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Land and Environment Court of NSW Judicial Newsletter

Legislation

- Statutes and Regulations

Planning:

Environmental Planning and Assessment Amendment (Offences and Enforcement) Regulation 2015, published 31 July 2015:

(a) provides that certain time periods are not included in the calculation of the assessment period for State significant development and are not counted in the calculation of the deemed refusal period for that category of development;

(b) increases the maximum penalties for certain fire safety offences, and an offence relating to signs on development sites, by omitting the stated penalties and relying on the default maximum penalty of $110,000 (fixed by section 125D(2) of the *Environmental Planning and Assessment Act* 1979;

(c) updates a reference to a provision about fire brigade inspection powers that has been amended;

(d) allows authorised fire officers to issue penalty notices, but only in respect of the contravention of orders given by authorised fire officers and certain other fire-related offences;

(e) provides for the enforcement of court orders to cease the use of premises as backpackers' accommodation and boarding houses by the making of utilities orders;

(f) modifies the application to planning matters of provisions of the *Protection of the Environment Operations Act* 1997 relating to court orders in connection with offences;

(g) extends the expanded offence of providing false or misleading information in connection with a planning matter to the provision of information in response to a requirement of a condition of a development consent, an approval to carry out a project that is a transitional Part 3A project or an approval under Part 5.1 of the *Environmental Planning and Assessment Act* 1979;

(h) provides for further offences to be dealt with by penalty notices (or "on-the-spot fines");

(i) increases the penalties for certain offences that are dealt with by penalty notice; and

(j) makes savings and transitional provisions that are consequential on amendments made by the *Environmental Planning and Assessment Amendment Act* 2014 in relation to offences, penalties, enforcement and the disclosure of political donations and gifts.

[For further explanatory notes see Circular PS 15-004 issued by the Department of Planning and Environment]

Environmental Planning and Assessment Amendment (Transitional Part 3A Approvals) Regulation 2015, published 21 August 2015, provides that a transitional Part 3A approval does not lapse if a request for extension has been duly made to the Minister but has not been determined before the approval would otherwise lapse.

Environmental Planning and Assessment Amendment Act 2014 No 79 proclamation published 31 July 2015, appointed:

(a) 31 July 2015 as the day on which Schedules 1 [1]–[12] and 2 to that Act commenced; and

(b) 30 September 2015 as the day on which Schedules 1 [13], 4 [6] and 6 to that Act commenced.

Those amendments to the *Environmental Planning and Assessment Act* 1979, and the regulations made under that Act, relate to:

(a) offences, penalties and enforcement powers (which commenced on 31 July 2015), and

(b) the offence of providing false or misleading information in connection with a planning matter and the disclosure of political donations and gifts (which commenced on 30 September 2015).

Environmental Planning and Assessment Amendment (Fire Safety Reports) Regulation 2015, published 2 October 2015, amends the Environmental Planning and Assessment Regulation 2000 to:

(a) remove the requirement for the Fire Commissioner to provide an initial fire safety report and a final fire safety report in relation to certain buildings (but to give the Commissioner the option of providing such reports); and

(b) update references to legislation referred to in the definitions of "environmentally sensitive area of State significance" and "sensitive coastal location".

Environmental Planning and Assessment Amendment (Notification of Neighbours) Regulation 2015, published 28 October 2015, amends the Environmental Planning and Assessment Regulation 2000 to:

(a) provide that the current requirement that certifying authorities must give occupiers of neighbouring land 14 days' written notice of an application for a complying development certificate before a certificate is issued applies only to land in certain urban local government areas;

(b) provide that the current requirement that persons with the benefit of a complying development certificate give at least 7 days' written notice to occupiers of land within 20 metres of the boundary of land that is the subject of the complying development certificate of the person's intention to commence work applies only to land in certain urban local government areas (that is not in a residential release area); and

(c) provide that persons with the benefit of a complying development certificate applying to land in other local government areas give at least 2 days' written notice to occupiers of land within 20 metres of the boundary of the land that is the subject of the complying development certificate of the person's intention to commence work.

Local Government:

Local Government Amendment (Councillor Misconduct and Poor Performance) Bill 2015, passed by both Houses of Parliament on 20 October 2015, amends the *Local Government Act* 1993 and the Local Government (General) Regulation 2005 to reform the legislative scheme for addressing councillor misconduct and poor performance and council maladministration by, in particular, streamlining processes, improving the effectiveness of performance improvement orders and providing additional relevant powers to the Minister and the Chief Executive of the Office of Local Government.

Criminal:

Crimes Regulation 2015, published 28 August 2015, remade without any changes of substance, the Crimes Regulation 2010.

Water:

Water (Part 8—General) Repeal Regulation 2015, published 18 September 2015, repealed the Water (Part 8—General) Regulation 1995 consequent on the repeal of Part 8 of the *Water Act* 1912 on 21 September 2015.

Water Management (Application of Act to Flood Work Approvals) Proclamation 2015, published 18 September 2015, declared that Part 3 of Chapter 3 of the *Water Management Act* 2000 applies to all flood work approvals in relation to each part of the State on and from 21 September 2015.

Water Management (General) Amendment (Flood Work Approvals) Regulation 2015, published 18 September 2015:

(a) provides for the circumstances in which applications for flood work approvals are to be advertised by the Minister;

(b) provides for certain exemptions from the requirement to hold a flood work approval; and

(c) makes provision with respect to applications for certain entitlements under Part 8 of the *Water Act* 1912 consequent on the repeal of that Part on 21 September 2015 and the conversion of such entitlements into flood work approvals to which Part 3 of Chapter 3 of the *Water Management Act* 2000 applies.

Water Management (General) Amendment (Value of Water Illegally Taken) Regulation 2015, published 23 October 2015, prescribes the methods to be used to determine the value of water illegally taken from a water source to which Part 2 of Chapter 3 of the *Water Management Act* 2000 applies for the purposes of the Minister imposing a charge for that water, which may include a penalty component.

Water Sharing Plan for the Peel Valley Regulated, Unregulated, Alluvium and Fractured Rock Water Sources Amendment Order 2015, published 14 August 2015, amended the Water Sharing Plan for the Peel Valley Regulated, Unregulated and Fractured Rock Water Sources 2010 in respect of water supply works and some access licences.

Water Sharing Plan for the New South Wales Murray and Lower Darling Regulated Rivers Water Sources Amendment Order 2015, published 28 August 2015, amended the Water Sharing Plan for the NSW Murray and Lower Darling Regulated Rivers Water Sources 2003 in respect of water for the Barmah-Millewa Allowance.

Water Sharing Plan for the Gwydir Regulated River Water Source 2016, published 16 October 2015, commences 1 July 2016. It will replace the Water Sharing Plan for the Gwydir Regulated Water Source 2002.

Water Sharing Plan for the Macquarie and Cudgegong Regulated Rivers Water Source 2016, published 16 October 2015, commences 1 July 2016. It will replace the Water Sharing Plan for the Macquarie and Cudgegong Regulated Rivers Water Source 2003.

Water Sharing Plan for the Upper Namoi and Lower Namoi Regulated River Water Sources 2016, published 16 October 2015, commences 1 July 2016. It will replace the Water Sharing Plan for the Upper Namoi and Lower Namoi Regulated River Water Sources 2003.

Pollution:

Protection of the Environment Operations (Clean Air) Amendment (Cruise Ships) Regulation 2015 — published 4 September 2015, will require cruise ships to use low sulfur fuel while berthed in Sydney Harbour (from 1 October 2015) and at any place within the boundaries of Sydney Harbour (when not berthed) from 1 July 2016. Additionally the regulation provides for the following:

(a) requiring fuel suppliers to provide the masters of cruise ships with certain documents and fuel samples relating to the refuelling of those ships;

(b) providing that masters and owners of cruise ships must keep certain log books and other documents relating to fuels;

(c) requiring appropriate persons to be available to answer questions and provide information about a cruise ship's fuel systems and engines while it is berthed in port;

(d) enabling the Environment Protection Authority to approve alternative methods for a cruise ship to achieve low sulfur oxides and particulate matter emissions instead of using low sulfur fuel;

(e) providing for certain defences, exemptions and exceptions to these requirements to use low sulfur fuel;

(f) prescribing certain offences relating to these obligations and requirements as penalty notice offences;

(g) enabling a penalty notice that relates to an offence that applies to a master of a vessel to be served by leaving it on, or attaching it to, the vessel or leaving it with the person having command or charge of the vessel for the time being; and

(h) providing for appeals to the Land and Environment Court against certain decisions of the Environment Protection Authority regarding certain exemptions and approvals.

- Mining and Petroleum:

SEPP (Mining, Petroleum Production and Extractive Industries) Amendment (Significance of Resource) 2015, published 2 September 2015, deleted Clause 12AA: Significance of resource from the SEPP (Mining, Petroleum Production and Extractive Industries) 2007.

- Miscellaneous:

Rural Fires Amendment (Bush Fire Prevention) Act 2015 commenced on 28 August 2015. The Act amends the *Rural Fires Act* 1997 to:

(a) provide that persons are not guilty of offences under environmental legislation merely for carrying out bush fire hazard reduction work or vegetation clearing work if the work is carried out under, and in accordance with, the *Rural Fires Act* 1997;

(b) permit vegetation clearing work to be carried out in certain areas near farm sheds in order to reduce bush fire risk;

(c) clarify how provisions authorising vegetation clearing work apply to the removal of trees; and

(d) ensure that the written consent of adjoining neighbours is obtained before certain vegetation clearing work is carried out. [full explanatory notes]

Biosecurity Act 2015 assented 22 September 2015, repeals a number of Acts, including the *Noxious Weeds Act* 1993, and consolidates and amends a number of Acts. The Act:

(a) provides a framework for the prevention, elimination and minimisation of biosecurity risks posed by biosecurity matter, dealing with biosecurity matter, carriers and potential carriers, and other activities that involve biosecurity matter, carriers or potential carriers;

(b) promotes biosecurity as a shared responsibility between government, industry and communities;

(c) provides a framework for the management of:

(i) pests, diseases, contaminants and other biosecurity matter that are economically significant for primary production industries,

(ii) threats to terrestrial and aquatic environments arising from pests, diseases, contaminants and other biosecurity matter,

(iii) public health and safety risks arising from contaminants, non-indigenous animals, bees, weeds and other biosecurity matter known to contribute to human health problems; and

(iv) pests, diseases, contaminants and other biosecurity matter that may have an adverse effect on community activities and infrastructure;

(d) provides a framework for risk-based decision-making in relation to biosecurity;

(e) gives effect to intergovernmental biosecurity agreements to which NSW is a party; and

(f) provides the means by which biosecurity requirements in other jurisdictions can be met, so as to maintain market access for industry.

The Act provides for appeals in Class 2 of the Land and Environment Court's jurisdiction from decisions relating to the giving of a biosecurity direction (s 140); biosecurity registration, including renewal, suspension or cancellation (s 182); accreditation of biosecurity certifiers (s 213); approval of accreditation authorities (s 277); recovery of administrative costs and other fees (s 328); and permits (s 360). Additional Class 4 civil enforcement jurisdiction is conferred under s 109 (orders for delivery of a seized thing); s 148 (compliance with a biosecurity undertaking); s 171 and s 350 (conditions requiring financial assurance); and s 385 (proceedings for an order to restrain a contravention of any requirement imposed by the Act). The Act includes savings and transitional provisions in Sch 7, including in relation to the repeal of the *Noxious Weeds Act* 1993, and the definition of "noxious weed".

Evidence Regulation 2015, published 28 August 2015, remade with minor changes, the Evidence Regulation 2015.

Fines Regulation 2015, published 28 August 2015, remade with minor amendments, the Fines Regulation 2010.

Aboriginal Land Rights Amendment (Elections) Regulation 2015, published 10 July 2015, amended the Aboriginal Land Rights Regulation 2014 to save the effect of certain informal votes recorded on ballot-papers for the election of members of the NSW Aboriginal Land Council.

Pesticides Amendment Act 2015 No 3, proclamation published 31 July 2015, appointed:

(a) 1 September 2015 as the day on which Schedule 1.1 to that Act commenced; and

(b) 1 December 2015 as the day on which the other uncommenced provisions of that Act commence, including enabling the EPA to bring civil enforcement proceedings in Class 4 of the Court's jurisdiction.

Pesticides Amendment Regulation 2015, published 31 July 2015, made amendments to the Pesticides Regulation 2009:

(a) to include a new licensing scheme with respect to prescribed pesticide work and to make other amendments that are consequential on the amendments made to the *Pesticides Act 1999* by the *Pesticides Amendment Act* 2015;

(b) to provide for an exemption from the requirement under the *Pesticides Act 1999* for a registered pesticide to be used in accordance with the instructions on an approved label for such a pesticide; and

(c) to prescribe fees for the giving of clean-up and prevention notices.

Subordinate Legislation (Postponement of Repeal) Order 2015, published 14 August 2015, postponed the repeal of, inter alia, the following statutory rules until 1 September 2016:

Building Professionals Regulation 2007

Community Land Development Regulation 2007

Community Land Management Regulation 2007

Crimes (Sentencing Procedure) Regulation 2010

Criminal Procedure Regulation 2010

Crown Lands (Continued Tenures) Regulation 2006

Crown Lands (General Reserves) By-law 2006

Crown Lands Regulation 2006

Environmentally Hazardous Chemicals Regulation 2008

National Parks and Wildlife Regulation 2009

Noxious Weeds Regulation 2008

Pesticides Regulation 2009

Petroleum (Offshore) Regulation 2006

Petroleum (Onshore) Regulation 2007

Protection of the Environment Operations (Clean Air) Regulation 2010

Protection of the Environment Operations (General) Regulation 2009

Protection of the Environment Operations (Noise Control) Regulation 2008

Strata Schemes Management Regulation 2010

Swimming Pools Regulation 2008

Threatened Species Conservation Regulation 2010

- Bills

Greater Sydney Commission Bill 2015, introduced 22 October 2015:

- constitutes the Greater Sydney Commission as a NSW Government agency with functions that include:
  - (i) to provide advice and make recommendations to the Minister on matters relating to planning and development in the Greater Sydney Region, and on impediments to the implementation of any plan or proposal relating to development in the Greater Sydney Region;
  - (ii) prepare and provide reports on implementation of any plan or proposal relating to development in the Greater Sydney Region; and
  - (iii) other functions including the power to make local environmental plans under Part 3 of the *Environmental Planning and Assessment Act* 1979, and to prepare draft strategic plans under a new Part 3B of the EPA Act;
- provides for the constitution of Sydney planning panels for the Greater Sydney Region that will be taken to be a joint regional planning panel for the purposes of the EPA Act;
- amends the *Environmental Planning and Assessment Act* 1979 to:
  - (i) provide that the Greater Sydney Commission may be a consent authority, and may make local environmental plans for the purpose of environmental planning in each local government area in the Greater Sydney Region; and
  - (ii) insert a new Part 3B Strategic Planning.

The Greater Sydney Region is identified in Sch 1 to be the area from Hawkesbury in the north to Wollondilly in the south, and Blue Mountains in the west, excluding Gosford and Wollongong.

The proposed Part 3B Strategic Planning provides for:

(a) declaration of any area of the State to be a region, and any part of the Greater Sydney Region or any other region to be a district;

(b) preparation, content and making, and review, of a strategic plan, being a regional plan, or a district plan;

(c) public exhibition requirements for a draft strategic plan;

(d) limiting legal proceedings in relation to the validity of a strategic plan to those instituted within 3 months following publication on the NSW planning portal; and

(e) the making of regulations relating to strategic planning.

Courts and Other Justice Portfolio Legislation Amendment Bill 2015, inter alia, amends the *Civil Procedure Act* 2005 in relation to payments attached to garnishee orders, persons under legal capacity, judgment

debts and interest paid on orders for costs; and amends the *Fines Act* 1996 to make it clear that a monetary penalty imposed by a court for contempt is a fine that may be collected by the State Debt Recovery Office.

Regulatory Reform and Other Legislative Repeals Bill 2015, which has passed both Houses of Parliament and awaits assent, repeals a number of Acts including the *Valuers Act* 2003, and inter alia, amends the *Land Acquisition (Just Terms Compensation) Act* 1991 and the *Mine Subsidence Compensation Act* 1961 to delete the reference to a "registered valuer" and replace it with a reference to a "qualified valuer" who is defined to be a person who has membership of the Australian Valuers Institute (other than associate or student membership); has membership of the Australian Property Institute (other than student or provisional membership) acquired in connection with his or her occupation as a valuer; has membership of the Royal Institution of Chartered Surveyors as a chartered valuer; or is of a class prescribed by the regulations. Those amendments commence on a date to be proclaimed.

A package of legislation to amend the *Mining Act* 1992 and the *Petroleum (Onshore) Act* 1991 has passed both Houses of Parliament, and is awaiting assent:

- Mining and Petroleum Legislation Amendment (Grant of Coal and Petroleum Prospecting Titles) Bill 2015;
- Mining and Petroleum Legislation Amendment (Harmonisation) Bill 2015;
- Mining and Petroleum Legislation Amendment (Land Access Arbitration) Bill 2015.

Mining and Petroleum Legislation Amendment (Grant of Coal and Petroleum Prospecting Titles) Bill 2015, amends the *Mining Act* 1992 and the *Petroleum (Onshore) Act* 1991 to establish a new system for granting certain prospecting titles for coal and petroleum. The new system will feature a competitive selection process for the granting of an exploration licence or assessment lease in relation to certain areas under the Mining Act or an exploration licence, assessment lease or special prospecting authority under the Petroleum Act, including:

(a) enabling the Minister to constitute an area as a controlled release area for specified minerals under the Mining Act;

(b) providing that the whole State is constituted as a controlled release area for coal;

(c) providing that the following prospecting titles can only be granted pursuant to a competitive selection process:

> (i) an exploration licence or assessment lease under the Mining Act relating to land in a controlled release area (with certain exceptions for exploration licences granted to holders of existing mining authorities or on behalf of the Crown); and
>
> (ii) an exploration licence, assessment lease or special prospecting authority under the Petroleum Act, and

(d) providing that a petroleum title is not to be granted in respect of an area unless any applicant who had an application in respect of that area expunged (by operation of the *Petroleum (Onshore) Amendment (NSW Gas Plan) Act* 2014) has first been given an opportunity to participate in a competitive selection process for the grant of the title;

(e) providing for various matters in relation to invitations for competitive selection applications, the process for competitive selection and the consideration of applications; and

(f) making miscellaneous amendments relating to applications for prospecting titles under the Mining Act and the Petroleum Act.

Mining and Petroleum Legislation Amendment (Harmonisation) Bill 2015 amends the *Mining Act* 1992 and the *Petroleum (Onshore) Act* 1991 as follows:

(a) by consolidating provisions about mining authorisations and petroleum titles into a separate Schedule of standard clauses that:

> (i) allow a decision-maker to require an applicant or tenderer to furnish further information;

(ii) require applications and tenders to be supported by a proposed work program;

(iii) provide broader and more flexible grounds on which mining authorisations and petroleum titles may be granted, suspended or cancelled;

(iv) require the need to conserve and protect the environment to be taken into account in considering applications;

(v) specify other matters that may be taken into account in considering applications, including the applicant's technical and financial capability to carry out the proposed work program, compliance history and ability to meet minimum standards;

(vi) set out a non-exhaustive list of grounds on which applications or tenders can be refused;

(vii) provide broader and more flexible powers to impose and vary conditions, and (viii) allow security deposit conditions to be imposed in relation to any impact that is the result of work carried out under an authorisation or title, whether or not that impact affects land over which it was granted; and

(ix) provide for the modification of the amount of land to which an exploration licence that is being renewed can apply;

(b) by requiring the holder of an exploration licence or assessment lease under either Act to obtain a further approval for prospecting activities that are not exempt development under planning legislation, and creating a power to impose terms on such activity approvals;

(c) by requiring the lodging of reports in relation to all operations carried out under a mining authorisation or petroleum title and requiring any record created or maintained under the Act to be kept in a legible form for at least 4 years after the expiry or cancellation of the relevant authorisation or title;

(d) by giving decision-makers the power to waive minor procedural matters if the waiver is unlikely to adversely affect any person's rights or to result in any person being deprived of information necessary for the effective exercise of those rights;

(e) by enabling the Minister or an inspector to issue a prohibition notice to a person suspected of carrying out unauthorised activity, or a suspension notice in certain circumstances that could constitute grounds for cancellation of a mining authorisation or petroleum title, and by making a contravention of either type of direction a ground for cancelling an authorisation or title;

(f) by creating an offence for the non-payment of any annual rental fee or annual administrative levy payable for a mining authorisation or petroleum title;

(g) by providing for the Secretary to refund or waive payment of fees, in certain circumstances;

(h) by making it an offence to aid, abet, counsel or conspire in the commission of an offence;

(i) by providing that a court that is satisfied, to a civil standard, that a person has carried out unauthorised prospecting or mining may order the person to pay costs and expenses incurred in the prevention or management of any environmental impact or rehabilitating land or water or to pay compensation for loss or damage suffered;

(j) by providing for the giving of enforceable undertakings in relation to contraventions of statutory provisions;

(k) by providing for the ongoing effect of notices and of conditions of mining authorisations and petroleum titles;

(l) by providing for the extraterritorial application of notices relating to investigation and enforcement action;

(m) by prohibiting inspectors, certain member of staff of the Department and certain persons who exercise judicial or official functions under the Acts from holding a direct or indirect beneficial interest in a mining authorisation or petroleum title;

(n) by providing for the use and disclosure of information, work programs and samples provided under the Acts, including under information sharing arrangements with other regulatory agencies;

(o) by enabling mandatory codes of practice (including for land access), minimum standards and conditions to be adopted by regulation;

(p) by amending the Petroleum (Onshore) Act 1991 to permit the holder of an exploration licence or assessment lease to beneficially use gas recovered by the holder when prospecting for petroleum and to harmonise particular compliance, investigation and enforcement provisions with those of the Mining Act 1992, including by aligning provisions relating to audits, inspection and investigative powers, the giving of directions, enforcement and administration;

(q) by amending the Mining Act 1992 to require the holder of a mining authorisation to collect cores and samples; and

(r) by making other minor and consequential amendments and enacting savings and transitional provisions consequent on the enactment of the proposed Act.

