October 2016

Volume 8 Issue 3

Land and Environment Court of NSW Judicial Newsletter

Legislation

Statutes

- Local Government:

As of 23 September, the *Local Government Amendment (Governance and Planning) Act 2016 No 38* (Proclamation) commenced some changes to the *Local Government Act 1993* in respect of:

(a) the purpose of the Act and principles for local government;

(b) the roles of governing bodies of councils, mayors and councillors;

(c) the appointment of administrators, financial controllers and temporary advisers;

(d) the functions of general managers;

(e) delegations by councils; and

(f) the auditing of councils by the Auditor-General.

Justice Portfolio Legislation (Miscellaneous Amendments) Act 2016 amended the *Land and Environment Court Act 1979* (s 13(4)) and the *Statutory and Other Offices Remuneration Act 1975* (Schedule 2) to bring the determination of remuneration of acting Commissioners of the Court within the scope of determinations by the Statutory and Other Offices Remuneration Tribunal. These amendments came into effect on 25 October 2016.

Statute Law (Miscellaneous Provisions) Act (No 2) 2016 relevantly contained provisions which made or will make minor changes to the Acts set out below. The Act was assented to on 25 October 2016.

(a) *Aboriginal Land Rights Act 1983* to provide that:

- a voting member of a Local Aboriginal Land Council (LALC) attend 2 meetings of the Council within a 12-month period before becoming entitled to vote in elections for Board members of the Council does not apply if an administrator has been appointed to perform all of the Council's functions at any time during that period;
- a person who is elected to fill a vacancy arising during the term of office of a Chairperson or Deputy Chairperson of the Board of a LALC holds office for the remainder of the term of the vacant office (rather than for a fixed period of 2 years, as is currently the case); and

- similar changes are proposed for the Chairperson or Deputy Chairperson of the NSW Aboriginal Land Council;

These amendments came into effect on 25 October 2016

(b) *Mining Act 1992*: The amendment will make it clear that the relevant decision-maker (being either the Minister for Industry, Resources and Energy or the Secretary of the Department of Industry, Skills and Regional Development) must invite submissions in relation to a proposed variation of certain conditions attaching to an authorisation at the same time as giving the holder of the authorisation notice of the draft variation, and that the deadline specified for making submissions must be at least 28 days after the notice is given.

This amendment has not yet come into effect but will commence on 6 January 2017.

(c) *Petroleum (Onshore) Act 1991*: The amendment will make it clear that the Minister for Industry, Resources and Energy must invite submissions in relation to a proposed variation of certain conditions attaching to a petroleum title at the same time as giving the holder of the petroleum title notice of the draft variation, and that the deadline specified for making submissions must be at least 28 days after the notice is given.

This amendment has not yet come into effect but will commence on 6 January 2017.

Regulations

- Local Government:

Local Government (General) Amendment (Transitional) Regulation 2016 — published 23 September 2016, made transitional provisions consequent on the commencement of changes to arrangements for auditing councils.

The Local Government (Bayside) Proclamation 2016 — published 9 September 2016 at 2.00 pm:

- amalgamated the local government areas of the City of Rockdale and the City of Botany Bay to form the new local government area of Bayside and provided for savings and transitional matters consequential on that amalgamation; and
- the Proclamation also made amendments to the *Local Government (Council Amalgamations) Proclamation* 2016 and the *Local Government (City of Parramatta and Cumberland) Proclamation* 2016.

- Criminal:

Criminal Appeal (Amendment No 1) Rule 2016 — published 12 August 2016, amended the Criminal Appeal Rules to:

(a) require the leave of the Court of Criminal Appeal for an application to set aside or vary its orders; and

(b) enable the Court to determine on the papers whether to grant leave and whether to grant the application.

- Mining and Petroleum:

Mining Regulation 2016 — published 12 August 2016, remade with minor amendments, the Mining Regulation 2010 which was repealed on 1 September 2016.

Petroleum (Offshore) Regulation 2016 — published 12 August 2016, remade the Petroleum (Offshore) Regulation 2010 which was repealed on 1 September 2016.

Petroleum (Onshore) Regulation 2016 — published 12 August 2016, remade with minor amendments, the Petroleum (Onshore) Regulation, which was repealed on 1 September 2016.

- Water:

Water Sharing Plan for the Nambucca Unregulated and Alluvial Water Sources 2016 — commenced 30 September 2016.

(a) Part 2 of Chapter 3 of the *Water Management Act 2000* applies to each water source to which the prescribed water sharing plan applies and to all categories and subcategories of access licences in relation to any such water source other than floodplain harvesting access licences; and

(b) Part 3 of Chapter 3 of the Act applies to each water source to which the prescribed water sharing plan applies and to all approvals in relation to any such water source other than drainage work approvals and aquifer interference approvals.

Water Management (General) Amendment (Floodplains) Regulation 2016 — published 12 August 2016:

(a) enables certain land that was designated as a floodplain under the *Water Act 1912* and taken to be a floodplain under the *Water Management Act 2000* to cease to be taken to be that floodplain if it is later declared under the principal Act to be, or to form part of, another floodplain; and

(b) declares certain land to be the Gwydir Valley Floodplain.

Floodplain Management Plan for the Gwydir Valley Floodplain 2016 — published 12 August 2016

- Miscellaneous:

Subordinate Legislation (Postponement of Repeal) Order 2016 — published 5 August 2016, delays the repeal of a number of regulations until 1 September 2017, including:

- Coastal Protection Regulation 2011
- Crimes (Sentencing Procedure) Regulation 2010
- Criminal Procedure Regulation 2010
- Noxious Weeds Regulation 2008
- Strata Schemes Management Regulation 2010
- Swimming Pools Regulation 2008
- Western Lands Regulation 2011

Subordinate Legislation (Postponement of Repeal) Order (No 2) 2016 — published 29 August 2016, delays the repeal of a number of regulations until 1 September 2017, including:

- Threatened Species Conservation Regulation 2010
- Environmentally Hazardous Chemicals Regulation 2008
- National Parks and Wildlife Regulation 2009
- Pesticides Regulation 2009
- 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

- Threatened Species Conservation Regulation 2010

Acts assented to but not yet in force

Apart from provisions on building defects, the Strata Schemes Management Act 2015 and the Strata Schemes Management Regulation 2016 will commence on 30 November 2016. Provisions on building defects will commence on 1 July 2017.

State Environmental Planning Policies [SEPP)

State Environmental Planning Policy (State Significant Precincts) Amendment (Sydney Olympic Park) 2016 (2016-564) — published LW 29 August 2016

The SEPP (Sydney Region Growth Centres) 2006 has been amended by the following:

- SEPP (Sydney Region Growth Centres) Amendment (Minimum Lot Sizes) 2016 — published 29 July 2016

This amendment makes various minimum allotment size changes to a range of localities falling within the principal instrument.

- SEPP (Sydney Region Growth Centres) Amendment (Wilton) 2016 — published 29 July 2016
- SEPP (Sydney Region Growth Centres) Amendment (Blacktown Growth Centres Precinct Plan) 2016 — published 22 August 2016
- SEPP (Sydney Region Growth Centres) Amendment (Box Hill) 2016 — published 22 August 2016
- SEPP (Sydney Region Growth Centres) Amendment (South West Priority Growth Area) 2016 — published 29 August 2016

These amendments make various changes to detailed planning controls to operate within each of the areas nominated in the title of the amending instrument.

Court Practice and Procedure

On 31 October, the Chief Judge made a new Practice Note to be known as Practice Note – Strata Schemes Development Proceedings. It commences on 30 November 2016. The purpose of the Practice Note is to set out the procedural framework for proceedings commenced pursuant to those elements of the *Strata Schemes Management Act 2015 (NSW)* that will commence on 30 November 2016.

Miscellaneous

The Parliamentary Research Service has released the following:

- Compulsory acquisition of land: A brief legislative and statistical overview (e-brief 06/2016)
- Biodiversity Conservation Bill 2016 and Local Land Services Amendment Bill 2016 (Issues Backgrounder 3/2016)
- Threatened species legislation in NSW: a recent history (e-brief 5/2016)
- Local Government Amendment (Governance and Planning) Bill 2016 (e-brief 04/2016)

The Department of Planning and Environment has released the following Planning Circulars:

- Loose-fill asbestos insulation notations on s 149 planning certificates (PS 16-001)
- Simplifying and improving the planning system – SEPP review Stage 1 (PS 16-002)
- Notations on s 149 planning certificates for land affected by the draft Coastal Management SEPP (PS 16-003)
- Independent reviews of plan making decisions (PS 16-004)
- Delegation of plan making decisions (PS 16-005)

Civil Procedure Amendments

Court Security Regulation 2016 — published 26 August 2016, remade, with some amendments, the Court Security Regulation 2011 which was repealed on 1 September 2016. The regulation makes provision for, *inter alia*;

(a) permitting certain uses of recording devices in court premises; and

(b) permitting the transmission of court proceedings in certain circumstance

Uniform Civil Procedure (Amendment No 78) Rule 2016 – published 14 October 2016, omits references to DX addresses for registries. At this stage the LEC will continue to provide a DX address for receipt of documents.

On Exhibition/Consultation

The Department of Planning and Environment is seeking comments on:

- the Sydney Olympic Park Master Plan 2030 – submissions close 15 November 2016;
- an Environmental Impact Assessment Discussion Paper – submissions close 27 November 2016; and
- the Draft Medium Density Design Guide – submissions close 12 December 2016.

The Environment Protection Authority is seeking comments on the Contaminated Land Management Guidelines for the NSW Site Auditor Scheme – submissions close 9 November 2016.

Judgments

Federal Court of Australia

***Young v Hughes Trueman Pty Ltd* [2016] FCA 1176** (Bromwich J)

(related decisions: *Young v Hughes Trueman Pty Ltd & Anor* [2016] FCCA 989 (Smith J); *Young v Hones* [2014] NSWCA 337 (Bathurst CJ; Ward JA; Emmett JA); *Young v Hones (No 2)* [2014] NSWCA 338 (Bathurst CJ; Ward JA; Emmett JA); *Young v Hones* [2013] NSWSC 580 (Garling J); *Young v Hones (No.2)* [2013] NSWSC 1429 (Garling J); *Young v Hones (No 3)* [2014] NSWSC 499 (Garling J); *Young v King* [2004] NSWLEC 93 (McClellan CJ); *Young v King (No 6)* [2015] NSWLEC 111 (Sheahan J); Young v King [2016] NSWCA 282 (Basten JA; Gleeson JA; Emmett AJA)).

Facts: The Applicant, Mrs Young (Young) filed an application under r 36.05 of the Federal Court Rules 2011 (Cth) for an extension of time to file a notice of appeal from orders made by Smith J of the Federal Circuit Court of Australia on 29 April 2016. Smith J ([2016] FCCA 989) had dismissed Young's application to set aside a bankruptcy notice, which was issued on the basis of an unmet order for costs

made in the Supreme Court of New South Wales following the Applicant's failed negligence suit in that Court ([2013] NSWSC 1429), those proceedings having been appealed to finality ([2014] NSWCA 338), and there being no basis for the costs order not to stand.

The proceedings arose from a dispute in about 2001, between Young and her immediate neighbours, Mr Brendan King and Mrs Kristina King (the Kings), wherein Young alleged that the Kings had carried out unlawful works on their property and on its boundary with her property. The proceedings were originally settled in the New South Wales Land and Environment Court (the LEC) ([2004] NSWLEC 93) and finalised by consent orders (the 2004 Consent Orders) dismissing the proceedings, with McClellan CJ noting, as part of those orders, an undertaking by the Kings to carry out certain works. The Kings were ordered to pay Young's costs.

Young became dissatisfied with the 2004 Consent Orders and she alleged there was a material difference between the benefit she thought she would receive from the performance of the undertaking by the Kings and the benefit she would, in fact, receive. She considered that she had been misled. Accordingly, Young has, since 2004, sought to have the 2004 Consent Orders set aside, by this Court and in the prerogative jurisdiction of the Supreme Court. She has also commenced many related proceedings – against her advisers and representatives from those days, and others. Underpinning her attempts to set aside the 2004 Consent Orders has been an allegation of collusion or conspiracy involving the Kings, the Council and the parties' respective advisers. Her attempts in this Court and the Supreme Court failed, and her appeal to the New South Wales Court of Appeal was also dismissed with costs ([2016] NSWCA 282).

These present bankruptcy proceedings followed from Young's commencement of proceedings in 2010 in the Supreme Court, alleging negligence by her former lawyers and the Respondents, Hughes Trueman Pty Ltd and Stephen Perrens, her former engineering experts, for their part in the 2004 proceedings and associated 2004 Consent Orders and undertaking. The Supreme Court negligence proceedings were dismissed by Garling J on 27 September 2013 ([2013] NSWSC 1429), his Honour upholding claims of both advocate's immunity and witness immunity. Young was ordered to pay the costs of the Defendants to the negligence suit, including the present Respondents. Those costs orders formed the basis of the present bankruptcy notice.

In the Federal Circuit Court ([2016] FCCA 989), Young sought to set aside the bankruptcy notice on two grounds:

(1) An asserted counter-claim, set-off or cross-demand equal to or exceeding the costs order upon which the bankruptcy notice was based; and

(2) An assertion that the bankruptcy notice was an abuse of process by the Respondents for any of three alleged collateral purposes, including:

   (a) to prevent Young from prosecuting proceedings to set aside the 2004 Consent Orders;

   (b) to prevent exposure of misconduct by the Respondents and others to procure the 2004 Consent Orders; and

   (c) to facilitate or mandate the sale of Young's home to pre-empt access to evidence of the alleged misconduct.

Smith J held that Young's application for costs was an abuse of process, finding that there was no basis for the allegation of conspiracy and concluding that such a conspiracy was unarguable and should never have been put by members of the legal profession. A further argument put before Smith J, that Sheahan J gave inadequate reasons, was also dismissed by his Honour as plainly wrong and not a basis for setting aside a bankruptcy notice.

In her claim for an extension of time to appeal Smith J's decision, Young advanced 15 grounds, related broadly to the alleged conspiracy; error on the part of Sheahan J in *Young v King (No 6)* [2015] NSWLEC 111 (which was unsuccessfully appealed); error on the part of Smith J in impliedly holding that no prima facie case had been established for the purposes of s 40(1)(g) of the *Bankruptcy Act 1966 (Cth)*; evidence; denial of procedural fairness; and alleged apprehended bias or actual bias on the part of Smith J.

