plane, was clearly correct. The measurement conducted by the appellant which resulted in a height of 9.422m was not one in accord with the proper construction or the definition of "height", and the appellant's contention that her Honour had erred in her construction of the definition should be rejected: at [12], [13];

(2) the provision of the DCP in relation to the maximum number of storeys was not a mandatory requirement: at [10];

(3) the Council officers had not only identified but given careful consideration to the relevant provisions of the LEP and DCP upon which the appellant relied: at [22];

(4) insofar as there were inconsistencies between the proposed development and the provisions of the LEP that were not mandatory but only descriptive, the proposition advanced by the appellant that there was no power to approve the development had no legal validity: at [24];

(5) it had not been demonstrated that the rejection of the tender of a letter from a registered surveyor opining that the height of the building was 9.422m had miscarried: at [27]; and

(6) there was no error in the approach of her Honour in relation to the order for costs of the Class 4 proceedings: at [29].

Halley v Minister Administering the Environmental Planning and Assessment Act 1979 [2010] NSWCA 361 (Giles, Hodgson, Tobias JJA)

(related decision: *Halley v Minister Administering the Environmental Planning and Assessment Act 1979* [2010] NSWLEC 6; (2010) 170 LGERA 449 Lloyd J)

Facts: the Minister had compulsorily acquired an area of land which formed the foreshore part of Lot 212 DP 866891, on Woodford Bay. The acquired land was zoned 9(c) (Regional Open Space Reservation Zone) under the Lane Cove Local Environmental Plan 1987 ("the LEP") and the residue of Lot 212 was zoned Residential 2(a2)(2(a2)). The appellant had rejected the Minister's offer of compensation in the sum of $2,016,500 under the *Land Acquisition (Just Terms Compensation) Act* 1991, claiming compensation in the amount of $3,400,000 together with disturbance. The appellant's primary submission was that Lot 212 at the date of acquisition was capable of subdivision into two allotments and that the construction of Nott Lane could have been extended to serve the additional lot that would have fronted Woodford Bay. In determining the market value under s 55 of the Act to be $1,300,000, Lloyd J had accepted that Lot 212 was physically capable of being subdivided into two allotments in terms of the minimum area requirements in the LEP; however, the likelihood of any consent being granted for a subdivision of that allotment was extremely remote. His Honour concluded that a hypothetical purchaser would conclude that Lot 212 had little, if any, potential for further subdivision.

Issue:

(1) whether the market value of the land had been correctly determined.

Held: dismissing the appeal with costs:

(1) at the date of acquisition the number of lots still zoned 9(c) had reduced from six to two (excluding the acquired land). Further, the foreshore land along the waterfront of Woodford Bay was at the date of acquisition in three zones, being 6(a) Open Space Recreation "A", 6(b) Open Space Bushland "B", and 9(c) Regional Open Space Reservation, and not two, zone 6(b) not being referred to. The misinterpretation of the map that formed part of the LEP constituted an error of law: at [21] and [27];

(2) by overlooking the fact that land in the immediate vicinity of the acquired land was zoned 6(b) which had been reserved for a public purpose and acquired by the State Planning Authority, the Planning and Environment Commission or the Minister, his Honour had failed, as required by s 56(1)(a) of the Act to disregard not only the land zoned 9(c) but also other land along the western foreshore of Woodford Bay which was zoned 6(b): at [49];

(3) the conclusion that it was highly unlikely that the Council would consent to a further subdivision of Lot 212 was based on a series of findings that were divorced from the issue in respect of which error was alleged. His Honour's reasoning was essentially dependent on his application of planning controls which he was required to apply in circumstances where it was open to find that it was highly unlikely that the Council would approve a third lot: at [79];

(4) it was critical that at trial it was accepted that the Council would insist on a foreshore building line of up to 30m along the whole of the foreshore within which bushland would be maintained. Maintenance of the bushland strip along the foreshore was a given, whether it was a result of the reservation or of a foreshore building line: at [80] and [81]; and

(2) the error with respect to the failure to recognise the 6(b) land and ignore its zoning was not sufficiently material to or operative upon the ultimate decision to warrant the setting aside of the decision, and did not go to the heart of the cognitive and evaluative process adopted: at [83] and [84].

Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd [2010] NSWCA 353 (Giles, Hodgson, Tobias JJA)

(related decision: *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd and Minister for Mineral Resources (No 2)* [2010] NSWLEC 1 Preston CJ; *Caroona Coal Action Group Inc v Coal Mines Australia Pty Ltd (No 3)* [2010] NSWLEC 59 Preston CJ)

Facts: the applicant brought proceedings under s 296 of the *Mining Act* 1992 ("the Act") challenging the validity of an exploration licence ("EL6505") granted to Coal Mines Australia ("CMA") over an area formerly part of the area covered by Coal Authorisation No 216 ("A216") issued in 1980 and successively renewed until 2003. On 22 February 2006 the Minister signed and dated the Instrument of Renewal of A216 for a term expiring on 28 February 2011. On 12 April 2006 the Department's Manager, Coal and Petroleum Titles, by delegation from and on behalf of the Minister and Director-General, approved a submission to approve pursuant to ss 121(1)(a) and 123(1)(b) of the Act the partial transfer of A216 to CMA and to register CMA as holder of EL6505. CMA and the Minister executed EL6505 on 12 April 2006. At first instance the proceedings were dismissed with costs.

Issues:

(1) whether in purporting to renew A216 the Minister was in breach of s 114(6) of the Act in that there was no evidence that he was satisfied that special circumstances existed that justified the renewal of that authority over the number of units in question;

(2) whether the Deed between the Minister and CMA purported to be a grant of an exploration licence pursuant to Pt 3 of the Act in that it did not purport to be a transfer by the Director-General as the holder of A216 of part of that authority to CMA; and

(3) whether there was a breach of s 160(1) of the Act which required that a legal or equitable interest in an authority could not be created or disposed of except by instrument in writing.

Held: dismissing the appeal with costs:

(1) there was no error of law in the finding that that the appellant had not established that the Minister failed to form the requisite mental state of satisfaction for the purposes of s 114(6): at [61]-64];

(2) as the appellant had failed to establish that there was no evidence capable of supporting the inference that the Minister did form the relevant mental state of satisfaction, it must logically and inevitably follow that it had failed to establish, the onus being upon it, that the Minister did not form that mental state of satisfaction: at [66];

(3) where a transfer or part transfer of an authority was effected pursuant to Div 2 of Pt 7, s 160(1) had no part to play in giving effect to that statutory process. Section 122 contained its own code with respect to the registration of transfers including a part transfer, and the general provisions in ss 160 and 161 had no application to the specific provisions of s 122 which governed the registration of a transfer of an authority: at [89];

(4) a transfer or part transfer was a creature of the statute and the only documentation required was that referred to in ss 120(2) and 123(2): at [90];

(5) s 123(2)(a) had no application to the present case, and the Deed as signed between the Minister and CMA complied with s 123(2)(b): at [91];

(6) the conclusion that nowhere in the statutory scheme for the transfer of authorities was there a requirement for a document or instrument of transfer between the transferor and transferee to effect the transfer of an authority either in whole or in part was clearly correct: at [94];

(7) there being no evidence as to the sequence in which the relevant acts or events occurred, the appellant could not have discharged the onus of establishing on the balance of probabilities that there had been a breach of the timing requirement of s 123(2) that a document setting out the terms of a proposed new authority be signed before part of an authority is transferred: at [102]; and

(8) there may be some doubt as to whether the public interest costs principle applies to an appeal by an unsuccessful litigant who asserts that the original proceedings had been instituted and prosecuted in the public interest. The primary judge was not persuaded that the usual rule that costs should follow the

event should be relaxed with respect to the trial and gave cogent reasons to support that decision; the same should apply to the costs of the appeal: at [106].

Jeray v Blue Mountains City Council (No 2) [2010] NSWCA 367 (Allsop P and McFarlan JA, Young JA in dissent)

(related decision: 40968 of 2008, 16 July 2009 Lloyd J and *Jeray v Blue Mountains City Council* [2010] NSWCA 153 Handley JA and Sackville AJA)

Facts: on the fourth day of a hearing in the Land and Environment Court challenging the validity of certain development consents, Mr Ivan Jeray, an unrepresented litigant, brought a motion for the primary judge to recuse himself. His Honour dealt with the motion and dismissed it. Mr Jeray argued that the primary judge ought not sit on the recusal application as it concerned himself. The primary judge asked Mr Jeray to proceed, but he protested that he could not. The judge heard submissions from the respondents to the effect that if Mr Jeray did not continue, the judge would have no choice but to dismiss the case. After asking Mr Jeray for his response, the primary judge held that as Mr Jeray had declined to proceed with the matter, he was in substance discontinuing the proceedings. Accordingly, his Honour dismissed case with costs.

Issues:

(1) whether Mr Jeray was denied procedural fairness as a consequence of the primary judge's conduct.

Held: allowing the appeal:

(1) at the root of procedural fairness is the provision of a fair hearing to a litigant and the basal notion that the litigant has understood the proceedings before him and had an adequate opportunity given to him considering his attributes, qualities and deficiencies which render the litigant more or less able to vindicate his rights in court. A sharp line between rules and consequences cannot be drawn in this respect. The question is what a judge must do to provide a fair hearing and equal justice, not what he might do to exemplify judicial practice: at [6] and [12];

(2) the trial judge failed to afford Mr Jeray the fairness required by the unusual circumstances of the case. He failed to ascertain if Mr Jeray was asking for an adjournment by his ambiguous response. In the light of the character of the consequences of dismissing the action with costs, the ascertainment of whether Mr Jeray was obstinately refusing to proceed with the case had to be put to him squarely. His Honour did not indicate to Mr Jeray prior to dismissing the matter with costs that the dismissal would be with costs, and the significance of the costs consequences were not explained. The necessarily interlocutory nature of the dismissal was not specified and there was insufficient clarity in the absence of clear warnings to evince an implication that Mr Jeray was refusing to proceed or impliedly discontinuing his case. It was no answer to a complaint of procedural fairness that once the proceedings were dismissed with costs the litigant did not of his own motion seek to have the orders withdrawn: at [24] and [25]; and

(3) fairness to Mr Jeray required that he be told what the judge considered to be the effect of his conduct and the possible consequences of his discontinuing the proceedings, particularly regarding his liability to pay the respondents' costs and the probable requirement to pay these costs before commencing further proceedings: at [37] and [38].