Mining and Petroleum Legislation Amendment (Land Access Arbitration) Bill 2015 amends the *Mining Act* 1992 and the *Petroleum (Onshore) Act* 1991 to give effect to the recommendations of the review undertaken by Mr Bret Walker SC in June 2014 entitled Examination of the Land Access Arbitration Framework — Mining Act 1992 and Petroleum (Onshore) Act 1991.

The Bill amends the Acts in relation to the land access arbitration framework, including:

(a) the composition of the Arbitration Panel under the Mining Act (which performs the functions of the Arbitration Panel under the Petroleum Act);

(b) negotiating access arrangements under the Acts;

(c) enabling an access code to be prescribed for the purposes of the Acts (which may include mandatory provisions that are taken to form part of access arrangements);

(d) mediation and arbitration of access arrangements;

(e) enabling the Secretary of the Department of Industry, Skills and Regional Development (the Secretary) to approve arbitration procedures for the purposes of mediations and arbitrations under the Acts;

(f) costs for negotiating, mediating and arbitrating access arrangements;

(g) the establishment of public registers of access arrangements under the Acts;

(h) allowing the Land and Environment Court to determine access arrangements if the Court is already considering an application relating to operations near dwelling-houses, gardens or significant improvements on the land concerned;

(i) clarifying the extent of the general immunity of landholders from liability for other persons' acts or omissions on the landholder's land;

(j) excluding seismic surveys on certain roads from prohibitions of certain operations within a certain distance of dwelling-houses, gardens or significant improvements;

(k) clarifying the operation of certain provisions relating to operations in proximity to significant improvements and enabling regulations to specify works and structures that are and are not such improvements;

(l) renewal of exploration licences and assessment leases under the Petroleum Act over areas of land smaller than that comprised in the application for renewal;

(m) clarifying the rights of holders of production leases;

(n) extending the access arrangement regime that applies in relation to exploration licences under the Petroleum Act to production leases under that Act;

(o) assessment of compensable loss suffered or likely to be suffered as a result of the exercise of rights under petroleum titles; and

(p) savings, transitional and other miscellaneous matters.

The Bill also provides for the cancellation of certain petroleum exploration licences that are comprised of land within national parks.

Protection of the Environment Operations Amendment (Enforcement of Gas and Other Petroleum Legislation) Bill 2015, passed by both Houses of Parliament, amends the *Protection of the Environment Operations Act* 1997 to confer on the EPA responsibility for investigating and instituting proceedings for offences against relevant Acts in relation to the carrying out of petroleum activities that are authorised, or required to be authorised, by the following:

(a) exploration licences, assessment leases, production leases and special prospecting authorities under the *Petroleum (Onshore) Act* 1991;

(b) development consents under Part 4 of the *Environmental Planning and Assessment Act* 1979, to the extent that they authorise the carrying out of development for the purposes of petroleum activities;

(c) approvals under Part 3A of the *Environmental Planning and Assessment Act* 1979, to the extent that they authorise the carrying out of projects for the purposes of petroleum activities; and

(d) water access licences, water use approvals and water supply work approvals under the *Water Management Act* 2000, and licences in respect of bores under the *Water Act* 1912, to the extent that they authorise the taking or use of water, or the construction or use of a water supply work, for the purposes of petroleum activities.

The amendments will not authorise the EPA to grant or cancel any of those authorities, or to generally administer those authorities, but will authorise the EPA to provide relevant information or records to the agencies responsible for the administration of those authorities.

- State Environmental Planning Policy [SEPP) Amendments

SEPP Amendment (Heathcote Ridge West Menai) 2015, published 27 July 2015, amended the Sutherland Shire LEP 2006 in respect of land in the Heathcote Ridge West Menai.

SEPP (Major Development) Amendment (Ryde) 2015, published 1 October 2015, amended the Ryde LEP 2014 and the SEPP (Major Development) 2005 in respect of land at the Macquarie University Campus and the Macquarie Park corridor.

SEPP (Housing for Seniors or People with a Disability) Amendment 2015, published 30 October 2015, specifies certain land in Hornsby Shire to be taken to be land that adjoins land zoned primarily for urban purposes, and amends the savings and transitional provisions for development applications made before SEPP (Seniors Living) 2004 (Amendment No 2).

- On Exhibition

The EPA is seeking feedback on its Draft Industrial Noise Guidelines until 13 November 2015. The guidelines are intended to replace the NSW Industrial Noise Policy (EPA 2000).

The Department of Primary Industries has invited submissions on its Proposed Marine Park Zoning. Submissions close 13 November 2015.

The NSW Government is seeking feedback on draft Guidelines for the Economic Assessment of Mining and Coal Seam Gas Proposals until 24 November 2015. Until 30 November 2015, the Division of Resources and Energy is accepting submission on its draft of the Exploration Code of Practice: Community Consultation.

The Office of Local Government is conducting the Swimming Pool Barrier Review 2015. Submissions close 23 October 2015. [discussion paper]

IPART has released a draft report on CSG landholder benchmark compensation rates. Submissions close 30 October 2015.

The Federal Department of the Environment has released a Draft policy statement: advanced environmental offsets under the EPBC Act. Submissions closed 12 October 2015.

Court Practice and Procedure

Land and Environment Court (Amendment No 1) Rule 2015, published 10 July 2015, removed appeals under s 56A of the *Land and Environment Court Act* 1979 from those proceedings in the Land and Environment Court in relation to which the Court is not to make an order for the payment of costs unless it considers that the making of such an order is fair and reasonable in the circumstances. The amendment made by this Rule is consequent on amendments to the Uniform Civil Procedure Rules 2005. [see Uniform Civil Procedure (Amendment No 74) Rule 2015, published 10 July 2015].

Uniform Civil Procedure (Amendment No 73) Rule 2015, published 10 July 2015, amended Rule 10.14 to make it clear that an application for substituted and informal service must be accompanied by an affidavit that includes:

(a) a statement as to the applicant's knowledge of the whereabouts of the person to be served; and

(b) a statement as to any communications that have occurred between the applicant and the person to be served since the cause of action in the proceedings arose (including any communications by telephone, fax or electronic mail).

Procedures in the Court of Appeal have changed - see Uniform Civil Procedure Rules (Amendment No 75) 2015, published 31 July 2015.

Changes to fees in the Court commenced on 1 August 2015, as legislated for in the Civil Procedure Amendment (Fees) Regulation 2015 and the Criminal Procedure Amendment (Fees) Regulation 2015, published 17 July 2015. Aside from the annual increase in fees, there is now a tiered structure for fees in Class 8, the subdivision exemption has been removed, and Councils are now to pay "corporation" fees as set out in the fee schedule.

Judgments

- Federal Court of Australia

Spencer v Commonwealth of Australia [2015] FCA 754 (Mortimer J)

Facts: Mr Spencer owned a rural property named "Saarahnlee" which was predominantly covered by native trees. Mr Spencer claimed that as a result of prohibition imposed under the *Native Vegetation Conservation Act 1997* (NSW) and *Native Vegetation Act 2003* (NSW) ("the State Acts") against clearing a large amount of vegetation on his property, the New South Wales government assessed Saarahnlee as no longer commercially viable. Mr Spencer argued that the *Natural Resources Management (Financial Assistance) Act 1992* (Cth) and the *Natural Heritage Trust of Australia Act 1997* (Cth) ("the Commonwealth Acts"), in tandem with other Commonwealth grants made pursuant to s 96 of the Constitution, provided Commonwealth incentives for the implementation of the State Acts as part of a formal and informal agreement between the State and Commonwealth to preserve native vegetation with a view to meeting the Commonwealth's obligations under the Kyoto Protocol. As a result Mr Spencer claimed the Commonwealth Acts and the State Acts were invalid

pursuant to s 51(xxxi) of the Constitution because they appropriated his property rights in relation to Saarahnlee, and separately, the carbon in the trees at Saarahnlee, on other than just terms. Mr Spencer also sought compensation with respect to the alleged appropriation.

Issues:

(1) whether the State Acts operated to restrict Mr Spencer's use of Saarahnlee to the extent that it constituted acquisition of property for the purposes of s51(xxxi);

(2) whether the right to ownership of the carbon in the trees on Saarahnlee was a valuable right, and therefore capable of acquisition for the purposes of s 51(xxxi);

(3) whether the operation of the Commonwealth Acts and Commonwealth grants that assisted the implementation of the State Acts, made the State Acts subject to the operation of s 51(xxxi); and

(4) whether s 51(xxxi) conditions the ability of the Commonwealth to make grants under s 96 of the Constitution, and inter-governmental agreements under s 61 of the Constitution, such that the Commonwealth could not validly make a grant or agreement conditioned on the State acquiring property on other than just terms.

Held: application dismissed, issue of costs reserved:

(1) although the State Acts resulted in a fundamental alteration and impairment of the rights that were held by Mr Spencer in Saarahnlee, they did not constitute an acquisition of Mr Spencer's rights in Saarahnlee by the Commonwealth for the purposes of s 51(xxxi) because the State Acts did not operate to alter the proprietary legal relationships of his property: at [554]-[566];

(2) there was no proprietary right to the carbon in the trees at Saarahnlee. Rather, Mr Spencer owned the potential to create recognisable and enforceable rights (by agreement or otherwise) which were unaffected, or were enhanced, by the implementation of the Commonwealth and State Acts: at [532]-[535];

(3) while the Commonwealth and State shared a common purpose in the introduction of the State Acts, and the Commonwealth grants given under s 96 assisted the State in achieving that purpose, this did not invite the application of s 51(xxxi) to the State Acts: at [470]; and

(4) as the Commonwealth grants and Commonwealth Acts did not coerce the State to exercise its power to appropriate property on other than just terms, the grants made under s 96 were validly made: [467]-[490] and [600].

- NSW Court of Appeal

Arinson Pty Limited v City of Canada Bay Council [2015] NSWCA 199 (Basten and Meagher JJA, Campbell AJA)

(related decision: *Arinson Pty Ltd v City of Canada Bay Council* [2014] NSWLEC 43 Biscoe J)

Facts: the appellants own land fronting both the eastern and western sides of Chapman Street in Strathfield. They purchased the properties in anticipation of amalgamating the sites and constructing a large residential development. In 2003, the Council caused the closure of Chapman St, landlocking a number of properties owned by the appellants. The owners of the land fronting Chapman St, including the appellants, consented to its closure in anticipation of the appellants' purchase of the land occupied by Chapman St, known as 1A Chapman, from the Council, and incorporating that land in its development, pursuant to development consent then in force. However, the sale of 1A Chapman did not occur as the parties could not agree on the terms of sale, accordingly, the development consent was never acted upon, and eventually lapsed.

The appellants brought these proceedings seeking the creation of two easements over 1A Chapman for the benefit of its landlocked properties, one for subsurface services, and the other for access to a public road.

Section 88K(1) of the *Conveyancing Act 1919* empowers the Court with the ability to grant easements over land where "reasonably necessary for the effective use or development of other land that will have the benefit of the easement". Relevantly, an easement may be created only if the owner of the land "can be adequately

compensated for any loss or other disadvantage that will arise from imposition of the easement": s 88K(2). The Court is required to order the payment of compensation when granting the easement, "unless the Court determines that compensation is not payable because of the special circumstances of the case": s 88K(4).

The trial judge granted the two easements, and ordered the appellants to pay the Council the sum of $550,000 in compensation.

Issue:

(1) whether the trial judge erred in finding that there were no special circumstances of the case that would justify not making a compensation order.

Held: (JC Campbell AJA, Basten and Meagher JJA agreeing): appeal dismissed with costs:

(1) section 88K(4) does not require a two stage reasoning process whereby the decision maker first identifies circumstances that are out of the ordinary and then determines whether those circumstances produce the consequence that compensation should not be ordered. It was entirely appropriate for the trial judge to address those issues together: at [39];

(2) the default position is that compensation will be paid for an easement created under s 88K, and there is a presumptive burden on someone who asserts that compensation should not be made: at [42];

(3) there was no basis upon which it could be argued that the allotments that had the benefit of access to Campbell Street as a public road should be put back to the position they were in before they became landlocked. The consent that the appellants gave to the Council for the closure of Campbell St was not conditional upon the then current development consent being acted upon: at [46];

(4) it was not possible to return the allotments to their pre-closure position as there had been changes in the planning laws that allowed more intense development: at [47] - [48];

(5) as the allotments did not have the benefit of an easement for subsurface services prior to the road closure, paying no compensation for that easement would not have the effect of returning the properties back to their pre-closure position: at [50];

(6) the Court should be slow to require the Council to enter into a transaction on terms that would be a breach of its public duty to obtain the best price it could for its assets: at [52];

(7) the easements reduced the marketable value of the Council's land. Prospective purchasers of the burdened land, other than the appellants, would view the easements as a "blight" on the property title, and that would correspondingly reduce the price the appellants would have to pay for the land if they were to purchase it: at [54];

(8) the appellants were afforded an opportunity by the trial judge to make submissions on the issue of whether they would have reasonably foreseen that they would need to pay for some right of access over 1A Chapman: at [60]; and

(9) the equitable principle established in *Muschinski v Dodds* (1995) 160 CLR 583, preventing one party to a joint relationship or endeavour from obtaining the benefit of something contributed by another party to that relationship in circumstances where the joint relationship has ended through no fault of either party, did not apply to the circumstances of this case. The joint relationship between the Council and the appellants was of a business kind, not the type of relationship of mutual trust and confidence that existed in *Muschinski*: at [66].

Rafailidis v Camden Council [2015] NSWCA 185 (McColl and Gleeson JJA, Bergin CJ in Equity)

(related decisions: *Rafailidis v Camden Council (No 4)* [2014] NSWLEC 22; *Rafailidis v Camden Council (No 5)* [2014] NSWLEC 85, Sheahan J)

Facts: Koula and Efrem Rafailidis ("the appellants") were convicted and fined for contempt by Sheahan J. The alleged contempt arose out of the failure of the appellants to comply with some orders made in respect of an unauthorised secondary dwelling on land they owned jointly.

In 2008 the Council granted the appellants development consent (the "2008 development consent") to erect a new dwelling on their land. At the time the development application was lodged, there was a single storey fibro clad dwelling on the property (the "existing dwelling"). The development consent was conditional on the appellants lodging a separate development application for the demolition of the existing dwelling and, too, that it should "be demolished and/or removed from the site within 28 days of the completion of the proposed dwelling." The new dwelling was erected and occupied by the appellants, but the existing dwelling was not demolished within 28 days or at all. On 5 March 2012 Lloyd AJ made an orders in class 4 proceedings commenced by the Council, including an order ("Order 2") requiring the appellants to within 90 days (a) demolish the unauthorised structure, or (b) obtain development consent to allow it to remain. The appellants lodged a development application that would allow the dwelling to remain, but it was refused by the Council on 28 May 2012. Biscoe J granted a stay of the earlier orders on condition that the respondents file and serve a Class 1 appeal against the Council's refusal of their development application of May 2012 on or before 31 May 2012.

On appeal, pursuant to agreement reached between the parties at a conciliation conference under s 34 of the *Land and Environment Court Act 1979* on 4 July 2012, consent was granted that allowed the structure to remain, conditional upon its partial demolition, and of the carrying out of some other works.

On 19 July 2012, Biscoe J lifted the stay and amended Order 2, extending the 90 day period in Order 2 to 4 July 2013, allowing the appellants time to complete the works required by the 2012 consent. In so doing, his Honour rejected the appellants' argument that they had fulfilled Order 2 by obtaining the 2012 consent, and therefore that order was "final and spent" and could not be varied. Those works were not completed by 4 July 2013, and the Council filed a motion seeking the contempt orders the subject of the appeal. Sheahan J found each appellant guilty of contempt and convicted each of that charge.

On appeal, the appellants submitted that the argument rejected by Biscoe J, that Order 2 had been complied with by way of the 2012 development consent, and, accordingly, there could have been no contempt of Court, should be accepted.

Issues:

(1) whether the trial judge erred in finding the appellants guilty of, convicting, and fining them for contempt of court; and

(2) costs.

Held: (McColl JA, Gleeson JA and Bergin CJ in Equity agreeing): appeal upheld, orders of trial judge set aside, and the Council ordered to pay the costs of the appellants at first instance and of the appeal:

(1) in contempt proceedings, two questions of interpretation arise: first, what the order or undertaking said to be breached requires on its true construction; and secondly, whether that requirement is sufficiently clear to the person affected by the order to support its enforcement against that person: at [45];

(2) the appellants understood that Order 2 required them to obtain development consent allowing them to retain the subject dwelling, which they obtained. They did not see it as necessary to satisfy the conditions of that consent to comply with the order. That meaning was one which ought fairly to have been in their contemplation when the order was made: at [57]; and

(3) assuming the appellants' construction of Order 2 was correct, the order was satisfied upon the granting of development consent in 2012, there was therefore no order for Biscoe J to amend as that condition was "final and spent": at [58]; and

(4) once it was accepted that the appellants' construction of Order 2 was an available one, it was clear the appellants should not have been convicted of contempt of Court: at [61].

Jojeni Investments Pty Ltd v Mosman Municipal Council (No 2) [2015] NSWCA 208 (Macfarlan, Gleeson and Leeming JJA)

(related decisions: *Jojeni Investments Pty Ltd v Mosman Municipal Council* [2015] NSWCA 147 (Macfarlan, Gleeson and Leeming JJA, *Jojeni Investments Pty Ltd v Mosman Municipal Council* [2015] NSWLEC 120 Sheahan J)

Facts: the NSW Court of Appeal allowed an appeal from a decision of the Land and Environment Court and set aside a declaration that a particular property in Mosman "has the benefit of existing use rights as two flats in a house" and in lieu thereof declared that the property "has the benefit of existing use rights as a building containing flats". This decision related to costs. The Council accepted that it should pay the costs of the successful appellant both on appeal and first instance. The appellant ("Jojeni") sought to have part of its costs paid on an indemnity basis, relying on a series of offers of compromise purporting to be under the *Uniform Civil Procedure Rules 2005* ("UCPR"), and Calderbank letters, sent both at first instance and on appeal.

At first instance by letter dated 12 November 2013 Jojeni's solicitors proposed an offer on the terms that there be a verdict in favour of the applicant; a declaration that the property had the benefit of existing use rights as a residential flat building; and that each party pay its own costs of the proceedings. That letter was expressed to be an open offer issued in accordance with the Calderbank principles, and enclosed a document purporting to be an offer of compromise in accordance with r 20.26 of the UCPR. By letter dated 10 December 2013 the Council rejected all offers, maintaining both limbs of its defence, and stating, inter alia, that it was in the public interest that there be a contravenor and that the Council would raise the arguments foreshadowed.

Jojeni was unsuccessful at first instance and costs were ordered against it. Shortly after commencing its appeal Jojeni made a further offer of settlement, including an offer that each party pay its own costs of the appeal proceedings and the appellant pay the Council's costs of the proceedings in the Court below. That offer was not accepted by the Council.

Issues:

(1) whether Jojeni's offers involving each party bearing its own costs were in substance the same as offers inclusive of costs and thus did not comply with r 20.26(2)(c) of the UCPR;

(2) whether the discretion to "order otherwise" in respect of the claim for costs under r 42.14 of the UCPR should be exercised on the basis that costs incurred after an offer be assessed on an indemnity basis if the order or judgment on the claim is "no less favourable" than the terms of the offer; and

(3) whether the Calderbank principles, which would require it to be shown that the Council acted unreasonably in refusing either offer, entitled Jojeni to the special costs order which it sought.

Held: setting aside the costs orders made by the Land and Environment Court, ordering the respondent to pay the appellant's costs both at first instance and on the appeal, and ordering the appellant to pay the respondent's costs of the costs application on the ordinary basis:

(1) there was no difference between an offer containing a term that each party bear its own costs, and an offer which was silent as to costs; such an offer did not contravene r 20.26(2)(c): at [15];

(2) the discretion retained by the Court to "order otherwise" under r 42.14 should be exercised in favour of the Council. The Council, as a public authority, was the only appropriate contradictor to the appellant's claim; the litigation involved generally applicable questions of public law; and even had the Council consented to any of the declarations proposed by Jojeni it would have remained necessary for the Court to be satisfied that the relief was appropriate. Further, it would be inappropriate to encourage the Council, through the provision of a financial incentive, to consent to orders that should properly be determined by a court with the benefit of argument: at [17];

(3) to the extent that "exceptional circumstances" were required for the exercise of the court's discretion to "order otherwise", they were present: at [18]; and

(4) in circumstances where the subject matter of the proceeding was declaratory relief, where the point was of general importance, where acceptance of the offer would have deprived the Court of the benefit of argument on both sides and where the Council was the only appropriate contradictor, the Council was not shown to have behaved unreasonably in refusing either offer: at [19].

Rossi v Living Choice Australia Ltd [2015] NSWCA 244 (Basten, Ward and Emmett JJA)

(related decisions: *Rossi v Living Choice Australia Ltd (No 3)* [2013] NSWLEC 46, *Rossi v Living Choice Australia Ltd (No 4)* [2013] NSWLEC 136, *Rossi v Living Choice Australia Ltd (No 5)* [2013] NSWLEC 197, *Rossi v Living Choice Australia Ltd (No 6)* [2014] NSWLEC 116, Pain J)

Facts: the first respondent Living Choice Pty Ltd ("Living Choice") obtained development consent in 2010 for the construction of a number of villa units as part of a retirement village on land owned by it in Glenhaven, adjoining land owned by the appellant Mr Rossi ("the Stage 2 Consent"). Living Choice subsequently obtained separate development consent in 2012 for the construction of a retaining wall ("the Retaining Walls Consent") close to the boundary between its land and Mr Rossi's land.