Issue: Whether there were sufficient grounds for an extension of time to file a notice of appeal from orders made by a judge of the Federal Circuit Court dismissing an application to set aside a bankruptcy

notice which was issued on the basis of an unmet order for costs made in the Supreme Court of New South Wales.

Held: Dismissing the appeal:

(1) The case for a conspiracy at no time rose higher than an assertion that collusion in the nature of a conspiracy was the only explanation for what had happened: at [41];

(2) A party to litigation cannot make such serious allegations based upon nothing more substantial than a bare assertion that something must be the only possible explanation for what has transpired: at [43];

(3) The success of the application for an extension of time to bring an appeal against the decision of the primary judge ultimately depended on demonstrating that such a conspiracy exists, and then in demonstrating how it entitles the Applicant to the relief she sought: at [45];

(4) No prima facie or arguable case was established for the existence of the conspiracy upon which Young relied, nor of any like impropriety by way of collusion or otherwise on the part of the Respondents in contributing to the process by which the undertaking came to be given by the Kings as part of the making of the 2004 Consent Orders: at [46];

(5) There was no foundation for the suggestion that Smith J did not have regard to the submissions and evidence before him: at [60];

(6) Young's failed application to seek costs of her failed LEC proceedings from non-parties was hopelessly misconceived and doomed to failure: at [64];

(7) Smith J was correct in implicitly finding that no prima facie case had been established for the asserted counter-claim, set-off or cross-demand equal to or exceeding the costs order upon which the bankruptcy notice was based: at [69];

(8) Three of her grounds (11, 12 and 13) misstated his Honour's findings, and there were no errors in his Honour's conclusions in relation to those grounds: at [72]-[78];

(9) Merely pointing to prior adverse conclusions or comments by a judge will not suffice to establish even apprehended bias, let alone actual bias: at [80];

(10) Courts are entitled to expect that lawyers acting for litigants will remain dispassionate, and examine what is before them calmly and rationally and have proper regard to what can be proved and not merely asserted. Of equal importance, members of the public are also entitled to expect those qualities of their lawyers: at [93]; and

(11) The conduct of Young's solicitors in this matter was reprehensible: at [94].

NSW Court of Appeal

Botany Bay City Council v The State of New South Wales [2016] NSWCA 243 (Bathurst CJ, Ward JA, Sackvile AJA)

First instance Supreme Court decision: *Botany Bay City Council v State of New South Wales* [2016] NSWSC 583 (Garling J)

Facts: On 6 January 2016, the Minister for Local Government (the Minister) initiated a proposal for the amalgamation of Botany Bay City Council (the Council) with Rockdale City Council. The Minister's proposal was referred pursuant to s 218F of the *Local Government Act 1993* (the LG Act) to the Third Respondent, the Chief Executive of the Office of Local Government (the Chief Executive) for examination and report. The Chief Executive made a delegation of functions to the Fourth Respondent (the Delegate). The Delegate invited submissions by, and discussions with, the Council, and the Council made submissions on 28 February and 3 March 2016. On 11 March 2016 the Council lodged its own proposal with the Minister pursuant to s 218F, that the Council be amalgamated with only particular parts of Rockdale City Council and with parts of Randwick Council and of Sydney City Council, and requested that it be referred to the Delegate. On 18 March 2016, the Council was advised that the proposal had been referred to the Delegate.

The Council commenced judicial review proceedings in the Land and Environment Court on 23 March 2016, seeking declaratory and other relief to the effect that the Delegate and the Chief Executive were required to have regard to the Council proposal in the examination and report of the Minister's proposal. The summons was dismissed at first instance (*Botany Bay City Council v Minister for Local Government* [2016] NSWLEC 35 (Pain J)) and the expedited appeal was dismissed ex tempore by the Court of Appeal (*Botany Bay City Council v Minister for Local Government* [2016] NSWCA 74 (Bathurst CJ, Beazley P, Ward JA)).

The Council then commenced judicial review proceedings in the Common Law Division on grounds that the Minister, the Delegate and the Local Government Boundaries Commission (the Commission) had exceeded their statutory powers in various ways. Garling J (the primary judge) dismissed the claim for declaratory and other relief brought by the Council. The Council sought leave to appeal against that decision, with the argument on appeal heard concurrently.

Issues:

(1) Whether the primary judge should have held that the Commission's review of the *Proposed Merger of City of Botany Bay and Rockdale City Councils* dated 3 May 2016 (the review) was *ultra vires* because the Commission misconstrued the powers and functions conferred on it by s 218F(6)(b) of the LG Act.

(2) Whether the primary judge erred in finding that the Minister afforded the Council procedural fairness, notwithstanding that the Minister allowed the Council only a limited time to make submissions on the Commission's review and a report prepared in March 2016 by the Delegate on the Merger Proposal; and

(3) Whether the primary judge should have found that the Delegate denied procedural fairness to the Council, in that he did not afford the Council an opportunity to answer adverse findings he proposed to make about a "community poll" conducted by the Council on the merger proposal.

Held: Dismissing the appeal with costs:

(1) The Council's construction of s 218F(6)(b) of the LG Act that the Commission was required to conduct, in effect, a rehearing on the merits of the Minister's proposal was not correct. Section 218F(6)(b) provides that the Commission "must review [the Chief Executive's] report and send its comments to the Minister". The Commission's primary function is to review the report already prepared by the Chief Executive and comment whether the Chief Executive has performed his or her functions in accordance with the legislation: at [95];

(2) The Commission did not commit any legal error by observing that the name of the new council and the Delegate's suggestion of boundary realignment were matters for the Minister. There is nothing in the legislation that obliged the Commission to go any further than to draw these matters to the Minister's attention with a view to considering whether the Merger Proposal should be modified: at [100];

(3) The primary judge gave cogent reasons for finding that the Minister provided the Council with a reasonable opportunity to put its arguments. The Council had the opportunity to prepare and present detailed submissions to the Delegate and it took full advantage of that opportunity. The opportunity already afforded to the Council at earlier stages of the process was validly an important consideration to take into account in determining whether the Minister had given the Council a reasonable time in which to prepare its submission: at [81];

(4) Considering the "whole process prescribed by statute", it was not incumbent on the Minister to grant the Council sufficient time to prepare an entirely fresh set of submissions canvassing the merits and drawbacks of the Minister's proposal. The Minister's obligation went no further than allowing the Council an adequate opportunity to identify and correct what it considered to be factual errors and misconceptions in the Delegate's Report or the Commission Review. The Council did not explain why the time allowed by the Minister for this purpose was insufficient: at [83];

(5) The further evidence admitted on the Council's application for leave to appeal made it clear that the Minister provided the council an adequate opportunity to make submissions: at [85]; and

(6) The Council's submission amounted to a contention that the Delegate should have informed the Council of his thinking on one issue among many that he had to consider in examining the Minister's Merger Proposal. Procedural fairness did not require the Delegate to take this course: at [108].

Golden Mile Property Investments Pty Ltd (in liq) v Cudgegong Australia Pty Ltd [2016] NSWCA 224 (Basten, Meagher and Ward JJA)

Previous litigation history: *Cudgegong Australia Pty Ltd v Transport for NSW* [2014] NSWLEC 19 (Pain J)

Golden Mile Property Investments Pty Ltd (in liq) v Cudgegong Australia Pty Ltd [2015] NSWCA 100 (Macfarlan, Emmett and Gleeson JJA)

Decision under appeal: *Cudgegong Australia Pty Ltd v Transport for NSW (No 3)* [2015] NSWLEC 185 (Pain J)

Facts: In 2012 Transport for NSW (TNSW) compulsorily acquired certain land at Rouse Hill. The land was the subject of two mortgages. The first mortgage was granted to Stacks Managed Investments Ltd (Stacks), and the second to a company related to Stacks (RTS Super Pty Ltd (RTS Super)). The registered proprietor of the land and mortgagee, Golden Mile Property Investments Pty Ltd (Golden Mile), was wound up in 2007. In 2008, Stacks entered into a contract for sale of the land to Cudgegong Australia Pty Ltd (Cudgegong) for the sum of $2,250,000, following the default of the mortgages of Golden Mile (the first contract). In April 2012, Golden Mile was deregistered. In May 2012, TNSW issued proposed acquisition notices in relation to the land.

In June 2012, an agreement was signed between Stacks and Cudgegong rescinding the first contract by which Cudgegong surrendered any interest in the land (the rescission deed). On the same day, a further contract for the sale of land was signed (the second contract) under which Stacks agreed to sell, and Cudgegong agreed to buy, the land for the increased sum of $2,888,648. In July and August 2012, Cudgegong, Stacks and RTS Super lodged claims for compensation in respect of the proposed compulsory acquisition. The mortgagees, Stacks and RTS Super, accepted the offer of compensation and entered into a Deed of Release and Indemnity with TNSW.

In early 2013, Cudgegong commenced proceedings in the Land and Environment Court for compensation (as beneficial owner of the land and for disturbance costs). Golden Mile was joined in those proceedings by court order to argue it held the compensable interest. The primary judge found Cudgegong had the compensable interest in the land in *Cudgegong Australia Pty Ltd v Transport for NSW* [2014] NSWLEC 19. Golden Mile successfully appealed to the Court of Appeal (*Golden Mile Property Investments Pty Ltd (in liq) v Cudgegong Australia Pty Ltd* [2015] NSWCA 100). The matter was remitted to the primary judge for the purpose of determining the respective interests of Golden Mile and Cudgegong in the land, as at the date of acquisition.

On the remittal, the primary judge again held that Cudgegong had the relevant compensable interest. Her Honour found that Stacks was obliged to enter into the second contract for sale immediately after executing the rescission deed by reason of an earlier oral agreement between Cudgegong and Stacks to rescind the first, and enter into the second, contract. Golden Mile sought leave to appeal from that interlocutory decision on questions of law.

Issues:

(1) The overarching issue was who held the compensable interest in the acquired land in the unusual circumstance of a mortgagee exercising a power of sale.

(2) Whether there was a breach of the mortgagees' duties at the time of negotiating the oral agreement to rescind the first contract and enter into the second contract; and

(3) Whether the primary judge erred in holding that existence of the oral agreement (if proved) meant there was no independent exercise of power of sale by Stacks when entering into the second contract.

Held: Leave to appeal allowed on limited grounds and appeal dismissed with costs:

(1) In relation to Ground 3, separate contracts formed part of one overall transaction, there was no separate exercise of power of sale by Stacks, the mortgagor: at [70]-[72];

(2) In relation to Ground 2, the enforceability of the oral agreement as a contract is not precluded by s 54A of the *Conveyancing Act 1919 (NSW)* once the rescission deed had been entered into, as there would have been sufficient part-performance of the oral agreement to be enforceable: at [79];

(3) Leave should not be granted to raise Ground 4, as there was evidence open to the primary judge at trial to conclude that the mortgagee had complied with the duties of mortgagee when agreeing to rescind the first contract and enter into a second contract at an increased price: at [95]; and

(4) Finding that Cudgegong had superior interest to Golden Mile for the purposes of the *Land Acquisition (Just Terms) Compensation Act 1991 (NSW)* upheld: at [101].

Hoy v Coffs Harbour City Council [2016] NSWCA 257 (Bathurst CJ, Simpson and Payne JJA)

Related decisions: *Hoy v Coffs Harbour City Council (No 2)* [2015] NSWLEC 182 (Pain J); *Hoy v Coffs Harbour City Council* [2014] NSWLEC 1217 (Brown C and Parker AC)

Facts: Ms Hoy was the owner of a large parcel of land in the Coffs Harbour region that was rezoned for public purposes. Under Pt 2 Div 3 of the *Land Acquisition (Just Terms) Compensation Act 1991 (NSW)* (the Just Terms Act), Ms Hoy gave notice requiring Coffs Harbour City Council (the Council) to acquire her land. The Council offered compensation in the sum of $3,180,000. She objected to this amount under s 66 of the Just Terms Act and the appeal was heard by two commissioners of the Land and Environment Court. The commissioners determined that, apart from certain land the subject of constraints (the residual lot), the land could be subdivided into 106 lots (each worth $18,000). With respect to the residual lot, the commissioners considered the valuation evidence that there was a possibility the lot could be developed into a rural residential lot. Whilst the commissioners determined that this was a possibility, the identified constraints meant that the potential was severely restricted and valued this lot at $72,000. The commissioners made an allowance for disturbance and solatium in their determination and ordered that Ms Hoy be compensated in the amount of $2,034,957.39 in total.

Ms Hoy appealed the decision of the commissioners to a judge of the Land and Environment Court (Pain J) on a question of law under s 56A of the *Land and Environment Court Act 1979 (NSW)* (the Court Act). Pain J dismissed the appeal. Ms Hoy then appealed on a question of law under s 57 of the Court Act to the Court of Appeal, requiring leave to appeal. The Council cross-appealed regarding the allowance made by the commissioners for disturbance and solatium.

Issues:

(1) Whether the primary judge erred in not finding that the commissioners failed to deal with the evidence concerning the development of the residual lot into a rural residential lot and that there was no evidence to support their valuation of the residual lot (Grounds 1-3).

(2) Whether the primary judge erred in refusing leave to argue that the commissioners failed to deal with engineering evidence as to the costs of developing steep land in comparable sales (Grounds 4-6).

(3) Whether the primary judge erred in determining that legal costs incurred in establishing hardship were not disturbance costs incurred "in connection with the compulsory acquisition of the land" under s 59(1)(a) of the Just Terms Act (Ground 7); and

(4) Whether, having regard to s 26 of the Just Terms Act, it was an error of law to make an allowance for disturbance costs or solatium in compensating for an acquisition activated under Pt 2 Div 3 of the Just Terms Act (cross-appeal).

Held: Refusing leave to appeal on Grounds 1-6 and dismissing the appeal and cross-appeal:

Bathurst CJ, Simpson and Payne JJA agreeing:

(1) There was no error of law in the approach the commissioners took to considering the evidence: at [30];

(2) Where a commissioner has concluded that land has nominal value, the task of ascribing a figure to that value is essentially a matter of judgement consequent upon the determination that the land has nominal value: at [33];

(3) There is no error of discretion in refusing leave where a party seeks to argue a ground wider than that suggested by the grounds of appeal and written submissions and then further refuses, upon invitation, to amend his or her summons: at [41]-[42];

(4) Section 26 of the Just Terms Act confers a discretion on the Valuer-General to take into account matters referred to in that section, as done by the commissioners, notwithstanding that the acquisition process is activated by the hardship provisions: at [54]; and

(5) The power to compensate for legal costs under s 59(1)(a) of the Just Terms Act does not extend to costs incurred in establishing hardship. A person is only entitled to compensation once the authority becomes bound to acquire the land. Legal costs incurred in establishing hardship are incurred prior to an entitlement to compensation and thus do not fall within s 59(1)(a): at [59].

Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council [2016] NSWCA 253 (Basten JA, Meagher JA and Leeming JA)

First instance LEC decision: *New South Wales Aboriginal Land Council v The Minister Administering the Crown Lands Act (Moira Park No 1 and Moira park No 2 claims)* [2015] NSWLEC 179 (Moore AJ)

Facts: In 2009, two claims were made by the New South Wales Aboriginal Land Council (the NSWALC) under the *Aboriginal Land Rights Act 1983 (NSW)* (the ALR Act) for adjoining parcels of land near the town centre of Morriset, within the Lake Macquarie City Council local government area. The claims were refused by the joint Crown Land Ministers in 2014, on the basis that part of the land would be needed, or likely be needed, for residential land (s 36(1)(b1) of the ALR Act); and part of the land would be needed, or likely be needed, for an essential public purpose (s 36(1)(c) of the ALR Act).

The NSWALC appealed both claims in the Land and Environment Court, where the primary judge upheld the appeals and ordered the transfer of both lots in fee simple to the Biraban Local Aboriginal Land Council. The appeals were upheld on the basis that, as per s 36(1)(b1) of the ALR Act, whilst it was clear the lands were needed, or likely needed, for the allotment of residential buildings in 1989, the status had radically changed at the time of the 2009 claims as, by this stage, there was no longer to be residential development across the totality of the lands. With respect to s 36(1)(c) of the ALR Act, the primary judge determined that the coincidence of use and purpose for residential development cannot allow one to rely on the claimability exclusion and that, on the proper construction of s 36(1)(c), the Minister had no basis for resisting the claimability of the lands.

The Minister appealed the decision of the primary judge in the Court of Appeal on four grounds.

Issues:

(1) Whether the primary judge erred in law by concluding, on the basis of a change in the residential subdivision layout made after the Minister formed an opinion that the lands were needed, or likely to be needed, as residential land, that there was no opinion of a Crown Lands Minister for the purpose of s 36(1)(b1) of the ALR Act.

(2) Whether the primary judge erred in law by taking into account the change in the residential subdivision layout between when the Minister formed his opinion and the claim date, which was an irrelevant consideration, in determining whether there existed the relevant opinion under s 36(1)(b1) of the Act.

(3) Whether the primary judge erred in law in applying *Chamwell Pty Ltd v Strathfield Council* [2007] NSWLEC 114 to s 36(1)(b1); and

(4) Whether the primary judge erred in law in construing the words in s 36(1)(c) of the Act 'essential public purpose' as not being capable of including 'residential use or development, including for subdivision purposes.'

Held: (Basten JA, Meagher JA and Leeming JA) dismissing the appeal with costs:

(1) The primary judge did not err in law as the Minister's challenge of the finding that an opinion was accepted to have been held in 2004 was not held in 2009 was a question of fact: at [58];

(2) The change in the residential subdivision between when the Minister formed his opinion and the claim date was not an irrelevant consideration which amounted to an error of law as this was relied on in the course of the making of findings of fact and did not engage the limited appellate jurisdiction of the Court which was confined to questions of law: at [61];

(3) The application of *Chamwell* was not an error of law as although it was erroneously relied upon such reliance it did not impact upon what was essentially a factual conclusion by the primary judge: at [79]; and

(4) The primary judge did not err in the manner he construed s 36(1)(c) as ordinary private sector residential ownership, whether by developers or owner occupiers, does not fall within an essential public purpose: at [106].

Morocz v Marshman [2016] NSWCA 202 (Macfarlan and Payne JJA, Emmett AJA)

First instance Supreme Court decision: ***Morocz v Marshman*** [2015] NSWSC 149, [2015] NSWSC 325 and [2015] NSWSC 612 (Harrison J)

Editor's note: This decision is reported solely for the relevance of the consideration by the Court of Appeal of issues concerning admissibility of expert evidence and leave to adduce further evidence on appeal. It is not necessary to traverse other aspects of matters dealt with at first instance or on appeal.

Facts: In August 2006, the Appellant consulted the Respondent for medical advice. The Appellant was provided a brochure outlining the risks of a proposed medical procedure, which risks were also conveyed by the Respondent. On 6 February 2007, the Respondent performed the procedure on the Appellant, who claimed various health issues and side-effects following the procedure.

In February 2010, the Appellant commenced proceedings against the Respondent alleging negligent failure to warn of the material risks of the procedure. On 6 March, the primary judge found that a number of expert reports that were filed on behalf of the Appellant were inadmissible. On 17 April 2015, the primary judge found that the Appellant had received adequate warnings of the material risks and dismissed the Appellant's case. Finally, on 29 May 2015, the primary judge ordered the Appellant to pay the Respondent's costs on an indemnity basis. The self-represented Appellant in this matter appealed the three judgments.

Evidentiary Issues:

(1) Whether the primary judge erred in ruling, (a), that the Appellant's expert reports were inadmissible and, (b), s 5O of the *Civil Liability Act 2002 (NSW)* (the CL Act) applied by reason of s 5P of the CL Act; and

(2) Whether the Court should permit the tender of further documentary evidence.

Held: Appeal dismissed with costs:

Determinations on the evidentiary issues

(1) (a) The primary judge was correct in finding the Appellant's expert evidence as inadmissible: at [103]. Each expert report was either:

(i) irrelevant to the proceedings in that they did not provide for the particular warnings that should have been provided nor did they explain if the side effects were caused by the procedure, at [79]; or

(ii) under the opinion rule (s 76 of the *Evidence Act 1995 (NSW)* (the Evidence Act) the experts were not authorised to provide such opinions. The reports did not adequately explain what each expert's specialised knowledge was, or how that specialised knowledge was applied to the facts: at [67];

(b) The primary judge did not provide a finding based on s 5O, the Appellant misunderstood the findings: at [108];

(2) In proving special grounds to admit further evidence, a party must show that the evidence could not be obtained with reasonable diligence at trial, there is a high degree of probability that there would be a different verdict and the evidence must be credible (*Supreme Court Act 1970 (NSW)* (the SC Act) ss 75A(7) and 75A(8)): at [44].

Nash Bros Builders Pty Ltd v Riverina Water County Council [2016] NSWCA 225 (Basten, Macfarlan and Ward JJA)

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

Facts: Nash Bros Builders Pty Ltd and Nash Bros Constructions Pty Ltd (collectively, "Nash Bros") were responsible for the construction of a retirement village (the project) for which conditional consent had been granted (the consent). Condition 3 of the consent required that "prior to the issue of the Construction Certificate, a compliance certificate is to be obtained in respect of water management works". Riverina Water County Council (Riverina Water) constructed, installed and connected water supply services (the infrastructure) to the project. Reference to water management works in condition 3 is a reference to the infrastructure. Using the infrastructure, potable water would be supplied to the project by Wagga Wagga City Council. A charge between $470,000 and $500,000 applied for the compliance certificate (the charges).

From March 2012, Riverina Water issued notices to Nash Bros for the charges, which were paid. However, from September 2013, payment of the charges was made under protest and on a "without prejudice" basis. In January 2014, Nash Bros commenced proceedings in the Court seeking a declaration that Riverina Water had no power to levy the charges.

At first instance, Pepper J refused the declaratory relief, finding that both s 608 of the *Local Government Act 1993 (NSW)* (the LG Act) (by operation of s 400 of the LG Act) and s 306 of the *Water Management Act 2000 (NSW)* (the WM Act) (by operation of ss 64 and 400 of the LG Act) empowered Riverina Water to levy the charges.

Section 400 of the LG Act provided that the LG Act applied to county councils in the same way it applied to councils. Section 64 of the LG Act granted councils the functions of a water supply authority.

Section 608 of the LG Act provided that "a council may charge and recover an approved fee for any service it provides, other than a service provided, or proposed to be provided, on an annual basis for which it is authorised or required to make an annual charge under s 496 or s 501". Section 501 provided that "a council may make an annual charge for any of the following services provided … on an annual basis by the council … water supply services".

Section 305 of the WM Act stated that "a person may apply to a water supply authority for a certificate of compliance for development carried out, or proposed to be carried out". Under s 306 of the WM Act, a water supply authority could require, as a precondition to granting a certificate of compliance, that an applicant pay a specified amount, construct water management works, or do both. Section 307 made the granting of a certificate of compliance conditional on the person satisfying any requirements made under s 306.

Issues:

(1) Whether s 608 of the LG Act authorised Riverina Water to levy the charges.

(2) Whether s 306 of the WM Act authorised Riverina Water to levy the charges; and

(3) Whether the prospect of a future application was a sufficient basis upon which the power in s 306 of the WM Act could be exercised.

Held: Dismissing the appeal with costs:

(1) (Ward JA and Macfarlan JJA agreeing): Both s 608 and s 501 conferred power of a discretionary nature on a council. That a council could choose to provide the services which comprised its water delivery system on an annual basis (and levy a fee under s 501) did not preclude the power under s 608 being exercised where the relevant services were not going to be provided on an annual basis. Nothing in the evidence suggested that the services for which the charges were being levied were services provided "on an annual basis": at [113];

(2) (Basten JA, Macfarlan JA agreeing): Section 608 authorised Riverina Water to charge a fee for "any service". There was no reason to read that phrase down so as to exclude the capital works which fell within the definition in the LG Act of "water supply work": at [33]. The operation of the exclusion contained in s 608 depended upon a service being provided "on an annual basis". Because the construction of the infrastructure was provided on a one-off basis, the exclusion did not operate and s 501 had no operation: at [33]-[34];

(3) It did not matter that Riverina Water was not going to supply water to the project (for which a charge under s 501 of the LG Act could be made), because Riverina Water was recovering the cost of providing the infrastructure: at [34];

(4) (Ward JA, Macfalan JA agreeing): The power to levy the charges under s 306 of the WM Act required that a person "apply" for a certificate of compliance. In the absence of an application for a compliance certificate, the power to levy a charge under s 306 was not enlivened. As the primary judge had found that there had been no application made, s 306 of the WM Act could not be a source of power to levy the charges actually levied: at [90]-[91];

(5) (Basten JA, in dissent): On appeal, Nash Bros accepted that it could not recover past payments: at [21];

(6) Therefore the appeal was limited to whether s 306 of the WM Act was a source of power to levy the charges. The purpose of Div 5 of the WM Act (containing ss 305-307), inferred from its context, is that development requires a certificate of compliance: [17]-[18];

(7) Condition 3 of the consent mandated that Nash Bros receive a certificate of compliance prior to it being granted a Construction Certificate: at [18]; and

(8) While it may be that Riverina Water could not require payment until an application was made and notice in writing was given by Nash Bros, the consent nevertheless prevented construction until the certificate of compliance was obtained: at [23].

Roden v Bandora Holdings Pty Ltd [2016] NSWCA 220 (McColl; Basten and Payne JJA)

(related decision: *Roden v Bandora Holdings Pty Ltd* [2015] NSWLEC 191 (Pain J))

Facts: on 13 October 2014, Byron Shire Council (the Second Respondent) granted consent to a development application lodged by Bandora Holdings Pty Ltd (the First Respondent), for what was described as a "rural tourist facility". The relevant land was zoned under the *Byron Local Environmental Plan* 1988 (the Byron LEP) as 1(a) - General Rural Zone. Amongst the prohibited purposes of development was that identified as "tourist facilities". The application was objected to by a neighbour, Colin Roden (the Appellant), who brought proceedings in the Land and Environment Court, challenging the validity of the consent. On 7 December 2015, Pain J dismissed the summons. The Appellant applied for leave to appeal on two grounds.

Issues:

(1) Whether the primary judge erred in finding that the development was not a "tourist facility" within the meaning of the Byron LEP; and

(2) Whether the primary judge erred in construing and applying cl 31 in the Byron LEP by making no finding as to the unavailability of alternative locations, in circumstances where there was evidence that other locations were potentially available.

Held: Appeal upheld. Orders 1 to 3 made by the Land and Environment Court set aside and new orders made. The matter was remitted to the Land and Environment Court for relief consequential pursuant to the new orders.

(1) The primary judge erred in her construction of the relevant environmental planning instrument. Application of the general principles of statutory construction to cl 34 demonstrated that examples contained in the definition of "tourist facility" were illustrative rather than exhaustive, contrary to the primary judge's finding: at [14]-[15];

(2) Consequently, the use in question is covered by this definition: at [24]-[27];

(3) As the development was for a prohibited purpose, the development consent was declared to be invalid: at [35]; and

(4) Because the factual matter of alternative locations was not squarely raised in the Land and Environment Court, this ground of appeal was rejected: at [45].

Williams Group Australia Pty Ltd v Crocker [2016] NSWCA 265 (Ward JA, Simpson JA and Payne JA)

First instance Supreme Court decision: ***Williams Group Australia Pty Ltd v Crocker*** [2015] NSWSC 1907 (McCallum J)

Editor's note: This decision is reported solely for the relevance of the consideration by the Court of Appeal of the issue concerning electronic signatures. It is not necessary to traverse other aspects of matters considered at first instance or on appeal.

Facts: Mr Crocker was one of three directors of IDH Modular Pty Ltd (IDH), a building module supplier that was granted a credit approval by Williams Group Australia Pty Ltd (Williams) to which it was to supply building materials on credit to IDH. That application, and an accompanying all-moneys guarantee, bore the electronically affixed signatures of each of the three directors of IDH in their capacities as directors and guarantors, respectively. The signatures had been affixed using "HelloFax", a system which allows users to upload their signature and electronically apply it to documents. Each of the signatures had purportedly been witnessed by IDH's administration manager.

The primary judge found for Mr Crocker on the basis that his electronic signature had been placed on the application and guarantee without his knowledge or authority. Williams appealed, challenging the primary judge's findings on the questions of ostensible authority and ratification.

Issues:

(1) Whether the affixed electronic signature bound Mr Crocker based on the principles of ostensible authority?

Held: Dismissing the appeal with costs:

(1) The primary judge did not err in declining to find that Mr Crocker was bound by the guarantee by reason of ostensible authority. A finding of ostensible authority would have required a representation of authority by Mr Crocker of his authorisation of some other person to affix his electronic signature to documents, on which Williams had relied when supplying goods to IDH on credit. Mr Crocker's mere use of the "HelloFax" system did not amount to such a representation so as to bind him personally to the obligations imposed by those documents: at [65] and [67]-[68].