Those Best Placed Pty Ltd v Tweed Shire Council [2010] NSWCA 309 (Allsop P and Macfarlan JA)

(related decision: *Those Best Placed Pty Ltd v Tweed Shire Council* [2010] NSWLEC 83 Biscoe J)

Facts: Those Best Placed Pty Ltd ("TBP"), a start up business that had never traded, made a development application to erect a shed with a bathroom on land in Upper Crystal Creek. Tweed Shire Council ("the council") required that TBP provide a report demonstrating that sufficient land area and site conditions existed to cope with the additional use to which a septic tank might be subject as a result of the construction. TBP refused to supply the report and the development consent was refused. Biscoe J dismissed the application

which sought, amongst other things, a review of the council's refusal of the development application, on the basis that it disclosed no real cause of action and ordered that TBP pay the council's costs.

Issue:

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

Held: denying leave to appeal:

(1) the submissions put by TBP did not warrant granting leave to appeal. None of them raised any matter of principle or of general importance, or raised any clearly arguable issue, much less one that suggested that any obvious injustice had occurred as a result of the decision at first instance: at [7]; and

(2) the trial judge was correct to find that the request by the council for a report was justified by cl 54 of the Environmental Planning and Assessment Regulation 2000 to consider the development application: at [8]-[9].

Supreme Court of NSW

Transport Construction Authority v Parramatta City Council [2010] NSWSC 1168 (Gzell J)

Facts: in 2004 Parramatta City Council ("the council") sought compensation for land compulsorily acquired by the Transport Construction Authority ("TCA") in the Land and Environment Court. In 2006 these proceedings and others were settled by a deed of release and discontinued. In 2010 Parramatta City Council made a second claim for compensation outside the 90 day period prescribed for objection to the amount of compensation offered. A notice of motion seeking leave to file outside of the 90 days was pending in the Land and Environment Court. This gave rise to a dispute as to whether the sections of road acquired were the subject of the first proceedings. TCA opposed the motion on the basis that the council's claim was answered by the deed. The council disputed this on the basis that the intention of the parties in forming the deed was that it applied to land adjacent to the road and did not include the road. TCA sought a declaration in the Supreme Court that the deed between the parties settling the earlier proceedings in the Land and Environment Court was a bar to current proceedings between the parties in the Land and Environment Court. The council filed a notice of motion seeking that the proceedings be transferred to the Land and Environment Court.

Issues:

(1) whether a transfer order to the Land and Environment Court should be made.

Held: transferring the matter to the Land and Environment Court:

(1) the proceedings in both the Supreme Court and the Land and Environment Court were related because the matters which they dealt with were so closely associated as to form part of the same controversy: at [26];

(2) the Land and Environment Court was the most appropriate forum having exclusive jurisdiction to determine compensation for compulsory acquisition of land, the deed being executed in respect to proceedings in the Land and Environment Court and the relief sought in the Supreme Court was with respect to the current proceedings in the Land and Environment Court: [33], [36] and [54]; and

(3) there was no impediment to the Land and Environment Court deciding the issue raised in the proceedings in the Supreme Court of whether the deed was a bar to the current proceedings in the Land and Environment Court: [49].

Hoxton Park Residents' Action Group Inc v Liverpool City Council [2010] NSWSC 1312 (Rein J)

Facts: the proceedings concerned a development approval given by the Liverpool City Council ("the council") to the Malek Fahd Islamic School Ltd ("the school"), which wishes to develop land at Hoxton Park. Hoxton Park Residents' Action Group Inc ("Hoxton Park") were opposed to the development approval granted to the school and the owner of the land on the basis of the creation of a "faith based educational facility". Relevantly, Hoxton Park's case was that the funding arrangements between the Commonwealth and the State and thus to the school contravened s 116 of the Constitution (prohibiting the Commonwealth from making any law establishing a religion or for imposing religious observance or for prohibiting any free exercise of any religion); that the council had not been validly established and had no properly recognised or lawful existence; that the State did not have the power to make a law authorising the approval and construction of the school and that the property rights of Hoxton Park were infringed or were threatened to be infringed. By notices of motion, the defendants sought to have the proceedings dismissed or struck out on the basis that no reasonable cause of action had been disclosed.

Issues:

(1) whether the funding arrangements between the Commonwealth and the State and thus to the school contravened s 116 of the Constitution;

(2) whether the council had been validly established and had a lawful existence;

(3) whether the State had the power to make a law authorising the approval and construction of the school;

(4) whether the property rights of Hoxton Park were infringed or were threatened to be infringed by the development; and

(5) whether the proceedings disclosed a reasonable cause of action.

Held: dismissing the proceedings:

(1) Hoxton Park's focus was not on the provision of funding to religious schools but to Islamic schools. This was relevant to the application of s 116 of the Constitution: at [20]:

(2) a religion cannot be established as the religion of Australia or as a national institution of the Commonwealth by permitting a school to be build at Hoxton Park. The fact that few or no persons of the Muslim faith live in Hoxton Park cannot be relevant to the question of whether s 116 is infringed by the funding legislation: at [35];

(3) the funding legislation would not have the effect of prohibiting the free exercise of other religions and faiths at the school and thus amount to a prohibition of religion pursuant to s 116: at [44];

(4) the proscriptions in s 116 of the Constitution are against Commonwealth, and not State, laws: at [55]

(5) laws which permit councils to grant development consents are laws for the peace, welfare and good government of New South Wales pursuant to s 5 of the *Constitution Act* 1902 (NSW) ("the State Constitution") and therefore do not amount to a breach of the State Constitution. Any suggestion that the council was usurping the legislative power of the State was "absurd": at [59];

(6) the failure of the 1998 referendum to amend the Constitution to make express reference to local government is irrelevant to the legitimacy of the existence of local councils: at [65];

(7) pursuant to ss 5 and 51 of the State Constitution and ss 2 and 5 of the *Australia Act* 1986 (Cth), the State Parliament has the power to enact legislation with respect to local councils: at [68]-[74];

(8) it followed that the argument that the council did not have the power to consider and approve the DA also failed: at [74]; and

(9) none of the claims were tenable or disclosed a reasonable cause of action: at [98].

Western Australian Supreme Court

Chief Executive Officer, Department of Environment and Conservation v Szulc [2010] WASC 195 (Martin CJ)

Facts: the Department of Environment and Conservation ("DEC") commenced proceedings in October 2009 against Mr Szulc for clearing vegetation. DEC sought an interlocutory injunction to prevent Mr Szulc from carrying out any further clearing. Mr Szulc was unprepared to deal with the application. On that basis it was adjourned and an interim injunction was granted. At the hearing of the interlocutory injunction in November 2009, Martin CJ found that clearing had taken place on the property which had not been the subject of a clearing permit issued pursuant to the provisions of the *Environmental Protection Act* 1986 (WA). As a result the interim injunction was continued. The matter was then directed to mediation. However, when DEC officers carried out an inspection on 10 May 2010, it revealed that further clearing of 42 hectares had been undertaken by Mr Szulc.

Issues:

(1) whether the defendant was in contempt of court; and

(2) if so, what was an appropriate penalty.

Held: the defendant was guilty of contempt:

(1) the contempt was serious and was undertaken wilfully and deliberately as part of an ongoing campaign by Mr Szulc directed against DEC and its attempts to protect the native vegetation on his property: at [44]; and

(2) Mr Szulc was sentenced to three months imprisonment: at [52].

Land and Environment Court of NSW

Judicial decisions

- **Judicial Review**

Parks and Playgrounds Movement Inc v Newcastle City Council [2010] NSWLEC 231 (Biscoe J)

Facts: the applicant challenged the lawfulness of the council's decision to remove 14 fig trees in Laman Street, Newcastle. No development application was lodged for the removal of the trees. The council justified the proposed removal as an exercise of power under s 88 of the *Roads Act* 1993 or alternatively, under cl 98(2) of State Environmental Planning Policy (Infrastructure) 2007 ("ISEPP"). Section 88 of the *Roads Act* allowed a roads authority to "remove…any tree…on or overhanging a public road if, in its opinion, it is necessary to do so for the purpose of…removing a traffic hazard". It was expressed to apply "despite any other Act or law to the contrary".

Issues:

(1) whether the power in s 88 of the *Roads Act* is subject to a jurisdictional fact that the trees were a traffic hazard;

(2) whether a tree is "on or overhanging a public road" in circumstances where its roots and branches extended into or overhung adjoining land that was not a public road;

(3) whether s 88 of the Roads Act was a free-standing provision which did not require development consent under Pt 4 of the *Environmental Planning and Assessment Act* 1974 ("EPA Act") or compliance with ss 111 and 112 in Pt 5;

(4) whether council's power to remove the trees under cl 98(2) of ISEPP required development consent under Part 4 of the EPA Act or compliance with Part 5; and

(5) whether a species impact statement was required.

Held: dismissing the application:

(1) whether the trees are a traffic hazard was not a jurisdictional fact. Section 88 of the *Roads Act* expressly prescribed only one condition to the exercise of power – that the roads authority form the prescribed opinion: at [88];

(2) as a matter of ordinary parlance, the trees were "on or overhanging a public road" even though some roots and branches extended into or overhung adjoining land: at [93];

(3) the words in s 88 of the *Roads Act* "despite and other Act or law to the contrary", suggested that s 88 was not subject to any other statutory planning requirements: at [99]. Thus, the council's power to remove the trees under s 88 was not subject to any development consent requirement in Pt 4 of the EPA Act nor the requirements of Pt 5: at [116];

(4) the council's power to remove the trees under cl 98(2) of ISEPP was not subject to any development consent requirement under Pt 4 but is subject to Part 5: at [17], [121]. No breach of Pt 5 had been established: at [17]; and

(5) the removal of the trees was unlikely to significantly affect threatened species. Consequently, even if development consent was required, a species impact statement was not required: at [155].

Kennedy v NSW Minister for Planning [2010] NSWLEC 240 (Biscoe J)

Facts: the applicant challenged the validity of two consents to modify a major project approval under s 75W of the *Environmental Planning and Assessment Act* 1979. The project approval was for a 181 lot subdivision at Sandon Point. Sandon Point is a culturally significant area for Aboriginal people. The modifications allegedly took away a number of conditions relating to the protection of Aboriginal cultural heritage.

Issues:

(1) whether, in approving the modifications, the Minister was obliged and failed to consider:

  (a) the protection of Aboriginal cultural heritage as recommended in three reports;

  (b) aboriginal artefacts; and

  (c) the principles of ecologically sustainable development;

(2) whether the decision was manifestly unreasonable; and

(3) whether the applicant was denied procedural fairness.