The *State Environmental Planning Policy (Housing for Seniors or People Living with a Disability)* 2004 ("the Seniors Policy") prescribed relevant standards and considerations for the development. Under cl 13F of the *State Environmental Planning Policy (Major Development)* 2005 ("the Major Development Policy") the Sydney West Joint Regional Planning Panel ("the Panel") exercised the consent authority functions of The Hills Shire Council ("the Council") in the determination of development applications for development with a capital investment value of more than $10 million; the Council retained the functions of the receipt and assessment of development applications, and notification of the determination of development applications. Council staff prepared briefing notes and reports for the Panel; and in a planning report prepared by the development assessment manager recommended approval of the proposal in the Stage 2 development application. At its meeting on 23 September 2010 the Panel resolved to adopt the Council officer's recommendation to approve the development. On 12 October 2010 the Council notified Living Choice "of the determination by The Hills Shire Council of the Development Application…", subject to conditions "…deemed necessary by [the Council]…". On 6 June 2012 the Council's solicitors wrote to the solicitors for Mr Rossi and Living Choice enclosing what was described as a "reissued" notice of determination for the Stage 2 Development Consent which referred to a determination of the application by the Panel.

In August 2011 Living Choice applied to the Council for consent for "removal of trees and erection of retaining walls"; that application was refused, and subsequently approved in the Retaining Walls Consent on an application for review under s 82A of the *Environmental Planning and Assessment Act 1979* ("the EPA Act"). The plans for that consent included a sheet showing villa units 204 to 210 on the Rossi boundary, with details of fencing, batter and a blockwork wall, and with sections showing the line of the existing surface significantly below the finished floor level of the buildings.

Mr Rossi commenced proceedings against Living Choice, the Council, and the Panel, seeking declarations that the two development consents were void and of no effect, and orders for the demolition of certain of the villa units and remedial orders. The Panel filed a submitting appearance. On 25 November 2013 the primary judge made a declaration of invalidity in relation to the Retaining Walls Consent and made consequential remedial orders; her Honour declined to make an order of invalidity in respect of the Stage 2 Consent. Mr Rossi appealed from the orders of the primary judge; the Council filed a cross-appeal; and Living Choice filed a notice of contention supporting the orders of the primary judge and sought leave to file a cross-appeal raising the same questions as those raised in the notice of contention and appealing from certain of the costs orders made by the primary judge. The Panel filed a submitting appearance in all three appeals.

Issues:

(1) whether the primary judge erred in finding that the Council's assessment function was amenable to judicial review such that an error made by the Council in the assessment process could invalidate the consent granted by the Panel;

(2) whether the primary judge's finding that the Council had assessed the fill intended to be placed in order to locate villas 204-210 at certain levels was not open, wrong, or contrary to the evidence;

(3) whether the primary judge erred in finding that the development approved by the Stage 2 Consent included the retention of fill by retaining walls on or near the Rossi boundary;

(4) whether the primary judge erred in finding that the assessment of the impacts of the retention of fill on the Rossi boundary was a mandatory relevant consideration under s 79C of the EPA Act for the purposes of the Council's assessment and the Panel's determination;

(5) whether the primary judge erred in finding that s 79C(1)(b) and s 79C(1)(c) had been breached by the Council in its assessment and the Panel in its determination, in failing to consider the retention of fill and the impacts of the retention of fill along the Rossi boundary;

(6) whether the primary judge erred in finding a breach of s 79C by the Panel in its determination on the basis that the Panel could not have been satisfied in accordance with cll 33, 34 and 36 of the Seniors Policy as required by cl 32 of the Seniors Policy;

(7) whether the primary judge erred in failing to find that the rule in *Browne v Dunn* precluded Mr Rossi from making submissions that the Council had breached s 79C in its assessment of the Stage 2 development application;

(8) whether the primary judge erred in failing to make a declaration that the Stage 2 Consent was invalid and of no effect;

(9) whether the primary judge erred in failing to find that the notices of determination dated 12 October 2010 and 6 June 2012 relating to the Stage 2 Consent were invalid;

(10) whether the primary judge erred in the exercise of her discretion under s 124 of the EPA Act in failing to make orders requiring Living Choice to pay compensation to Mr Rossi or carry out landscaping on the Rossi land; and

(11) whether the primary judge erred in adopting Living Choice's landscaping scheme and making a finding based on that scheme, which was not in evidence before her Honour.

Held: with respect to Mr Rossi's appeal, directing that the parties consult to reach a common position relating to appropriate variations to the orders made by the primary judge concerning landscaping and screening on land owned by Mr Rossi and Living Choice, setting aside the costs orders except those orders requiring payments by the Panel, declaring the first purported notification of the Stage 2 Consent invalid and giving leave for filing of submissions as to appropriate order as to costs; with respect to the applications by both The Hills Shire Council and Living Choice, dismissing the cross-appeal and the application for leave to cross-appeal and noting that the costs of those proceedings are to be the costs of the parties in the appeal by Mr Rossi:

(1) it was the determination of the Panel, not the assessment of the Council, that was amenable to judicial review. Where the material relied upon by the Panel was inadequate for a proper exercise of its function of determining the application, the subject matter of any legal challenge would remain the determination of the Panel: at [23] Basten JA, [268]-[269] Emmett JA (Ward JA agreeing with both at [79]);

(2) although the Panel was a necessary party to the proceedings and properly submitted to whatever orders the Court might make, the Council was only properly joined to the extent that it was affected by the declarations sought by Mr Rossi that the notices of determination relating to the Stage 2 Consent were invalid; it was otherwise unnecessary for the Council to play an adversarial role, there already being active contestants, namely Mr Rossi and Living Choice: at [15] Basten JA, [270] Emmett JA (Ward JA agreeing with both at [79]);

(3) there was no error in the primary judge's factual finding that, to the extent there was to be fill placed on the Rossi boundary, its impact was assessed by the Council: at [283] Emmett JA, Ward JA agreeing at [79];

(4) there was no error in the primary judge's rejection of the contention based on the rule in *Browne v Dunn*. The Council was under no misapprehension as to the nature of the case it had to meet; it was open to the Council to adduce evidence from the Council's development assessment manager to explain matters the subject of allegations in the points of claim and it did not do so: at [345] Emmett JA, Ward JA agreeing at [79];

(5) the primary judge did not err in finding that the Council and the Panel had failed to assess the impact of the floor level of the villas at the western end of the development adjoining the Rossi land being 3.9m above the natural level of the land, in contravention of s 79C(1)(a)(i), s 79C(1)(b) and s 79C(1)(c) of the EPA Act: at [18] Basten JA, [339] Emmett JA (Ward JA agreeing with both at [79]);

(6) the defects in the notification on 12 October 2010 of the Stage 2 Consent did not have the result that the Panel's determination was invalid. While those defects did not result in any demonstrated detriment to Mr Rossi there should be a declaration of invalidity in respect of that notification. On the basis of the

submissions made to the Court, there was no reason to make a declaration of invalidity in respect of the second notification: at [37] Basten JA, [370] Emmett JA (Ward JA agreeing with both at [79]); and

(7) notwithstanding the breach of s 79C of the EPA Act the preferable course was not to make a declaration of invalidity in relation to the Stage 2 Consent but instead to make an order under s 25B of the *Land and Environment Court Act* 1979 that landscaping work be carried out along the Rossi boundary. The parties should seek agreement on the appropriate form of ameliorative orders: at [55]-[56] Basten JA, [370] Emmett JA (Ward JA agreeing with both at [79]).

Rossi v Living Choice Australia Ltd (No 2) [2015] NSWCA 301 (Basten, Ward and Emmett JJA)

(related decisions: *Rossi v Living Choice Australia Ltd* [2015] NSWCA 244 Basten, Ward and Emmett JJA; *Rossi v Living Choice Australia Ltd (No 3)* [2013] NSWLEC 46, *Rossi v Living Choice Australia Ltd (No 4)* [2013] NSWLEC 136, *Rossi v Living Choice Australia Ltd (No 5)* [2013] NSWLEC 197, *Rossi v Living Choice Australia Ltd (No 6)* [2014] NSWLEC 116, Pain J)

Facts: on 21 August 2015 the Court of Appeal handed down a judgment allowing in part an appeal brought by Mr Rossi from decisions made in the Land and Environment Court ("LEC") and dismissing cross-appeals and applications for leave to cross-appeal brought by each of Living Choice Australia Ltd ("Living Choice") and The Hills Shire Council ("the Council"). Directions were made in relation to the ameliorative relief to be ordered in relation to unauthorised works that had been undertaken by Living Choice on the boundary of Mr Rossi's land and on its own land, and the costs of the proceedings, indicating that both issues would be determined on the papers. Each party filed submissions with respect to costs and Mr Rossi and Living Choice filed separate submissions as to the form of orders to effect ameliorative relief. Mr Rossi and Living Choice were unable to reach agreement as to the ameliorative orders, and while they agreed as to the specification to be adopted for the necessary landscaping work they did not agree as to the landscape plan (or plans) to be adopted. Both produced landscaping plans prepared by their respective consultants, and each criticised the plans produced by the other.

Issues:

(1) what were the appropriate orders in relation to ameliorative relief;

(2) what were the appropriate orders in relation to the costs of the LEC proceedings and on appeal; and

(3) whether an order under s 25B of the *Land and Environment Court Act* 1979 should be made.

Held: allowing Mr Rossi's appeal in part; pursuant to s 25B of the *Land and Environment Court Act* suspending the development consent insofar as it related to the construction of villa units 204-210 until such time as any orders made by the LEC on remittal had been substantially complied with; setting aside certain of the orders made by the primary judge; remitting the matter to the LEC to determine the ameliorative relief to be ordered; ordering Living Choice and the Council to pay 70% of Mr Rossi's costs of the proceedings in the LEC to date, such liability being joint and several, and apportioning those costs as between the respondents as to 65% against Living Choice and 35% against the Council but with payments by the Joint Regional Planning Panel to be in part satisfaction of the Council's portion; ordering that Living Choice and the Council pay 75% of Mr Rossi's costs of the proceedings on appeal disregarding costs post-hearing, such liability to be joint and several and apportioning liability for those costs equally as between the respondents; and ordering Living Choice and the Council to pay interest on a specified allowed percentage of each amount of costs and disbursements actually paid by Mr Rossi to his legal advisers in connection with the proceedings in the LEC from the date of payment of each such amount; and directing that the post-hearing costs relating to appropriate ameliorative relief be treated as costs of the remitted proceedings in the LEC:

(1) having regard to the complaints made as to the impact of the Rossi landscape plan on villa occupants and in particular the allegation that the plan would be contrary to the design principles of the *State Environmental Planning Policy (Housing for Seniors or People Living with a Disability)* 2004, and the absence of a joint report, there was no choice but to remit the proceedings to the LEC for the making of appropriate ameliorative orders: at [10];

(2) the parties' submissions on costs demonstrated the wisdom of a broad brush global approach to minimise ongoing disputes in what had been a complex and highly contentious matter, and it was likely that further expense would be incurred if costs were to be determined on an issue by issue basis: at [16];

(3) there was no error in the primary judge's approach to the question of costs although that left open the unenviable prospect of further disputation as to the apportionment of the costs as between the various issues: at [18];

(4) in relation to the costs of the LEC proceedings, as between Mr Rossi and Living Choice, making allowance for the improved level of success achieved by Mr Rossi as a result of the hearing on appeal, it remained the case that he did not have total or even substantially full success at the trial, and an appropriate order was that Mr Rossi receive 70% of his costs of the trial proceedings as a whole: at [24]. The Council had not been obliged to defend its conduct in circumstances where there was an active party, Living Choice, with an interest and commitment to that defence, and to the extent that the decision-making process was found wanting, the Council and the Joint Regional Planning Panel, which was the responsible decision-maker, should share responsibility for Mr Rossi's costs: at [30]. As between Living Choice and the Council, there were two factors affecting the apportionment of costs, being liability for the civil enforcement proceedings and the cost of seeking ameliorative orders appropriate relief for the breaches of planning law: at [31]. It was not appropriate to award costs against the separate respondents individually, and it was not in the interests of justice of the efficient disposal of the case to apportion costs according to issues. Mr Rossi should recover a defined portion of his costs for which each of the respondents would be jointly and severally liable, and the Court should indicate the proportions as between them which it considered appropriate: at [32];

(5) in relation to the costs of the appeal, as with the costs of the trial there should be a global assessment, and the appropriate assessment was to order that the Council and Living Choice be jointly and severally liable for 75% of Mr Rossi's costs on appeal and should bear responsibility equally between themselves: at [43], [43]. The failure to achieve final resolution as to the ameliorative relief required that the post-hearing costs should be treated as costs on the remitter; and as Mr Rossi had not achieved what he sought as to costs orders, his costs of the appeal should not include any costs post-hearing: at [44]; and

(6) it was appropriate to make an order under s 25B of the *Land and Environment Court Act* 1979: at [48].

Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 (Meagher and Leeming JJA)

(related decisions: *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 Pain J, *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 Pearson C)

Facts: Four2Five Pty Ltd (the "Applicant") sought leave to appeal pursuant to s 57 of the *Land and Environment Court Act 1979* ("the Court Act") against the decision of Pain J dismissing an appeal pursuant to s 56A of the Court Act against the decision of the Commissioner in an appeal under s 97 of the *Environmental Planning and Assessment Act 1979* from a refusal by Ashfield Council of consent to an application for construction of a mixed use development. The Commissioner had upheld the appeal, granting development consent subject to several conditions that had the effect of deleting some units on the top level. The applicant proposed three grounds of appeal: the first ground being that it had not been accorded procedural fairness in relation to being fully heard on the adequacy of its request pursuant to cl 4.6 seeking to justify the contravention of the height development standard in cl 4.3(2A) of the *Ashfield Local Environment Plan 2013;* and the second and third grounds relating to the construction of cl 4.6.

Issues:

(1) whether the primary judge's failure to determine the contention in proposed ground one amounted to an error of law; and

(2) whether the primary judge had erred in finding that there was no error in the Commissioner's construction of cl 4.6.

Held: (Leeming JA, Meagher JA agreeing): leave to appeal refused, notice of motion dismissed:

(1) there were two reasons why leave should not be granted in respect of ground one. First, there was no error, and no error of law, in the primary judge not determining a ground which rightly or wrongly the moving party

had not wished to have determined before the primary judge: at [9]. Secondly, ordinarily leave should not be granted in a second appeal in respect of a point not advanced in the earlier appeal: at [10];

(2) there was no error, and certainly no error of law, disclosed in the Commissioner's reasoning as to environmental planning grounds to justify contravention of the development standard: at [15]; and

(3) it was not apparent that the Commissioner had approached the question of satisfaction in relation to subclause 4.6(3)(a) on the basis that regard could only be had to matters other than those referred to in cl 4.6(4)(a)(ii). And secondly, as the primary judge had noted, success on that ground alone would not result in the appeal being upheld, because the Commissioner was not satisfied as to either of the matters in subclause (3): at [16].

De Angelis v Pepping [2015] NSWCA 236 (Macfarlan and Gleeson JJA, Sackville AJA)

(related decision: *De Angelis v Pepping* [2014] NSWLEC 108 Adamson AJ)

Facts: the appellant challenged the validity of an amending local environmental plan ("Amending LEP") made on 28 March 2014 and a development control plan ("DCP") made on the same date that incorporated changes that had been made in the Amending LEP. The appellant owns the land that is the subject of the Amending LEP, at the intersection of Bowral Street and Moss Vale Road, Bowral ("the site"). The effect of the Amending LEP was to rezone the site from B4 Mixed Use to R3 Medium Density Residential under *the Wingecarribee Local Environmental Plan 2010*, and would prohibit the appellant's proposed development of the site for commercial purposes. The respondent Council first resolved to prepare a planning proposal under s 55(1) of the *Environmental Planning and Assessment Act 1979* ("the EPA Act") in June 2013, while an appeal from a deemed refusal of a development application for the site was pending. The planning proposal was revised and submitted to the Minister on 28 August 2013, after the appeal was dismissed. On 25 September 2013 a delegate of the Minister issued a gateway determination under s 56 of the EPA Act ("the Gateway Determination"), which specified the community consultation requirements under ss 56(2)(c) and 57 of the EPA Act, stating that compliance with section 5.5.2 of the *Guide to Preparing LEPs* (Department of Planning and Infrastructure 2013) was required. On the same date written authorisation was issued to the Council to exercise the functions of the Minister under s 57 of the EPA Act. Following public exhibition, and notification by means of newspaper notices and letters to some owners of properties adjoining the site, the Council resolved on 27 November 2013 in accordance with s 59 of the EPA Act to proceed with the making of the Amending LEP. On 14 October 2012, the Minister, pursuant to s 23 of the EPA Act, had delegated all of his functions under s 59 of the EPA Act to all councils. On 12 December 2012 the Council resolved to accept these delegations, and in accordance with s 381 of the *Local Government Act 1993* ("LG Act"), delegated those functions to its General Manager and to the Manager Strategic & Assets. On 19 December 2013 the General Manager purported to delegate pursuant to s 378(2) of the LG Act certain powers to the Group Manager Strategic & Assets including to be the Council's nominated Planning Officer for the purpose of delegation including the preparation of a draft local environmental plan under s 54 of the EPA Act. Mr Pepping, the Group Manager Strategic & Assets, signed the Amending LEP.

The primary judge dismissed the application, finding that the Council had given notice of the planning proposal to the appellant, and had complied with the consultation requirements of the Gateway Determination; that Mr Pepping was authorised to sign the draft as agent of the Council, there being no power for the Council to delegate authority directly to Mr Pepping and there being no valid sub-delegation by the General Manager; and that in any event relief would have been declined in the exercise of discretion. The appellant appealed.

Issues:

(1) whether the primary judge erred in finding that the appellant had received notice of the planning proposal;

(2) whether the Council complied with the community consultation requirements specified by the Minister pursuant to s 56(2) of the EPA Act; and

(3) whether the primary judge erred in finding that Mr Pepping had authority to sign the Amending LEP.

Held: (Sackville AJA, with whom Macfarlan JA and Gleeson JA agreed), allowing the appeal, setting aside the orders made by Adamson AJ, declaring the Amending LEP invalid and of no effect, and ordering the Council

pay fifty per cent of the costs of the appellant for the Land and Environment Court proceedings, and of the appeal:

(1) the copy of the signed letter in the Council's files was cogent evidence that the letter had been prepared and that, in the ordinary course, it would have been posted to the relevant address: at [91]. The letter was drafted with the appellant specifically in mind and signed by an officer of the Council. The need for a letter to the appellant was not overlooked: at [93]. There was no error in the primary Judge's finding that the appellant had received notice of the planning proposal: at [94];

(2) the planning proposal was notified on the Council's website and the appellant made no complaint about the material exhibited on the website. There was no evidence that the few landowners who did not receive individual letters were unaware of the planning proposal or were denied the opportunity to make any submissions they wished Council to consider: at [110]. The community, including the appellant, had the opportunity to make submissions on the planning proposal: at [111]. Further, the appellant or anyone else inclined to do so could have made a submission to the Council that a savings provision should be incorporated in the planning proposal at the drafting stage: at [113];

(3) it was common ground in the appeal that the Amending LEP was validly made pursuant to s 59(2) of the EPA Act, only if Mr Pepping was authorised to sign the instrument on behalf of the Council: at [121]. Even if it were correct to characterise the final steps as "secretarial", that did not support the conclusion that Mr Pepping was authorised to make the Amending LEP. The Council's resolution of 27 November 2013 did not purport to confer that authority on Mr Pepping. Further, it was always open to the Council or an officer acting under delegated authority to make the Amending LEP after Parliamentary Counsel had settled the draft: at [130]. Mr Pepping was not acting merely as "a functionary amanuensis and signatory", as the drafting still had to take place in consultation with the Council and decisions had to be made on matters not expressly dealt with in the planning proposal itself: at [132]. The primary judge erred in holding that Mr Pepping had authority as the Council's agent to sign the draft Amending LEP, and his actions in purporting to make the Amending LEP were done without the authority of the Council: at [134]; and

(4) the appellant had established that the Amending LEP was not validly made because the conditions for the exercise of the power conferred by s 59(2) of the EPA Act were not satisfied, and that was not a mere technicality that could be overcome. The fact was that the purported making of the Amending LEP was not authorised by the statutory scheme and was invalid, and it was therefore appropriate to grant declaratory relief: at [139].

Brown Brothers v Pittwater Council [2015] NSWCA 215 (McColl JA, Macfarlan JA, Tobias AJA)

(related cases: *Pittwater Council v Brown Brothers Waste Contractors Pty Limited* [2009] NSWLEC 50 Lloyd J, *Pittwater Council v Brown Brothers Waste Contractors Pty Limited (No 2)* [2009] NSWLEC 210, *Pittwater Council v Brown Brothers Waste Contractors Pty Ltd (No 3), Pittwater Council v Wayne Gordon Brown; Pittwater Council v Gary Neil Brown* [2012] NSWLEC 66, *Pittwater Council v Brown Brothers Waste Contractors Pty Ltd (No 4); Pittwater Council v Wayne Gordon Brown (No 2); Pittwater Council v Gary Neil Brown (No 2)* [2013] NSWLEC 219, Pepper J)

Facts: two brothers and Brown Waste Contractors Pty Ltd ("the appellants") operated a waste facility subject to a development consent granted by the Pittwater Council ("the Council"). In 2007 the Council initiated proceedings for breach of development consent which were settled by way of consent orders ("the 2007 orders") that required the appellants to remove waste from the site. In contempt proceedings in 2009 resulting from the failure to comply with the consent orders, the trial judge convicted one of the appellants and made adverse findings of credit against him. In 2011 the appellants pleaded guilty to further contempt charges before the same judge, but soon after sought to withdraw their guilty pleas on the basis that they had received incorrect legal advice on the proper construction of the 2007 orders. The trial judge refused the application, which led to the appeal before the New South Wales Court of Appeal.