Wingecarribee Shire Council v De Angelis [2016] NSWCA 189 (Basten, McColl, and Payne JJA)

(related decision: *De Angelis v Wingecarribee Shire Council* [2016] NSWLEC 1 (Craig J))

Facts: The *Wingecarribee Local Environmental Plan* 2010 (the LEP) commenced operation on 16 June 2010. As at that date, the LEP permitted mixed use development on Mr De Angelis' land. On 11 November 2013, Mr De Angelis lodged a development application for a mixed use development (the DA). Mr De Angelis appealed its deemed refusal to the Court. On 16 October 2015, the LEP was amended by way of changes to the zoning map. Significantly, mixed use development on Mr De Angelis' land was prohibited. Clause 1.8A of the LEP contained the standard saving provision, which provided that:

> If a development application has been made before the commencement of this Plan ... the application must be determined as if this Plan had not commenced.

Mr De Angelis argued that cl 1.8A was ambulatory in operation, and applied in relation to both development applications made prior to 16 June 2010 and also to development applications made prior to any amendments subsequently made to the LEP. Accordingly, the DA was required to be determined in accordance with the LEP as it stood at the date the DA was lodged, rather than as at the date of determination. It was accepted between the parties that, as at the date of determination, the development was prohibited development. At first instance, Mr De Angelis' construction of cl 1.8A was accepted.

Issues:

(1) Whether leave to appeal should be granted; and

(2) Whether the construction of the savings provision contained in cl 1.8A of the LEP found by the trial judge was correct.

Held: Allowing the appeal:

(1) It was appropriate to grant leave to appeal because cl 1.8A was a mandatory clause contained in the standard instrument: at [2];

(2) Savings and transitional provisions are rarely ambulatory. They usually deal with a precise point in time, namely, the point at which a new legal instrument commences: at [9];

(3) The proper construction of the amendment made on 16 October 2015 depended upon the purpose and language used in the LEP. The purpose of the amendment could be derived from its effect, which was to prohibit development consent being granted to the DA. Further, the language of the amendment stated that it commenced on the date of its publication. As the amendment had no savings provision, it took effect on the date of its promulgation, namely, 16 October 2015: at [12];

(4) Absent further provision, an amendment to a zoning plan map cannot be read as intending to amend the savings provision contained in cl 1.8A of the LEP, which operated as at the commencement date of that plan. In relation to the DA, cl 1.8A had no operation. Therefore, mixed use development, the subject of the development application, was prohibited development: at [18]; and

(5) While a local environmental plan ought to be construed in the light of practical considerations, rather than by a meticulous comparison of the language of various provisions as may be appropriate when construing an Act of Parliament, this should not be understood as conflicting with the principles of statutory construction which require attention to the language of the instrument and its apparent purpose: at [20].

Young v King [2016] NSWCA 282 (Basten JA; Gleeson JA; Emmett AJA)

(related decisions: *Young v King* [2004] NSWLEC 93; *Young v King (No.2)* [2009] NSWLEC 125; *Young v King (No. 3)* [2012] NSWLEC 42; *Young v King (No 4)* [2012] NSWLEC 236; *Young v King (No 5)* [2012] NSWLEC 280; *Young v King (No 6)* [2015] NSWLEC 111; *Young v King (No 7)* [2015] NSWLEC 178; *Young v King (No. 8)* [2015] NSWLEC 187; *Young v King (No 9)* [2016] NSWLEC 4; *Young v King (No 10)* [2016] NSWLEC 70; *Young v King* [2013] NSWCA 364; *Young v Hones* [2013] NSWSC 580; *Young v Hones (No.2)* [2013] NSWSC 1429; *Young v Hones (No.3)* [2014] NSWSC 499; *Young v Hones (No.4)* [2015] NSWSC 792; *Young v Hones (No.5)* [2016] NSWSC 822; *Young v Hones* [2014] NSWCA 337; *Young v Hones* [2014] NSWCA 338; *Young v Hones* [2015] HCASL 73; *Young v Hughes Trueman Pty Ltd & Anor* [2016] FCCA 989; *Young v Hughes Trueman Pty Ltd* [2016] FCA 1176).

Facts: On 14 April 2003, the Applicant (Young) commenced Class 4 proceedings alleging that her immediate neighbours (the Kings) had carried out unlawful works on their property and on its boundary with her property.

The case was settled, and McClellan CJ made consent orders on 19 February 2004, in which the Kings gave an undertaking to do certain works (set out in Exhibit A). The proceedings were formally dismissed, and the Kings were ordered to pay Young's costs.

Those orders were amended by consent on 8 March 2004, but when the Kings lodged with Warringah Shire Council (the Council) their development application to do the works required by Exhibit A and their undertaking, those works impacted on Young's property and she declined owner's consent. Those works have never been carried out.

Young has, since 2004, commenced many other related proceedings – against her advisers and representatives from those days and against others – and, in this Court and in the prerogative jurisdiction of the Supreme Court, she has been seeking, since 2008, to set aside the 2004 orders.

In 2013, the Court of Appeal allowed an appeal by Young against Sheahan J's dismissal of her motion under the *Uniform Civil Procedure Rules* 2005 (NSW) (UCPR) r 36.15 in October 2012. The Court of Appeal remitted that motion, and Young's subsequent prerogative relief summons in the Supreme Court, to this Court for both matters to be heard together.

Young made wide-ranging allegations of fraud, collusion, misrepresentation, and conspiracy regarding the agreement at the heart of the 2004 consent orders, and also framed her prayers for relief on the basis of common or unilateral mistake.

Sheahan J dismissed both proceedings on 9 July 2015, and ordered Young to pay the Kings' costs on a party-party basis.

Subsequently, Young appealed his Honour's decisions in both matters to the Court of Appeal, and also filed, on 20 August 2015, in this Court, a Notice of Motion seeking her costs of both matters from 8 March 2004 on an indemnity basis, from not only the Kings, but also from 16 non-parties to the proceedings, generally those lawyers and experts who had advised either side in 2003-2004 and since, other than her post-2004 legal representatives (Muriniti and Newell), but also the Council.

On 1 December 2015, Sheahan J summarily dismissed Young's costs claims against eight of the 16 non-party respondents, and ordered Young to pay their costs of her Notice of Motion.

On 19 February 2016, Sheahan J amended his 9 July 2015 costs order in favour of the Kings to an order for costs on an indemnity basis. He also dismissed the balance of Young's 21 August 2015 Notice of Motion and ordered Young to pay the costs of the affected respondents, with the Kings' costs to be again on an indemnity basis. He stood over:

(1) the claims made by the Kings for indemnity costs to be paid personally by Muriniti and Newell, and

(2) all remaining claims made by the non-party respondents for further relief.

On 10 May 2016, Young filed two summonses seeking leave to appeal in the Court of Appeal from Sheahan J's orders of 19 February 2016, on the basis that the 2016 costs orders were the occasion of "a substantial injustice".

That part of the May 2016 summonses which concerned orders in favour of the Kings was listed by the Court of Appeal to be heard with her substantive appeals, and the Court of Appeal decided those matters on 19 October 2016.

Emmett AJA (Basten and Gleeson JJA agreeing) stated that "the entire thrust of the complaints made by Mrs Young, through her counsel, is directed at the conduct of her legal advisers and witnesses in 2004. There is not a skerrick of evidence of the conspiracy hinted at by Mrs Young…": at [90]. It was held that despite the extensive and unnecessarily complex allegations of fraud, there was nothing to link Young's advisers with the Kings, their advisers or the Council. The appeals were dismissed with costs.

Emmett AJA (Basten and Gleeson JJA agreeing) concluded that the basis upon which Young sought to challenge the 2015-2016 costs orders was dependent upon her success in the substantive appeal, and, for the reasons those appeals failed, the costs appeals should also fail.

(Motions remain undetermined before the Land and Environment Court as at the date of this newsletter by various of the 18 costs respondents, including the Kings, seeking personal and/or indemnity costs orders against Muriniti and Newell.)

Held: Dismissing Young's appeals:

(1) The complaints made by Young, through her counsel, were directed at the conduct of her legal advisers and witnesses in 2004. There was no evidence of the conspiracy hinted at by Young involving the Kings and their advisers, Young's former advisers or the Council: at [90];

(2) There was nothing to link those advising Young with either the Kings, or their advisers or the Council. The allegation of a conspiracy involving Young's advisers was completely without evidentiary foundation and should never have been made: at [90];

(3) Young was bound by the actions of her advisers. There was not a skerrick of evidence to suggest that her then advisers exceeded their authority in negotiating the settlement and asking McClellan ChJ to make the original orders: at [91];

(4) There was no evidence of any mistake on the part of Young's then legal advisers, despite the fact that she had ample opportunity to adduce such evidence: at [92];

(5) No basis whatsoever was advanced in support of a contention that Sheahan J acted in accordance with a wrong principle or ignored relevant material or decided on the basis of misapprehension of the facts when exercising his direction to refuse Young the opportunity to call certain witnesses: at [93];

(6) Young was bound by the conduct of her advisers at the relevant time, acting within the scope of their authority. Whether or not she has a cause for complaint against those advisers was not within the scope of these proceedings: [94];

(7) Sheahan J made clear his reasons for rejection of Young's allegations of fraud, notably the lack of evidence of any real, probative value that would warrant a finding of fraudulent behaviour. There was no error on his Honour's part in that regard: at [95];

(8) The final ground of appeal, that the cumulative effect of the several decisions of Sheahan J gives rise to a reasonable apprehension of bias on the part of the judge, was without substance: at [97];

(9) The basis upon which Young sought to challenge the 2016 orders in relation to costs was dependent on her success in the substantive appeals. As those appeals failed, the costs orders appeals should also fail: at [104].

NSW Court of Criminal Appeal

Geitonia Pty Ltd v Inner West Council; Gertos v Inner West Council [2016] NSWCCA 186 (Price J, Garling J, N Adams J)

Facts: This was an appeal against conviction by Geitonia Pty Ltd (Geitonia) and Bill Gertos (Gertos). In February and March 2015, Geitonia and Gertos, together with GRC Projects Pty Ltd (GRC), were prosecuted by the Inner West Council in the Land and Environment Court. GRC took no part as it was in liquidation. Geitonia and Gertos pleaded not guilty to separate summonses; each committed an offence against s 125(1) of the *Environmental Planning and Assessment Act 1979 (NSW)* (the EPA Act), in that each carried out development on land in contravention of s 76(1) of the EPA Act. Gertos was the sole director and shareholder of Geitonia. A disused two-to-three-storey, late Victorian-style building was on the land. Most of the building was demolished in the course of redevelopment by Global Demolitions Group Pty Ltd (Global). Foong Takounlao (Foong) was GRC's manager. The Respondents argued the demolition of the front southern façade of the existing building on the land was in breach of the development consent granted under the EPA Act. The trial judge rejected the Appellants' arguments by finding the development consent (on its proper construction) did not permit the demolition of the front southern façade; the Appellants were vicariously liable for the demolition of the front southern façade; and the defence of necessity failed.

Issues:

(1) Whether the Prosecutor failed to discharge its responsibility to call all material witnesses and this caused a miscarriage of justice in the circumstances (Ground 1); and

(2) Whether the judge erred by finding that the development consent did not permit the demolition that occurred of the front southern façade (Ground 2).

Held: Appeals dismissed:

Per Price J:

(1) In consideration of the first ground of appeal, the Prosecutor's judgement that Foong's evidence would be unreliable was founded on Foong's attempts in 2011 to create false evidence: at [74] and [78];

(2) However, this occurred three years before the trial in question. There was a clear error in judgement by the Prosecutor in not calling Foong: at [82];

(3) Further, evidence independent of Foong provided strong support for the trial judge's conclusion that Gertos instigated the demolition of the front southern façade. In conjunction with Foong's fraudulent conduct, this evidence points to the likelihood that anything he may have said in support of the Appellants' case would have been rejected by the trial judge: at [92]-[94];

(4) Thus, there was no apparent disadvantage to the Appellants by Foong not being called as a witness and Ground 1 of the appeal was rejected: at [95]-[96];

(5) There was no evidence before the judge that supported the contention that a structural element is an element of the building which holds up the floors and roof: at [119];

(6) Further, the trial judge's acceptance of the Prosecutor's expert engineer's evidence was not challenged: at [126]; and

(7) Therefore, Ground 2 was rejected: at [127].

Per N Adams J, agreeing with Price J on both grounds but adding, with respect to Ground 1:

(8) No attempt was made to contact Foong until the week before the trial and no statement was ever taken from him: at [158];

(9) Although it was an error of judgement not to call Foong, the question which followed was whether a miscarriage of justice occurred "having regard to the conduct of the trial as a whole": at [160];

(10) The evidentiary onus is on the Appellants to establish a miscarriage of justice: at [164];

(11) The Appellants provided no evidence of attempts to contact Foong or requests to the Prosecutor to do so: at [164]; and

(12) There was no basis for the court to conclude that Foong would in fact have given an account consistent with the Appellants' case in this matter: at [167].

Per Garling J, agreeing with Price J on Ground 2 but dissenting on Ground 1:

(13) Foong should have been called as a witness: at [130];

(14) The sole basis for the Prosecutor not calling Foong was the untested allegation that Foong had once attempted to construct false evidence: at [132];

(15) The Prosecutor's suspicion that Foong would give unreliable evidence was not an adequate basis to decline to call him when the Prosecutor did not know what evidence Foong would give: at [135];

(16) The only inference to be drawn was that the prosecution made a deliberate, tactical decision not to call Foong: at [137]; and

(17) The failure to call Foong gave rise to a miscarriage of justice: at [151].

Supreme Court of NSW

Young Mining Co Pty Ltd v Minister for Industry, Resources and Energy NSW [2016] NSWSC 1193 (Stevenson J)

Facts: On 22 November 2013, the Minister for Industry, Resources and Energy NSW (the Minister) sought a security deposit from the Plaintiff, Young Mining Co Pty Limited, as a term of Consolidated Mining Lease 15 (in respect of the Thuddungra magnesite mine near Young), for the amount of $1,040,000. On 8 June 2016, following no payment by the Plaintiff for the security deposit, the Minister issued a direction under s 240AA of the *Mining Act 1992* (NSW) directing the Plaintiff to suspend all mining operations, with effect 18 July 2016. On 15 July 2016, the Minister acceded to the Plaintiff's request to extend the time for the provision of the security until 18 August 2016. On 19 July 2016, the Plaintiff commended proceedings in the Land and Environment Court seeking an order that the 8 June 2016 suspension notice itself be suspended until 12 September 2016. Moore J ordered, on this day, that the 8 June 2016 suspension notice be varied so that the date of suspension be extended to 4.00 pm on 23 August 2016; however, due to a dispute regarding the Land and Environment Court's jurisdiction to make such order, or any like order, Moore J transferred the proceedings to the Supreme Court. The Plaintiff contended before the Supreme Court that jurisdictional error occurred, on the part of the Minister, or "*Wednesbury* unreasonableness", by deciding not to extend the suspension time after acting up until now with "great elasticity."