Held: dismissing the appeal:

(1) the public interest is a mandatory consideration in relation to modification of a project approval under s 75W: at [56] and [78];

(2) in this case, the public interest required consideration of Aboriginal cultural heritage and protection of Aboriginal artefacts: at [56];

(3) the Minister's obligation to consider the public interest was not at a level of particularity which required the Minister to consider two reports on Aboriginal heritage to a greater extent than he did and to seek out and consider a third report: at [67];

(4) the Minister was also not required to find out about and consider the recollections of the applicant and another Aboriginal person that soil containing artefacts was dumped on the project site in 2002: at [73];

(5) the public interest required consideration of relevant principles of ecologically sustainable development ("ESD"): at [78];

(6) the Director-General's report did not expressly refer to the principles of ESD, but it considered the substance of these principles: at [87]-[89];

(7) the modified conditions provided a measure of protection for such Aboriginal artefacts as may exist on the project site. It was open to a decision-maker to conclude that the conditions were reasonable: at [93]; and

(8) there was no denial of procedural fairness. The applicant was given an opportunity to be heard when he was invited to make submissions on the modification request: at [107]-[108].

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

Facts: the applicant challenged the validity of a development consent for the erection of a school and the construction of a road. The challenge related to the environmental impact of a bridge which was proposed to be constructed on the land at a later stage. The bridge was not assessed as part of the development application but was to be assessed later under Pt 5 of the *Environmental Planning and Assessment Act* 1979 ("EPA Act"). Condition 174 of the development consent provided that an occupation certificate for the school would not be issued until the bridge was constructed. The construction of the bridge would require the clearance of about 998 m^2 of bushland, largely comprising an endangered ecological community ("EEC").

Issues:

(1) whether, contrary to s 79C(1)(b) of the EPA Act, the council was required and failed to consider the likely impact of the construction of the bridge on the EEC;

(2) whether, contrary to s 79C(1)(a)(i) of the EPA Act, the council was required and failed to consider the requirements of cl 9(2)(d) of State Environmental Planning Policy 19 – Bushland in Urban Areas;

(3) whether the proceedings were time barred by s 101 of the EPA Act which provided that legal proceedings must be commenced within 3 months of the consent being publicly notified; and

(4) whether the s 101 notice was defective as it did not state that the consent could be viewed "during ordinary office hours" as required by cl 124(1)(c) of the Environmental Planning and Assessment Regulation 2000.

Held: upholding one ground of the appeal:

(1) the council stated in answer to an interrogatory that in determining the development application it did not consider the likely impacts on the EEC: at [16];

(2) the likely impacts of the school development included the likely impacts of the construction of the bridge on the EEC: at [19]. This was because the school could not be occupied until the bridge was completed. The bridge was inextricably bound up with the development and it was likely that the bridge would be constructed: at [20];

(3) under cl 9(2)(d) of SEPP 19 the council could not grant approval for the construction of the bridge unless it had taken the effect of the proposed development on bushland into account: at [34]. However, the council had not granted approval for construction of the bridge. The failure to consider cl 9(2)(d) when determining the development application for the school did not affect its validity. However, the SEPP had to be considered later under the Pt 5 assessment of the bridge: at [35];

(4) the proceedings were commenced well outside the three month limit imposed by s 101. Prima facie, therefore, the proceedings were time barred: at [38]; and

(5) in circumstances where a notice implicitly stated (because it was so obvious that it went without saying) that a development consent could be inspected during ordinary office hours, it was unlikely that the legislature intended that an omission to say so expressly would invalidate the notice: at [54].

D'Anastasi v Environment Protection Authority [2010] NSWLEC 260 (Pain J)

Facts: the applicant unsuccessfully brought proceedings challenging a notice seeking information and records issued by the Department of Environment, Climate Change and Water pursuant to s 193 of the *Protection of the Environment Operations Act* 1997 ("PEO Act"). Failure to comply with a notice without a lawful excuse was an offence under s 211 of the PEO Act. An interlocutory order restrained the respondents from enforcing the notice until further order from the Court. As the EPA was conducting an investigation to determine whether an offence was committed by the misuse of pesticides under the *Pesticides Act* 1999 and had limited time (12 months) in which to commence prosecution, a prompt decision was desirable.

Issues:

(1) whether the statutory notice was within the terms of s 193 of the PEO Act, particularly:

  (a) whether the statutory notice could validly require information beyond the personal knowledge of the recipient;

  (b) whether a jurisdictional fact was a legal antecedent to exercising the notice power; and

  (c) whether the statutory notice needed to have a legitimate forensic purpose;

(2) whether the EPA had a duty to act fairly or reasonably in terms of the statutory notice; and

(3) whether there was an onus of proof on the EPA to prove that a notice was lawfully issued.

Held: dismissing the summons and ordering the applicant to answer the notice, her Honour held that:

(1) statutory provisions should be construed to be consistent with the language and purpose of all the provisions of the statute and a court must strive to give meaning to every word of a statutory provision (at [43]);

(2) the scheme of the PEO Act and of the *Pesticides Act* had to be considered when construing s 193. Both Acts provide similarly that authorised officers exercising Ch 7 powers can investigate matters in relation to the *Pesticides Act*, suggesting that in this case the notice power is being exercised for the purposes of the *Pesticides Act* (at [44]);

(3) a statutory notice could relate to any matter within the functions or responsibilities of the regulatory authority appointing the officer who issued the notice. The power to issue a notice was discretionary with the capacity to requisition any person to furnish information or records. There was no temporal or geographic boundary to s 193 (at [46]-[47]);

(4) a statutory notice was not restricted to matters within the personal knowledge of the recipient and there was no basis for reading such a requirement into the statute. It could require a person to make inquiries of third parties in order to provide information (at [52]);

(5) it was inherently unlikely that in the exercise of investigatory powers that an authorised officer's decision to issue a notice seeking information and records in pursuit of enforcement responsibilities would have to satisfy a jurisdictional fact which could be the subject of a court challenge where the court could substitute its own opinion of fact for that of the authorised officer. There was no jurisdictional fact which had to be met before a notice under s 193 could be issued (at [53]-[55]);

(6) the broad scope of investigatory powers had been recognised as including "fishing" for information. The test of legitimate forensic purpose applied to subpoenas was not a relevant test for s 193 notices requiring information and records as it would inappropriately and substantially curtail the power otherwise available under s 193: (at [56]-[57]);

(7) there were no procedural requirements such as the giving of a notice of an intention to issue a notice in s 193 or elsewhere in the PEO Act and no particular form of notice was specified (at [58]);

(8) provided that the applicant used his best endeavours to answer the questions in the notice following the making of inquiries and gave answers he believed were correct within the time frame specified, he complied with the notice. The notice was not impossible to answer and was not unreasonable in its terms (at [63]); and

(9) there was no statutory basis for arguing that the EPA bore an onus of proof to establish that the relevant authorising officer issued the notice lawfully whenever a notice was challenged (at [65]).

Ku-ring-gai Council v Sydney West Joint Regional Planning Panel (No 2) [2010] NSWLEC 270
(Biscoe J)

Facts: the applicant, Ku-ring-gai Council ("the Council"), challenged the validity of a development consent granted by the first respondent, the Sydney West Joint Regional Planning Panel ("JRPP"), to the second respondent, Hyecorp Property Fund No 6 Pty Ltd, for the demolition of four existing dwellings and the construction of two residential flat buildings. Part of the land contained a road reserve.

Issues:

(1) whether the JRPP had no power to determine the development application because it was a pre-condition to carrying out permanent work on the land that the Council or JRPP form the opinion that the purpose for which the road reserve was reserved could not be carried into effect within a reasonable time and this pre-condition was not satisfied;

(2) whether the JRPP had no power to determine the development application because assessment of a SEPP 1 objection by the Council or the JRPP was a pre-condition which was not satisfied;

(3) whether there was a denial of natural justice arising from the late submission of the SEPP 1 objection; and

(4) whether the Council had standing to bring the proceedings.

Held: upholding the first ground of challenge:

(1) the "consent" of the responsible authority referred to in cl 13(2) of the *Ku-ring-gai Planning Scheme Ordinance* ("KPSO") was development consent. Accordingly, the cl 13(2) functions vested in the Council were conferred on the JRPP: at [75];

(2) as a majority of the JRPP did not form the opinion required by cl 13(2) of the KPSO it followed that the JRPP did not form that opinion: at [83];

(3) council officers did not assess the SEPP 1 objection before the development application was determined by the JRPP. In such circumstances, the JRPP had no power to determine the development application: at [105]. However, the SEPP 1 objection was legally immaterial as the proposed development complied with the 50% deep soil landscaping standard when the term "site area" in the KPSO was properly construed to include the road reserve: at [106], [110];

(4) as the SEPP 1 objection was legally immaterial, Ground 3, which related to denial of natural justice due to the late submission of the SEPP 1 objection, was also immaterial: at [116]; and

(5) the Council had standing to bring the proceedings. Although s 23G(5A) of the *Environmental Planning and Assessment Act* 1979 ("EPA Act") provided that a regional panel is "taken to be the council", the council was not suing itself. Rather, it was applying to set aside a consent which it was deemed to have granted. There was no reason why it could not do so pursuant to s 123 of the *EPA Act*: at [119], [122].

- **Civil Enforcement**

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

Facts: the council brought proceedings to enforce a condition of consent. The condition at the heart of the matter (condition 32 of the stage 2 consent) required that, "[t]he existing above ground electricity and telecommunications cables within the road reserves and within the site, shall be replaced, at the applicant's expense, by underground cable and appropriate street light standards, in accordance with the Energy Providers (sic) guidelines."

The consent was granted in March 2003 to Moscat (the owner of the subject site at the time of the development application) for a development located on O'Riordan Street, Mascot containing 111 residential units and one commercial unit. The subject property was located in the Mascot Station precinct of the council area to which the "City of Botany Bay – Development Control Plan No. 30 – Mascot Station Precinct" applied. The DCP required that, "[a]t the full cost of the developer, all service cables in the street, adjacent to and within the confines of any development site within the Mascot Station Precinct, are required to be placed underground".

Also of importance was the stage 1 consent in which condition 34 required Ralansaab Pty Limited ("Ralansaab") enter into a deed with the council. That deed required the undertaking on works on Church Avenue such as road widening, undergrounding of cables and the dedication of land to the council.

Ralansaab acquired the site following the grant of consent to Moscat. It was established as a joint venture solely to purchase and develop the site and had been wound up. The second respondent was the builder contracted by the first respondent to carry out the development. The third respondent was the strata manager of the development and filed a submitting appearance. The five other respondents were directors of either or both of the first or second respondents at various stages.

Energy Australia, being the "relevant energy provider", provided a quote in August 2002 to Moscat, which provided for the removal of eight wood poles on Church Avenue and O'Riordan Street. Following the purchase of the site by Ralansaab, Energy Australia was contracted by the second respondent to carry out the works in about March 2004. It prepared a plan of works in April 2006 but the scope of works had been reduced to the removal of only three wood poles and the replacement of two wood poles with steel lighting.

A quotation of the cost of street lighting forwarded to the council by Energy Australia in October 2004 outlined the scope of works to be undertaken. This quotation was accepted by council in late October 2004.

Having completed the majority of construction on the subject site, the respondents obtained an occupation certificate from a private certifier on 9 December 2005. The occupation certificate certified that all relevant conditions of consent had been complied with.