Issues:

(1) whether, in construing the 2007 orders in the course of judgment, the trial judge denied the appellants procedural fairness to make submissions on the proper construction of the 2007 orders;

(2) whether a fair-minded lay observer might reasonably have apprehended bias because the trial judge had previously made findings of credit against the appellants, and whether the appellants had waived the right to object on the ground of apprehended bias as the matter was not raised before the trial judge during the hearing;

(3) whether the trial judge erred in finding that the principle of finality of litigation applied to prevent the withdrawal of the guilty pleas; and

(4) whether the trial judge erred in finding that the appellants acceded to the 2007 orders due to a genuine consciousness of guilt, rather than incorrect legal advice.

Held: (McColl JA, Macfarlan JA and Tobias AJA agreeing) appeal allowed, granting leave to appellants to withdraw pleas of guilty and remitting the matter to a judge other than Pepper J, reserving costs of the withdrawal application and ordering respondent to pay the appellants' costs of the appeal:

(1) the withdrawal application required the trial judge to consider whether there existed an arguable question of guilt. No procedural unfairness was occasioned by the construction of the 2007 orders at that stage of the proceedings: at [154];

(2) the adverse findings of credit against the appellants in earlier proceedings were sufficient to constitute a basis for a reasonable apprehension of bias. But, because the appellants failed to raise this issue before the trial judge, the appellants had waived their right to complain about the matter on appeal: at [142]-[143];

(3) although the appellants consented to the 2007 orders, it would be a miscarriage of justice to prevent the appellants from resiling from that position: at [209]; and

(4) on the evidence it was not open to the trial judge to conclude that the appellants pleaded guilty with knowledge that the 2007 orders contained potential ambiguity, and therefore, that they had a genuine consciousness of guilt: at [202].

Kessly v Hasapaki [2015] NSWCA 316 (Basten and Macfarlan JJA, Sackville AJA)

(related decision: *Grustein v Hasapaki* [2014] NSWLEC 173, *Grustein v Hasapaki (No 2)* [2014] NSWLEC 174 Biscoe J)

Facts: the appellant, Mrs Kessly (formerly Grustein), and the respondent, Mrs Hasapaki, own adjoining properties. In 2004 Mrs Kessly obtained orders by consent in proceedings in the Land and Environment Court ("LEC") relating to an encroachment of the respondent's home on her land. The consent orders included a declaration as to the extent of the encroachment by reference to a sketch plan prepared by a registered surveyor, and required the appellant to grant the respondent an easement in respect of the encroachment for which the respondent agreed to pay the appellant an amount of $5,000 and a further amount on account of the appellant's legal costs and disbursements, with $800 to be paid in advance. That amount was duly paid. In January 2005 the appellant sent the respondent a transfer annexing a new plan prepared by a surveyor; that plan was deficient and the respondent declined to execute the transfer. After an exchange of correspondence there was no further communication until January 2014. In July 2014 the respondent filed a notice of motion seeking to have the appellant committed for contempt of court. At the hearing on 29 October 2014 the appellant's legal representative sought an adjournment on her behalf based on her medical condition. The adjournment was refused, and the primary judge proceeded to hear the motion, found the appellant to be in contempt (order (2)) and made consequential orders, including orders (7) and (8) requiring the appellant to pay the respondent's costs on an indemnity basis, with order (9) a set off for monies that the respondent was liable to pay under the 2004 orders. The orders included an order that, in order to give effect to the order for the grant of an easement, as suggested by the primary judge, the respondent prepare the necessary transfer and that the registrar of the Court execute the document if the appellant failed to do so. The appellant appealed, challenging the refusal of the adjournment and the orders with respect to the motion for contempt. On the hearing of the appeal counsel for the respondent indicated that his client had no interest in maintaining the declaration that the appellant had been guilty of contempt, and noted that there was no purpose in setting aside the procedural orders made in 2014 which had been carried out, with the result that the easement had been registered over the appellant's land and the certificate of title returned to the appellant. The orders remaining in dispute were the orders requiring the appellant to pay the respondent's costs on an indemnity basis.

Issues:

(1) whether there was an error of law on the part of the primary judge in rejecting the adjournment application;

(2) whether there was procedural unfairness in the way in which the hearing proceeded following refusal of the adjournment application; and

(3) what were the appropriate orders for the costs of the preparation of the transfer and the costs of the contempt motion.

Held: (Basten JA, with whom Macfarlan JA and Sackville AJA agreed): allowing the appeal and setting aside orders (2), (7), (8) and (9), ordering the appellant to pay the respondent's costs of preparing and registering the transfer, directing that those costs may be set off against the payment for the easement required to be paid by the respondent under the 2004 consent orders, and making no order as to the costs of the contempt motion in the LEC and the proceedings on appeal:

(1) the orders requiring payment of costs on an indemnity basis were imposed by way of punishment for contempt, and accordingly, if the finding as to contempt was to be set aside, those orders required reconsideration: at [10];

(2) there was no error of law on the part of the primary judge in rejecting the adjournment application. The real problem lay not in refusing the adjournment application but what was said in the course of the hearing and what happened thereafter. It was apparent from the exchanges between the appellant's representative and the primary judge that the practical solution proffered by the primary judge involved not proceeding to make a finding with respect to the contempt charge, nor to impose a penalty. It was on that basis that the representative was given an opportunity to obtain instructions, following which he indicated that his client would not be attending, and on which he sought advice from his principal and then sought leave to withdraw: at [26];

(3) on that basis, it was not open to the primary judge to make a declaration that the appellant was in contempt and impose a penalty on her in her absence. It followed that order (2) being the declaration that she was guilty of contempt, and orders (7)-(9) obliging her to pay costs assessable on an indemnity basis, should be set aside: at [27];

(4) the appellant should pay the respondent's costs of preparing and registering the transfer of easement: at [29]; and

(5) there should be no order as to the costs of the contempt motion in the LEC: seeking to deal with the matter by way of a contempt motion rather than seeking a variation of the original orders was an ill-considered step, and as the primary judge made plain, the penalty sought of imprisonment would not have been imposed in any event; further, there would have been a lively issue, had the contempt charge been contested, as to whether a declaration should have been made; and the procedural orders were proposed by the primary judge and, in effect, not opposed by either party: at [30].

Bailey v Director-General, Department of Natural Resources NSW [2015] NSWCA 318 (Basten, Gleeson and Leeming JJA)

(related decisions: *Bailey v Director General, Department of Natural Resources* [2014] NSWSC 1012 Fullerton J, *Director-General of the Department of Land and Water Conservation v Bailey* [2003] NSWLEC 160 Talbot J, *Director General Department of Land and Water Conservation v Bailey* [2003] NSWCCA 361 Mason P, Hidden and Shaw JJ)

Facts: Mr Bailey and his sister owned a rural property in northern New South Wales. In 2000 and 2002 Mr Bailey cleared a total of 84.4ha of native vegetation from an area intending to construct a water storage unit. The appellants did not obtain development consent under Part 2 of the *Native Vegetation Conservation Act 1997* ("NVC Act"), and there was no approval under the *Water Act* 1912 for the construction of the water storage unit. In April 2000 Mr Bailey had obtained legal advice that consent would not be required to clear native vegetation for the purpose of constructing a dam. In July 2002 the Director General of the Department of Land and Water Conservation commenced proceedings in the Land and Environment Court against Mr Bailey for offences of clearing native vegetation without development consent in contravention of s 21(2)(a) of the NVC Act, which was then in force. Mr Bailey defended the proceedings on the basis that the clearing was

exempt from the operation of the NVC Act under s 12(f) of that Act, being clearing that was, or was part of, designated development (namely an "artificial waterbody") pursuant to the *Environmental Planning and Assessment Act 1979*, and as a "farm structure" under State Environmental Planning Policy No 46 – Protection and Management of Native Vegetation ("SEPP 46"). The trial judge found that both exemptions applied and dismissed the charges; on a stated case, the Court of Criminal Appeal upheld the trial judge's approach. In 2006 the appellants commenced proceedings in the Supreme Court seeking damages for malicious prosecution, negligent misrepresentation, breach of duty, and misfeasance in public office. The primary judge dismissed the proceedings, awarding costs in favour of the defendants, to be assessed on an indemnity basis from the date of an offer of compromise. The appellants appealed, pursuing only the claim based on malicious prosecution.

Issues:

(1) whether a construction of the law sufficient to support the conviction was reasonably available to the prosecutor;

(2) whether the Director-General lacked a belief in the guilt of Mr Bailey as evidenced by his failure to obtain legal advice in light of the legal advice provided by the appellants or his failure to give evidence;

(3) whether the maintenance of the proceedings after the Land and Environment Court had rejected the prosecution case involved the malicious maintenance of the prosecution; and

(4) whether the trial judge erred in ordering indemnity costs based on an offer of compromise.

Held: (Basten JA, Gleeson and Leeming JJA agreeing): dismissing the appeal and ordering the first appellant to pay the respondents' costs of the appeal on liability; dismissing the appeal from the orders of the trial judge as to the costs of the trial, and ordering the appellants to pay the respondents' costs of the appeal with respect to the costs of the trial:

(1) the first and second elements of the tort of malicious prosecution were uncontroversial: the Director-General was the State's officer in whose name the criminal proceedings were commenced, and to the extent that other government officers may also have been responsible, the State was properly joined; and Mr Bailey had been acquitted: at [10];

(2) the third and fourth elements of the tort required that the proceedings had been instituted without reasonable and probable cause, which included both objective and subjective elements; and that they had been instituted for an improper purpose: at [11], [12];

(3) on a reading of the legislative scheme as a whole it was reasonably open for the Director-General to treat the exemption in s 12(f) of the NVC Act as applying only to development that was otherwise lawful: at [38];

(4) it was reasonably open for the Director-General to treat the exemption provided in Sch 3 of SEPP46 for "minimal clearing" for construction of "farm structures" (including "farm dams") as not applying to the clearing. The exemption excluded large scale structures and consequently would not encompass a large water storage unit covering approximately 90ha, and the exemption could reasonably be read as referring to developments for lawful purposes, and not to developments otherwise requiring approval but not approved: at [43], [44];

(5) the only two bases relied upon as demonstrating a lack of reasonable and probable cause for the prosecutions were the availability of those two exemptions. If the prosecutor adopted a reasonably available belief as to the operation of those exemptions, as a matter of law, the claim for malicious prosecution must have failed. It was necessary for the appellant to demonstrate that either those views were not reasonably available, or, failing that, they were not held by the prosecutor or those responsible for the prosecution: at [45];

(6) the legal advice did not demonstrate that there was no reasonable basis upon which to prosecute Mr Bailey: it was given before the clearing had taken place and did not advise in relation to the charges later laid; it was directed specifically to the operation of Sch 3 of SEPP 46, and there was no reference to a possible exemption under s 12(f) of the NVC Act; the reference in the advice to the possibility of an

exemption if clearing was to be no more than 2ha indicated that the author of the letter either had no information as to the size of the proposed dam or did not address her mind to that issue; and the letter noted advice that approval would be required under the Water Act: at [49]- [56];

(7) there was no basis on the facts established to draw an inference that the Director-General did not have a belief when directing that charges be laid in the probable guilt of the appellant: at [85];

(8) there was no error in the trial judge's conclusion that the material considered by the Director-General did not provide a factual basis from which to infer that he had no honest belief in Mr Bailey's guilt, so that when taken together with the absence of a reasonable basis for concluding objectively that the grounds were probably insufficient, that left nothing on which the principle in *Jones v Dunkel* could operate: at [95];

(9) the decision to proceed with the stated case to the Court of Criminal Appeal was readily explicable on rational grounds and provided no evidence to support a view that the prosecution was being maintained without reasonable and probable cause or for an improper purpose: at [103]; and

(10) the challenge to the costs order was rejected. The form of the offer for compromise complied with r 20.26 of the *Uniform Civil Procedure Rules 2005*: at [110]. An offer to forego substantial costs in circumstances where it could reasonably be expected by the offeror that costs would follow the event would generally involve an element of compromise, and did so in the present case, as the trial judge correctly held: at [116]. While having dismissed the claims at the liability stage it was not necessary for the trial judge to address the question of damages, neither that fact nor the fact that certain aspects of the assessment of damages were agreed, affected the entitlement to recover the costs of assessing damages: at [118].

- NSW Court of Criminal Appeal

Environment Protection Authority v Riverina (Australia) Pty Ltd (No 2) [2015] NSWCCA 252 (Hoeben CJ at CL, Hall and Garling JJ)

(related decisions: *Environment Protection Authority v Riverina Australia Pty Ltd* [2015] NSWCCA 16 Hoeben CJ at CL, Hall and Garling JJ, *Environment Protection Authority v Riverina (Australia) Pty Ltd* [2014] NSWLEC 190 Pepper J)

Facts: these proceedings concerned a stated case by which two questions were referred to the Court from the Land and Environment Court ("LEC") for determination pursuant to s 5AE of the *Criminal Appeal Act 1912*, arising from a finding by the LEC that the summons filed by the applicant, prosecutor in proceedings in which the respondent was charged with offences under s 120(1) of the *Protection of the Environment Operations Act 1997*, was bad for duplicity. Both of the stated questions were answered in the negative. This decision concerned three consequential matters arising.

Issues:

(1) whether it was sufficient to make an order remitting the matter to the LEC or whether an additional order should be made requiring the appellant/prosecutor to take steps to give effect to the Court's judgment;

(2) whether a costs order should be made in favour of the respondent in relation to the costs of the stated case; and

(3) whether any costs order should be made in relation to the proceedings in the LEC.

Held: (Hall J, with whom Hoeben CJ at CL and Garling J agreed), remitting the proceedings to the LEC and ordering the appellant to pay the costs of the respondent of the proceedings in the Court of Criminal Appeal:

(1) it was inappropriate to make any orders as sought by the appellant remitting the proceedings with a direction to the prosecutor to elect to amend the summons or that it be struck out, or directing the trial judge to require the prosecutor to elect to amend the summons. On remittal of the proceedings the trial judge below had appropriate case management powers to ensure that any orders reflected and accorded with the outcome of the Court of Criminal Appeal judgment and the answers to the questions on the case stated, and in the event of non-compliance the LEC was in a position to give direction and if necessary order a stay of proceedings until there had been full and proper compliance: at [12];

(2) remittal orders are not usually made on the final disposition of case-stated proceedings. The exercise of the jurisdiction of a court upon a case stated is, apart from any costs orders or other ancillary orders, completed on that court formulating its determination by way of answers to the questions stated, reflecting the fact that once questions that have been submitted have been answered the primary proceedings remain within the control of the referring court: at [13];

(3) in circumstances as in the present case where no error had been established in answering the stated case on the part of the trial judge it was not necessary for a direction to be given that the proceedings be determined "according to law", the law having been correctly applied. The questions being answered, the LEC proceedings could resume in accordance with that Court's case management powers: at [15];

(4) a proper exercise of the discretion on costs in the circumstances of the case was that the respondent, as the successful party, should be awarded the costs of the stated case proceedings. While a requirement for "special reasons" to exist before the respondent could be awarded their costs was doubtful, the appellant's failure to amend the summons whether attention was drawn to its defects in the proceedings below would be sufficient to constitute a "special reason" for awarding costs: at [21]; and

(5) while it was true that s 257C of the *Criminal Procedure Act 1986* limited the power of the LEC to make costs orders, s 257C governed the award of costs in criminal proceedings of this type. The Court was not persuaded that the power of the Court under s 5AE(2) of the *Criminal Appeal Act* was broad enough to permit the making of a costs order in favour of the respondent in relation to the whole of the trial in the LEC from its commencement to the date of the stated case. Even if there were power to award such costs, the appropriate time for consideration of the costs of the proceedings below was when the proceedings had been concluded, and no order should be made by the Court in regard to the costs of the proceedings below: at [24].

Benedict Industries Pty Ltd v Sutherland Shire Council [2015] NSWCCA 272 (Macfarlan JA, Adams and Fagan JJ)

(related decision: *Sutherland Shire Council v Benedict Industries Pty Ltd (No 4)* [2015] NSWLEC 101 Pepper J)

Facts: Benedict Industries Pty Ltd ("Benedict") was charged by Sutherland Shire Council ("Council") with five offences in relation to the construction of a large earthen bund around the perimeter of a quarry which it was operating. Four of those offences, the subject of the appeal, related to the allegation that Benedict damaged trees and bushland vegetation in contravention of the Sutherland Shire Tree and Bushland Preservation Order 2001 ("TPO").

Benedict mounted a collateral challenge against the validity of the TPO, submitting before the trial judge that four of the five offences it was charged with should be dismissed as the TPO did not validly apply during the charge periods, because: (1) the TPO was not validly made, as the resolution passed by the Council purporting to make the TPO ("the resolution") only established when the TPO would commence operation but did not actually 'make' the TPO as required by cl 13(2) of the *Sutherland Shire Local Environment Plan 2000* ("SSLEP 2000"); (2) the objectives contained in the TPO could not be consistently applied across entire local government area as its application to certain areas was dependent on the amendment of the *Sydney Regional Environmental Plan 17 – Kurnell Peninsula* ("Kurnell Peninsula SREP") and the *Sutherland Local Environmental Plan – Menai Town Centre* ("Menai LEP"); (3) that the TPO impermissibly restricted the operation of its empowering provision contained in the SSLEP 2000; and (4) the repeal of the SSLEP 2000 by the *Sutherland Local Environment Plan 2006* ("SSLEP 2006") rendered the TPO inoperative, as it reduced the operation of the TPO such that it no longer applied to the entire local government area as intended.

In dismissing the collateral challenge, the trial judge held that the TPO was validly made, did not impermissibly restrict the power granted by the SSLEP 2000, and, to the extent that provisions in the TPO were not operative or were reduced in effect, these provisions could be read down.

Issues:

(1) whether, on its proper construction, the resolution passed by the Council purported to make the TPO operative;

(2) whether the TPO, if purported to be made, was valid; and

(3) whether the repeal of the SSLEP 2000 impliedly repealed the TPO.

Held: (Macfarlan JA, Adams and Fagan JJ agreeing), dismissing the appeal:

(1) contextual assertions did not assist in the interpreting the resolution, rather the terms of the resolution needed to be examined. Clause 13(6) of the SSLEP 2000 required that a notice be published in the Gazette and in a local newspaper. The resolution passed by the Council reflected this requirement, specifically providing that the TPO was to "take effect from the date of its advertisement in the Government Gazette and the St George and Sutherland Shire Leader." The words used in this resolution manifested a clear intent to 'make' the TPO in accordance with cl 13(6) of the SSLEP 2000: at [32]-[34];

(2) clause 1 of the TPO purported to apply to the entire local government area, however, given that the Kurnell Peninsula SREP and Menai LEP had not been amended at the time the TPO came into force, the TPO lacked the jurisdiction to regulate these areas. Benedict argued that to sever or read down the TPO would involve an impermissible exercise in re-writing the TPO. It was accepted that, to the extent that when the TPO was enacted it lacked the jurisdiction to regulate the areas controlled by the Kurnell Peninsula SREP and Menai LEP, even following any amendment to either planning instrument, the TPO would not operate in relation to these areas: at [25]-[26]. Nonetheless, the TPO could be read down as there was no reason to conclude that unless the TPO had its full, intended operation it should not operate at all: at [47]; and

(3) the SSLEP 2006 repealed the SSLEP 2000 except in relation to certain excluded land, which included the land upon which the alleged offences occurred. Whilst the repeal of the SSLEP 2000 further reduced the area to which the TPO applied, and while it was correct that the Council's purpose in enacting the TPO was for it to apply to the whole local government area, this did not mean that if it could not operate in this manner that the Council would not want it to operate at all. If read down, the operation of the TPO would not be radically different in relation to the reduced land than its intended operation to that land. The repeal of the SSLEP 2000 therefore did not impliedly repeal the TPO: at [56], [58].

- Supreme Court of New South Wales

Attorney General of New South Wales v Martin [2015] NSWSC 1372 (Simpson J)

Facts: the Attorney General of New South Wales sought orders against the defendant, Anthony Gilbert Martin under the *Vexatious Proceedings Act 2008* ("the Act") that all of the proceedings in New South Wales already instituted by Mr Martin be stayed and that Mr Martin be prohibited from instituting proceedings in NSW without leave of the Supreme Court. The Attorney General's evidence comprised affidavits and two large volumes, one of which contained judgments and decisions in proceedings brought by Mr Martin in courts of NSW, including five separate proceedings in the Land and Environment Court and a number of appeals to the Court of Appeal; the Australian Capital Territory; and in the High Court of Australia. Section 91 of the *Evidence Act 1995* provides:

> **91 Exclusion of evidence of judgments and convictions**
>
> (1) Evidence of the decision, or of a finding of fact, in an Australian or overseas proceeding is not admissible to prove the existence of a fact that was in issue in that proceeding.
>
> (2) Evidence that, under this Part, is not admissible to prove the existence of a fact may not be used to prove that fact even if it is relevant for another purpose.

Issues:

(1) whether Mr Martin had "frequently instituted or conducted vexatious proceedings in Australia" as required by s 8(1)(a) of the Act; and

(2) whether the judgments in the earlier proceedings brought by Mr Martin were admissible as evidence in the present proceedings.