Issues:

(1) Whether or not the decision of the Minister not to allow the Plaintiff further time to provide security under a mining lease was so unreasonable as to bespeak jurisdictional error, or "Wednesbury unreasonableness".

Held: The Plaintiff's application for interlocutory relief is refused with costs: at [30]; proceedings dismissed with costs: at [31]:

(1) No conclusion as to the financial position of the Plaintiff could be made, which would ascertain when security would be available: at [26];

(2) This conclusion was considered directly relevant to determine whether the Minister acted unreasonably in refusing further extensions: at [27]; and

(3) No conclusion could therefore be made that there was a serious question to be tried that it is unreasonable for the Minister to not further extend the time for provision of the security, let alone to conclude that the Minister's decision not to do so was so unreasonable that no reasonable Minister could reach it: at [28].

Land and Environment Court of NSW

- Judicial Review

Bay Simmer Investments Pty Ltd v The State of New South Wales [2016] NSWLEC 123 (Pain J)

Facts: The Applicant runs a business at Walsh Bay Sydney. The State of New South Wales, the First Respondent, through its entity Arts NSW, obtained development consent for a concept plan for the Walsh Bay Arts Precinct (WBAP), a staged development application. The WBAP is state-significant development (SSD) as provided in *State Environmental Planning Policy (State and Regional Development)* 2011. The Applicant commenced judicial review proceedings challenging the grant of development consent under s 89E of the *Environmental Planning and Assessment Act 1979 (NSW)* (EPA Act) by the delegate of the Second Respondent, the Minister for Planning (the Minister) alleging failures in the approval process.

Issues:

(1) Whether s 79C(1) of the EPA Act applied to the assessment of the SSD application so that construction impacts were a mandatory relevant consideration.

(2) Whether the Minister failed to consider a mandatory relevant matter under s 79C(1)(b).

(3) Whether the Minister failed to consider a mandatory relevant matter under s 79C(1)(d).

(4) Whether the Minister failed to make enquiries; and

(5) Whether the Minister's decision was unreasonable in the *Wednesbury* sense.

Held: Dismissing the summons and ordering the Applicant to pay the First Respondent's costs:

(1) The factual matter at the core of grounds (2) to (5) was the decision of the delegate not to assess and consider construction impacts of building the WBAP: at [3]);

(2) The SSD application does not seek consent for development as defined in the EPA Act: at [39]. Consent was granted to a concept plan did not permit construction. There is a distinction between applications made under Div 2 and Div 2A (staged development), with staged development applications involving subsequent applications for future physical works: at [47]-[48];

(3) The statutory scheme in Div 2A expressly provides for the approval of a concept in precisely the manner that occurred in relation to the WBAP: at [48];

(4) As specified by the chapeau, s 79C(1) applies to the extent it is relevant to the staged development application: at [49].

(5) Construction impacts are not a mandatory relevant consideration in the staged development envisaged by the concept proposal approved: at [60];

(6) As construction impacts were not a mandatory relevant consideration under s 79C(1)(b), submissions dealing with construction noise were also not mandatory relevant considerations: at [69];

(7) There was no duty to consider construction impacts as a mandatory relevant consideration in relation to the development application and there was therefore no mandatory duty placed on the delegate to inquire into those impacts: at [72]; and

(8) As there was no duty to consider construction-related impacts as a mandatory relevant consideration in the manner contended for the Applicant, the delegate's decision not to take into account such impacts could not be unreasonable in the *Wednesbury* sense: at [74].

Cheetham v Goulburn Motorcycle Club Incorporated [2016] NSWLEC 80 (Moore J)

Facts: Goulburn Mulwaree Council (the Council) granted Goulbourn Motorcycle Club Incorporated (the Club) development consent for what the Council regarded as being a development for the purposes of a "recreation facility (outdoor)" pursuant to the *Goulburn Mulwaree Local Environmental Plan* 2009 (the LEP). The Club made an application to the Council under s 82A of the *Environmental Planning and Assessment Act 1979 (NSW)* (the EP&A Act) seeking to change conditions of the development consent attached to the Council's approval, which, following the Council's review, led to an amended condition. The outcome of the alteration was to effect a tripling of the frequency with which the Club council conducted events at the proposed facility and also provided certainty that future operations would not require further applications to the Council. The Cheethams commenced proceedings seeking to have the development consent with the amended condition set aside on the basis that, properly characterised, the development for which application was made should be regarded as a "recreation facility (major)" and that pursuant to the Land Use Table the development was prohibited within the RU6 Transition zone within which the Club's site is located. The LEP defines "recreation facility (major)" as "a building or place used for large-scale sporting or recreation activities that are attended by large numbers of people which includes theme parks, sports stadiums, showgrounds, racecourses and motor racing". The Cheethams submitted that, tested against this definition, the development properly fell within this category.

Issues:

(1) Whether the development was properly characterised as "recreation facility (outdoor)" or "recreation facility (major)" under the LEP and, therefore, whether the development was permissible within the zone.

Held: Dismissing the appeal with costs reserved:

(1) Proper consideration of the proposed facility, when tested against the definition of "recreation facility (major)", disclosed no factual features that would have required the Council to determine its characterisation as falling within that definition: at [83]; and

(2) The implied conclusion of the Council that the first elements of the definition was not applicable to the proposed facility was open to it and, on an assessment of fact and degree available to the Council, it was also open to the Council to conclude that the proposed facility did not constitute a "motor-racing track" of a type requiring to be brought within the inclusionary elements of the concluding section of the definition of "recreation facility (major)": at [84].

Fenwick v Woodside Properties Pty Ltd [2016] NSWLEC 104 (Pepper J)

Facts: Woodside Properties Pty Ltd (Woodside) was granted development consent on 28 September 2005 by Wingecarribee Shire Council (the Council) for a 33-lot subdivision (the consent). Woodside subsequently applied, on a number of occasions, to modify the consent. Approval was granted for the modification applications on 12 November 2013 (Mod 1), on 10 December 2014 (Mod 4), and on 25 February 2016 (Mod 5). Woodside sought a further modification (Mod 6). Mod 6 resulted in a deemed refusal against which Woodside commenced Class 1 proceedings (the Class 1 proceedings).

Ms Fenwick lives adjacent to the land to which the consent had been granted. The Council had notified her of the original development application, but had not notified her of the modification applications, Mod 1 or Mod 4. Ms Fenwick commenced proceedings seeking declarations that Mod 1, Mod 4 and Mod 5 were invalid (Class 4 proceedings).

Issues:

(1) Whether an extension of time to commence judicial review proceedings should be granted.

(2) Whether Mod 1 or Mod 4 were invalid by reason of the failure to notify; and

(3) Whether Mod 5 was invalid because it was based, in part, on the earlier invalid modification applications.

Held: Declaring Mod 1, Mod 4 and Mod 5 to be invalid:

(1) The challenge to Mod 1 and Mod 4 required an extension of time within which to commence judicial review proceedings: r 59.10 of the *Uniform Civil Procedure Rules* 2005. Because the application was unopposed, Ms Fenwick was unaware of the modification applications and, upon becoming aware, quickly commenced the Class 4 proceedings, it was appropriate grant an extension of time: at [8];

(2) Mod 1 and Mod 4 were required to be notified or advertised in the same manner in which they had originally been notified or advertised: at [10]. Because the notification requirements had not been complied with, Mod 1 and Mod 4 were infected with jurisdictional errors and were invalid: at [18]-[19]; and

(3) The approval of Mod 5 was in several material respects premised on Mod 1 and Mod 4: at [21]. Insofar as the Council took into account Mod 1 and Mod 4 in determining Mod 5, because the former were invalid the Council took into account an irrelevant consideration. Mod 5 therefore also contained a jurisdictional error and was invalid: at [25].

Hunter's Hill Council v Minister for Local Government; Lane Cove Council v Minister for Local Government; Mosman Municipal Council v Minister for Local Government; North Sydney Council v Minister for Local Government; Strathfield Municipal Council v Minister for Local Government [2016] NSWLEC 124 (Moore J)

Facts: The Minister for Local Government (the Minister) made proposals under s 218E(1) of the *Local Government Act 1993 (NSW)* (the LG Act) to amalgamate the local government areas of Hunter's Hill, Lane Cove and Ryde, the local government areas of Mosman, North Sydney and Willoughby and the local government areas of Burwood, Canada Bay and Strathfield. The Minister referred the proposals under s 218F(1) of the LG Act to the Acting Chief Executive of the Office of Local Government (the Departmental Chief Executive) for examination and report. The Departmental Chief Executive delegated those functions to various Delegates. The Delegates were required, under s 263(1) of the LG Act, to examine and report on the proposal. For the purpose of exercising those functions, s 263(2A) and s 263(2B) of the LG Act required each Delegate to hold an inquiry and give reasonable public notice of the holding of this inquiry. Each Delegate furnished his completed examination report (the Delegate's report) to the Local Government Boundaries Commission (the Boundaries Commission) for review and comment. The respective Delegate's reports recommended that each proposal be implemented. The Boundaries Commission was required, under s 218F(6)(b) of the LG Act, to review the Delegate's report and send its comments to the Minister. Hunter's Hill Council, Lane Cove Council, Mosman Municipal Council, North Sydney Council and Strathfield Municipal Council (the Applicants) each opposed their respective amalgamation proposal.

Common Issues:

(1) Whether each Delegate gave reasonable public notice of the holding of the inquiry in accordance with s 263(2B) of the LG Act.

(2) Whether the scope of the public notice was sufficient in accordance with s 263(2B) of the LG Act.

(3) Whether each Delegate held an inquiry into the proposal satisfying the mandate in s 263(2) of the LG Act;

(4) Whether each Delegate denied the Council procedural fairness in connection with the inquiry or examination;

(5) Whether each Delegate addressed the relevant mandatory matters in s 263(3) when furnishing his report; and

(6) Whether the statutory amalgamation process undertaken in respect of the proposal was invalidated because it was conducted on the misleading premise that KPMG had provided independent analysis of the proposal.

Specific Issues:

Hunter's Hill, Lane Cove and Strathfield Municipal Councils

(7) Whether the information concerning the location of the relevant Delegate's public inquiry sessions to which interested people or organisations were invited was insufficient.

Hunter's Hill and Lane Cove Councils

(8) Whether the Delegate's analysis of the financial advantages and disadvantages of the proposal was not carried out in accordance with s 263(3)(a) of the LG Act for relying on incorrect (earlier) modelling rather than on correct (more recent) figures.

(9) Whether the Hunter's Hill and Lane Cove local government areas were contiguous as required by s 204(3) of the LG Act.

(10) Whether by operation of s 205(3)(b) of the LG Act, Hunter's Hill and Lane Cove local government areas were deemed to be contiguous because the Fig Tree Bridge linked the two areas.

(11) Whether the Delegate denied the Councils procedural fairness in taking into account material provided to him without disclosing the substance of the information before him, or providing access to the information or an opportunity to comment on the information in preparation of his report.

Lane Cove Council

(12) Whether the information about the location of the venue for the public inquiry sessions was sufficient to satisfy the 'reasonable public notice" requirements of s 263(2B) of the LG Act;

Mosman and North Sydney Councils

(13) Whether the statutory process undertaken in respect of the proposal was invalidated because the Acting Chief Executive chose to delegate the mandated functions to different Delegates when, the Councils submitted, two proposals had been subject to a single, composite referral.

(14) Whether the process undertaken by the Delegate in examining and reporting upon this proposal should have had regard to two other proposals being the original proposal concerning the amalgamation between North Sydney and Willoughby and the Pittwater, Warringah and Manly Councils amalgamation;

(15) Whether the Delegate failed adequately to consider mandatory relevant factors pursuant to s 263 (a), (e1), (e2) and (e5) of the LG Act.

Mosman Municipal Council

(16) Whether the Delegate constructively failed to exercise his jurisdiction in not holding a poll to ascertain the attitude of the residents and ratepayers of the council areas for the purposes of s263(3)(d) of the LG Act.

North Sydney Council

(17) Whether the Delegate failed to discharge his functions under s 263(2) of the LG Act by not holding a meeting in the North Sydney local government area.