A certificate of practical completion was given by Energy Australia in February 2006. This certificate was enclosed in a letter to council in May 2006, in which the council was informed that the undergrounding works had been completed.

In September 2006, the council was alerted to a possible non-compliance of condition 32 following a complaint by a developer of another property on O'Riordan Street. However, council did not act on this complaint until July 2007, when council's officers attended the site to confirm that three wood poles remained on its O'Riordan Street frontage.

Issues:

(1) whether the non-corporate respondents "carried out" the development;

(2) whether the deeds entered into between the parties defined the scope of works required under the relevant conditions;

(3) assuming the validity of condition 32, whether the condition was satisfied by the works already carried out;

(4) whether condition 32 was invalid due to its uncertainty;

(5) whether condition 32 was invalid under the *Newbury* principles; and

(6) whether the court should exercise its discretion by not granting relief to the council.

Held: council's summons was dismissed:

(1) the non-corporate respondents did not carry out the development and therefore were not liable for any breaches of the *Environmental Planning and Assessment Act* 1979: at [157];

(2) on the available evidence, the Court should not lightly infer that it was the non-corporate respondents who caused a lesser scope of works to be undertaken: at [158];

(3) the deeds outlined only the scope of works required under condition 34 of the stage 1 consent and specifically dealt with works on the Church Ave frontage: at [163];

(4) the phrase "in accordance with the Energy Provider's guidelines" connoted compliance with technical specifications required by Energy Australia rather than its definition of the scope of undergrounding works required by condition 32: at [191];

(5) the respondents could not solely rely on Energy Australia's certificate of completion to establish that they completed all the works required under condition 32: at [192];

(6) a condition of consent had to be construed on its face, and not by reference to extraneous documents, such as the DCP, unless its terms were expressly incorporated into the consent by clear reference: at [169];

(7) while condition 32 was uncertain as it did not specify the road frontages on which the undergrounding was to occur (at [170]) it was not invalid because:

   (a) the first *Newbury* test was not offended as the condition requiring the underground of cables had the legitimate planning purpose of providing amenity benefits to the subject development as well as to the wider community: at [181];

   (b) the second *Newbury* test, requiring that conditions of consent "reasonably and fairly relate to the development" was offended as the condition required works beyond the frontages of the site: at [182]; and

   (c) the third *Newbury* test was not offended, despite the overlap between it and the second test, as the condition was "not so unreasonable that no reasonable planning authority could have imposed it": at [186]; and

(8) even if invalid, the Court would have exercised its discretion and refused to grant the council relief due to the understandable reliance of the respondents on Energy Australia as the relevant energy provider to plan and carry out the works; the failure of the council and its officers to promptly act upon the issue of non-compliance; the delay in bringing proceedings; the substantial costs already incurred by the respondents in undergrounding cables; and the greater burden of requiring the lay respondents to undertake additional works at such a late stage: at [202].

Shoalhaven City Council v Bonner [2010] NSWLEC 251 (Biscoe J)

Facts: in 2008 the respondents constructed a dwelling on land in the Jerberra Estate, south of Nowra. The respondents knew it was unlawful to construct the dwelling as the zoning did not permit it and therefore development consent could not be granted. There are many other illegal dwellings on the Estate. Since the 1990s both council and the residents have tried unsuccessfully to get the land rezoned to permit residential dwellings. This was the first time the council had taken legal action against anyone in the Estate. The parties agreed that the unlawful structures could not stay on the land indefinitely and that a demolition or removal order should be made but stayed for three years to allow a reasonable opportunity for the potential rezoning to occur. However, the council argued the respondents should have to vacate the land in three months, while the respondents argued they should be allowed to stay for three years.

Issues:

(1) the only issue was whether the Court should exercise its discretion to stay the cease use order for three years.

Held: in staying the cease use order until 30 September 2011:

(1) the respondents proposal that they be allowed to stay for three years, subject to conditions requiring certain works to be carried out to meet health and safety standards, sat uncomfortably with the *Environmental Planning and Assessment Act* 1979 where the council assessed and determined development applications according to a range of mandatory and non-mandatory considerations and other statutory requirements: at [47];

(2) it was appropriate to stay the cease use order for nine months to 30 September 2011, which was prior to the commencement of next summer and the associated potentially higher bushfire risk: at [48];

(3) in reaching this conclusion the Court had regard to the conduct of the parties and the personal circumstances of the respondents. This included the fact that the respondents had three dependent children, that Mrs Bonner was due to give birth to their fourth child on Boxing Day and the respondents' modest financial position: at [43]-[44]; and

(4) a stay of the cease use order for nine months would provide breathing space to allow Mrs Bonner to return to work, but not too soon after the birth of her fourth child. It would also provide a window of opportunity for potential rezoning: at [50].

- **Development Application**

Betohuwisa Investments Pty Ltd v Kiama Municipal Council [2010] NSWLEC 223 (Craig J)

Facts: Old Kiama Wharf Company Pty Ltd ("OKW**"**) sought development consent from the council to effect improvements upon land it had leased from the Crown. The application was refused. Subsequent to the refusal, OKW assigned its property, including the lease and its business conducted in the premises, to the appellant, an entirely unrelated entity. The appellant then lodged an appeal pursuant to s 97 of the *Environmental Planning and Assessment Act* 1979 against the council's refusal of OKW's development application. The council sought dismissal of the appeal on the ground that the appellant was not an "applicant" within the meaning of s 97.

Issues:

(1) whether the appellant was an "applicant" within the meaning of s 97.

Held: appeal dismissed:

(1) as the term "applicant" was not defined in the Act, its meaning had to be gleaned from its context within the Act, including taking cognisance of the different bases upon which a person was qualified to make various applications under the Act: [37];

(2) no distinction was made in the Act between an "applicant" for the purpose of making a development application and an "applicant" for the purpose of appeal, indicating that the same person or entity was intended to be referred to in each context: [38]-[40];

(3) the term "applicant" was not confined to the person or entity who signed the development application form. It extended to principals of the person or entity on whose behalf the application was made: [42]-[43];

(4) the term "applicant" did not extend to the appellant by reason of the transfer of rights and assets in relation to the land and business from the development applicant to the appellant. OKW's "right of action" to appeal from the refusal of its development application was not capable of being transferred to the appellant as part of OKW's intellectual property. In addition, the appellant's contractual right to have

OKW do all things necessary to "perfect" the sale did not entitle the appellant to do all things that otherwise only OKW was empowered to do: [57]; and

(5) the statutory language read in context was intractable in requiring that the "applicant" entitled to institute the appeal had to be the person or entity who lodged the development application: [70].

Stannic Securities Pty Ltd v Wyong Shire Council [2010] NSWLEC 249 (Biscoe J)

Facts: the applicant appealed against the deemed refusal of a development application. The only issue concerned the quantum of monetary contributions the council was allowed to levy under s 94 of the *Environmental Planning and Assessment Act* 1979. On 4 June 2010, the Minister issued a Direction capping contributions for the subject land at $20,000 per lot. The council and the Minister argued that subsequent Directions issued on 15 and 16 September 2010 revoked the 4 June Direction. The 15 September 2010 Direction stated: "This Direction revokes the previous Direction under section 94E of the Act as set out in Schedule 1. This Direction does not apply to land identified in Schedule 2".

Issues:

(1) whether the 15 and 16 September 2010 Directions revoked the 4 June Direction, enabling the Council to levy more than $20,000 per lot; and

(2) whether planning circulars should be used to construe the Directions.

Held: determining that there was no cap:

(1) the dispute between the parties related to whether the Direction made on 4 June 2010 had any continuing force: at [16];

(2) the planning circulars should not have been used to construe the Directions as statements by the Minister's Department as to what it thought the Minister's Directions meant and were of no assistance in ascertaining their objective meaning: at [20]; and

(3) the 4 June 2010 Direction was wholly revoked by the sentence in the 15 September 2010 Direction: "This Direction revokes the previous Direction…". The next sentence simply has the effect that the operative parts of the Direction do not apply to land identified in Schedule 2: at [26]. It does not mean, as the applicant contended, that this sentence operated to qualify the previous sentence such that the revocation of the 4 June 2010 Direction did not apply to land identified in Schedule 2 – which included the subject land: at [25]-[27].

Wollongong City Council v Vic Vellar Nominees Pty Limited [2010] NSWLEC 266 (Biscoe J)

Facts: between 1996 and 1999 two dwellings were partially constructed on a lot at Corrimal with Council consent. Under the Wollongong Local Environmental Plan 1990 ("WLEP") the Council could not consent to the subdivision of the lot unless each allotment of land to be created by the subdivision has "an existing dwelling-house" on it.

Issues:

(1) whether each of the two partially constructed dwellings was an "existing dwelling-house" for the purpose of the WLEP.

Held: determining that the partially constructed dwellings were not existing dwelling-houses:

(1) a dwelling-house had to have not only accommodation for sleeping but also kitchen, bathroom and lavatory facilities, if not also laundry facilities: at [50];

(2) the word "existing" before "dwelling-house" emphasises that the dwelling-house must be constructed with those facilities, not partially constructed with some of the facilities missing at the time of consideration of the subdivision application: at [50];

(3) as the WLEP prohibited consent to subdivision unless "each" allotment of land to be created had an existing dwelling-house and as construction of the northern building was more advanced than construction of the southern building it was sufficient to determine whether the southern building was an existing dwelling-house: at [61]; and

(4) the southern building did not have a kitchen sink, facilities for the preparation and cooking of food, a bath, shower, taps, toilet, washbasin or clothes washing facilities: at [63]. Much more than minor work was required to make the building habitable. Thus, the southern building was not an existing dwelling-house for the purpose of the WLEP: at [65], [66].

Jaimee Pty Ltd v Council of the City of Sydney [2010] NSWLEC 245 (Craig J)

Facts: application had been made to the Council to modify three conditions of a development consent that authorised alterations and internal additions to an existing warehouse building together with its change of use. Two of the three conditions required the payment of monetary contributions, one for affordable housing pursuant to an LEP and the other under a s 94 Plan. The third condition required the issue of a construction certificate before any excavation or demolition took place. In response to the application, the Council modified the consent by agreeing to deletion of the construction certificate condition but refused to modify either of the monetary contribution conditions. The applicant appealed to the Court from the Council's determination pursuant to s 96(6) of the *Environmental Planning and Assessment Act* 1979 ("the Act"). Having regard to the Council's response to the applicant's statement of facts and contentions filed in the proceedings, the applicant sought to amend its application so that the only issue to be argued was limited to the payment required under the s 94 Contributions Plan. It no longer wished to argue against the condition requiring an affordable housing contribution. The Council opposed amendment of the application.