Held: ordering that all proceedings in NSW already instituted by Mr Martin are stayed and Mr Martin is prohibited from instituting proceedings in NSW without leave of the Supreme Court:

(1) whether s 91 of the *Evidence Act* operates to exclude the use of any of the decisions and judgments will depend upon an analysis of three things - (i) what facts were in issue in those proceedings; (ii) what facts were found in the decisions; and (iii) the use to which the Attorney General seeks to put those judgments - that is, what facts she seeks to prove by their use: at [13];

(2) in some of the proceedings which Mr Martin instituted and which the Attorney General wished to rely on as evidence in the present proceedings there were findings of fact in respect of which s 91 of the *Evidence Act* precluded reliance for the purpose of proving that the proceedings were vexatious as defined in s 6 of the Act: at [39], [66], [102], [106], [112], [119];

(3) in the other proceedings there was no relevant finding of fact that would be excluded by s 91 of the *Evidence Act*: at [45], [54], [61], [74], [79], [95], [98]; and

(4) Mr Martin had both instituted and conducted proceedings that are vexatious, and he had done so frequently and over a considerable period: at [122].

- Land and Environment Court of NSW

Judicial Review

Gold and Copper Resources Pty Ltd v The Hon. Chris Hartcher MP, Minister for Resources and Energy [2015] NSWLEC 116 (Craig J)

Facts: Cadia Holdings Pty Ltd ("Cadia"), the second respondent, owns and operates a gold and copper mining complex known as Cadia Valley Operations, located approximately 25 kilometres south west of Orange in the Central Tablelands of New South Wales. These operations are carried out under a number of mining leases granted under the *Mining Act 1992* and a project approval granted under Pt 3A of the *Environmental Planning and Assessment Act 1979*. By an amended summons, the applicant, Gold and Copper Resources Pty Ltd ("Gold & Copper"), challenged the validity of two mining leases for mining purposes only granted by the respondent Minister to Cadia in September 2013. Prior to those mining leases being granted, applications for two exploration licences had been lodged on behalf of Gold & Copper over parts of the land in respect of which the mining leases were sought. At the time of the decision to grant the mining leases to Cadia, Gold & Copper had not provided its consent to the Minister to do so.

Issues:

(1) whether the grant of the mining leases was in breach of s 58(1)(c)(i) of the *Mining Act* by reason of the fact that Gold & Copper had not consented to the grant of those leases;

(2) whether the mining leases were granted in breach of the *Mining Act*, as each mining lease application that founded the grant of the leases failed to indicate the mineral bearing capacity of the land to which each application related and therefore each was deemed to have been refused by operation of cl 76(9) of the Mining Regulation 2010; and

(3) whether the grant of the mining leases was manifestly unreasonable because each mining lease was granted without any restriction as to the depth of land that was demised and neither mining lease application had included information as to the mineral bearing capacity of the land to which it related nor the extent of any mineral deposits on that land.

Held: dismissing Gold & Copper's amended summons:

(1) the provisions of s 58(1)(c)(i) of the *Mining Act* did not deny to the Minister the power to grant the mining leases: at [72]. Neither the text in s 58(1)(c)(i) nor its context in Pt 5 of the Act justified the result that in every substantive provision in which the expression "mining lease" is used, the expression will always comprehend a mining lease of any kind: at [75]-[76];

(2) failure to provide the mineral bearing capacity of the land did not result in the invalidity of the mining leases: at [115]. Clause 76(9) of the Mining Regulation 2010 had no operation in the present case and provided an

unsound basis on which to conclude that its purpose was to reverse the effect of the provisions of the *Mining Act* itself in respect of a lease granted following an application that was incomplete: at [129]; and

(3) the decision made by the Minister to grant the mining leases was not shown to be so unreasonable that judicial intervention was required: at [147]. The decision was made "within a range of possible, acceptable outcomes" that were defensible both by reference to the surrounding facts and to the law: at [151].

Hoxton Park Residents Action Group Inc. v Liverpool City Council (No 2) [2015] NSWLEC 125 (Craig J)

(related decision: *Hoxton Park Residents Action Group Inc v Liverpool City Council (No 3)* [2012] NSWLEC 43 Biscoe J)

Facts: by amended summons filed 15 December 2013 the applicant challenged a decision made by the Sydney West Joint Regional Planning Panel ("JRPP") on 28 February 2013 to grant development consent, subject to conditions, for a school and associated facilities in the suburb of Hoxton Park. The development application was lodged with the Liverpool City Council on 26 June 2012. It assessed the development to be an educational establishment with a capital investment value ("CIV") over $5 million and therefore referred the application to the JRPP as determining authority pursuant to cl 21 of State Environmental Planning Policy (State and Regional Development) 2011 ("SEPP 2011") and cl 6 of Schedule 4A of the *Environmental Planning and Assessment Act 1979* ("EPA Act"). An earlier development consent, granted by the Council in 2009 to develop the site for the purpose of a school, had been declared invalid by the Court. The Court in that matter also restrained further work on the site pursuant to the 2009 consent.

Issues:

(1) whether the consent granted by the JRPP authorised buildings already erected and works already undertaken pursuant to the 2009 consent that were determined to be unlawful by the Court, with the consequence that the JRPP lacked power to grant the consent it purported to give;

(2) whether the CIV of the development exceeded $30 million, with the consequence that the Minister should have been the correct consent authority by operation of cl 8(1) of SEPP 2011; and

(3) whether there was a reasonable apprehension of bias on the part of the Council nominees when exercising their function as members of the JRPP, by reason of their participation in the 2009 consent.

Held: dismissing the applicant's amended summons, with costs (unless a different costs order sought):

(1) the decision of the JRPP did not purport to grant development consent either to past use of the site or to the erection of buildings or site works carried out under the 2009 consent: at [68]. A building certificate issued by the Council for completed building work had the effect of sanctioning the continued existence of those buildings already erected on site: at [67];

(2) the applicant failed to establish, on the balance of probabilities, that the CIV was more than $30 million. Figures identified in the development application form and "admissions" attributed to the Council by reference to those figures could not be sustained evidencing the CIV: at [102]; and

(3) the circumstance that either of the two Councillors appointed to the JRPP by the Council may have had a predisposition to a particular outcome because of their prior involvement in the 2009 consent process did not, of itself, give rise to any reasonable apprehension of bias: at [136]. Even if apprehended bias had been established on the part of the two Councillors, the decision of the JRPP to grant development would not have been impugned, as the Ministerial appointees of the panel, who comprised a quorum and all voted in favour of development consent, had no prior involvement in any decision directed to the development of the site as a school: at [150].

SHCAG Pty Ltd v Hume Coal Pty Ltd [2015] NSWLEC 122 (Pain J)

Facts: SHCAG Pty Ltd (the "Applicant") commenced judicial review proceedings against the decision of the NSW Minister for Resources and Energy (the "Second Respondent") to grant authorisation to Hume Coal Pty Ltd (the "First Respondent") to carry out coal exploration activities, specifically the drilling of boreholes. The First Respondent was the holder of the mining licence "Authorisation 349" and had conducted two phases of

exploration activities within the licence area. The Review of Environmental Factors for phase 3 exploration activities (the "REF 3") for the drilling of 25 boreholes was approved by the Second Respondent. Twenty of the 25 boreholes were located on five different properties, the landowners of which were represented by the Applicant. The Applicant sought a declaration that the approval was void and of no effect.

Issues:

(1) what was the scope of the "activity" for the purposes of s 110 of the *Environmental Planning and Assessment Act 1979* (the "EPA Act");

(2) whether access to private land (as provided for under the *Mining Act 1992*) to precisely identify access tracks was required to comply with s 111 of the EPA Act;

(3) whether the Second Respondent failed to examine and take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of that activity prior to approving the activity, contrary to s 111 of the EPA Act (cumulative, economic/social and physical impacts); and

(4) whether the Second Respondent breached s 112 of the EPA Act by approving the activity without first being furnished with an Environment Impact Statement as required by s 112(1).

Held: amended summons dismissed:

(1) the "activity" was the drilling of 25 boreholes with associated activities as described in the REF 3: at [118];

(2) the statutory schemes in the EPA Act and the Mining Act if viewed jointly (for which there is no explicit statutory basis) did not suggest that the precise access tracks to a proposed borehole must be known in order for s 111 to be complied with by the Second Respondent: at [166]. A Pt 5 EPA assessment process could be undertaken before obtaining an access arrangement under the Pt 8 Div 2 Mining Act process: at [165];

(3) there was no failure to examine and take into account the precise access track to a particular borehole and potential environmental impacts concerning access tracks. It was sufficient that the Second Respondent's Assessment Report, the REF 3 and Authorisation 349 identified a procedure for determining precise locations that limit damage to the land: at [167]-[182]. There was no failure to examine and take into account cumulative impacts as there was no evidence disputing the progressive rehabilitation of past phases of exploration drilling. There was no obligation on the Second Respondent to consider future possible boreholes the location of which was unknown: at [183]-[189]. There was no failure to examine and take into account economic and social impacts as there was nothing in the Applicant's submissions to the Second Respondent that showed a duty to inquire further and there was a separate regime provided by the Mining Act for determining access to private land under which landholders bear their own costs: at [190]-[200]; and

(4) the finding in *Fullerton Cove Residents Action Group Incorporated v Dart Energy Ltd (No 2)* [2013] NSWLEC 38; (2013) 195 LGERA 229 that s 112 of the EPA Act gives rise to a jurisdictional fact was not plainly wrong and was followed in the interests of judicial comity: at [203]. The Applicant bears the onus of proof of establishing a breach of s 112 and must satisfy the two conditions precedent for the precautionary principle to apply: at [211]-[212]. The physical impacts of access tracks were not likely to significantly affect the environment because the expert evidence demonstrated that the impacts were to be short term for properties used for grazing and cropping given the approach to construction and rehabilitation measures to be implemented: at [239]. Criticism of the REF 3 did not address the question required by s 112: at [238]. The social and economic impacts of access tracks were not likely to significantly affect the environment as such effects were to be mitigated by access arrangements, which can provide for negotiation of the timing of access, location of tracks and compensation for nuisance and inconvenience. Cumulative impacts were not likely to significantly affect the environment: at [256]. There was no likelihood of the phase 3 exploration activities significantly affecting the environment. The conditions precedent to the precautionary principle were not satisfied: at [257].

Nash Bros Builders Pty Ltd v Riverina Water County Council (No 2) [2015] NSWLEC 156 **(**Pepper J)

(related decision: *Nash Bros Builders Pty Ltd v Riverina Water County Council* [2014] NSWLEC 140 Pepper J)

Facts: Nash Bros Builders Pty Ltd and Nash Bros Construction Pty Ltd ("the applicants") were engaged in the development of a retirement village on behalf of the Grange Retirement Village ("Grange"), a related entity to the applicants. Condition 3 of the development consent ("the development consent") granted by Wagga Wagga City Council ("the Council") required the applicants to pay a development servicing charge prior to the issue of a compliance certificate in respect of water management works undertaken pursuant to s 64 of the *Local Government Act 1993* ("LG Act") and s 283 of the *Water Management Act 2000* ("WM Act"). The respondent, Riverina Water County Council ("Riverina"), provided water supply infrastructure to the retirement village in exchange for the pro rata payment of the fee specified in the development consent for connecting individual dwellings within the retirement village. The applicants challenged the authority of Riverina to impose the development servicing charges and sought to recover any payments that had already been made to Riverina.

Issues:

(1) whether s 608 of the LG Act authorised Riverina to levy the applicants with a development servicing charge as a fee for a service, product, or commodity;

(2) whether condition 3 of the development consent required the applicants to obtain a certificate of compliance from Riverina with respect to the water management works;

(3) whether the applicants were legally obliged to pay the development servicing charges pursuant to s 306(2) of the WM Act;

(4) whether, if Riverina had acted beyond power, the applicants were eligible to recover payments made to Riverina as the payments were made under compulsion under *colore officii,* despite the operation of the *Recovery of Imposts Act 1963* ("the Recovery Act"); and

(5) whether, if Riverina had acted beyond power, the applicants were eligible to recover payments as a form of mistake or unjust enrichment.

Held: the summons was dismissed and the applicants ordered to pay the respondent's costs:

(1) the proper construction of s 608 encompassed the continuing supply of water and the related recovery of infrastructure costs as a service for which fees could be charged: at [112]-[117];

(2) s 608 of the LG Act provided a wide power to Riverina to charge fees for services. The existence of s 510 of the LG Act as an alternative source of power to impose levies with respect to the development servicing charges did not derogate from the power contained in s 608: at [107];

(3) the development service charge levied under s 608 was a fee required for the issue of a compliance certificate pursuant to the conditions of the development consent, and was therefore specific to the LG Act. While the development servicing charge may have also been imposed under the WM Act, this was complimentary to the separate power which existed pursuant to the LG Act: at [124]-[128];

(4) the absence of a specific authority in relation to the compliance certificate required by in condition 3 meant that the fee was not exclusively payable to the Council. A certificate of compliance was therefore required to be issued by Riverina: at [144];

(5) the applicants were liable to pay the fee if an application for a compliance certificate was made. However on the evidence, no application for a certificate under s 306(2) had been made by the applicants. However, there was nothing in the statutory scheme of the WM Act which prevented the Council from imposing the fees on the basis that a certificate of compliance was necessary under condition 3 of the consent, even if no application had been made for it: at [177];

(6) even if Riverina was not statutorily entitled to charge the development servicing fee, ss 2 and 4 of the Recovery Act applied to prevent the recovery of fees which had been wholly passed onto another party, namely, Grange, by the applicants: at [189]; and

(7) the applicants had received a material benefit in consideration of the payments made to Riverina. Even if there were no legal obligation for the applicants to pay the development servicing charges, it would be inequitable for the applicants to recover charges while retaining that benefit: at [195].

Community Action for Windsor Bridge Inc v NSW Roads and Maritime Services & Anor [2015] NSWLEC 167 (Brereton AJ)

Facts: on 20 December 2013 the second respondent, Minister for Planning and Infrastructure ("the Minister") gave the first respondent NSW Roads and Maritime Services ("RMS") an approval ("the Approval") under s 115ZB of the *Environmental Planning and Assessment Act 1979* ("the EPA Act") for a State significant infrastructure ("SSI") project known as the Windsor Bridge replacement project ("the Project"). The Project involved the construction of a new 159m long five span bridge across the Hawkesbury River, construction of new northern and southern approach roads and the realignment and modification of access roads, and the removal of the existing bridge. The Approval was subject to numerous conditions including "Pre-Construction Conditions" contained in Part B of the Approval, which had to be satisfied before commencement of pre-construction or construction activities. Condition B1 required RMS to submit for approval by the Director-General a Strategic Conservation Management Plan ("CMP"), to provide for the heritage conservation of the Thompson Square Conservation Area ("Thompson Square") including identification of its heritage value, design principles to retain its heritage significance, specific mitigation measures, and changes to the detailed design of the project to mitigate heritage impacts. Conditions B2 to B7 related to Aboriginal heritage, a hydrological mitigation report, and landscaping, and B8 required revision of the Project to incorporate specified amendments and provision of a new design to the Director-General for approval. The applicant, an incorporated not-for-profit community association opposed to the Project, had made a submission opposing the proposal on account of its impact on Thompson Square both as a heritage precinct and as an area in the town centre of Windsor for use and enjoyment of the public. The applicant sought a declaration that condition B1, and/or conditions B1-B8 together, and consequentially, the Approval, were invalid on three bases: that the Minister did not decide, but deferred for later resolution in accordance with the terms of conditions B1 to B8, what modifications were to be made to the Project so the ultimate form and appearance of the Project was not discernible from the Approval, with the result that the purported approval lacked sufficient finality and certainty to be an "approval" within s 115ZB; that the Minister failed properly to take into account as a relevant consideration the impact of the project on cultural heritage; and that the Approval, particularly by the imposition of condition B1 (and/or conditions B1 to B8) was manifestly unreasonable. The respondents denied that the impugned conditions were invalid; the RMS, but not the Minister, alternatively contended that any invalid condition was severable from the approval so that the Approval was not invalid.

Issues:

(1) whether the pre-construction conditions were void for lack of finality or certainty;

(2) whether the pre-construction conditions were void for failure to consider cultural heritage as a relevant consideration;

(3) whether, if any of the conditions were void, the void condition was severable; and

(4) whether the Approval was manifestly unreasonable.

Held: dismissing the summons:

(1) the Minister's power under s 115ZB to approve or disapprove the carrying out of SSI, with or without modifications and conditions, permitted the approval of something different from what was proposed, so long as the differences did not amount to its wholesale rejection and replacement or its radical transformation: at [59];

(2) a number of features of Part 5.1 of the EPA Act and the context in which it operated suggested that SSI may be described, and approved, with considerable generality and flexibility. Part 5.1 is directed towards projects that are large in scale and often take place over a significant period of time (at [65]); it contains a mechanism for projects to be modified as they progress (at [66]); and s 115ZB(3) authorises the Minister not only to approve on conditions, but to modify, the infrastructure proposed (at [67]). Those features suggested that s 115ZB was not intended to require that every aspect of a proposed development be determined in the approval, not preclude scope for the imposition of modification and conditions which would allow a project to evolve significantly, even after approval, so long as it remained consistent with and within the scope of the approval: at [68];

(3) there were significant indicia in the terms of the Approval itself and in the context provided by the documents that were incorporated in it, that condition B1 was intended to leave only limited scope for

refinement of detail in the implementation of the Approval and not such as to leave in doubt the defined outer parameters of the approved SSI, nor permit a "modification" of the proposal within the meaning of s 115ZB(3) which could be made only by the Minister in the Approval: at [81]. Condition B1 did not of itself purport to be or authorise a modification of the parameters of the approved development; rather it stipulated that RMS may be required to incorporate the changes in the detailed design, where necessary and feasible, to mitigate heritage impacts: at [89]. There was no uncertainty or lack of finality in what the Minister had approved: at [95];

(4) the impact on cultural heritage was a mandatory relevant consideration for the Minister: at [104]. While it had to be properly taken into account, the weight to be attributed to it as against other permissible considerations was a matter for the Minister: at [108]. It did not follow that the fact that the Minister accepted that there were deficiencies in the heritage assessment in the environmental impact statement ("EIS") that he did not sufficiently consider impact on heritage. The material before the Minister unambiguously indicated that while the preferred option had advantages over the alternatives in other respects, it would have significant adverse heritage impacts which could not be avoided but might be mitigated by design refinement. Adoption of one course did not imply a failure to have regard to considerations that pointed in the other direction, but only that those considerations had been outweighed by others. The better inference was that the Minister accepted the Director-General's view that while the heritage impacts were serious, and while the heritage assessment was imperfect, the impacts were outweighed by other factors and there was some scope for mitigating the heritage impacts in implementation. That did not amount to a failure to consider adverse impact on cultural heritage: at [122];

(5) deletion of condition B1 would result in the residue of the Approval operating differently to the manner in which the whole would have operated. If invalid, condition B1 would not be severable: at [130]; and

(6) the imposition of condition B1, far from being devoid of plausible explanation, was explained by the intention of putting in place measures to mitigate the adverse heritage impacts that the Project would inevitable occasion and rescue what could be saved, including by refinement of the Project in the detailed design phase and addressing some of the deficiencies that had been identified in the heritage assessment to date. Such a decision was plainly within the bounds of possible acceptable outcomes. It was one of the decisions rationally open to the Minister. That many, even most, might have decided the question differently would not make the decision unreasonable in the legal sense: at [141].

Criminal

Sutherland Shire Council v Benedict Industries Pty Ltd (No 5) [2015] NSWLEC 103 (Pepper J)

(related decisions: *Sutherland Shire Council v Benedict Industries Pty Ltd* [2013] NSWLEC 121 Biscoe J; *Sutherland Shire Council v Benedict Industries Pty Ltd (No 2)* [2015] NSWLEC 39 Craig J; *Sutherland Shire Council v Benedict Industries Pty Ltd (No 3)* [2015] NSWLEC 97 Pepper J; *Sutherland Shire Council v Benedict Industries Pty Ltd (No 4)* [2015] NSWLEC 101 Pepper J)

Facts: the defendant, Benedict Industries Pty Ltd ("Benedict"), in proceedings which related to contraventions of ss 76B and 125 of the *Environmental Planning and Assessment Act 1979* ("the EPA Act"), sought by subpoena the production of historical council records ("the records") from Sutherland Shire Council ("the Council"). The absence of a relevant consent was an element of all the charges. The Council sought its reasonable losses and expenses relating to production of the documents pursuant to r 33.11 of the *Uniform Civil Procedure Rules 2005* ("the UCPR"). The *Criminal Procedure Act 1986* ("the CP Act"), however, stated that costs may only be awarded to a prosecutor where the court has convicted the accused person of an offence, or has made an order under section 10 of the *Crimes (Sentencing Procedure) Act 1999.*

Issues:

(1) whether s 257B of the CP Act, as a subsequently enacted statute, limited the operation of r 33.11 of the UCPR with respect to the ability of a prosecutor to seek losses and expenses relating to production of the subpoena, absent the conditions of s 257B of the CP Act being met;

(2) whether the losses and expenses claimed by the Council were reasonable; and

(3) whether delaying disentitling conduct by the Council precluded the claim for losses and expenses pursuant to r 33.11 of the UCPR.

Held: application dismissed, no order as to costs:

(1) the question was one of inconsistency or repugnancy of powers in separate enactments. It is generally presumed that where there is more than one applicable law, there is no contradiction, unless actual contrariety or irreconcilable conflict is apparent: at [18]-[19];

(2) the "losses and expenses" of answering a subpoena referred to in r 33.11(1) of the UCPR fell within the ambit of "costs" contained in s 257B of the CP Act. To the extent that the prosecutor sought an order that the accused pay its reasonable losses and expenses of answering the subpoena, the prosecutor was precluded from seeking payment until such time that a precondition to a prosecutor seeking costs, contained in s 257B, were met: at [26];

(3) Benedict was informed of the difficulty and expense of complying with the subpoena, but nevertheless sought the production of the documents. The expenses sought by Council were only for the fees charged by the NSW Government Repository for production of the records, in addition to the costs associated with sorting and claiming privilege over the records, and were, therefore, reasonable: at [35]; and

(4) the function of r 33.11 of the UCPR was to compensate applicants for actual loss or expense incurred in answering the subpoena, provided the loss or expense is reasonable. The alleged disentitling conduct of the Council did not bear on either the need to issue the subpoena, or the reason why the loss and expenses were incurred by it. In the absence of an established causal connection between the cost of complying with the subpoena and the disentitling conduct, the conduct of the Council was not a relevant consideration: at [40] and [44].