Strathfield Municipal Council

(18) Whether the Delegate failed adequately to consider mandatory relevant factors pursuant to s 263(3) (a), (b) and (e5) of the LG Act;

Held: Hunter's Hill and Lane Cove Councils' proceedings dismissed with a bare declaration made in Strathfield, Mosman and North Sydney Councils' proceedings that the report furnished by the Delegate to the Boundaries Commission was not a valid report in satisfaction of the requirements of s 218F(6)(a) of the LG Act:

Common Issues:

(1) Reasonable public notice of the holding of the inquiry was given in accordance with s 263(2B) of the LG Act: at [175]. Adopting the reasoning of Preston CJ in *Woollahra Municipal Council v Minister for Local Government* [2016] NSWLEC 86 ("*Woollahra*") the notices satisfied the three requirements arising from subss 263(1), (2A) and (2B) of the LG Act as the notices specified when and where the

inquiry was to be held, the proposal in relation to which the inquiry was to be held and the purpose of holding the inquiry: at [154];

(2) The appropriateness and adequacy of the notice required by s 263(2B) were satisfied in each of the proceedings as the content, timing and method of the giving of the notices were reasonable: at [174]-[175];

(3) There was no denial of procedural fairness by any Delegate in the holding and conduct of any of the public inquiry sessions: at [188];

(4) Adopting the reasoning at [111] in *Woollahra*, each relevant Delegate did not fail to permit and answer merit questions or engage in a dialogue with those at the relevant public inquiry sessions, as this is not what is mandated by s 263 of the LG Act: at [182] and [184]-[185];

(5) Each Delegate's examination and report on the proposal satisfied the requirements of ss 218F(1) and 263(1) of the LG Act: at [191]-[195]. The duty to provide the report was to provide it to the Boundaries Commission so that that Boundaries Commission could review the report and send its comments to the Minister as required by s 218F(6)(b). There was no obligation to interpose any reference of a Delegate's report to the relevant Council in the mandated steps: at [194];

(6) There was no infecting of any of the Delegates' processes in these proceedings arising out of any statement that KPMG was independent: at [218];

Specific Issues:

Hunter's Hill, Lane Cove and Strathfield Municipal Councils

(7) The specific pleading by Hunter's Hill, Lane Cove and Strathfield Municipal Council was without foundation: at [271]. The notices were sufficiently specific under the circumstances to permit a person desiring to attend the inquiry to be held by either Delegate to be able to ascertain the venue without there being any realistic risk of not being able to do so or going to the wrong place: at [270];

Hunter's Hill and Lane Cove Councils

(8) There was no valid basis for complaint in relation to s 263(3)(a) of the LG Act that the Delegate relied on incorrect (earlier) modelling as at its highest there could have been an error by the Delegate in relying on the wrong set of facts but there could be no suggestion that there was no factual basis for the conclusion which he reached: at [289]-[290];

(9) The operation of s 205(3)(b) had the effect of incorporating the Fig Tree Bridge within the local government areas of Hunter's Hill and Lane Cove rendering the two areas contiguous: at [353]-[354];

(10) Section 263 of the LG Act does not so require that information obtained by the Boundaries Commission or Departmental Chief Executive must be publicly disclosed and publicly adduced at inquiry under the section and so there was no denial of procedural fairness: at [368];

Lane Cove Council

(11) There was no foundation for the specific pleading made by Lane Cove Council regarding the location of the venue for the public inquiry sessions and the lack of public transport to it: at [371]. Beyond reasonable public notice as required by s 263(2B) and the right of the public to attend the inquiry (s 263(5)) there are no statutory requirements applicable in this respect: at [373];

Mosman and North Sydney Councils

(12) There was no express or implied prohibition in the LG Act prohibiting the Acting Chief Executive from delegating the mandated referred functions to two Delegates: at [388];

(13) The Delegate failed to consider a mandatory relevant factor and conduct any constructive examination to ensure that the opinions of each of the diverse communities of the resulting area or areas were reflectively represented pursuant to s 263(e5) of the LG Act: at [443]-[444];

Mosman Municipal Council

(14) The Delegate did not constructively fail to exercise his jurisdiction in not holding a poll pursuant to s 263(3)(d) of the LG Act: at [465]. The Delegate was aware that he could conduct a poll but he exercised his discretion pursuant to s 265(1) of the LG Act not to do so, which was not unreasonable or impermissible: at [464];

North Sydney Council

(15) The Delegate did not fail to discharge his function under s 263(2) of the LG Act by not holding a meeting in the North Sydney local government area as there are no statutory requirements for a public inquiry, beyond reasonable public notice as required by s 263(2E) and the right of the public to attend the inquiry (s 263(5)) and the selection of venues for the sessions of his public inquiry was not unreasonable: at [468]-[470];

Strathfield Municipal Council

(16) The Delegate failed to consider the mandatory relevant factor in s 263(3)(b) of the LG Act requiring him to have regard to "the community of interest and geographic cohesion in the existing areas and in any proposed new are": at [491] . The Delegate misconstrued this requirement in the manner he defined 'communities of interest': at [488] – [490]; and

(17) The Delegate failed to consider the mandatory relevant factor in s 263(e5) of the LG Act to ensure that the opinions of each of the diverse communities of the resulting area or areas were reflectively represented as he failed to intellectually engage with the matter and confined himself to "culturally" diverse communities: at [497]-[499].

Kinloch v Newcastle City Council [2016] NSWLEC 109 (Sheahan J)

Facts: The Applicants (the Kinlochs) challenged a development consent granted by Newcastle City Council (the Council) to Ms Dart (the First Respondent) in respect of a property she owned, as a joint tenant with Mr Dart (the Third Respondent), at 18 Bond Street, Newcastle. The Kinlochs' central complaint was not the merits assessment of the Dart development application (the DA) but the fact that the Council's assessing officer purported to determine the application and did not refer it to the Council's Development Assessment Committee (the DAC), therefore denying the Kinlochs the "procedural fairness" they alleged would result from an opportunity to voice their concerns to elected councillors. Central to the dispute was the interpretation of the Council's Instrument of Delegation, cl 1.3 of which requires that the DAC be delegated authority to determine applications under the *Environmental Planning and Assessment Act 1979* (the EPA Act) if council officers recommend approval of a development application which conflicts with the Council's adopted objectives and policies, except where the conflict is minor and strict compliance would be unreasonable or unnecessary. The Kinlochs' position was that the conflict between the DA and the Council's adopted objectives and policies, contained in the DCP, was not minor, and, accordingly, should have triggered delegation of the decision-making authority to the DAC.

Issues:

(1) Did the Council's assessing officers have authority to determine the development application or, conversely, by virtue of cl 1.3 of the Instrument of Delegation, was the relevant delegation engaged, such that the DAC was required to assess and determine it? In terms of cl 1.3:

  (a) were the conflicts between the DA and Council's adopted objectives and policies "more than minor"? and

  (b) was strict compliance with the Council's adopted objectives and policies unreasonable or unnecessary?

Held: Upholding the appeal:

(1) In the hierarchy of instruments and their objectives and policies, compliance with the applicable local environmental plan is necessary, whilst the provisions of the DCP are guiding principles only: at [80];

(2) The employment of the conjunctive "and" in cl 1.3, viz "except where the conflict is minor and strict compliance would be unreasonable or unnecessary"; and the unreasonable outcome that would result if an application were not to proceed to the DAC - because it may only satisfy one, but not both, of these tests - required cl 1.3 to be interpreted in a composite way: at [90];

(3) The conflicts between the DA's provision for building envelope, including setbacks: at [108] and view loss: at [128], and the respective DCP controls related to these, constituted conflicts with the Council's adopted objectives and policies that were "more than minor", and provided reasonable grounds for referral to the DAC: at [128];

(4) The conflicts in relation to privacy: at [121] and landscaped area: at [136] were not considered to be "more than minor"; and

(5) A previous consent for a site, having achieved commencement, albeit in only a minimal way, is not a relevant consideration in a merits assessment of a new DA: at [144].

Ku-ring-gai Council v Mr Garry West as delegate of the Acting Director-General, Office of Local Government [2016] NSWLEC 118 (Moore J)

Facts: On 6 January 2016, the Minister for Local Government (the "Minister") made a proposal (the proposal) under s 218E(1) of the *Local Government Act 1993 (NSW)* (the "LG Act") to amalgamate the local government areas of Hornsby Shire (north of the M2) and Ku-ring-gai. The Minister referred the proposal under s 218F(1) of the LG Act to the Acting Chief Executive of the Office of Local Government (the "Departmental Chief Executive") for examination and report. The Departmental Chief Executive delegated those functions to a delegate, Mr Garry West (the Delegate). The Delegate was required, under s 263(1) of the LG Act, to examine and report on the proposal. For the purpose of exercising those functions, s 263(2A) and s 263(2B) of the LG Act required the Delegate to hold an inquiry and give reasonable public notice of the holding of this inquiry. The Delegate furnished his completed examination report (the Delegate's report) to the Local Government Boundaries Commission (the Boundaries Commission) for review and comment. The Delegate's report recommended that the proposal be implemented. The Boundaries Commission was required, under s 218F(6)(b) of the LG Act, to review the Delegate's report and send its comments to the Minister. The Applicant, Ku-ring-gai Council (the Council), opposed the amalgamation proposal.

Issues:

(1) Whether the Delegate gave reasonable public notice of the holding of the inquiry in accordance with s 263(2B) of the LG Act.

(2) Whether the Delegate held an inquiry into the proposal in accordance with s 263(2A) of the LG Act.

(3) Whether the statutory amalgamation process undertaken in respect of the proposal was invalidated because it was conducted on the misleading premise that KPMG had provided independent analysis of the proposal.

(4) Whether the Delegate denied the Council procedural fairness in taking into account material provided to him without disclosing the substance of the information before him, or providing access to the information or an opportunity to comment on the information in preparation of his report.

(5) Whether the Delegate failed to hold an inquiry into the proposal in accordance with s 263(2A) of the LG Act on the basis that changes were made to what the Council considered to be the Proposal after the public inquiry was held, mandating the necessity for a further inquiry.

(6) Whether the refusal to provide the full KPMG documents was a denial of procedural fairness by the Department of Premier & Cabinet as these documents should have been disclosed and taken into account by the Delegate.

(7) Whether the notice of the location of the Delegate's inquiry to which interested people or organisations were invited was insufficient and also geographically misleading.

(8) Whether the Delegate failed to give consideration to what the Council said was the impact on rates pursuant to s 263(3)(a) of the LG Act causing his reporting to miscarry.

(9) Whether the Delegate declined to give consideration to the proposed excision of the area south of the M2 and that this caused his reporting to miscarry; and

(10) Whether the Boundaries Commission, did not fulfil the statutory tasks set for it under s 218F(6)(b) of the LG Act so as to vitiate the process.

Held: Proceedings dismissed and costs reserved:

(1) The notice was sufficient pursuant to 263(2B) of the LG Act. The alleged defects regarding the requirement of s 263(2B) of the LG Act for the giving of "reasonable notice" were dealt with in *Hunter's Hill Council v Minister for Local Government; Lane Cove Council v Minister for Local Government; Mosman Municipal Council v Minister for Local Government; North Sydney Council v*

Minister for Local Government; Strathfield Municipal Council v Minister for Local Government [2016] NSWLEC 124 (*Hunter's Hill*) (at [152]-[175]) and the discussion and conclusions there set out were equally applicable in these proceedings: at [26]-[27];

(2) The Inquiry that was held by the Delegate into the proposal satisfied the requirements under s 263 of the LG Act. The alleged defects in the conduct of the inquiry by the Delegate were on general grounds dealt with in *Hunter's Hill* (at [176]-[188]) and the discussion and conclusions there set out were equally applicable in these proceedings: at [29]-[30];

(3) There was no infecting of any of the Delegate's processes arising out of any statement that KPMG was independent. The contention that KPMG was not independent and that the Delegate relied on the assertion vitiating the process was dealt with in *Hunter's Hill* (at [196]-[258]) and the discussion and conclusions there set out were equally applicable in these proceedings: at [32]-[33];

(4) Section 263 of the LG Act does not so require that information obtained by the Boundaries Commission or Departmental Chief Executive must be publicly disclosed and publicly adduced at enquiry under the section: at [45];

(5) The Delegate did not fail to hold an inquiry into the proposal in accordance with s 263(2A) of the LG Act on the basis that changes were made to what the Council considered to be the Proposal after the public inquiry was held. Properly defined the proposal did not encompass the entirety of the Minister's 6 January 2016 document, only that set out in the first sentence of the Executive Summary was included and all that preceded or followed that sentence was merely advocacy material to enable a proper understanding of the proposal: at [71]-[77];

(6) The complaint concerning the availability of the full KPMG documents to the Delegate, was dealt with in *Hunter's Hill* (at [218]-[254]) and the reasoning there set out was equally applicable in these proceedings: at [78]-[81];

(7) The notice of the location of the Delegate's inquiry was not geographically misleading as the identification given in the notice was of sufficient particularity so as to provide an adequate description of the venue in a fashion that would enable anybody wishing to attend the inquiry to be able to inform themselves sufficiently: at [92];

(8) There was no failure by the Delegate to consider the impact on rates given the operation of s 529 and the special rating provisions of the LG Act and the fact that there was no basis to find that the weight given to the rating equity issue was "manifestly unreasonable": at [140]-[141];

(9) The Delegate failed to consider the impact of the proposed merger on the residents and ratepayers of the area south of the M2 Motorway that had been portion of the Hornsby Shire Council local government area and therefore omitted a significant element of what was required of him by s 263(3): at [154]-[156];

(10) The Boundaries Commission did not fail its statutory task pursuant to s 218F(6) of the LG Act as the Boundaries Commission is not to examine and report on the Minister's proposal, but is directed to review the Chief Executive's report and send its comments to the Minister: at [163]-[164];

(11) Despite the failure of the Delegate to consider the impact of the proposed merger on the residents and ratepayers of the area south of the M2 Motorway, a bare declaration was inappropriate as this area had already been excised from the Hornsby local government area and formed part of the City of Parramatta local government area as a consequence of the *Local Government (City of Parramatta and Cumberland Councils) Proclamation* 2016 made on 12 May 2016 and as such a declaration would have had no utility: at [166].

Oberon Council v Minister for Local Government; Cabonne Shire Council v Minister for Local Government; McAlister and Graham v Minister for Local Government [2016] NSWLEC 131 (Preston CJ)

Facts: On 6 January 2016, the Minister for Local Government (the Minister) made proposals under s 218E(1) of the *Local Government Act 1993 (NSW)* (the LG Act) to amalgamate various rural local government areas: one to amalgamate the areas of Oberon and Bathurst (the Oberon proposal), a second to amalgamate Cabonne, Blayney and Orange City (the Cabonne proposal) and a third to amalgamate Gundagai and Cootamundra (the Gundagai proposal). The Minister referred the proposals

under s 218F(1) of the Act to the Acting Chief Executive of the Office of Local Government (the Departmental Chief Executive) for examination and report. The Departmental Chief Executive delegated those functions to a delegate (the Delegate) for each proposal. Each Delegate was required under s 263(1) of the LG Act to examine and report on the proposal. For the purpose of exercising those functions, s 263(2A) and s 263(2B) of the LG Act required each Delegate to hold an inquiry and give reasonable public notice of the holding of this inquiry. Between mid-March and early April 2016, each Delegate furnished their completed report (the Delegate's report) to the Local Government Boundaries Commission (the Boundaries Commission) for review and comment. Each Delegate's report recommended that the proposal be implemented. The Boundaries Commission was required under s 218F(6)(b) of the LG Act to review each Delegate's report and send its comments to the Minister. On 3 May 2016, the Minister decided to recommend to the Governor, pursuant to s 218F(7) of the LG Act, that the Gundagai proposal be implemented. On 4 May 2016, the Minister decided that the Oberon and Cabonne proposals were to be implemented subject to the outcome of the proceedings affecting these proposals. The Governor, by proclamation under s 218A(1) (the Proclamation), amalgamated the areas of Gundagai and Cootamundra on 12 May 2016. Oberon Council opposed the Oberon proposal, Cabonne Shire Council opposed the Cabonne proposal and Gundagai Shire Council opposed the Gundagai proposal. Due to the dissolution of Gundagai Shire Council, the former mayor and deputy mayor were substituted as the applicants in the proceedings challenging the Gundagai proposal.

Issues:

(1) Whether the Minister validly made the proposals under s 218E(1) of the LG Act.

(2) Whether the Minister's referral of the proposals under s 218F(1) of the LG Act for examination and report was manifestly unreasonable.