Issues:

(1) whether it was open to amend an application to modify a development consent, having regard to the absence of any expressed power so to do in the Act or Environmental Planning and Assessment Regulation 2000 ("the Regulation"), particularly when compared with cl 55 of the Regulation;

(2) whether the Court could exercise the power to allow the modification application to be amended;

(3) whether there was power to allow the Class 1 application to the Court to be amended; and

(4) whether the power should be exercised in the present case.

Held: amendment allowed:

(1) the provisions of s 96 should be interpreted to give practical effect to their purpose. That purpose includes consideration of submissions received from third parties as well as the Council's own assessment of the application. It would impose undue rigidity, not required by the legislation, to prevent any amendment to be made, no matter how minor, in response to submissions received: at [28]-[30];

(2) the absence of a specific provision, such as one equivalent to cl 55 of the Regulation, does not militate against the discretion to allow the amendment to be made: at [31]-[33];

(3) if it was open to the Council to allow the application to be amended, so it was open to the Court to allow the modification application to be amended (s 39(2) *Land and Environment Court Act* 1979): at [52];

(4) in the present case, it was open to allow the Class 1 application to be amended so as to limit the matter with which the applicant was "dissatisfied" to one only of the three conditions that were the subject of the Council's determination. The three conditions were disparate in their operation. The amendment contemplated was not to be compared with the position that pertained in an appeal under s 97 of the Act where dissatisfaction is expressed with a condition of consent but where the grant of consent itself cannot be severed from the condition under consideration for the purpose of an appeal: at [56]; and

(5) the purpose of the amendment being to reduce the issues to be agitated on the hearing of the appeal, application of the provisions of Pt 6 of the *Civil Procedure Act* 2005 supports the application for amendment being allowed: at [59].

- **Compulsory Acquisition & Valuation**

Vilro Pty Ltd (In Voluntary Liquidation) v Roads and Traffic Authority NSW [2010] NSWLEC 234 (Pain J)

Facts: the applicant lodged an objection to the amount of compensation offered following the compulsory acquisition of land it owned at Port Macquarie under s 66 of the *Land Acquisition (Just Terms Compensation) Act* 1991 ("the JT Act"). The land was acquired to create a deviation to a public highway. The acquisition bisected land owned by the applicant into two portions north and south of the new highway. Access to a public road for the northern portion was removed by the acquisition. The applicant claimed market value of the acquired land and injurious affection to the residue land based on four claim areas (that is, depreciation in the value of the land severed from the acquired land as a result of the public purpose).

Issues:

(1) whether the applicant's land would have been rezoned residential rather than rural but for the public purpose;

(2) whether the compulsory acquisition resulted in loss of access to the public road of the applicant's land; and

(3) whether detailed expert evidence would be obtained by prudent parties to a hypothetical sale.

Held: partially rejecting the claim for injurious affection but determining that compensation based on market value was payable:

(1) the applicant's lands were not rezoned as residential because of the need identified by the Port Stephens Council ("the Council") in 2001 to undertake further environmental investigations. The reason was not related to the public purpose (at [116]-[119]);

(2) in the absence of evidence of the Council's consideration of the decision in 1989 to rezone neighbouring land belong to the applicant for residential use, including any evidence from the Applicant, the opinion of town planners concerning the reason for the northern boundary being along the proposed highway was speculation (at [104]-[107]);

(3) the northern portion of the applicant's land was landlocked as a result of the acquisition and access for residential purposes to the northern land in the medium to long term was likely. In light of these two circumstances, a prudent hypothetical purchaser would consider there was a substantial loss of value of the northern residue land as a result of that loss of access (at [205]-[214]);

(4) more detailed expert evidence than would be obtained by prudent parties to a hypothetical sale was adduced but the complexity of the environmental constraints on the site suggested that fairly detailed reports would be obtained by such parties particularly on the issue of koala habitat and populations (at [126]-[127]); and

(5) it was agreed that the appropriate method of valuation was the before and after method applied to the acquired and residue land. Given the planning process undertaken by the Council in the area of the applicant's land, the comparable sales approach was preferable to a hypothetical development model as it was less subjective and more reliable given the uncertainty of when the claim areas would be rezoned and the range of opinions expressed on lot yield (at [258]-[261]).

Brock v Roads and Traffic Authority NSW [2010] NSWLEC 244 (Sheahan J)

Facts: the respondent acquired land from the applicant for the purpose of constructing a road through the applicant's property. The proposed road was to cross the Hunter River and provide an alternative access to East Maitland. The applicant appealed under the *Land Valuation (Just Terms Compensation) Act* 1991 against the offer of compensation in relation to market value and disturbance items.

The subject land was prime agricultural land on the floodplains of the lower Hunter region. It lay on the northern bank as well as the western bank of Hunter River near the town of Lorn. As the River headed downstream in a west to east direction towards Newcastle, it made a turn towards the north at the eastern boundary of the applicant's land, before it turned again to the east. The land also hosted a flood levee bank running north-south on the western side of the River. The applicant had used, and continued to use, the property for the herding of cattle and goats. The property also has the benefit of development consent for a residential dwelling that had not been acted upon.

The acquisition was a corridor for the construction of the road and the northern abutment for the new bridge over the River. The road corridor bisected the applicant's land in the north-south direction on the top of the levee bank, leaving a narrow sliver of residue land east of the road along the western bank of the River.

As part of an "adjustment plan" to compensate the applicant, the respondent installed a stock watering system, pumping water from the River to troughs on parcels west of the new road. The adjustment plan also involved the construction of stock proof dividing fences along the two sides of the new road. The dividing fence between the road and the applicant's land east of the road was to be located below the levee bank at some points, representing a damage risk to the dividing fence in times of flooding.

In the 'before' scenario, the subject lands consisted of 73.6858 hectares in three distinct parcels. The acquired lands comprised 6.85944 hectares. After the acquisition, the residue lands consisted of 66.82589 hectares, of which, 6.46 hectares lay between the new road and the River. In the 'after' scenario, the applicant would continue to have access to the severed portion of land along the River, through a series of gates along the fence with the road, or underneath the bridge abutment. However, the River's historic migration northwards meant that the underbridge access was at risk in the future without protective works.

Following the acquisition, the applicant, in order to augment her residue holding, purchased adjoining land away from the river and the road, which was directly comparable to the subject land.

The applicant's claim was $1,110,000 for loss in market value and $378,783.28 for various disturbance items. The respondent, however, contended that the compensation paid should be $180,000 for the market value of the acquired land, $140,000 for injurious affection and severance and $30,780 for agreed disturbance items.

Issues:

(1) whether the subject property's highest and best use was that of "farming land" or as a "rural retreat/residence";

(2) whether sales of properties used as "rural retreats/residences" were comparable to the subject property;

(3) whether the comparable sale of neighbouring land (the purchase by the applicant) required a downward adjustment based on adjoining purchaser influence;

(4) whether a "piecemeal" approach of valuation or a flat rate of diminution should be applied to the valuation of the residue land due to the severance and injurious affection;

(5) whether the applicant should be compensated for various disputed disturbance claims; and

(6) whether any of the disturbance claims were more appropriately dealt with as adjustments in the 'after' scenario.

Held: in determining compensation to the applicant in the amount of $468,467 ($437,087 for market value compensation and $31,380 for disturbance), that:

(1) the subject land's highest and best use was that of "farming land" as the property had high quality soil, was comparatively level and was subject to flooding, a factor that was a disadvantage for residences but could be an advantage for farming as topsoil was replenished: at [51];

(2) the sales relied upon by the applicant, which were "rural retreats", were not comparable as they offered different amenity characteristics, were not flood prone and catered for different buyers: at [55];

(3) the applicant's purchase of adjoining land did not need to be adjusted in value as a comparable sale because there was no evidence the sale was in excess of market value: at [52];

(4) the applicant's fencing claim should be limited to those parts of the residue land which could still be conveniently used as grazing land, as the land which could not be used would be assigned no value in the "after" valuation: at [77];

(5) the fencing claim due to flood risk should be calculated on a 20 year period as that was a realistic timeframe for a prospective purchaser: at [77];

(6) the fencing claim was better included as an adjustment to the 'after' value of the land, rather than as a disturbance claim; at [72];

(7) the benefit of the respondent's provisions of a new stock watering system outweighed the costs to the applicant of using and maintaining such a system: at [82];

(8) other claims for disturbance costs were not reasonably incurred and/or referable to the acquisition: at [91], [96] and [99];

(9) injurious affection and severance items were addressed in the loss of market value in the 'after' valuation: at [112]; and

(10) a flat rate of diminution could not be applied as unaffected parcels of land would be compensated under this methodology, whereas the 'piecemeal' approach valued each portion of land in the 'after' scenario to determine the acquisition effects: at [118].

- **Criminal Jurisdiction**

Director-General, Department of Environment, Climate Change and Water v Source & Resources Pty Limited; Director-General, Department of Environment, Climate Change and Water v Alexander; Gordon Plath of the Department of Environment, Climate Change and Water v Source & Resources Pty Limited; Gordon Plath of the Department of Environment, Climate Change and Water v Alexander [2010] NSWLEC 235 (Pepper J)

Facts: the Department of Environment, Climate Change and Water ("DECCW") alleged that contrary to s 12(1) of the *Native Vegetation Act* 2003, Source & Resources Pty Limited ("S&R") and Mr Kelvin Alexander unlawfully cleared native vegetation and contrary to s 118D(1) of the *National Parks and Wildlife Act* 1974 it knowingly caused damage to the habitat of a threatened species. Mr Alexander was a director of S&R. He was an 83 year old man who suffers from memory lapses and hearing loss. The defendants pleaded not guilty to the charges through their legal representative. Consent orders were made for the filing and serving of evidence. The defendants did not comply with these orders. On 25 October 2010, the defendants' legal representative filed notices of ceasing to act contrary to r 7.29(2)(a) of the Uniform Civil Procedure Rules 2005. On the first day of the hearing the defendants appeared unrepresented. On behalf of both defendants, Mr Alexander made an opening statement that was rambling, inconsistent in parts and generally difficult to follow. But the statement did reveal that the defendants had possible defences to the charges. As a consequence, on the second day of the hearing the Court suggested to Mr Alexander that the defendants avail themselves of the New South Wales Bar Association's Legal Assistance Referral Scheme. They did and Mr Peter McEwen SC was able to appear for the defendants on a *pro bono* basis. A short adjournment was granted to the defendants to allow instruction to be given and to allow Mr McEwen SC to provide advice. However, before the proceedings were due to resume, Mr McEwen SC on behalf of the defendants informed the Court that he was having difficulty obtaining instructions from Mr Alexander and that he was concerned that Mr Alexander may not be fit to stand trial.

Issues:

(1) whether the proceedings ought to be adjourned and vacated on the basis of Mr Alexander's possible unfitness to stand trial;

(2) whether the *Mental Health (Forensic Provisions) Act* 1990 applied to the Court; and

(3) whether a corporation can be unfit to stand trial.