Director-General, Department of Environment and Climate Change v Hudson (No 2) [2015] NSWLEC 110 (Pepper J)

(related decisions: *Hudson v Director-General, Department of Environment Climate Change and Water* [2012] NSWCCA 92 Bathurst CJ, Whealy JA, McClellan CJ at CL, *Director-General of the Department of Environment and Climate Change v Hudson* [2009] NSWLEC 4 Lloyd J)

Facts: at first instance, Mr Hudson was convicted and fined $400,000 for the illegal clearing of 486 ha of native vegetation in contravention of s 12 of the *Native Vegetation Act 2003* ("the NV Act"), in addition to being fined $8,000 for failing to provide information as required in a statutory notice issued under s 36 of the Act (*Director-General of the Department of Environment and Climate Change v Hudson* [2009] NSWLEC 4). Mr Hudson successfully appealed his sentence, but not his conviction, in the Court of Criminal Appeal ("the CCA"). The matter was remitted to the Court for re-sentencing and the determination of outstanding costs issues.

Issues:

(1) the appropriate sentence to be imposed in respect of each offence;

(2) whether, in quashing the penalties of Lloyd J and remitting "the question of sentence", the CCA also set aside the costs order made by his Honour; and

(3) whether costs should be ordered against Mr Hudson in either or both sentencing proceedings.

Held: Mr Hudson was fined $318,750 for breach of s 12 of the NV Act, and $1,275 for breach of s 36(4) of the NV Act. Mr Hudson was ordered to pay the costs of the rehearing in addition to half of the prosecutor's costs in the original proceedings:

(1) the ordinary sentencing principles contained in s 3A of the *Crimes (Sentencing Procedure) Act 1999* applied. Objective factors included the extensive environmental harm caused by the commission of the offences, particularly the offence against s 12 of the NV Act. The accused's contention that the environmental harm was mitigated by the presence of a noxious weed infestation that necessitated the clearing was rejected on the basis that even in light of the infestation, the clearing was disproportionate, unnecessary and did not occur in accordance with a weed control order made under the *Noxious Weeds Act 1993*, which would have rendered the clearing a "routine agricultural management activity" under the NV Act: at [86]-[88] and [119]-[121];

(2) Mr Hudson's subjective considerations included the extra-curial punishment inflicted on Mr Hudson due to adverse media attention, Mr Hudson's lack of co-operation during the investigation, and the failure of Mr Hudson to acknowledge he had done anything wrong: at [180], [189] and [202];

(3) in quashing the penalties ordered by Lloyd J, the CCA intended to include the costs ordered by his Honour because, consistent with the statutory definitions given to the word "sentence" in the *Criminal Procedure Act 1986* and the *Court (Appeal and Review) Act 2001*, the costs were part of the "question of sentence" remitted to the Court for determination: at [232]-[243]; and

(4) while Mr Hudson successfully challenged his sentence before the CCA, only a small portion of the proceedings before Lloyd J were in fact occupied by this issue. It was therefore just and fair that Mr Hudson pay half of the prosecutor's costs of the proceedings before Lloyd J, and all of the costs of the hearing on remitter: at [245]-[246].

Chief Executive, Office of Environment and Heritage v Geoffrey Phillip Manchee; Chief Executive, Office of Environment and Heritage v Bogamildi Investments Pty Ltd [2015] NSWLEC 117 (Pepper J)

Facts: Bogamildi Investments Pty Ltd and Mr Manchee ("the accused") were charged on 11 September 2014 with the illegal clearing of native vegetation in contravention of s 12 of the *Native Vegetation Act 2003* ("the NV Act"). In its summonses, the Chief Executive, Office of Environment and Heritage ("the OEH") alleged that the illegal clearing occurred over a period of just over four years from 16 December 2008 to 10 January 2013 ("the charge period"). The accused sought to quash the summonses because they failed to particularise an essential ingredient of the offence, namely, the exact date or dates on which the offence charged was alleged to have been committed. Because s 42(3) of the NV Act required the OEH to bring the proceedings within two years of the offence having been committed ("the limitation period"), the accused argued that much of the charge period was time barred. The OEH submitted that the charge was a continuing offence, and therefore was capable of being charged as a range of dates, and failing that, the defect was able to be cured.

Issues:

(1) whether offences against s 12 of the NV Act were capable of being charged as a continuing offence;

(2) whether the charges validly included acts occurring outside of the limitation period;

(3) whether, if the acts occurring outside the limitation period were time barred, the summonses could be amended to cure the defect; and,

(6) whether, if the summonses were amended, the accused was entitled to costs.

Held: notice of motion dismissed:

(1) a breach of s 12 of the NV Act may be pleaded as a continuous offence, occasioned by multiple clearing events over a period of time: at [43];

(2) because it was open for the OEH to charge the offence as a continuing offence, the limitation period was calculated from the date on which the offence was completed, 10 January 2013, which was within the limitation period. The OEH was, however, still required to prove at trial, beyond reasonable doubt, the connection of the various acts of clearing to each other and whether the acts in question were part of an organised course of conduct: at [44] and [52];

(3) by reason of s 16(2) of the *Criminal Procedure Act 1986*, because the summonses clearly identified the nature of the offences charged, there was no uncertainty or ambiguity in the summonses leading to unfairness which would enable the accused to object to their amendment: at [68]; and

(4) it was unlikely that amendment of the summonses would result in additional costs for the accused because no plea had been entered or expert evidence obtained. Any costs thrown away due to the conduct of OEH as a result of the amendments were capable of being accommodated at the conclusion of proceedings: at [75]-[76].

Kempsey Shire Council v Slade [2015] NSWLEC 135 (Biscoe J)

Facts: Kempsey Shire Council sought to recover a statutory debt under s 105(1) of the *Protection of the Environment Operations Act 1997* ("POEO Act"). The respondents were Michael Slade and his father Barry Slade. The claim was for reasonable costs and expenses of taking clean-up action in respect of pollution incidents resulting from the deposit of asbestos at a waste facility ("the Premises") during the currency of the lease of the Premises to Michael Slade or the currency of a later lease to a company of which the respondents were the only directors and shareholders.

It was common ground that: asbestos was deposited at the Premises during the occupancy under the two leases, as a result of which there were pollution incidents; reasonably suspecting that pollution incidents had occurred at the Premises, the Environment Protection Authority gave Council a clean-up notice under s 92(1) of the POEO Act; Council complied with the clean-up notice; suspecting (it said reasonably) that the respondents had caused the pollution incidents, Council gave the respondents compliance cost notices under s 104(2)(b) requiring them to pay reasonable costs and expenses incurred by Council; and the respondents had not paid any of the costs and expenses. In accordance with an order of the Court and as agreed by the parties, this case determined all issues except quantum.

Issue:

(1) whether it was reasonable for Council to suspect that the respondents had caused the pollution incidents.

Held: judgment for the applicant against the respondents for a debt under s 105(1) of the POEO Act in an amount to be assessed by the Court or as agreed by the parties:

(1) there may be more than one person who causes a pollution incident, and a person who causes a pollution incident includes: a person (including a workman or stranger) who did the act that led to the pollution incident; a person who directed the act; a person who established the system that enabled the act to occur; and a person with sufficient control over operations to be held responsible for the act or with responsibility and authority to prevent or correct the act. Such persons may be corporate directors, officers or managers, or even a person with no formal association with the corporation that did, or also caused, the act. The corporate veil is of no avail: at [40]; and

(2) it was objectively reasonable for Council to suspect that the respondents had caused the pollution incidents: at [120]. The respondents were involved in a small business and throughout the term of both leases the respondents were its only managers. The correspondence from Barry Slade to Council created the impression that the respondents were both in charge of operations. The respondents both had management authority and responsibility for asbestos removal practices: at [118]. The respondents had, and it was reasonable to suspect they had, authority and responsibility to prevent or correct asbestos being left on the Premises, and failed to do so. They were accountable because of the responsibility and authority of their positions for the conditions that gave rise to the pollution incidents: at [119].

Preston v Zapantis [2015] NSWLEC 121 (Pepper J)

Facts: Mr Preston was convicted by the Local Court for failing to cease specified building work contrary to a stop work order and fined $12,000. The works related to a development consent granted to Mr Preston by Leichhardt Municipal Council ("the Council") to make internal alternations to his property ("the premises"). The Council had earlier issued a penalty infringement notice ("the first PIN"), which Mr Preston paid, relating to works which exceeded the terms of the development consent. A second inspection revealed Mr Preston had continued works on the premises. Mr Preston was issued with a stop work order by the council pursuant to s 121B of the *Environmental Planning and Assessment Act 1979* ("the EPA Act") instructing him to "cease all unauthorised work". Mr Preston continued certain works and subsequently the Council initiated proceedings in the Local Court. At trial, the Council led evidence from a Council inspector who had reviewed the plans, and inspected the premises on two separate occasions and concluded that the works were unauthorised. The plans attached to the development consent ("the plans") were not before the Local Court. On appeal, Mr Preston submitted that the Council could not, without reference to the plans, prove the works he undertook were distinguishable from those authorised by the consent. The Council, in reply, sought leave to adduce fresh evidence to counter Mr Preston's submission.

Issues:

(1) whether, in the absence of the plans, the observations of the Council officer were capable of proving beyond reasonable doubt that the works were unauthorised; and

(2) whether leave should be granted for the Council to tender affidavit evidence in the absence of its maker.

Held: appeal upheld with costs:

(1) limited probative weight could be given to the bare assertion that the inspector had visually examined the works absent reference to the approved plans to conclude that unauthorised works had occurred: at [62]; and

(2) the new evidence was not permitted because it would be unfair for the Mr Preston to be forced to respond to new evidence which was plainly available to the Council earlier in the Local Court: at [57].

Chief Executive, Office of Environment & Heritage v Orica Australia Pty Ltd; Environment Protection Authority v Orica Australia Pty Ltd [2015] NSWLEC 109 (Preston CJ)

Facts: Oceanic Coal Australia Pty Ltd ("Oceanic Coal") operated the West Wallsend Colliery beneath Sugarloaf State Conservation Area in the Newcastle coalfields. Coal was extracted from the West Wallsend Colliery using the longwall extraction method. Longwall mining causes sagging and bending of near surface rocks and cracking and subsidence of the ground above the mine. Grouting is used to fill subsidence cracks to reduce public safety risk and water ingress and to increase strength and stability of the ground.

After the commencement of mining at the West Wallsend Colliery in July 2012, significant surface subsidence impacts occurred in Sugarloaf State Conservation Area including one crack 470m in length which started at the top of a cliff and ran down its side ("the crack"). The crack's depth was at least 18m. Oceanic Coal directed Orica Australia Pty Ltd ("Orica"), with whom it had a supply contract, to grout the crack. The terrain in which the crack occurred was difficult to access and the bottom of the crack could not be seen. Oceanic Coal was advised that it was too dangerous to place an operator at the base of the crack to form an earthen plug to prevent leaks or to act as a spotter because the cliff face was showing signs of slabbing or fracturing. As such, Oceanic Coal directed Orica to monitor the downslope area of the cliff from the top of the cliff feature.

Orica commenced grouting the crack on Thursday 30 May 2013 and continued on Friday 31 May 2013. On each day 10.8 tonnes of grout product mixed with water was pumped into the crack. Orica did not work over the weekend or on Monday. On the morning of Tuesday 4 June 2013 work resumed and in the morning one of the workers noticed that grout was leaking from the base of the cliff into an ephemeral drainage channel and then work stopped. The leaking grout was of about 148 cubic metres in volume and affected about 280m of the drainage channel.

Oceanic Coal was issued a remediation direction by the Office of Environment and Heritage ("OEH"). Remediation activities included manually breaking up the grout, removing bulk bags of grout by helicopter and transportation of the grout to a licensed waste facility. These tasks were undertaken by Orica's workers. Remediation was completed on 6 June 2014.

The Chief Executive of OEH prosecuted Orica under s 156A(1) of the *National Parks and Wildlife Act 1974* for damaging reserved land. The Environment Protection Authority prosecuted Orica under s 120(1) of the *Protection of the Environment Operations Act 1997* for polluting waters. Orica pleaded guilty to both offences.

Issues:

(1) what were the objective circumstances of the offences;

(2) what were the subjective circumstances of Orica; and

(3) what was the appropriate penalty for each offence.

Held: convicting Orica of the offences, ordering Orica to pay fines totalling $120,000 and ordering Orica to pay the prosecutors' legal costs:

(1) the offences were in the low end of objective seriousness: at [118]. The leakage of the grout and its removal caused actual environmental harm during the period until the grout was removed and caused the potential to cause harm by increasing the likelihood of weed invasion and by affecting water quality downstream: at [88]. The actual and potential harm caused by the offences was towards the lower end of

the range of extent of harm: at [88]. The risk that grout might leak from the crack in the cliff that was being filled into the drainage channel downslope of the cliff was reasonably foreseeable: at [92]. It was reasonably foreseeable that if grout did flow into the drainage channel, it would damage the drainage channel and the waters and aquatic ecology in it: at [100]. There were practical measures that Orica could have taken to prevent, control, abate or mitigate the harm that was caused to the drainage channel and its biotic and abiotic components: at [102]-[104]. Orica had control over the causes that gave rise to the offences: at [108]. The offences were not committed negligently or for financial or commercial gain: at [115], [117];

(2) Orica's record of prior convictions was not an aggravating factor nor was it a mitigating factor: at [123]-[124]. Orica entered early pleas of guilty providing full utilitarian value to the criminal justice system: at [125]. Orica expressed genuine remorse for the offences: at [131]. Orica was of good corporate character: at [132]. Orica was unlikely to reoffend: at [133]. Orica provided assistance to authorities: at [135]; and

(3) synthesising all of the relevant objective and subjective circumstances, the appropriate penalties were fines of $100,000 for each offence. The amounts were discounted by 25% for the utilitarian value of the pleas of guilty, making the amounts $75,000 for each offence: at [141]. The totality principle was considered because there were two offences arising out of the same incident: at [142]. However, the boundaries of the offences were not coterminous. The physical or external elements of the offences were different: at [144]. There were areas of overlap of aggravation reflected in the commission of each offence by Orica: at [147]. It would be wrong to punish Orica twice for its conduct in committing the offences in these areas of overlap: at [147]. To remove the extent of double punishment the aggregate of the fines was reduced by 20% so as to make the fine $60,000 for each offence: at [148].

Water NSW v Faulkner [2015] NSWLEC 158 (Moore AJ)

Facts: on 9 March 2015 Water NSW filed four summonses, each charging Mr Craig Faulkner with an offence contrary to a provision of the *Sydney Water Catchment Management Regulation* 2013 (now known as the *Water NSW Regulation* 2013) ("the 2013 Regulation"). By notice of motion, Water NSW sought to amend the summons by changing the references to the 2013 Regulation to the *Sydney Water Catchment Management Regulation* 2008 ("the 2008 Regulation") and the numerical clause of the regulation relied upon as the number of the clause had changed between the 2008 Regulation and the 2013 Regulation, although the wording was identical in each of the 2008 and 2013 Regulations. Water NSW also sought to amend the particulars of two summonses, being to correct the relevant identifying numerical reference to a clause in the 2008 Regulation to the 2013 Regulation. Water NSW relied on ss 11, 16(2) and 21(1) of the *Criminal Procedure Act 1989* in support of its application.

The evidence adduced by Water NSW on the motion comprised an affidavit of its instructing solicitor, Mr Mark Cottom and an affidavit of Ms Lisa Crambrook, an employee of Water NSW. Mr Cottom attested to the effect that the references to the 2013 Regulation in the summonses were a clerical preparation error and that it had been Water NSW's intention to charge Mr Faulkner with offences under the 2008 Regulation prior to and at the time of commencing the main proceedings. Ms Crambrook's evidence on the motion comprised documents that existed prior to the commencement of the proceedings showing references to the 2008 Regulation rather than the 2013 Regulation.

Issue:

(1) whether the provisions in ss 11, 16(2) and 21(1) of the *Criminal Procedure Act* permitted Water NSW to amend the four summonses.

Held: Water NSW was granted leave to rely on the amended summonses, which were to be filed and served by a specified date:

(1) the amendments sought by Water NSW did not simply seek to delete the reference to the statutory instrument and rely on the bare essential factual ingredients of the offence, but sought to correct the reference to the appropriate provision in the 2008 Regulation. As a consequence, reliance on s 11 of the *Criminal Procedure Act* was not sufficient: at [26];

(2) there was no basis for s 16(2) of the *Criminal Procedure Act* to play any role, because the case concerned interlocutory notices of motion rather than the trial: at [28]-[29];

(3) the change in each instance was one of correction of clerical error rather than needing to research what was the proper operative statutory nature providing a foundation for each summons: at [48]. Permitting those amendments was entirely consistent with the powers contained in s 20(1) of the *Criminal Procedure Act*: at [49]. Exercising that power did not give rise to the laying of a new charge that would be statute barred: at [50]; and

(4) an amendment to replace the reference to the 2013 Regulation with the 2008 Regulation in each relevant summons did not have the effect of ousting the Court's jurisdiction to deal with the matters. This was because of the savings and transitional provisions in cl 35 of Sch 2 of the 2013 Regulation, the words of which are of sufficient breadth to encompass the retention of the ability to commence proceedings for a breach of the 2008 Regulation in the Court. Permitting the amendments to each of the four summonses would not have the effect of bringing into being summonses for which there was no jurisdictional basis for proceedings to continue: at [51]-[69].

Queanbeyan City Council v Kovacevic [2015] NSWLEC 152 (Craig J)

Facts: by a Court Attendance Notice ("CAN") issued in the Local Court of Queanbeyan on 2 November 2011, Mrs Kovacevic was prosecuted for an offence against s 125(1) of the *Environmental Planning and Assessment Act 1979* ("the EPA Act"). The offence alleged that she did not cease the use of premises in Queanbeyan as a transport depot, in contravention of a Notice requiring her so to do. The prosecutor named in the CAN was Mr Reynders who, at the time of issuing the Notice, was an employee of the Council. On 11 September 2012, the charge was dismissed in the Local Court. By summons filed in this Court on 10 October 2012, the Council commenced an appeal in its own name pursuant to s 42(2B)(b) of the *Crimes (Appeal and Review) Act 2001* (NSW) ("the Appeal Act"). The summons commencing the appeal by the Council asserted that the Magistrate erred in law by failing to correctly construe the definition of "transport depot" in the Queanbeyan Local Environmental Plan 1998 ("LEP").

Issues:

(1) whether the Court had jurisdiction to entertain the appeal instituted by the Council, given that the Prosecutor named in the CAN was Mr Reynders;

(2) whether, properly construed, s 42(2B)(b) afforded a right of appeal from a decision that was an acquittal of the charge brought against Mrs Kovacevic;

(3) how the expression "transport depot" as defined in the LEP should be construed; and

(4) the appropriate order or orders to be made disposing of the appeal.

Held: appeal upheld and matter remitted to the Local Court for determination:

(1) the Council was the person responsible for the conduct of the prosecution in the Local Court. The proper construction of relevant provisions of the *Criminal Procedure Act 1986* (NSW) and the Appeal Act, together with the content of the CAN and relevant findings in the judgment of the Magistrate, confirm that the Council was the "prosecutor" entitled to bring the appeal: at [32];

(2) both the text and context of s 42(2B)(b) of the Appeal Act supported the exercise of the Council's right to bring the appeal, accepting that the "order" made by Magistrate Bone was equivalent to an acquittal. The jurisprudence addressing the subsection and its equivalent expression in earlier legislation supported that conclusion: at [85];

(3) the disjunctive interpretation of the definition of "transport depot" was correct, as it was consistent with the objectives expressed in the LEP for both business and industrial zones: at [128]. The definition of "transport depot" identifies a facility or kind of warehouse, intended to accommodate motor powered or motor drawn vehicles that are required or intended for use in connection with the conduct of a "passenger transport undertaking", "business", "industry" or "shop": at [129]; and

(4) where material legal error affecting the dismissal order has been found, the Court should be slow to deny the prosecution some form of remedial order within the bounds established by s 48(3) of the Appeal Act: at [170]. It was in the interests of both the respondent and the Council to have determined whether the alleged

conduct constituted an offence against s 125(1) of the EPA Act and, if so, what penalty, if any, should be imposed: at [171].

Civil Enforcement

Boronia Park Preservation Group v MSMG Developments Pty Ltd [2015] NSWLEC 112 (Pepper J)

Facts: Boronia Park Preservation Group ("Boronia") sought to challenge a construction certificate issued in relation to a development consent granted by Hunters Hill Council ("the Council") to MSMG Developments Pty Ltd ("MSMG"). In the principal proceedings, Boronia sought relief under s 123 of the *Environmental Planning and Assessment Act 1979* ("the EPA Act"), arguing that the construction certificate issued to MSMG was invalid because it was issued after the consent had lapsed. The surrounding land adjacent to the construction site was of ecological and heritage value. During the interlocutory proceedings, Boronia sought an interim injunction restraining MSMG from carrying out the development. MSMG sought an order that Boronia pay security for costs. Rule 59.11 of the *Uniform Civil Procedure Rules* ("UCPR") does not allow security for costs in judicial review proceedings except in exceptional circumstances, MSMG argued that r 59.11 was not engaged because these were not judicial review proceedings.