(3) Whether each Delegate gave reasonable public notice of the holding of the inquiry in accordance with s 263(2B) of the LG Act.

(4) Whether each Delegate held an inquiry into the proposal in accordance with s 263(2A) of the LG Act.

(5) Whether each Delegate examined the proposal in accordance with ss 218F(1) and 263(1) of the LG Act and, in so doing, adequately considered the factors in s 263(3) of the LG Act.

(6) Whether each Delegate accorded procedural fairness to the relevant applicant councils and their ratepayers and residents in connection with the inquiry or examination for each proposal.

(7) Whether the Boundaries Commission reviewed and commented on each Delegate's report in accordance with s 218F(6)(b) of the LG Act.

(8) Whether the Boundaries Commission accorded procedural fairness to the relevant applicant councils and their ratepayers and residents in reviewing each Delegate's report.

(9) Whether the statutory amalgamation process undertaken in respect of each proposal was invalidated because it was conducted on the misleading premise that KPMG had provided independent analysis of the proposal.

(10) Whether the Minister made a valid recommendation under s 218F(7) to the Governor to implement the Gundagai proposal;

(11) Whether the Minister invalidly made a conditional recommendation under s 218F(7) to the Governor to implement the Oberon and Cabonne proposals; and

(12) Whether cl 5(1) of the Proclamation, which implemented the Gundagai proposal, was *ultra vires* for impermissibly conferring power on the Minister.

Held: In each of the proceedings: proceedings dismissed; Applicant to pay the Respondents' costs:

(1) The Minister validly made each proposal under s 218E(1) of the LG Act: at [98]-[99]. The evidence did not establish that the Minister: had not made the proposals, that Cabinet had instead made the proposals, that the decision to make the proposals was predetermined by Cabinet or that the consultant KPMG and the Department of Premier & Cabinet had made the proposals as part of some joint venture: at [102]-[103]. There was no scope to judicially review the decision to make the proposals on the ground of manifest unreasonableness: at [104]. Regardless, the Minister's decision was not manifestly unreasonable: at [105]-[110];

(2) The Minister validly referred each proposal under s 218F(1) of the LG Act: at [120]. There was no scope to judicially review the referral of the proposals on the ground of manifest unreasonableness but, regardless, the decision to refer the proposals was not manifestly unreasonable: at [122]-[123];

(3) Reasonable public notice of the holding of each inquiry was given in accordance with s 263(2B) of the LG Act: at [135]. The content of the public notices given satisfied the three requirements arising from subs 263(1), (2A) and (2B) of the LG Act as the notices specified: when and where the inquiry was to be held, the proposal in relation to which the inquiry was to be held and the purpose of holding the inquiry: at [139]-[145]. The public notices given were reasonable: at [146]-[147];

(4) The inquiry that was held by each Delegate satisfied the statutory requirements of an inquiry under s 263 of the LG Act: at [175]. The inquiry required to be held under s 263 of the LG Act was not the examination of the proposal and was not required to be conducted as an examination of the proposal: at [176]. Section 263 did not require that the inquiries follow a particular procedure or that the Minister make publicly available his reasons or the evidentiary basis for making each proposal: at [177]-[183];

(5) Each Delegate's examination and report on the proposal satisfied the requirements of s 263 of the LG Act: at [307]. The Delegates were not required to 'examine' the factors in s 263(3) of the LG Act or make a finding on every question of fact relevant to each factor: at [308]-[309]. The Delegates did not fail to have regard to any of the factors in s 263(3) of the LG Act: at [312]. The discussion by each Delegate on the factors was sufficient to evidence that regard was had to the factors at the level of particularity required by the LG Act: at [314]. In considering the factors, the Delegates did not fall into legal error by: misinterpreting the factors, assessing the factors in a factually erroneous way, failing to obtain particular information or failing to give reasons for particular findings or conclusions: at [319]-[323];

(6) The Delegates did not deny the applicant councils or their ratepayers and residents procedural fairness by: any failure to give reasonable public notice of the holding of the inquiries, imposing procedural limitations on public participation at the inquiries or being "uninformed and blinkered" in conducting the inquires: at [332]-[336]. The Delegates did not deny the applicants procedural fairness by not disclosing various documents prepared by KPMG or by not providing the applicants with the opportunity to respond to submissions of other persons which were potentially adverse to the applicants: at [337]-[338];

(7) The Boundaries Commission's review and comment on each Delegate's report satisfied the statutory requirements in s 218F(6)(b) of the LG Act: at [355]. The requirement to review and comment on the proposals did not require the Boundaries Commission to re-examine the merits of each proposal: at [356];

(8) The Boundaries Commission did not deny the applicants procedural fairness by not: furnishing the applicants with a copy of each Delegate's report, providing an opportunity to the applicants to comment on each Delegate's report or considering any comments by the applicants in reviewing each Delegate's report: at [377]. A duty to accord procedural fairness did not attach to the exercise of the statutory power under s 218F(6)(b) of reviewing and commenting upon each proposal: at [378]. The exercise of this statutory power was not apt to adversely affect the applicants: at [378];

(9) The statements concerning the independence of KPMG's analysis and modelling were not misleading or, even if they were, did not invalidate the statutory amalgamation process in respect of the proposals: at [421]. The evidence did not demonstrate that KPMG was not an independent contractor providing independent advice and services and, therefore, the relevant statements were not misrepresentations: at [422]-[424]. Regardless, any such misrepresentation could not vitiate any step in the statutory process for the proposals: at [425];

(10) The Minister did not make a decision under s 218F(7) to recommend to the Governor that the Oberon or Cabonne proposals be implemented: at [457];

(11) The Minister's decision under s 218F(7) to recommend to the Governor that the Gundagai proposal be implemented was not beyond power: at [458]. The LG Act did not prevent multiple proposals concerning the Gundagai local government area from being dealt with separately and concurrently: at [460]. The making and referral of a second proposal concerning the Gundagai local government area, subsequent to the making and referral of the Gundagai proposal, did not preclude the Minister

from validly recommending to the Governor under s 218F(7) that the Gundagai proposal be implemented: at [462]; and

(12) Clause 5(1) of the Proclamation, which implemented the Gundagai proposal, was not *ultra vires* by impermissibly conferring power on the Minister. This clause was authorised by ss 218C(1) and 213 of the LG Act: at [463].

People for the Plains Incorporated v Santos NSW (Eastern) Pty Limited [2016] NSWLEC 93 (Moore J)

Facts: People for the Plains Incorporated (the Applicant) commenced two sets of proceedings against a development project being constructed by the First, Second and Fourth Respondents (the Santos interests). The Secretary of the Department of Industry was the Third Respondent to the proceedings. The first proceedings were judicial review proceedings challenging the validity of a production water project at Leewood being undertaken by the Santos interests on the basis that the Applicant considered that the relevant approvals given under the *Petroleum (Onshore) Act 1991 (NSW)* (the PO Act) were void and of no effect. The second proceedings were civil enforcement ones brought pursuant to s 123 of the *Environmental Planning and Protection Act 1979 (NSW)* (the EPA Act). The first proceedings were commenced in the Supreme Court but were transferred to the land and Environment Court to be heard with the second proceedings.

The Santos interests held three titles under the PO Act: a petroleum exploration licence (PEL 238), a petroleum production licence (PPL 3) and a petroleum assessment lease (PAL 2). The proposed Leewood facility was to be constructed within PAL 2. In order to determine the potential for the extraction of hydrocarbons, the process to be undertaken across the three titles involved drilling holes which would produce significant volumes of produced water. This produced water was proposed to be transferred to the water treatment facility at Leewood where it would undergo a process that would separate the produced water into brine and a second element being near drinkable water. The brine would be stored at the Leewood facility, whilst the near drinkable water would be pumped to another area (land owned by the Santos interests) to be used for the irrigation of lucerne crops, with the resultant harvested fodder to be sold commercially.

With respect to the first set of proceedings, the Applicant contended that pursuant to ss 29 and 33 of the PO Act, to the extent that activities on PEL 238 comprised prospecting, those activities must take place within that petroleum title and are not able to be transferred to another petroleum title held by the Santos interests. The Applicant argued that the project was petroleum exploration and pursuant to cl 6(d), the *State Environmental Planning Policy (Mining and Extractive Industries)* 2007 (the Mining SEPP) did not require development consent and that it was being carried out on land owned by the Santos Interests. In the second set of proceedings, the Applicant argued that the *State Environmental Planning Policy (Infrastructure)* 2007 (the Infrastructure SEPP) or the *Narrabri Local Environmental Plan* 2012 (the Narrabri LEP) applied, or potentially applied, to the project that rendered it impermissible. The Santos interests contended that it was unnecessary to go beyond the Mining SEPP on the basis that proper characterisation of the development was for the purpose of petroleum exploration which was permissible without development consent. The matter of characterisation of the activities was dealt with first given this determination would potentially dispose of both proceedings.

Issues:

(1) Whether any of the activities of (and works associated with) the Leewood facility could be characterised as being for the purposes of "prospecting" within the meaning of that term in the PO Act.

(2) Whether the meaning of "on the land comprised in the" licence or lease in ss 29 and 33 of the PO Act was confined to the nominated petroleum title or whether it should be construed with the importation of words not in its express terms; and

(3) Depending on the proper characterisation of the development proposal, whether the Infrastructure SEPP or the Narrabri LEP applied to the development rendering any part of the proposed activities impermissible.

Held: Dismissing the first and second proceedings with costs reserved in both:

(1) Proper characterisation of the proposed facilities (and their operation) up to and including the operation of the Leewood facility (but excluding the lucerne-cropping activities) were appropriate to be regarded as being for the purpose of petroleum exploration prospecting: at [102];

(2) The proper purposive reading of s 33 of the PO Act operated to permit the Leewood facility to deal with produced water from petroleum exploration activities undertaken by the Santos interests on PEL 238 in addition to produced water generated by petroleum exploration and/or assessment activities being undertaken by the Santos interests on PAL 2: at [103]; and

(3) The Leewood Project, in part, was properly characterised as being for the purpose of the activity of petroleum exploration and was thus permitted by the provisions of cl 6(d) of the Mining SEPP without development consent. The lucerne-cropping activities proposed for PAL 2 were a separate and distinct use properly characterised as "extensive agriculture" for the purposes of the Narrabri LEP and thus did not require consent under that instrument. As a consequence, there was no need to consider the potential operation of either the Infrastructure SEPP or the assessment requirements of or consent processes under the Narrabri LEP: at [105].

Protect Our Parks Incorporated v Wollongong City Council and Ors [2016] NSWLEC 99 (Moore J)

Facts: Skydive the Beach and Beyond Sydney Wollongong Pty Ltd (Skydive), the Third Respondent, operates a skydiving business at Stuart Park at North Wollongong which was a Crown reserve for which the appointed trustee and trust manager was Wollongong City Council (the Council). Skydive operates in the park through a commercial relationship with the Council to use the park in two ways: the first being the use of the oval within the park as a drop zone, whilst the second comprised the use of a former caretaker's cottage as a centre for administration of the jumping activities and storage of the parachuting equipment. In 2014, Martin Morris & Jones Pty Ltd (the Second Respondent), a town planning consultancy engaged by Skydive, applied to the Council to demolish the caretaker's cottage and build a new building for Skydive. The Council granted development consent for the construction of a new building, but at a different location from that which was initially proposed in the initial development application.

Protect Our Parks Incorporated (the Applicant) challenged the granting of development consent in the Land and Environment Court on three grounds. Firstly, it argued that Stuart Park should be regarded as a "recreation area" given it was dedicated for "public recreation" pursuant to the *Crown Lands Act 1989 (NSW)* (the Crowns Lands Act) and that pursuant to the definition of "recreational facilities (outdoor)" in the *Wollongong Local Environmental Plan* 2009 (the LEP) the development was prohibited. Secondly, the Applicant argued that the Council failed to consider a Plan of Management in force under the Crown Lands Act which does not permit new commercial buildings to be constructed in Stuart Park. Thirdly, it was argued that when the development application was amended to alter the location of the proposed building from that identified in the original development application, the readvertisement was deficient so as to vitiate the subsequent Council process leading to the granting of the development consent.

Issues:

(1) Whether properly characterised the proposed development was prohibited.

(2) Whether the Council failed to have regard to a mandatory consideration, being the Stuart Park Plan of Management, in force under the Crown Lands Act; and

(3) Whether the public notification regarding the amended development application was insufficient under s 79A(2) of the EPA Act.

Held: Upholding the appeal on the third ground and standing over for a further hearing on what relief, if any, should be granted:

(1) Skydive's proposed development, being for the purposes of constructing a building ancillary to the carrying out of the skydiving activities, was capable of falling within the scope of the defined use of "recreation facility (outdoor)" and was therefore permissible with consent: at [70];

(2) Whilst the proposed development was incompatible with the Stuart Park Plan of Management, breaches of the Crown Lands Act do not lie within the jurisdiction of the Land and Environment Court. It was not necessary for the Council to consider the Stuart Park Plan of Management in exercising its function as the consent authority under the EPA Act to Skydive's development application: at [89];

(3) The notification of the amended development proposal was defective in a material aspect in that the description of the proposed development failed to refer to an essential element, namely, that demolition of an existing council works' administration building and an existing amenities block were not adverted to in the notification: at [136].

Shellharbour City Council v Minister for Local Government (No 2) [2016] NSWLEC 119 (Moore J)

Facts: On 6 January 2016, the Minister for Local Government (the Minister) made a proposal (the proposal) under s 218E(1) of the *Local Government Act 1993 (NSW)* (the LG Act) to amalgamate the local government areas of Shellharbour City and Wollongong City. The Minister referred the proposal under s 218F(1) of the LG Act to the Acting Chief Executive of the Office of Local Government (the Departmental Chief Executive) for examination and report. The Departmental Chief Executive delegated those functions to a delegate, Mr Mike Allen (the Delegate). The Delegate was required, under s 263(1) of the LG Act, to examine and report on the proposal. For the purpose of exercising those functions, s 263(2A) and s 263(2B) of the LG Act required the Delegate to hold an inquiry and give reasonable public notice of the holding of this inquiry. The Delegate furnished his completed examination report (the Delegate's report) to the Local Government Boundaries Commission (the Boundaries Commission) for review and comment. The Delegate's report recommended that the proposal be implemented. The Boundaries Commission was required, under s 218F(6)(b) of the LG Act, to review the Delegate's report and send its comments to the Minister. The Applicant, Shellharbour City Council (the Council), opposed the amalgamation proposal.