Held: adjourning and vacating the proceedings:

(1) the *Mental Health (Forensic Provisions) Act* did not apply to the Court. The Court was not expressly mentioned in that Act nor was it incorporated by virtue of the provisions of the *Land and Environment Court Act* 1979 or the *Criminal Procedure Act* 1986. The common rules regarding unfitness to stand trial therefore applied: at [58], [64] and [66];

(2) the concerns articulated by Mr McEwen SC gave rise to a real or substantial question as to Mr Alexander's fitness to stand trial: at [79]. As a result, a hearing into the fitness of Mr Alexander to stand trial had to be conducted: at [81]. The remainder of the Class 5 hearing was therefore required to be vacated and the prosecution adjourned until such time as Mr Alexander's fitness could be determined by the Court: at [84];

(3) it was not necessary to determine whether S&R was unfit to stand trial: at [89]; and

(4) the proceedings against S&R were not to be heard separately from Mr Alexander's prosecution because to do so would not have facilitated the "just, quick and cheap" resolution of the real issues for determination in the prosecutions: at [90].

Environment Protection Authority v Queanbeyan City Council [2010] NSWLEC 237 (Pepper J)

Facts: Queanbeyan City Council ("the council") was charged with a strict liability offence of polluting waters in contravention of s 120 of the *Protection of the Environment Operations Act* 1997 ("the Act"). The council operated a sewerage system that had been subject to historical incidents of overflows of sewage at the Morisset Street sewage pumping station ("the pumping station"). The Environment Protection Authority ("EPA") issued a series of statutory prevention notices that required the council to review the operation of the sewerage system, to construct an underground retention system at an appropriate location identified by the council and to prepare a maintenance and inspection plan to reduce effluent surcharges. In compliance the council designed, constructed and installed the Waniassa Street overflow outlet ("the outlet") as an augmentation to the pumping station. The council did not apply for an environmental protection licence ("licence") in respect of either the pumping station or the outlet. The EPA had indicated that it would not issue any such licence. On 4 and 5 November 2007, there were two overflow incidents resulting in the discharge of sewage into the Queanbeyan River caused by a pump and alarm failure at the pumping station. The alarm was to notify the council if one of the pumps at the pumping station failed. After the first incident on 4 November 2007, the council was aware that the alarm system was not operating properly. It was not until council employees arrived for work on 5 November that the second pump failure was discovered. Twelve hours had elapsed between the failure of the pump and its reactivation resulting in a significant spillage of sewage into the Queanbeyan River. The council was charged with water pollution only in respect of the second pollution incident on 5 November 2007.

Issues:

(1) whether a prosecution for water pollution caused by the unintentional discharge of sewage should be permanently stayed because of the refusal by the EPA to issue a licence thereby preventing the council from relying on a statutory defence available only to licence holders;

(2) whether the licence was required to be issued under the Act;

(3) whether, had the licence been issued, the defendant would have been able to avail itself of the statutory defence;

(4) whether if the proceedings continued they would be unfair; and

(5) whether, if unfair, the public interest in permitting the prosecution to proceed outweighed any unfairness.

Held: refusing to permanently stay the prosecution:

(1) the test for ordering a permanent stay was whether the council would, not might, have obtained a licence and whether that a licence, if issued, would have contained a condition that would have provided the council with a statutory defence: at [122];

(2) even if unfairness was established, the Court had to balance the interests of the accused to a fair trial against those of the community in having breaches of environmental laws prosecuted: at [131];

(3) a licence was not required to be issued by the EPA: at [136];

(4) even if a licence had been issued, no conditions attaching to any licence issued would have permitted the second pollution incident the subject of the charge: at [136];

(5) in light of the council's history of sewage overflows, with their attendant risk of harm to the environment and to human safety, the public interest in permitting the prosecution to proceed outweighed any unfairness created by the absence of a licence even if it was required to be issued: at [136]; and

(6) the council was on notice that the alarm system and pump were faulty. It was the failure by the council not to take extra measures to address these operational issues that would have denied it a defence under the Act; not any omission on the part of the EPA to issue the council with a licence: at [167].

Environment Protection Authority v Chillana Pty Ltd [2010] NSWLEC 255 (Sheahan J)

Facts: the defendant company pleaded guilty to a charge under s 120(1) of the *Protection of the Environment Operations Act* 1997 in that it polluted the waters of Salty Creek and the Castlereagh River with untreated abattoir effluent.

The spill was the result of a fractured underground pipe, carrying effluent pumped from the defendant's abattoir to treatment ponds away from the plant. The effluent escaped from the pipe, saturating nearby soil, then flowed into Salty Creek for a distance of 250 m before reaching the confluence with Castlereagh River. The higher volume of the receiving river meant the effluent was diluted.

Salty Creek, due to its modification by human activity, was in a degraded state prior to the spill. There was no reported fauna mortality as a result of the spill. However, the spill was extensive, and resulted in the creek being blood red in colour, covered with a layer of froth and animal fat, and smelt strongly of animal effluent.

The defendant raised the issue of impecuniosity and the capacity to pay a substantial fine in the near term, due to a general downturn in the abattoir industry.

Issues:

(1) whether the spill caused actual environmental harm in Salty Creek to a significant extent;

(2) whether the there was likely environmental harm to Castlereagh River;

(3) whether the defendant had a reduced capacity to pay a substantial monetary penalty; and

(4) whether the Court should reduce any monetary penalty based on the defendant's capacity to pay.

Held: in ordering the defendant to pay the sum of $60,000 (in instalments of $10,000 over two years and five months) to an environmental restoration/enhancement project under s 250(1)(c) of the *Protection of the Environment Operations Act* 1997:

(1) the spill caused significant short-term environmental harm along Salty Creek: at [59];

(2) there was insufficient evidence to conclude there was more than very minor and short term harm caused to Castlereagh River: at [60];

(3) the appropriate penalty in the circumstances would be $90,000, but it was reduced to $60,000 having regard to the early guilty plea, evidence of contrition and other mitigating factors: at [96];

(4) the evidence of the defendant's accountant clearly showed the company was under financial stress: at [112]; and

(5) the pollution incident was serious and the Court would not make further concessions beyond the one-third discount, other than to impose a regime of instalments for the payment of the penalty and other costs: at [115]-[116].

- **Costs**

Glaser v Poole (No 2) [2010] NSWLEC 232 (Pain J)

Facts: the Glasers sought an order for indemnity costs in Class 3 proceedings brought by their neighbour, Mrs Poole, under the *Encroachment of Buildings Act* 1922 ("the EB Act") which were discontinued on 3 August 2010. Mrs Poole also lodged an appeal in the Court against a demolition order issued by Waverley Council in relation to a masonry deck and room area built without development consent which encroached on the Glasers' and another neighbour's land. The Class 3 proceedings were intended to facilitate a successful outcome in the Class 1 appeal. The Glasers also sought an order for indemnity costs in Class 4 proceedings that they commenced seeking removal of the encroaching structure built without development consent. Pain J made orders requiring Mrs Poole to remove the masonry pool deck and room area erected without development consent which encroached on the Glasers' property (see *Glaser v Poole* [2010] NSWLEC 143). Mrs Poole offered to pay costs on the usual party/party basis in both proceedings. The costs provisions for Class 3 proceedings in r 3.7(1)(c) of the Land and Environment Court Rules 2007 did not apply to proceedings brought under the EB Act. The Court's discretion to award indemnity costs in both proceedings was contained in Pt 42 of the Uniform Civil Procedure Rules 2005 ("the UCPR").

Issue: whether costs ought be awarded on an indemnity basis in one or both proceedings.

Held: that in the Class 3 proceedings costs must be paid on an indemnity basis:

(1) indemnity costs orders are not made lightly (at [29]) and the decision to award indemnity costs depends on the exercise of the Court's discretion in light of the particular circumstances of the case: at [28];

(2) there was no particular aspect of the conduct of the proceedings commenced in Class 3 or Class 4 which suggested that an award of indemnity costs ought be made: at [36];

(3) the level of carelessness on the part of the Mr Poole in building an unauthorised and encroaching structure on the Glasers' land suggests that the justice of the circumstances justified an award of costs on an indemnity basis in the Class 3 proceedings to which the Glasers were joined through no fault of their own: at [37];

(4) there were no circumstances justifying an award of indemnity costs in the interest of justice in the Class 4 proceedings because while the Glasers were entitled to commence the action they were not essential to the resolution of the issues between the parties: at [38]; and

(5) each party had to pay their own costs of the hearing on indemnity costs: at [39].

Vis Visitor Investment Services Pty Ltd v Hawkesbury City Council & Anor [2010] NSWLEC 252 (Sheahan J)

(related decision: *Vis Visitor Investment Services Pty Ltd v Hawkesbury City Council & Anor* [2010] NSWLEC 10)

Facts: following the dismissal of the applicant's Class 4 proceedings, in which the council was awarded its costs on a party-party basis, the council sought part of or all of its costs on an indemnity basis.

The applicant commenced the unusual proceedings, seeking a declaration that it enjoyed consent to use certain land as a caravan park. The council submitted that the applicant was never granted a consent which could be held to approve the use of the land as a caravan park.

At the commencement of the hearing, the applicant sought to tender a 5,500-page bundle of documents which had been served only one working day earlier. Those documents were part of a series of documents totalling approximately 9,100 pages, which were produced to the applicant in July 2008 and later recorded on

a compact disc. The hearing was adjourned on the second day of hearing, on the request of both parties, after they recognised that not all of the relevant council documents were included in the tender bundle.

Prior to the hearing resuming on 5 August 2009 with amended pleadings from both parties, the council made a "without prejudice" offer to settle the litigation on the basis that particular lots and sites within the subject land enjoyed development consent for use as a caravan park. This offer was rejected by the applicant.

Issues:

(1) whether the proceedings were reasonably commenced;

(2) whether the attempt to tender a 5,500 page bundle of documents, which had been served late, was "trial by ambush" and constituted unreasonable conduct;

(3) whether the applicant's case on the resumption of the proceedings was doomed to fail; and

(4) whether the applicant's refusal of the offer of compromise was unreasonable.

Held: the notice of motion for indemnity costs was dismissed (with each party to pay its own costs of the motion):

(1) the proceedings were properly commenced: at [62];

(2) the council's preparedness to allow the applicant to open its case on the "big and late" bundle, and to then request the adjournment, was reasonable in light of the applicant's unreasonable conduct: at [65];

(3) the applicant's case on the resumption, although difficult, was still arguable and not "hopeless" or "doomed to fail": at [71]-[72]; and

(4) the applicant did not act unreasonably in rejecting the offer as it made a counter offer in open terms: at [69]-[70].