Issues:

(1) whether an application under s 123 of the EPA Act to set aside a construction certificate constituted judicial review proceedings falling within the ambit of r 59.11 of the UCPR;

(2) whether r 59.11 only applied to those aspects of proceedings which were judicial review in nature;

(3) whether, if r 59.11 did not apply, the Court's discretion to not order security for costs in proceedings brought in the public interest pursuant to r 4.2(2) of the *Land and Environment Court Rules 2007* ("LEC Rules") was enlivened;

(4) whether Boronia's interlocutory injunction should be granted in circumstances where Boronia had given no undertaking as to damages;

(5) whether an undertaking as to damages was required if the proceedings were brought in the public interest; and

(6) whether Boronia was entitled to an interim injunction.

Held: application for security of costs dismissed, injunctive relief granted, costs ordered against respondent:

(1) the ability to review an exercise of a power conferred by the EPA Act, including the issuing of a construction certificate, fell within the Court's jurisdiction pursuant to s 20(2)(b) of the *Land and Environment Court Act 1979*. As a result, the judicial review jurisdiction of the Court was engaged. The fact that relief was sought pursuant to s 123 of the EPA Act did not derogate from this conclusion. Properly characterised, these were not civil enforcement proceedings. Because the proceedings fell within the Class 4 judicial review jurisdiction of the Court, r 59.11 therefore applied: at [40]-[41]*;*

(2) while some of the grounds in the principal proceedings related to the issue of whether the consent had lapsed, other grounds sought consequential declaratory relief which were judicial review in nature and r 59.11 was nonetheless applicable: at [42]-[43];

(3) although there was other relief sought in the proceedings that could not be characterised as in the nature of judicial review, the proceedings had to be characterised as a whole, and an application for security of costs could not be made in respect of one aspect of the proceedings isolated from all others: at [45];

(4) on the assumption that "something more" was required for the proceedings to be classified as having been brought in the public interest in this context, because the litigation sought to protect land of significant environmental importance and value; affected a significant section of the public; and because there was no evidence of any financial gain to Boronia in bringing the proceedings, the litigation had been brought in the public interest. Although Boronia did not give any undertakings as to damages, public interest

considerations favoured the exercise of the discretion contained in r 4.2(2) of the LEC Rules and security for costs was not required even if r 59.11 was applicable: at [58]-[61],

(5) because the proceedings were brought in the public interest, the Court exercised its discretion contained in r 4.2(3)(a) of the LEC Rules to not require an undertaking as to damages: at [71]-[76]; and

(6) because there was a serious question to be tried and the balance of convenience favoured interim relief, the injunction was granted: at [64]-[65].

Cordina Chicken Farms Pty Ltd v Attard Racing Pty Ltd [2015] NSWLEC 108 (Moore AJ)

Facts: the first respondent ("Attard") is the owner of land upon which a poultry processing plant is operated by the second respondent, Supreme Poultry & Chickens Pty Ltd ("Supreme"), on land situated within the local government area of the third respondent, Gosford City Council ("the Council").

The applicant ("Cordina") is a competitor of the second respondent, and commenced these proceedings seeking a declaration and injunction to impugn a modification approval granted under s 96(1A) of the *Environmental Planning and Assessment Act 1979* ("the EPA Act") by the Council to Supreme, and preventing Supreme from conducting activities on the land in reliance upon it. It also sought orders restraining Supreme from using two structures on the site for which development consent had not been obtained.

The modification varied a 1994 development consent that approved the receipt of dead chickens from off site, their processing, and the packaging and distribution of various chicken products. In about December 2014, Supreme commenced processing activities on the site, which included the receipt and slaughter of live chickens on-site, and their preparation for processing. It was an agreed fact that these activities were beyond the scope of activities approved by the 1994 consent, and a condition of the 1994 consent expressly precluded the use of the site as an "abattoir". The Council informed Supreme of this fact and the modification application was made in response. That application described the existing consent as being for a "chicken processing factory" and it sought to modify the consent so as "to include poultry slaughtering".

Section 96(1A) of the EPA Act provides that a consent authority may modify a consent only if it is satisfied that (a) the proposed modification is of minimal environmental impact, and (b) the development to which the consent as modified relates is substantially the same as the development for which consent was originally granted. Cordina argued that the Council's satisfaction of both those issues was manifestly unreasonable, and its decision to approve the modification should therefore be set aside.

In addition, Supreme constructed two structures on the site without development consent, that it later conceded required consent. At the time of hearing Supreme had two building certificate applications pending before the Council that, if approved, would regularise the presence of the buildings. It was argued by Attard and Supreme that any order restraining the use of those two buildings should not be made whilst discussions continued with the Council regarding the regularisation of the buildings.

Issues:

(1) whether it was manifestly unreasonable for the Council to conclude:

a. that the activity for which consent was sought by the modification was of minimal environmental impact; and

b. that the modified development was substantially the same as the development for which consent was originally granted;

(2) whether the Court should exercise its discretion not to make orders immediately restraining the use of the two unauthorised structures; and

(3) costs.

Held: the s 96(1A) approval was valid. Orders restraining the use of the two unauthorised structures were made, but suspended for eight weeks. Cordina ordered to pay the costs of Attard and Supreme, subject to other orders being sought within a week of the orders being made:

(1) it was not "manifestly unreasonable" for the Council to conclude that the environmental impact of the modification was minimal. Cordina failed to illustrate how the modified development would have

environmental impacts other than minimal impacts. There was nothing in the reports before the Council which could have precluded it from finding that the impacts of the modification were minimal: at [22] – [24];

(2) it was not "manifestly unreasonable" for the Council to conclude that the modified development was substantially the same as the development for which consent was originally granted. It was reasonably open to the Council's delegate to view the receipt and slaughter of live chickens on-site as merely an "extension or evolution" of the poultry processing activities originally approved by the 1994 consent. That "extension or evolution" could be seen as a "natural change in the method of using the land or carrying on a business or industry", and accordingly, a characterisation of the use of the land as a livestock processing industry that includes the receipt and live slaughter of chickens is consistent with the level of generality required. It was therefore not unreasonable for the decision maker to conclude that despite the additional activities, the development the subject of the modified consent was substantially the same as that for which consent was originally granted: at [100] – [107];

(3) immediate cessation of the use of the unauthorised structures would likely lead to the unemployment of at least 23 employees of Supreme, and in addition, minimal environmental impacts would flow from the continuation of their use. Accordingly orders requiring the immediate cessation of their use should not be made until discussions regarding their regularisation were finalised: at [132] – [134]; and

(4) Cordina failed on its primary claim regarding the modification approval, and was only partially successful on its secondary claims in respect of the two unauthorised structures. Therefore, prima facie, Cordina should pay the costs of Attard and Supreme, subject to any reasons raised by Cordina as to why such an order should not be made: at [140] – [142].

Sutherland Shire Council v Sud [2015] NSWLEC 44 (Craig J)

(related decisions: *Sud v Sutherland Shire Council* [2012] NSWLEC 1162 Dixon C, *Sud v Sutherland Shire Council* [2013] NSWLEC 1177 Hussey C)

Facts: development consent was granted by the Council on 22 April 2010 for demolition of an existing dwelling and construction in its place of a new dwelling, pool and detached garage on land owned by the First Respondent ("the Consent"). A roof slab that extended 3m over the northern first floor balcony and five supporting columns were constructed, neither of which were shown on plans the subject of the Consent. Two separate applications were made to modify the Consent to include the roof slab extension, both of which were refused by the Council. An appeal to this Court from the Council's refusal of the second modification application was allowed in part, however the extension of the roof slab extension and its supporting five columns were expressly excluded from that approval. A second appeal to this Court from the Council's refusal of the Second Respondent's application for a building certificate in respect of the roof extension and columns was also refused. The Council brought proceedings in the Sutherland Local Court, charging the project manager, the Second Respondent in these proceedings, with committing an offence against s 125(1) of the *Environmental Planning and Assessment Act 1979* ("EPA Act") by reason of his failure to carry out development on the Land in accordance with the Consent by extending the roof slab. The Second Respondent entered a plea of guilty and was convicted on 12 December 2012. By summons filed in this Court on 15 August 2013 the Council sought declarations of breach of development consent as well as prohibitory and mandatory orders.

Issues:

(1) whether the order sought for demolition of the extended roof slab should be permanently stayed or struck out as an abuse of process;

(2) whether, in the exercise of its discretion, the Court should decline to make an order for demolition; and

(3) whether the development consent authorised the use of the roof of the dwelling as a recreational space for the occupants of the dwelling.

Held: the Council was successful in obtaining declarations of breach of the development consent as well as restraining and demolition orders against the Respondents:

(1) section 127(7) of the EPA Act does not proscribe the institution of civil proceedings for an order under s 124, once the prosecution proceedings have concluded either by conviction or dismissal: at [56].The civil

enforcement proceedings did not therefore involve an abuse of process and were consistent with the scheme of and provisions in Divs 3 and 4 of Pt 6 of the EPA Act: at [91];

(2) the works that were the subject of the charge in the Local Court were not confined to the roof extension. As a consequence the penalty imposed was not confined to that item and did not weigh against an order for demolition: [95]. Further, the detrimental environmental impact occasioned by the roof extension should be addressed by requiring its demolition, which can be undertaken without impacting adversely upon the integrity of the remaining roof slab: at [114]; and

(3) use of the roof as a terrace as part of the residential use of the dwelling was not sanctioned by the Consent. The intended use of the roof gave rise to an apprehension that the Consent would be breached. As such, it was a breach of the Act that engaged the power to make a restraining order against the Respondents pursuant to s 122(a)(ii) and 124 of the EPA Act: at [141].

Lake Macquarie City Council v Australian Native Landscapes Pty Ltd (No 2) [2015] NSWLEC 114 (Biscoe J)

Facts: this was a civil enforcement proceeding concerning the lawfulness of a rural composting industry conducted by the respondent, Australian Native Landscapes Pty Ltd ("ANL") at Cooranbong ("the Land"). Lake Macquarie City Council claimed that ANL's operation was unlawful in four areas relating to planning, native vegetation, offensive odour and water pollution.

In the planning claim, the Council claimed that in breach of the *Environmental Planning and Assessment Act 1979* ("the EPA Act"), ANL's works on and use of the Land were not authorised by, or were in breach of a condition of development consents granted by Council in 1986 and 1988 ("the Consents") in five respects: carrying out earthworks and constructing a 6 metre high bund surrounding the area of operation in the north, east and west; carrying out earthworks for and constructing a leachate dam; using two other dams (known as the clean water dam and the Crawford Road dam) on the Land; using the area known as the woodchip stockpile area for composting; and operating mechanical equipment (trucks) at times other than those permitted by the development consents. A condition of each development consent required the development proceed "generally in accordance with" the approved layout plan attached. The layout plans were not to scale and rudimentary, and did not depict the dams, the bund, or the woodchip stockpile area even though the clean water dam and Crawford Road dam were in existence at the time of the Consents.

In the native vegetation claim, the Council claimed that ANL breached the *Native Vegetation Act 2003* ("the NV Act") by clearing native vegetation in three polygon shaped areas on the Land. In the offensive odour and water pollution claims, the Council claimed that ANL used the Land in such a way as to cause adverse environmental impacts comprising water pollution/negligence, land pollution/negligence and emission of offensive odours in breach of the *Protection of Environment Operations Act 1997* ("the POEO Act").

Issues:

(1) whether the dams, bund and woodchip stockpile area were authorised by the 1986 and 1988 Consents;

(2) whether the development proceeded "generally in accordance with" the approved layout plans;

(3) whether the term "mechanical equipment" included trucks;

(4) whether ANL cleared native vegetation on the Land in breach of the NV Act;

(5) whether ANL caused or permitted the pollution of waters, the emission of offensive odours, and/or the deposit of waste in the construction of the south-western bund on the Land in breach of the POEO Act;

(6) whether ANL was negligent in causing organic nutrients to leak, spill or otherwise escape in a manner that harms or is likely to harm the environment, and/or in disposing of waste in the south-western bund; and

(7) whether there were discretionary grounds for denying relief.

Held: upholding the majority of the Council's claims:

(1) the 1986 and 1988 Consents approved plans were only intended to illustrate the area of the existing core works at the time of the Consents and the same area for future works (whether core or non-core). Since the clean water dam and the Crawford Road dam were not core works, they were not shown on the

approved plan (at [68]), even though they were in situ at the time of the Consents. In this context, the expression "generally in accordance with" indicated tolerance of the existence of these two dams. Thus, the 1986 Consent approved the two existing dams: at [69];

(2) the leachate dam, bund and woodchip stockpile area were not authorised by the terms of the 1986 and 1988 Consents. This is because, first, they were constructed by ANL about 15 years after the 1986 Consent and lie outside the spatial limits of the development approved by the Consents. Secondly, they required clearing of the "natural bush" designated in the 1988 Consent. Thirdly, even if the leachate dam and bund were within the approved spatial limits under the 1986 and 1988 Consents, their nature and extent are so great that they could not be ignored for planning purposes and would require development consent: at [72];

(3) the expression "mechanical equipment" included trucks: at [82];

(4) based on evidence of the extent of clearing from ecologists and aerial photographs, ANL cleared native vegetation on the Land in the three polygon shaped areas, in breach of the NV Act: at [84]-[92];

(5) ANL had in the past caused the emission of offensive odours from the Land in breach of the POEO Act. The sub optimal management of the developed area identified in May 2013 continued to the present day because the mitigation measures proposed by ANL's odour expert were implemented less than ideally or not at all: at [109];

(6) there was direct evidence of two past breaches of water pollution in breach of the POEO Act. The first, which ANL admitted, occurred in when ANL pumped water from the leachate dam to the clean water dam in 2004.The second past breach for which there was direct evidence occurred when ANL caused or permitted leachate from the woodchip stockpile area to drain to the north-east of that area. The direct evidence was based on observations made by Council's water expert in July 2013: at [120]-[126];

(7) based on the topography of the Land; evidence from Council's water expert concerning 38 occasions of rainfall over 300 millimetres in the last 90 years; water quality sampling; soil quality sampling; the storage surcharge capacity of the leachate dam; and two particular examples of rainfall, ANL had polluted water in breach of the POEO Act by permitting overflow from the leachate dam and leaking of water from compost used in south-western bund into the drainage line leading to the clean water dam: at [127]-[180];

(8) the Council's claim that ANL had negligently caused organic nutrients to leak, spill or otherwise escape in a manner that harms or is likely to harm the environment was dismissed: at [181]-[189];

(9) although the evidence established that waste consisting of compost materials, plastic, bottles and tile pieces was deposited in the south-western bund, the Court was not satisfied that the evidence established that the waste resulted in actual or likely harm to the environment: at [195]-[198]. The Council's claim that ANL had negligently disposed of waste was not proved: at [199]; and

(10) for the claims made out by the Council, there were a number of factors that affected the exercise of discretion including representations made by the Council to the effect that the works were authorised by a development consent. Subject to hearing the parties, the Court proposed a number of orders, some of which were to be stayed, including injunctions, declarations, and orders that ANL undertake certain activities: at [201]-[226].

Aboriginal Land Claims

New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (Nelson Bay) (No 3) [2015] NSWLEC 145 (Pain J)

(related decisions: *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* [2014] NSWCA 377; (2014) 88 NSWLR 125, Beazley P, Basten JA and Preston ChJ of LEC; *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (Nelson Bay) (No 2)* [2015] NSWLEC 71, Pain J; *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (Nelson Bay)* [2013] NSWLEC 148; (2013) 198 LGERA 122, Pain J)

Facts: in August 2009 the Worimi Local Aboriginal Land Council (the "Applicant") lodged an Aboriginal Land Claim in relation to land at Nelson Bay pursuant to s 36(3) of the *Aboriginal Land Rights Act 1983* (the "ALR Act"). From the 1970s the Port Stephens Council indicated sporadically to the Department of Lands (the "Department") that part of that land was needed for drainage purposes. In late 2009 a submission for approval in principle of the unconditional sale of lot 3542 to Christmas Bush Property Management Pty Limited was recommended by the acting senior manager at the Department and recommended for approval by the departmental program manager commercial. In 2010 the Minister's delegate approved a private treaty sale as the preferred option for the claimed land. In May 2010 an internal departmental document recommended the claim be refused citing the need or likely need for an essential public purpose of drainage.

Issue:

(1) whether part of the claimed land was needed or likely to be needed for an essential public purpose within the meaning of s 36(1)(c) of the ALR Act of drainage overflow.

Held: the Crown land was claimable and should be transferred to the Applicant:

(1) the time at which the Minister's view as to whether the land was needed or likely to be needed for the essential public purpose of drainage was the date of the claim, in this case August 2009. Events after the date of claim are not generally able to be considered, but where these confirm a foresight not a hindsight it is acceptable to consider them. The departmental approval of a sale so close to the date of claim was not consistent with the view that the land must be sold subject to an easement for drainage, and was inconsistent with a finding that the Department considered the land was needed or likely to be needed for drainage at the date of claim. The Minister did not discharge her onus of proof of establishing the land was needed or likely to be needed for the essential public purpose of drainage at the date of the claim: at [50]-[53].

Development Appeals

Lloyd v Wollongong City Council [2015] NSWLEC 146 (Pepper J)

Facts: Mr Lloyd ("Lloyd") appealed the decision of Wollongong City Council ("the Council") to refuse a development application for the erection of a dwelling ("the development") on vacant land under the *Wollongong Local Environmental Plan 2009* ("the 2009 LEP"). Before the Court was the determination of a separate question, namely, whether the development was permissible under cl 4.2A(b)(2) of the 2009 LEP. Clause 4.2A(2)(b) exempted developments on pre-2009 lots from the general prohibition against the erection of dwellings on certain rural and environmental protection zones under the 2009 LEP if the development was, in effect, permissible under the *Wollongong Local Environmental Plan 1990* ("the 1990 LEP"). The Council submitted that the development failed to meet the minimum lot size requirement under cl 14 of the 1990 LEP, and, because there had been no dispensation from that development standard under the *State Environment Planning Policy No 1 – Development Standards* ("SEPP 1"), the development was not permissible under the 1990 LEP.

Issues:

(1) whether, in determining if a development was permissible under the 1990 LEP, the mere prospect or possibility of approval under that LEP was sufficient to enliven the operation of cl 4.2A(2)(b); and

(2) whether, where dispensation from the development standard concerning lot size was available under SEPP 1 but had not been granted, the development was permissible under the 1990 LEP.

Held: separate question answered "no" and appeal dismissed:

(1) it was sufficient for the purposes of cl 4.2A(2)(b) of the 2009 LEP that the development was either allowed or allowable, as a matter of futurity, under the 1990 LEP: at [36] and [40]; but

(2) because no dispensation had been sought from the application of the development standard concerning minimum lot sizes contained in cl 14(1)(c) of the 1990 LEP, the development had neither been allowed nor was it allowable or permissible: at [52].

Practice and Procedure

Lake Macquarie City Council v Australian Native Landscapes Pty Ltd [2015] NSWLEC 92 (Biscoe J)

Facts: this case concerned the admission of expert evidence from Lake Macquarie City Council's expert planner, Mr Lovell, in his affidavit of 13 March 2015 and in his joint report with the planning expert for Australian Native Landscapes Pty Ltd (ANL). Mr Lovell, in his capacity as a Council investigating officer, was closely involved in retaining and instructing Council's other expert witnesses. ANL's contention of partiality was essentially based on the alleged content of those instructions. ANL contended that there were four matters which established that Mr Lovell was not impartial: firstly, he failed to inform each expert that a condition of the development consents in question provided for work to be carried out "generally in accordance with" the approved plan; secondly, he deliberately elected not provide Council's water management expert, Mr Jamieson, and ecologist, Mr Peake, with Council documents recording that in 2001 Council was content with the development; thirdly, he gave the experts the wrong impression that ANL had cleared 3.6 hectares on the site; and lastly, he provided to Mr Jamieson two assessment reports relating to development on adjacent land.

Issue:

(1) whether the Council's planning expert was not impartial and his evidence therefore inadmissible.

Held: evidence admitted:

(1) evidence of a partial expert is relevant and therefore admissible under s 56 of the *Evidence Act 1995*: at [15];

(2) partiality of an expert goes only to the weight of the expert's evidence*:* at [15];

(3) exceptionally, evidence of a partial expert combined with other circumstances may in some cases justify exclusion of the expert's evidence in the court's discretion under s 135 of the *Evidence Act* if its probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial to a party: at [15];

(4) in respect of the first contention against Mr Lovell's partiality, Mr Jamieson was provided with (inter alia) a copy of the relevant development consents and was therefore fully informed of the "generally in accordance with" condition. The evidence did not disclose whether or not Mr Lovell disclosed the "generally in accordance with" condition of the development consents to the other experts*:* at [18];

(5) in respect of the second contention, Mr Lovell provided Mr Jamieson and Mr Peake with a copy of a letter which made it sufficiently clear what Council's position was in 2001 in relation to the development: at [20];

(6) in respect of the third contention, Mr Lovell did not give the experts the wrong impression that ANL had cleared 3.6 hectares on the site. The documents provided to the experts indicate that approximately 3.6 hectares had been cleared, not that ANL had cleared the area: at [21]; and

(7) in respect of the fourth contention, the provision to Mr Jamieson of the two assessment reports relating to development on adjacent land did not in any way indicate partiality by Mr Lovell bearing on the admissibility of his evidence: at [22].

Positive Change for Marine Life Inc v Byron Shire Council [2015] NSWLEC 147 (Craig J)

Facts: on 4 June 2015, Byron Shire Council gave approval to itself to carry out beach protection works along sections of Belongil Beach. The approval was given under Pt 5 of the *Environmental Planning and Assessment Act 1979* ("EPA Act"). By summons filed 4 September 2015, the applicant sought a declaration that the works involve an activity that is likely to significantly affect the environment. The applicant also sought to restrain the Council from carrying out the work until it had complied with the provisions of s 112 of the EPA Act, including the preparation and public exhibition of an environmental impact statement for the works. John Vaughan, Shuttlewood Pty Ltd and Byron Preservation Association Inc each sought to be joined as respondents to the proceedings pursuant to r 6.24 of the Uniform Civil Procedure Rules 2005. Mr Vaughan and Shuttlewood were

adjoining land owners on whose properties the proposed works encroached. That application for joinder was opposed by the applicant.

Issues:

(1) whether the rights of parties seeking joinder would be affected by any order which may be made in the proceedings; and

(2) whether the requirements of r 6.24 were met in relation to Byron Preservation Association.

Held: the landowner parties were joined as respondents in the proceedings:

(1) important property rights were involved as a consequence of the approval that the Council had given: at [22]. Any order made in the proceedings had the potential to impact upon the two landowners in question and upon any rights against or liabilities to the Council that the property owners may have, given the history of coastal processes affecting their lands: at [20]-[21]; and

(2) the requirements of r 6.24 were not met in relation to the Association. While its members may have a general interest in the protection of Belongil Beach from further erosion, that general interest neither established the Association as a person who "ought to have been joined as a party" or as a person "whose joinder as a party is necessary to the determination of all matters in dispute in any proceedings": at [19].

Boronia Park Preservation Group Inc v MSMG Developments Pty Ltd and Ors (No 2) [2015] NSWLEC 155 (Moore AJ)

Facts: Boronia Park Preservation Group Inc ("Boronia Park"), the applicant in proceedings challenging the validity of a construction certificate issued in relation to a development consent granted by Hunters Hill Council ("the Council") to MSMG Developments Pty Ltd ("MSMG"), issued a subpoena to Mr Russell Kingdom, an arborist engaged by one of the respondents, and to Bee & Lethbridge Pty Ltd, a company of surveyors engaged also engaged by that respondent. This decision concerned a notice of motion filed by Boronia Park seeking leave to show certain subpoena documents produced by Mr Kingdom and Bee & Lethbridge to the councillors and General Manager of the Council, the second respondent in these proceedings. Boronia Park intended to show the subpoenaed documents to councillors and the General Manager to allow the Council to consider its position in relation to the proceedings (as it had earlier filed a submitting appearance) and to allow the Council to form its own view as to whether or not the development consent, the subject of the main proceedings, had lapsed. Use of the documents in this manner was feared to be a breach of the implied undertaken given by the parties to the Court to not use documents obtained under the compulsory processes of the Court for collateral purposes. Both Mr Kingdom and Bee & Lethbridge objected to their material being released to the Council's councillors and General Manager. The motion was heard in the absence of all the respondents.

Issue:

(1) whether there were special circumstances to provide a proper foundation for permitting Boronia Park to use the subpoena documents for the purposes sought.

Held: the Court declared that the provision by Boronia Park of the subpoena documents to the Council's councillors and the General Manager would not constitute a breach of the implied undertaking if the documents were provided for the purpose of allowing the councillors to form their view as to whether or not the relevant development consent had lapsed, and to be advised on that matter by the Council's General Manager:

(1) the subpoena documents would constitute part of the business records of Bee & Lethbridge and Mr Kingdom and would not be amenable to any claim for privilege: at [40(1)];

(2) the subpoena documents came into existence in connection with Bee & Lethbridge and Mr Kingdom's activities in relation to the site that was the subject of the main proceedings: at [40(2)];

(3) there was no proper basis for concluding that the subpoena documents contained any commercially sensitive material or material warranting preservation of confidentiality: at [40(3)];

(4) considering the date of commencement of the main proceedings and the range of dates of the subpoena documents, it was clear that none of the documents were likely to have been produced in anticipation of litigation: at [40(4)] and [48];

(5) the subpoena documents did not contain any sensitive personal data and there were no privacy concerns in relation to releasing the documents: at [40(5)];

(6) the documents came in to Boronia Park's possession through the conventional subpoena process. There was no suggestion that the documents were obtained in any improper fashion: at [40(6)]; and

(7) considering the above matters, special circumstances existed that warranted approval of the disclosure of the subpoena documents: at [54].

Costs

Oaks Hotels & Resorts (NSW) No 2 Pty Ltd v Otrebski [2015] NSWLEC 129 (Pepper J)

Facts: Oaks Hotels & Resorts (NSW) No 2 Pty Ltd ("Oaks") initially sought injunctive relief to stop Mrs Kurek and Mr Otrebski ("the respondents") from using a unit owned by them contrary to development consent. Oaks initiated the proceedings after sending correspondence to the respondents seeking that they discontinue their conduct. The correspondence was sent to the wrong address. Upon being served with the summons, the respondents immediately acceded to the relief sought. Oaks applied for the Court to exercise its discretion to award costs in its favour pursuant to s 98 of the *Civil Procedure Act 2005*.

Issues:

(1) whether costs should follow the event in circumstances where the initial notice of the alleged wrongdoing was ineffectual and the respondents acceded to the relief as soon as they were made aware proceedings had been instituted.

Held: application for costs dismissed, each party to bear their own costs:

(1) the parties were under, at the very least, a moral obligation to avoid the formal resolution of conflicts by curial means. Failure to do so resulted in the Court being unwilling, in the proper exercise of its discretion, to award costs because Oaks had engaged in disentitling conduct when it failed to make a proper attempt to resolve the legal dispute prior to the commencement of proceedings, and once proceedings had commenced, the respondents had immediately agreed to the relief. In these circumstances, Oaks should not have pursued its costs application, the estimated costs of which had become disproportionate to the costs of the substantive matter: at [25].

Carbone v Camden Council (No 2) [2015] NSWLEC 154 (Moore AJ)

(related decision*: Carbone v Camden Council* [2015] NSWLEC 1161 Smithson AC)

Facts: Mr Mario Carbone sought orders that the respondent, Camden Council, pay his costs of the conciliation conference, hearing and the Notice of Motion filed in these Class 1 proceedings relating to the Council's refusal of a development application to subdivide a parcel of land into four lots. Council officers had recommended approval of the application but the elected Council resolved to refuse the application. Mr Carbone succeeded overall in the main proceedings. Under r 3.7 of the Land and Environment Court Rules 2007, costs can only be awarded in Class 1 proceedings if it is fair and reasonable in the circumstances. Mr Carbone argued that costs should be awarded because the Council had acted unreasonably in the circumstances leading up to the commencement of the proceedings and/or had acted unreasonably in the conduct of the proceedings.

Issue:

(1) whether it was fair and reasonable in the circumstances for the Court to make an order for the payment of costs.

Held: Mr Carbone's application for costs was dismissed. Mr Carbone was ordered to pay the respondent's costs of the motion:

(1) standing the matter over for one week after the first return date for the Class 1 appeal to allow the Council to retain an independent consultant town planner was not unreasonable, given that Council had only refused Mr Carbone's development applicant 10 days prior: at [40]-[41];

(2) although no agreement was reached at the conciliation conference, reaching agreement is by no means the sole use for which such conferences are put. Conciliation conferences may narrow the range of issues needed to be determined, or further refine a development proposal: at [57];

(3) the fact that the contentions for refusal prepared by the Council's independent town planner were wider than those adopted in the Council's resolution rejecting the development application provided no basis for considering it proper to require the Council pay Mr Carbone's costs: at [62];

(4) although the Acting Commissioner found in favour of Mr Carbone overall, Mr Carbone did not succeed on all contested points. Of those points which Mr Carbone did not succeed, it was clear that there was genuine engagement between the two expert town planners. The imposition of a public positive convenant, as contended by the Council, was the significant pre-requisite for the success of Mr Carbone in the overall proceedings: at [64]-[78];

(5) it clearly would not be "fair and reasonable" to order Camden Council to pay Mr Carbone's costs as there was nothing unreasonable to be seen in the continuum of the behaviour of the Council, its staff, its expert or its legal advisors: at [80]; and

(6) there was no basis for any apportionment order being made in favour of the applicant as there was no unreasonable conduct by or on behalf of the Council at any point in the process: at [81].

Section 56A Appeals

Hoy v Coffs Harbour City Council [2015] NSWLEC 128 (Pain J)

(related decision: *Hoy v Coffs Harbour City Council* [2014] NSWLEC 1217 Brown C and Parker AC)

Facts: Mrs Hoy (the "Appellant") sought acquisition of her property by way of an owner-initiated acquisition as provided for in cases of hardship in Pt 2 Div 3 of the *Land Acquisition (Just Terms Compensation) Act 1991* (the "JT Act"). Coffs Harbour City Council (the "Respondent") accepted the Appellant's hardship application. The Commissioners, hearing an appeal against the Valuer-General's determination, determined compensation on the basis of market value, disturbance and solatium. The Appellant appealed under s 56A of the *Land and Environment Court 1979* (the "Court Act") on numerous grounds, including against the Commissioners' finding that compensation for disturbance did not include legal costs incurred in making the hardship application. The Respondent cross-appealed, arguing that the Commissioners misconstrued s 26 of the JT Act and by doing so erred in awarding compensation for disturbance and solatium.

Issues:

(1) whether the Appellant identified a question of law arising from the Commissioners' decision as required by s 56A of the Court Act;

(2) whether s 26 of the JT Act confers a discretionary power to award compensation for disturbance and solatium; and

(3) whether legal costs for "loss attributable to disturbance" defined in s 59 of the JT Act extend to legal costs incurred in making a hardship application.

Held: appeal dismissed:

(1) an appeal must identify a question of law explicitly or implicitly decided at first instance. Such a question must be vitiating. It is not permissible to adopt an approach to finding error that is nitpicking with an eye to identifying error. The Commissioners' decision must be read as a whole. The merits of the Commissioners' decision applying the agreed valuation methodology of the comparable sales approach cannot be the

subject of a s 56A appeal. Whether or not a sale is comparable requires the exercise of judgement. Precise mathematical reasoning is not required: at [7]-[18], [92]. The Appellant's grounds of appeal (1-6) did not satisfy these principles: at [18], [90]-[95];

(2) past authorities finding that s 26 of the JT Act conferred a discretion were not plainly wrong. The section is not ambiguous and the ordinary meaning of the words "need not" are permissive, suggesting conferral of a discretionary power. Section 25 refers to an owner-initiated acquisition in cases of hardship as being a "compulsory process", which calls up Pt 3 Div 4 (Determination of amount of compensation). It is important to construe a statute with as much generality as possible where individual rights arising from compulsory acquisition of land are concerned: at [120]-[125]; and

(3) legal costs incurred in making a hardship application do not fall under s 59 of the JT Act because they cannot be "in connection with the compulsory acquisition of the land": at [119], [126].

Riverstone Parade Pty Limited v Blacktown City Council [2015] NSWLEC 137 (Pain J)

(related decisions: *Riverstone Parade Pty Limited v Blacktown City Council* [2015] NSWLEC 1005, Fakes C and Speers AC)

Facts: Riverstone Parade Pty Limited (the "Appellant") appealed under s 56A of the *Land and Environment Court Act 1979* against the dismissal of an appeal against refusal of its development application (the "DA") for earthworks and associated activities. The Commissioners refused the DA for a number of reasons, including for non-compliance with cl 20 of the *State Environmental Planning Policy (Sydney Regional Growth Centres)* 2006 (the "SEPP") which deals with flood controls. The Commissioners considered that cl 20(2)(d) was not met but could be with further modelling. The Commissioners also found that the development should be refused under s 79C(1)(e) of the *Environmental Planning and Assessment Act 1979* (the "EPA Act") as the development was not in the public interest.

Issues:

(1) whether the Commissioners erred in their construction of cl 20(2)(b) of the SEPP;

(2) whether the Commissioners applied the wrong test in assessing regional impacts; and

(3) whether the Commissioners failed to afford the Appellant procedural fairness by not giving the Appellant an opportunity to undertake further flood modelling.

Held: appeal dimsised.

(1) there was a freestanding determination under s 79C(1)(e) of the EPA Act, which was not challenged by the Appellant: at [11], [75];

(2) it was open to the Commissioners to construe "does not increase" in cl 20(2)(b) of the SEPP as meaning "there will be no increase", rather than reading those words as permitting "an increase in flood levels which is more than nominal, not trivial": at [20]-[23]. The Commissioners' construction was consistent with the other subclauses of cl 20(2) and the aims of the SEPP: at [24]-[25;

(3) a commissioner not giving an "amber light" to a development application does not give rise to a question of law. It is a matter of merit. The Appellant impermissibly sought to raise this matter of merit in the guise of a failure to afford procedural fairness: at [38]; and

(4) the Commissioners considered regional impacts beyond the SEPP and the Riverstone West Development Control Plan 2009 as a necessary consideration under s 79C(1)(e): at [75]. The Commissioners' application of the approach in the SEPP to local flooding to regional flooding was a matter of merit consideration grounded by the public interest, rather than a failure to properly apply the SEPP. There was no vitiating legal error: at [78].

Papadopoulos v Blue Mountains City Council [2015] NSWLEC 164 (Craig J)

(related decision: *Papadopoulos v Blue Mountains City Council* [2015] NSWLEC 1169 Morris C)

Facts: on 13 October 2014 Blue Mountains City Council ("the Council") made an order pursuant to s 121B of the *Environmental Planning and Assessment Act 1979* ("the EPA Act"), requiring Mr Papadopoulos to remove two shipping containers located within the rear yard of his property. Mr Papadopoulos appealed against that order pursuant to s 121ZK of the EPA Act. At the hearing before the Commissioner, he submitted that the Council had no authority to issue the order as it infringed his rights as a property owner and was repugnant to the Constitution. The Commissioner confirmed the order made by the Council and dismissed the appeal on 21 May 2015. Mr Papadopoulos appealed that decision pursuant to s 56A of the *Land and Environment Court Act 1979*.

Issues:

(1) whether the Commissioner was in legal error in proceeding to hear and determine the appeal after Mr Papadopoulos indicated an intention to discontinue the appeal;

(2) whether Mr Papadopoulos had a right for the trial of his appeal under s 121ZK of the EPA Act to be conducted before a jury; and

(3) whether Mr Papadopoulos' property rights were disregarded by the Council.

Held: appeal dismissed:

(1) there was no basis upon which to discern any legal error by the Commissioner in proceeding to hear and determine the appeal as she did: at [22];

(2) Mr Papadopoulos failed to identify any legal basis upon which he was entitled to have his appeal tried before a jury. Section 80 of the Constitution only applies to the trial of a person charged with an indictable offence against any law of the Commonwealth, a different juristic entity from the State and was therefore irrelevant to any proceedings in this Court: at [23]-[24]; and

(3) the order given by the Council to Mr Papadopoulos did no more than regulate the use of his land and did not seek to appropriate his property. The provisions of the EPA Act had not been shown to be inconsistent with any law of the Commonwealth such as to engage the provisions of s 109 of the Constitution: at [29]-[30].

Commissioner Decisions

Autore & anor v Waverley Council [2015] NSWLEC 1350 (Fakes C)

Facts: the applicants appealed Waverley Council's refusal to grant an exemption under s 22 of the *Swimming Pools Act 1992* ("the Pools Act") in relation to pool barrier requirements. The applicants' in ground swimming pool is located at the rear of their Tamarama property and adjoins a council coastal reserve. At the rear of the adjoining property to the east is another in ground swimming pool. The masonry wall between the properties forms a common side wall between the two pool enclosures. In the section where the two pools are enclosed, the common wall ranges in height over two stepped sections from 1730mm to 1030mm when measured from the applicants' property. This is below the 1800mm height prescribed in the Pools Act, and the relevant regulation, and Australian Standards. However, when measured from the adjoining property, the wall is in excess of 1800mm high.

The applicants applied for an exemption under s 22(1)(b) of the Pools Act, claiming that the boundary wall provides an alternative which is no less effective than the statutory and other requirements. Section 22(1)(a) was not pressed as it was agreed that it is neither impracticable or unreasonable to comply with the requirements.

While only the common boundary wall was the subject of the exemption and the appeal, during the site inspection, the Council's senior building surveyor and the applicants' planner agreed that other sections of both pool enclosures were non- compliant with the relevant standards.

Issue:

(1) whether the existing boundary wall and the circumstances of the site were such that in order for a child to access the applicants' pool from the adjoining property to the east, the child would already have to be within

a restricted access area of presumed supervision, and thus the barrier provided an alternative which was no less effective.

Held: dismissing the application:

(1) the applicants' case rested on there being a compliant pool enclosure around the adjoining pool to the east with which the applicants' pool shared a common wall, however, as agreed by the parties' experts, neither property was otherwise fully compliant with the relevant standards prescribed in the Pools Act and with the current version of AS1962.1-2012: *Swimming Pool Safety Part 1: Safety barriers for swimming pools*: at [25];

(2) section 7(1) of the Pools Act requires that "the *owner of the premises* on which a swimming pool is located *must* ensure that the swimming pool is *at all times* surrounded by a child-resistant barrier" [emphasis added]: at [26];

(3) that requirement could not be delegated to an owner of other premises whether they own an adjoining swimming pool or not. The applicants' position was that the adjoining pool enclosure was compliant, however it was not, and presumed it to be a supervised area, which was an assumption which should not be made: at [27]; and

(4) while the appeal only concerned an exemption for the eastern boundary wall, given the intent of the legislation and standards, this element could not be considered in isolation given the other non-compliant elements of the enclosures: at [28].

Penrith Lakes Development Corporation Ltd v Penrith City Council [2015] NSWLEC 1329 (Brown ASC)

Facts: the applicant appealed pursuant to s 97 of the *Environmental Planning and Assessment Act 1979* ("the EPA Act") against the refusal of an application to subdivide a parcel of land of 340ha to create 138 lots each with a minimum of 2ha. The site forms part of the Penrith Lakes Scheme ("PLS") and is currently used for extraction of sand and gravel. The development application originally also sought consent for construction of roads and ancillary engineering works such as filling, retaining walls and drainage works; the application was amended during the course of the appeal to be for the subdivision layout and road construction and intersection locations, and ultimately by deletion of the road construction and intersections so that it essentially involved a "paper subdivision" with no works of any kind to be carried out.

The primary environmental planning instrument was *State Environmental Planning Policy (Penrith Lakes Scheme)* 1989 ("the SEPP"), the aims and objectives of which are, in cl 2(1), "to permit the implementation of" the PLS. Sch 1 of the SEPP defines the PLS to be "the creation of a regional recreational lake system ... for the benefit of the public as a result of (a) the staged optimum extraction of sand and gravel reserves, (b) the staged rehabilitation, reconstruction and landscaping of the land,...and includes the identification of land for possible future urban purposes as a result of the work referred to in paragraphs (a) and (b)". Clause 8 of the SEPP permits development "for the purposes of implementing" the PLS; and under cl 8(2)(a) consent is to be granted unless the consent authority is of the opinion that the proposed development (i) "does not fully implement" the PLS, (ii) "will not ensure the satisfactory implementation of" the PLS, or "is not generally in accordance with the structure plan". Clause 9 permits the carrying out of "interim development" for the purpose of agriculture, or for any other purpose "if the consent authority is satisfied that the carrying out of development for that purpose will not adversely affect the implementation of" the PLS. Clause 10 permits development "for the purposes of the construction or widening of roads".

The site was also subject to the provisions of *Interim Development Order No 93* ("IDO 93") which zoned the site Rural 1(a)(2) and provides a minimum lot size of 2ha.

Issues:

(1) whether the subdivision was permissible under cll 8, 9 or 10 of the SEPP; and

(2) whether, if permissible, the application should be approved on its merits.

Held: dismissing the appeal:

(1) consent could not be granted under cl 8(2)(a). While the proposed 2ha subdivision would be ultimately re-subdivided for urban purposes, that process was not "satisfactory", as the proper planning needed to

eventually accommodate around 5,000 lots was clearly more able to be undertaken in an efficient manner if the land was in one lot with one owner than 138 lots with potentially 138 owners: at [69]. The development did not "fully implement" the PLS on the land to which the development related, as the reliance by the applicant's planning expert on the development being an interim step in the progression to possible future urban uses was inconsistent with the intent of cl 8(2)(a)(i), which did not anticipate or sanction an interim step: at [70]. The development was not for the purposes of the PLS as it did not create "a regional recreational lake system": at [71]. The development was not "identification of land for possible future urban purposes", which would generally not include a subdivision into 2ha lots: at [72]. The approval of a 138 x 2h lot subdivision would also pre-determine and constrain the ultimate implementation of the PLS: at [73]. The hypothetical subdivision indicating that the proposed subdivision could be further subdivided to reflect a higher density did not provide sufficient justification for approval: at [74]. The minimum lot size in IDO 93 was only one matter that needed to be taken into account, and it was not the only relevant planning instrument: at [77];

(2) the proposed development was not "interim development" for the purposes of cl 9, as it did not prevent the sterilisation of the land by allowing an interim use pending the completion of the PLS, but rather provided for the ultimate use through an interim step in the process, a step not recognised in the SEPP: at [81];

(3) the development was not "for the purposes of the construction or widening of roads" as permitted by cl 10, but for the subdivision of land, and in any event the roads and drainage works originally proposed were ultimately not sought: at [85];

(4) even if the proposed development had been permissible pursuant to cll 8, 9 and 10 of the SEPP, there was no valid planning reason to support the application. There were issues relating to flooding, evacuation, bridge design, lake foreshore access, access to Castlereagh Road, and certain lot orientation that remained unanswered. There was no reason to approve a subdivision that could not be implemented and had no identified purpose: at [90]; and

(5) the wider public interest was best served by the rejection of the application so that land for the future growth of the Sydney region was produced in an efficient and environmentally sensitive manner: at [91]. The convoluted interim stage proposed in the application was inconsistent with the aim in s 5(a)(ii) of the EPA Act that seeks "the promotion and co-ordination of the orderly and economic use and development of land": at [92].

Court News

- Joanne Gray has been appointed as the Director and Registrar of the Land and Environment Court under the provisions of the *Government Sector Employment Act* 2013
- The Court congratulates Tony McAvoy, Acting Commissioner of the Court during 2012 and 2013, who has been appointed Senior Counsel