Kennedy v NSW Minister for Planning [2010] NSWLEC 269 (Biscoe J)

Facts: the applicant unsuccessfully challenged the validity of two requests to modify a Major Project Approval at Sandon Point. The challenge was on five grounds: the Minister failed to consider: (1) the protection of Aboriginal cultural heritage; (2) Aboriginal artefacts and (3) the principles of ecologically sustainable development; (4) the decision was manifestly unreasonable and (5) the applicant was denied procedural fairness. The respondents sought orders that the applicant pay their costs of the proceedings. It was common ground that the proceedings were brought in the public interest.

Issues:

(1) whether the applicant should be excluded from paying the respondents costs under the public interest exception; and

(2) whether the applicant should be excluded from paying the respondents costs due to impecuniosity.

Held: ordering the applicant to pay 20% of the respondents' costs:

(1) grounds 1, 2 and 3 constituted 'something more' than the mere characterisation of the proceedings as being brought in the public interest. They highlighted that the public interest is a mandatory consideration in considering a modification request under s 75W of the *Environmental Planning and Assessment Act* 1979 and that Aboriginal heritage and the protection of Aboriginal artefacts is an aspect of the public interest: at [10];

(2) grounds 4 and 5 did not constitute 'something more'. Ground 4 was very weak and was decided by reference to well established judicial review principles. Ground 5 was doomed to fail given that the applicant was personally notified of the modification requests and invited to make a submission: at [11];

(3) the applicant's failure to make a submission regarding the modification requests was not a countervailing circumstance which militated against departure from the usual rule as to costs. A submission generally goes to the merits of a proposal, whereas the proceedings challenged the lawfulness of the Modification

Approvals. If an applicant chose not to comment on the merits of a proposal this should not preclude him or her from calling into question the legality of the proposal for fear of an adverse costs order: at [14]; and

(4) absent special circumstances, inability to meet a costs order is an insufficient reason of itself to deprive a successful party of its costs: at [17]. In this case the proceedings were brought in the public interest by an Aboriginal man who had been fighting against the State and developers to protect Aboriginal cultural heritage at Sandon Point for many years. These circumstances, of themselves, were insufficient to justify no costs order, but they did reinforce the conclusion that there should be no costs order in relation to the first, second and third grounds of the challenge: at [18].

- **Practice and Procedure**

Ku-ring-gai Council v Sydney West Joint Regional Planning Panel [2010] NSWLEC 262 (Biscoe J)

Facts: the applicant, Ku-ring-gai Council, challenged the validity of a development consent granted by the first respondent, the Sydney West Joint Regional Planning Panel, to the second respondent, Hyecorp Property Fund No 6 Pty Ltd. At the commencement of the hearing the respondents sought leave to withdraw an admission in their Points of Defence.

Issues:

(1) whether the respondents should be granted leave to withdraw their admissions.

Held: denying leave to withdraw the admissions:

(1) a party may not withdraw an admission in a defence or subsequent pleading that operates for the benefit of another party, except with the consent of the other party or leave of the Court: at [2];

(2) in this case leave should not be granted as it would cause prejudice to the Council and disrupt and extend the hearing: at [18], [19]. Had the admissions not been made, the Council would have called expert evidence on the issue: at [12], [14]. It was not reasonable for the Council to be distracted from its conduct of the proceedings by having to find expert evidence whilst the hearing was in progress: at [15]; and

(3) it will usually be appropriate to grant leave to withdraw an admission where it is shown that the admission is contrary to the actual facts. The respondents did not show beyond controversy that the admission was contrary to the actual facts: at [16].

- **Section 56A Appeals**

Aldi Stores v Newcastle City Council [2010] NSWLEC 227 (Pepper J)

(first instance Commissioner decision: *Aldi Stores v Newcastle City Council* [2010] NSWLEC 1110 (Moore SC))

Facts: Aldi Stores ("Aldi") sought to build a store in Fletcher. The provisions of the Newcastle Local Environment Plan ("the LEP") stated that development for the purpose of a "local shop" was permissible, but a "shop" was prohibited. Aldi appealed to the Court. The Senior Commissioner made findings that the proposed development was consistent with the zone and the LEP objectives, that it did not involve an unreasonable environmental impact, and that it would not be refused based on an assessment of the merits of the development application. However, the Senior Commissioner went on to examine the "predominant use" of the development in the context of the extent to which the proposed store was predicted to trade to a market beyond that of the community of Fletcher. Evidence before the Court revealed that although the "predominant use" for the store would be as a "local shop", 25% of the projected future turnover would be from residents outside of Fletcher. The Senior Commissioner also had regard to the nature of the proposed

customer parking, which was in excess of the maximum provided for in the Development Control Plan. Aldi was not given notice that the Senior Commissioner intended to place weight on excess of parking. The Senior Commissioner considered that the excessive customer parking proposed and the high proportion of out-of-Fletcher turnover was relevant to the conclusion that he reached that the additional use proposed for the site was as a "shop", and not a "local shop". He therefore held that the development was prohibited and he refused to grant consent.

Issues:

(1) whether the Senior Commissioner erred in his determination that the proper characterisation of the proposed development was for the dual purpose of a "shop" and a "local shop"; and

(2) whether in making his decision the Senior Commissioner denied procedural fairness to Aldi by :

    (d) not putting Alidi on notice of the significance he attached to the evidence of excess parking; and

    (e) relying on a purported implied admission by Aldi as to what the "predominant use" of the store would be thereby suggesting that the store had other 'uses'; and

(3) whether the matter should be remitted to the Senior Commissioner for determination in accordance with the law or whether the Court should substitute its own judgment for that of the Senior Commissioner and grant the consent pursuant to the powers vested in the Court by s 56A(2) of the *Land and Environment Court Act* 1979 ("the Act").

Held: allowing the appeal and granting the development consent:

(1) the Senior Commissioner found as a matter of fact that the store was consistent with the definition of a "local shop": at [26]. He erred by considering whether there was another use as a "shop": at [27];

(2) the dictates of procedural fairness mandated that Aldi be given notice of, and afforded an opportunity to comment upon, the excess car parking issue, particularly in light of the determinative effect that this issue had on the reasoning of the Senior Commissioner: at [42];

(3) the Senior Commissioner did not misconceive the use of the concept of "predominant use": at [49]. Even if he had, this misconception would not have amounted to an error of law: at [50]; and

(4) no new findings of fact were required in order for the Court to grant development consent because all of the necessary findings regarding the merits of the development application were made by the Senior Commissioner, and therefore, the Court had the power to grant the consent under s 56A(2)(b) of the Act: at [56].

Brinara Pty Ltd v Gosford City Council [2010] NSWLEC 230 (Craig J)

(first instance Commissioner decision: *Brinara Pty Limited v Gosford City Council* [2010] NSWLEC 1196 (Moore SC and Morris C)

Facts: the applicant's land was used for many years for commercial purposes. The zoning later changed to make a commercial use prohibited. In 2005 development consent was granted for the erection and use of a new single storey commercial building on the land. The topography of the site was such that the area beneath the floor slab was a vacant under-croft area in which the structural columns of the building were apparent. The 2005 consent related to the whole of the land, with the unbuilt area required to be landscaped. The applicant sought consent to extend the commercial use on the land by enclosing the under-croft area with self-storage lockers. Its application was rejected by two Commissioners of the Court on the basis that they could not approve it under cl 42 of the Environmental Planning and Assessment Regulation 2000 ("the Regulation").

Issues:

(1) whether there was a decision on a question of law; and

(2) the ambit of inquiry directed by cl 42 of the Regulation identifying "the land on which the existing use was carried out."

Held: appeal upheld:

(1) the decision of the Commissioners did involve a decision on a question of law. That question, namely, the proper interpretation and application of cl 42 of the Regulation to the proposed development, was clearly material to the decision that they made: at [35];

(2) when identifying "the land on which the existing use was carried out", both a quantitative and qualitative assessment was required. This dual assessment involved the necessity to identify those areas of the land which, in some way, attracted or were necessary to the existing use, albeit that they were not at a moment in time actively occupied for that use. Consideration of land identified as being held in reserve for the existing use, including land that was land without which the current use could not be enjoyed, had to necessarily be undertaken: at [44];

(3) the ultimate question was whether there was some area of land including the existing commercial floor of the premises, but extending beyond it, that could fairly be regarded as a whole area used for the relevant purpose at the relevant time: at [45];

(4) where the lawful existing use was founded in a development consent, the land to which that consent was expressed to relate would usually determine the unit of land upon which the existing use was carried out: at [47];

(5) in the absence of any subsequent lawful use of part or parts of the land for a purpose other than a commercial purpose following implementation of the 2005 consent, consideration of the terms of the existing development consent, including its conditions, was fundamental to but not necessarily conclusive of the determination which the Commissioners were required to make: [48]; and

(6) on the facts found by the Commissioners, there was only one conclusion to be drawn, and that was that the requisite unit of land for the purpose of applying cl 42(2)(b) of the Regulation included the land located vertically beneath the existing floor slab as well as the land immediately to its north: at [54].

Commissioner decisions

- **Development Application Appeals under s 97 of the EPAA**

Andary v Council of the City of Sydney [2010] NSWLEC 1307 (Tuor C)

Facts: the applicant sought development consent to "continue use of premises as a service station …and use existing internal mechanical bays for purposes of washing … vehicles" on a site in Newtown which had an existing consent for use as a service station. Both "service station" and "car wash" were permissible uses in the Mixed Uses zone under the South Sydney Local Environmental Plan 1998 ("the LEP"). The LEP defined a "service station" to mean:

A building or place used for the fuelling of motor vehicles involving the sale by retail of petrol, oil or other petroleum [products, whether or not the building or place is also used for one or more of the following purposes:

…

(c) the washing and greasing of motor vehicles, or

…

In 2008 the council had refused consent for alterations and additions to the existing service station to provide a car wash facility, café, signage and awnings. In *Daniel Bek v Sydney City Council; Sydney City Council v*

Sydney Tool Supplies Pty Ltd [2008] NSWLEC 262 Sheahan J made orders in Class 4 proceedings directing the then tenant to cease use of the premises as a car wash.

Issues:

(1) whether the primary use of the site was as a service station;

(2) whether the noise and traffic generated by the car wash would result in acceptable amenity impacts on adjoining residential properties; and

(3) whether s 97B(2) of the *Environmental Planning and Assessment Act* 1979 required an order for costs as a consequence of the adjournment sought by the applicant to further amend the plans.

Held: granting development consent subject to conditions:

(1) the unauthorised operation of the car wash had had unacceptable impacts on the amenity of adjoining owners and was not ancillary to the service station use of the site: at [49];

(2) while the previous unauthorised use was an irrelevant inquiry in consideration of the merits of the application, the past use of the site as a car wash was a relevant consideration to assist in assessment of likely impacts of the proposal and how they could be mitigated: at [54], [55];

(3) the applicant was not seeking approval for a car wash or for a car wash and service station as two separate uses, and to be consistent with what was applied for in the development application, the Court had to be satisfied that the service station use would remain the dominant use of the site and the car wash would not operate as a separate, independent use: at [58];

(4) the proposal, if operated in accordance with the plans, the Plan of Management, and conditions of consent would be a continuation of the service station use and the car wash would be ancillary to that use: at [59];

(5) the definition of "service station" did not require that a car could only be washed if it had also used the petrol fuelling services: at [60];

(6) the evidence was that the proposal would not result in noise or traffic impacts that were unreasonable and the proposal was therefore consistent with the objectives of the zone and the relevant requirements of the applicable development control plan: at [64];

(7) the proposed acoustic fence and plexiglass would mitigate noise impacts and issues about structural adequacy and location could be dealt with by conditions: at [66], [67];

(8) if operated in accordance with the conditions of consent and the Plan of Management, the traffic generated by the car wash would not adversely affect the amenity of surrounding properties: at [71]; and

(9) the cumulative or overall effect of the amendments was not minor, and s 97B(2) applied: at [96].

- **Trees/Hedges**

Hough v Rettenmaier [2010] NSWLEC 1354 (Moore SC and Hewett AC)

Facts: the applicants brought proceedings under Pt 2A of the *Trees (Disputes Between Neighbours) Act* 2006 ("the Act"), which commenced on 2 August 2010, seeking orders in respect of a bamboo hedge at the rear of the respondents' property.

Issues:

(1) whether s 14A, which required that there be a group of 2 or more trees planted so as to form a hedge and rise to a height of at least 2.5m above ground level, was satisfied;

(2) whether s 14D, which required that there be severe obstruction to sunlight to a window of a dwelling or any view from a dwelling, was satisfied;

(3) whether the severity and nature of the obstruction was such that the applicant's interest in having the obstruction remedied outweighed any other matters suggesting the undesirability of disturbing or interfering with the trees; and

(4) what was the appropriate form of pruning regime to order, and who should be responsible for it.

Held: ordering the respondents to prune the bamboo to a height of 1.8m above the top of the fence between the properties and to maintain the bamboo pruned to a height not exceeding 2m:

(1) bamboo was prescribed by cl 4 of the Trees (Disputes Between Neighbours) Regulation 2007 to be a tree for the purposes of s 3(1) of the Act; the bamboo had been planted in clumps; and the height of the hedge was in excess of 8m in parts. The requirements of s 14A were satisfied and Part 2A of the Act applied: at [3]-[6];

(2) the view of vegetation from the windows of the family/kitchen room was not severely impacted by the hedge, and there was no jurisdiction with respect to the view from those windows: at [16];

(3) the bamboo provided a reasonably significant and observable interruption to the view from the upper balcony, and almost entirely obliterated the view of the water from the lower balcony. The impact on the view from the lower balcony was severe and there was jurisdiction under s 14D to make orders: at [17]-[20];

(4) the possibility that an application might be made by the respondents or their neighbours to the local council for consent to add an additional storey to their dwellings was not relevant to the proceedings: at [19];

(5) s 14E(2)(b) did not stand as an impediment to the making of orders: at [24];

(6) on consideration of the matters specified by s 14F, the views from the private open space at the ground floor level of the applicants' property were severely impacted by the bamboo; on the other hand it was not unreasonable for the respondents to have the privacy of their family area and swimming pool protected: at [28]; and

(7) it was appropriate to order the respondents to undertake the first pruning and to set a height within which the bamboo was to remain pruned which would be likely to result in pruning at intervals somewhere between six months and annually: at [32].

Hendry v Olsson [2010] NSWLEC 1302 (Moore SC and Galwey AC)

Facts: the applicants brought proceedings under ss 7 and 14B of the *Trees (Disputes Between Neighbours) Act* 2006 ("the Act") in relation to seven trees located on the respondents' land. The applicants contended that the trees by shading steps and a paved area, caused a risk of injury, and deposited seeds and other detritus causing gutter blockage and nuisance, and also constituted a hedge that caused severe obstruction of sunlight to two windows.

Issues:

(1) whether the jurisdictional requirements of Pts 2 and 2A of the Act were met; and

(2) whether orders should be made.

Held: dismissing the application:

(1) taking the applicants' case at the highest and assuming that the jurisdictional question in Part 2 of the Act was satisfied, as a matter of discretion the application should be dismissed. It was appropriate to expect and require ordinary maintenance to deal with deposition of detritus from trees; and even assuming that the trees caused the mould and slime, the responsibility for ordinary maintenance should extend to the cleaning of surfaces such as paving and paths: at [15];

(2) trees 1 and 2 together, and Trees 4 and 5 together, met the requirements of s 14A(1)(a), and as a consequence there were two separate hedges located at, or in the vicinity of, the boundary between the two properties: at [21]-24];

(3) the Court could not be satisfied on the evidence that Trees 6 and 7 were planted as opposed to being self sown, whether or not they were part of remnant native vegetation. Their consistency with the remnant native vegetation in the area made it probable that those trees were part of the remnant native vegetation in the area. There was no jurisdiction under Part 2A of the Act in relation to Trees 6 and 7: at [26]-[27];

(4) the relevant obstruction of sunlight in s14B was to a window of a dwelling and the definition of "window" did not include solar panels: at [29];

(5) a combination of Trees 6 and 7 and shadecloth on a pergola removed the possibility that the hedge comprising Trees 4 and 5 caused severe obstruction of sunlight to the more eastern of the applicants' windows. Trees 1 and 2 as a hedge did not provide a severe obstruction of sunlight to that window: at [36] and [38];

(6) the shadowing of the other window could not be regarded as severe: at [41]; and

(7) while there were hedges that were within the jurisdiction of the Court there was no obstruction of sunlight to either window on the applicants' property that met the test of a severe obstruction of sunlight by a hedge: at [41].

Drewett v Best [2010] NSWLEC 1305 (Brown and Fakes CC)

Facts: the applicant brought proceedings under Pt 2A of the *Trees (Disputes Between Neighbours) Act* 2006 ("the Act") in relation to a number of trees on the adjoining property that he claimed obstructed sunlight to and views from his dwelling. The applicant had not been able to gain access to the adjoining property, and following a site inspection by the Commissioners of that property, limited his application to 6 *Tecomaria capensis* (Cape Honeysuckle) located adjoining the brick retaining wall on the common boundary which had heights around 5m, and 4 *Syzygium sp* (Lillypilly) located in a row approximately 1.5m from the common boundary with heights around 5m.

Issues:

(1) whether there was severe obstruction of sunlight to a window; and

(2) whether there was severe obstruction of any view from the applicant's dwelling.

Held: ordering the respondent to prune the Cape Honeysuckle trees and 3 of the Lillypilly trees to an appropriate point where they could be maintained at a height of 2.5m above the ground, with the applicant to reimburse the respondent 50 percent of the cost of the initial pruning work:

(1) sunlight meant direct sunlight rather than daylight. Given the south western orientation, the windows would receive no sunlight in the morning or early afternoon, and the large camphor laurel on the adjoining property (not subject to the application) and the Fiddlewood tree on another property would deny afternoon sunlight to the windows. No order could be made in relation to obstruction of sunlight: at [17];

(2) the trees blocked all views in a southerly direction from the balcony area adjoining the living room: at [20];

(3) considering the relevant matters in s 14E of the Act a reduction in the height of the trees could be justified: at [21] and [22]; and

(4) as the benefit would go to the applicant, the applicant should contribute to the cost of the initial pruning, and thereafter the responsibility should lie with the respondent to maintain the nominated plants at the specified height: at [28].

- **Mining**

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

(related decision: *Martin v NSW Minister for Mineral and Forest Resources* [2010] NSWLEC 131 Biscoe J)

Facts: the applicant applied on 27 July 2009 for an exploration licence (ELA3747) under s 13 of the *Mining Act* 1992. On 24 November 2009 a delegate of the Minister refused ELA3747 on the ground that the applicant had failed to comply with licence conditions on four previous exploration licences. The applicant brought proceedings under s 293(1)(q)(ii) of the *Mining Act* against the Minister's refusal of ELA3747 on the basis that the decision was unlawful on several grounds.

Issue:

(1) whether the Minister's decision to refuse ELA3747 was unlawful.

Held: dismissing the application:

(1) the issue of the validity of the delegation of decision-making power had been dealt with by Biscoe J: at [24];

(2) the allegation that employees of the department had acted in bad faith in relation to the application was not made out on the evidence: at [25];

(3) there was no evidence to support an allegation of bad faith against the decision maker: at [27];

(4) no statement of charge specifying contempt as required by Div 3 of Pt 55 of the Supreme Court Rules 1970 had been filed and the allegation of contempt was dismissed: at [29];

(5) section 22(2) of the *Mining Act* empowered the Minister to refuse an exploration licence on any of the specified grounds or any other basis provided the discretion was exercised reasonably and having regard to the objects and purposes of the Act: at [33];

(6) section 26(1) of the *Mining Act* empowered the Minister to impose condition when issuing an exploration licence subject to the need to be reasonable and to comply with the objects and purposes of the Act: at [35];

(7) section 22(1)(b) of the Act conferred a broad discretion to refuse an application for an exploration licence, and in exercising that discretion it was reasonably open to the Minister to consider whether an applicant had complied with the conditions of other exploration licences because compliance with conditions was consistent with the objects and purposes of the Act: at [37];

(8) there was no evidence to support the submission that there was a culture and practice in the department to ignore non-compliance with conditions of exploration licences: at [39];

(9) the reports required under the conditions of the other exploration licences were submitted late and not in compliance with the request to submits all outstanding reports by 27 October 2009: at [46];

(10) there was no evidence to support the submission that bias against the applicant was a consideration or the reason for the refusal of ELA3747 or that there had been a prejudgment: at [49]; and

(11) the Court did not have jurisdiction to hear and determine proceedings for an offence alleged under s 365(2) of the *Mining Act*, and even if it did have jurisdiction the applicant had not filed a statement of charge to enliven that jurisdiction: at [52], [53].

Court News

New Developments

The new Practice Note for Class 1 Residential Development Appeals will commence on 7 February 2011.

Decisions from the Mining Warden's Court are now available through the Mining page on the LEC's website.

Acting Commissioner Larissa Behrendt was named the New South Wales Australian of the Year in recognition of her passionate and articulate advocacy for the rights of Aboriginal and Torres Strait Islanders.

Arrivals/Departures

The Court welcomes Ms Anne Heritage who will be job sharing as Librarian starting from 24 January 2011.

The Court also welcomes Ms Christine Craig who will be job sharing as Sheahan J's Associate starting from 31 January 2011.