Issues:

(1) Whether the Delegate gave reasonable public notice of the holding of the inquiry in accordance with s 263(2B) of the LG Act.

(2) Whether the Delegate held an inquiry into the proposal in accordance with s 263(2A) of the LG Act.

(3) Whether the statutory amalgamation process undertaken in respect of the proposal was invalidated because it was conducted on the misleading premise that KPMG had provided independent analysis of the proposal.

(4) Whether the refusal to provide the full KPMG documents was a denial of procedural fairness by the Department of Premier & Cabinet as these documents should have been disclosed and taken into account by the Delegate.

(5) Whether the Delegate denied the Council procedural fairness in taking into account material provided to him without disclosing the substance of the information before him, or providing access to the information or an opportunity to comment on the information in preparation of his report.

(6) Whether the notice of the Delegate's inquiry was insufficient pursuant to s 263(2B) of the LG Act as it did not provide the addresses of the locations where the inquiry sessions were to be conducted.

(7) Whether the notice was insufficient pursuant to s 263(2B) of the LG Act given the relative time of the year of the inquiry with respect to school holidays.

(8) Whether there was manifest unreasonableness in the Delegates' consideration of the s 263(3)(a) material submitted to him by the Council; and

(9) Whether the Boundaries Commission did not fulfil the statutory tasks set for it under s 218F(6)(b) of the LG Act so as to vitiate the process.

Held: Proceedings dismissed; Applicant to pay the Respondent's costs:

(1) The notice was sufficient pursuant to s 263(2B) of the LG Act. The alleged defects regarding the requirement of s for the giving of "reasonable notice" were dealt with in *Hunter's Hill Council v Minister for Local Government; Lane Cove Council v Minister for Local Government; Mosman Municipal Council v Minister for Local Government; North Sydney Council v Minister for Local Government; Strathfield Municipal Council v Minister for Local Government* [2016] NSWLEC 124 (*Hunter's Hill*) (at [152]-[175]) and the discussion and conclusions there set out were equally applicable in these proceedings: at [26]-[27];

(2) The Inquiry that was held by the Delegate into the proposal satisfied the requirements under s 263 of the LG Act. The alleged defects in the conduct of the inquiry by the Delegate were on general

grounds dealt with in *Hunter's Hill* (at [176]-[188]) and the discussion and conclusions there set out were equally applicable in these proceedings: at [29]-[30];

(3) There was no infecting of any of the Delegate's processes arising out of any statement that KPMG was independent. The contention that KPMG was not independent and that the Delegate relied on the assertion vitiating the process was dealt with in *Hunter's Hill* (at [196]-[258]) and the discussion and conclusions there set out were equally applicable in these proceedings: at [32]-[33];

(4) The complaint concerning the availability of the full KPMG documents to the Delegate, was without foundation and was dealt with in *Hunter's Hill* (at [218]-[254]) and the reasoning there set out was equally applicable in these proceedings: at [78]-[81];

(5) Section 263 of the LG Act does not require that information obtained by the Boundaries Commission or Departmental Chief Executive must be publicly disclosed and publicly adduced at enquiry under the section: at [45];

(6) The notice was not insufficient pursuant to s 263(2B) of the LG Act for not providing the address of the locations of the inquiry sessions as the capitalisation of the venue names was of sufficient specificity under the circumstances to permit a person desiring to attend the inquiry to be able to find either venue without there being any realistic risk of not being able to do so or going to the wrong place: at [67];

(7) The timing of the inquiry in relation to school holidays did not render the notice insufficient pursuant to s 263(2B) of the LG Act as statewide-circulating advertisements containing the date of the public inquiry sessions were reasonable reminders and statewide-circulating advertisements would have been available to all potentially interested residents and ratepayers who may have been holidaying elsewhere within New South Wales: at [77] – [78] and [82] – [84];

(8) There was no manifest unreasonableness regarding the s 263(3)(a) material: at [110]. The Delegate addressed the matters raised by this provision sufficiently and it was clear that he was well aware of the matters raised by the Council. That he did not feel the need to address them at the level of specificity that the Council felt was necessary did not mean that he did not consider the matters raised: at [109]; and

(9) The Boundaries Commission did not fail its statutory task pursuant to s 218F(6) of the LG Act as the Boundaries Commission is not to examine and report on the Minister's proposal, but is directed to review the Chief Executive's report and send its comments to the Minister: at [163]-[164].

Woollahra Municipal Council v Minister for Local Government [2016] NSWLEC 86 (Preston CJ)

Facts: On 6 January 2016, the Minister for Local Government (the Minister) made a proposal (the proposal) under s 218E(1) of the *Local Government Act 1993 (NSW)* (the LG Act) to amalgamate the local government areas of Randwick, Waverley and Woollahra. The Minister referred the proposal under s 218F(1) of the LG Act to the Acting Chief Executive of the Office of Local Government (the Departmental Chief Executive) for examination and report. The Departmental Chief Executive delegated those functions to a delegate, Dr Robert Lang (the Delegate). The Delegate was required, under s 263(1) of the LG Act, to examine and report on the proposal. For the purpose of exercising those functions, s 263(2A) and s 263(2B) of the LG Act required the Delegate to hold an inquiry and give reasonable public notice of the holding of this inquiry. In late March 2016, the Delegate furnished his completed examination report (the Delegate's report) to the Local Government Boundaries Commission (the Boundaries Commission) for review and comment. The Delegate's report recommended that the proposal be implemented. The Boundaries Commission was required, under s 218F(6)(b) of the LG Act, to review the Delegate's report and send its comments to the Minister. Two of the three local councils affected by the proposal, Randwick City Council and Waverley Council, supported the proposal but the Applicant, Woollahra Municipal Council (Woollahra Council), opposed it.

Issues:

(1) Whether the Delegate gave reasonable public notice of the holding of the inquiry in accordance with s 263(2B) of the LG Act.

(2) Whether the Delegate held an inquiry into the proposal in accordance with s 263(2A) of the LG Act.

(3) Whether the Delegate examined the proposal in accordance with s 218F(1) and s 263(1) of the LG Act.

(4) Whether the Delegate denied Woollahra Council procedural fairness in connection with the inquiry or examination.

(5) Whether the Boundaries Commission denied Woollahra Council procedural fairness in reviewing the Delegate's report.

(6) Whether the Boundaries Commission reviewed the Delegate's report in accordance with s 218F(6)(b) of the LG Act; and

(7) Whether the statutory amalgamation process undertaken in respect of the proposal was invalidated because it was conducted on the misleading premise that KPMG had provided independent analysis of the proposal.

Held: Proceedings dismissed; Applicant to pay the Respondents' costs:

(1) Reasonable public notice of the holding of the inquiry was given in accordance with s 263(2B) of the LG Act: at [74]. The content of the public notice given satisfied the three requirements arising from subss 263(1), (2A) and (2B) of the LG Act as the notice specified when and where the inquiry was to be held, the proposal in relation to which the inquiry was to be held and the purpose of holding the inquiry: at [58]-[65];

(2) The public notice given was reasonable as to content and timing and the public notice given did not need to specify the basis of the relevant proposal so as to put the public in a position to formulate arguments: at [66];

(3) The periods of time between the giving of the notice and the holding of the inquiry were sufficient: at [68];

(4) The forms in which public notice was given provided fair and reasonable notice to the public: at [73];

(5) The inquiry that was held by the Delegate into the proposal satisfied the statutory requirements of an inquiry under s 263 of the LG Act: at [106] and [114];

(6) The inquiry required under s 263 of the LG Act was not required to adopt a structure and forensic process similar to that of an administrative tribunal: at [106];

(7) Section 263 did not require the Delegate to carry out his function of examining the proposal in public at the inquiry and did not mandate that the inquiry follow a particular procedure: at [109]-[111];

(8) The Delegate was also not required under s 263 to make all the key materials that he was to rely upon in exercising his functions publicly available in advance of the inquiry: at [112];

(9) The Delegate's examination and report on the proposal satisfied the requirements of ss 218F(1) and 263(1) of the LG Act: at [158];

(10) The Delegate was not legally obliged to scrutinise, test and interrogate the claims made by the Minister and KPMG in documents accompanying the referral of the proposal or to scrutinise KPMG's assumptions, methodology or conclusions: at [159];

(11) The Delegate did not misdirect himself in having regard to the financial factors in s 263(3)(a) and did examine and report on these financial factors: at [166] and [168];

(12) The Boundaries Commission did not misdirect itself or improperly constrain itself in exercising its functions of reviewing and commenting on the Delegate's report under s 218F(6)(b) of the LG Act: at [205];

(13) The Boundaries Commission was not required under the LG Act to express its own view of the merits of the proposal or whether the proposal merited implementation: at [207];

(14) Particular statements made by the Boundaries Commission in its comments to the Minister did not show that it had improperly restrained itself in reviewing and commenting upon the Delegate's report: at [211];

(15) The Boundaries Commission critically evaluated the Delegate's report: at [211] and [217]-[218];

(16) The Delegate did not deny Woollahra Council procedural fairness by not disclosing and giving it an opportunity to make submissions on the various submissions and documents identified by Woollahra Council: at [241];

(17) The content of the duty to accord procedural fairness under s 263 of the LG Act did not extend to require the Delegate to disclose all adverse information that was credible, relevant and significant to the Delegate's examination and report: at [247];

(18) The relevant material adverse to Woollahra Council was disclosed: at [249];

(19) The Boundaries Commission did not deny Woollahra Council procedural fairness by not furnishing Woollahra Council with a copy of the Delegate's report, providing Woollahra Council with an opportunity to comment on the Delegate's report or considering Woollahra Council's comments in reviewing the Delegate's report and sending its comments to the Minister: at [266];

(20) A duty to accord procedural fairness did not attach to the exercise of the statutory power under s 218F(6)(b) of reviewing and commenting upon the proposal: at [267];

(21) The exercise of this statutory power was not apt to adversely affect Woollahra Council: at [272];

(22) The statements concerning the independence of KPMG's analysis and modelling were not false or misleading or, even if they were to be, did not invalidate the statutory amalgamation process in respect of the proposal: at [303];

(23) KPMG exercised its professional judgment in undertaking the analysis and modelling of the financial impacts of the proposal: at [304]; and

(24) The allegedly false or misleading statements did not cause the Delegate to fail to give the public notice required to be given, consider any mandatory relevant matter under s 263(3), hold the inquiry required to be held or examine and report on the proposal as required: at [305]-[309].

- Compulsory Acquisition

G. Suonaf Holdings Pty Ltd v Roads and Maritime Services [2016] NSWLEC 116 (Preston CJ)

Facts: Roads and Maritime Services (RMS) compulsorily acquired land owned by G. Suonaf Holdings Pty Ltd (the Applicant), known as 1 Tumbi Road, Tumbi Umbi (the land), under the *Land Acquisition (Just Terms Compensation) Act 1991* (the Just Terms Act). The land was a 1,606 square metre irregular L-shaped allotment located in a R2 Low Density Residential Zone under the *Wyong Local Environmental Plan* 2013. RMS offered the Applicant compensation of $508,500 - comprising $480,000 for the market value of the land and $28,500 for disturbance. The Applicant objected to this amount of compensation and instead claimed compensation of $1,500,000 for the market value of the land and $43,490 for disturbance. The Applicant's valuer relied on different sales of land from the RMS' valuer to derive the market value of the land. The Applicant's valuer relied on sales in East Gosford and Ettalong Beach that had been developed, or had potential to be developed, for medium density residential development to indicate a value for a 10-unit residential development on the land. The RMS' valuer relied on sales of low density residential land in the immediate vicinity of the land to indicate a value for a two-lot residential subdivision of the land.

Issues:

(1) Whether the sales relied upon by the Applicant provided a reliable indication of the market value of the land.

(2) Whether the sales relied upon by RMS provided a reliable indication of the market value of the land; and

(3) Whether the Applicant was entitled under s 59(1)(f) of the Just Terms Act to compensation for the stamp duty and other financial costs of purchasing replacement land for the purpose of earning rental income.

Held: Compensation payable of $585,927.27; RMS to pay the Applicant's costs:

(1) The sales relied upon by the Applicant's valuer did not provide any reliable indication of the market value of the land: at [7].

(2) The sales which the Applicant's valuer claimed provided a reliable indication of the market value of the land were located in a different residential zone, under a different environmental planning instrument, that permitted medium and high density residential development (whilst the land was in a zone where such development was prohibited). Additionally, the sales were in a superior location and closer to significant amenities: at [22] and [28];

(3) The sales relied upon by the RMS' valuer were comparable and could be used to indicate the market value of the land: at [7].

(4) These sales justified an average land value of around $250,000 per lot for a two-lot subdivision of the land: at [50];

(5) The Applicant failed to establish that it might reasonably incur stamp duty or other financial costs in purchasing a replacement property. Even if this had been established, such financial costs were not shown to be related to the actual use of the land, nor to be a direct and natural consequence of the acquisition: at [61].

- Criminal

Blacktown City Council v Wilkie (No 15) [2016] NSWLEC 98 (Pepper J)

(related decisions: *Blacktown City Council v Wilkie* [2001] NSWLEC 269 Pearlman J; *Blacktown City Council v Wilkie* [2003] NSWLEC 120 Pearlman CJ; *Blacktown City Council v Wilkie (No 12)* [2011] NSWLEC 238 Pepper J; *Blacktown City Council v Wilkie (No 13)* [2012] NSWLEC 110 Pepper J; *Blacktown City Council v Wilkie (No 14)* [2012] NSWLEC 252 Pepper J)

Facts: In 2001, Mr Craig Floyd caused 20,000 to 33,000 tonnes of waste material to be deposited on land located in Marsden Park. In civil enforcement proceedings, Pearlman CJ ordered that Mr Floyd remove the waste within five weeks, noting that the order remained on foot after this period expired ("the 2001 orders"). Subsequently, in 2002, Pearlman CJ found Mr Floyd guilty of contempt of the 2001 orders and sentenced him to two months' imprisonment. In 2003, Pearlman J again found Mr Floyd in contempt of the 2001 orders, amended the 2001 orders to require Mr Floyd remove 50 tonnes of the waste every month, and gave him a suspended six-month sentence ("the 2003 orders"). Following this, and up to 2006, Mr Floyd complied with the 2001 orders, as modified by the 2003 orders, but, thereafter, he ceased to do so.

Blacktown City Council ("the Council") subsequently commenced further contempt proceedings, which were dismissed following consent orders being entered into in 2009 ("the 2009 orders"). The 2009 orders partially amended the 2001 orders by requiring Mr Floyd remove 100 tonnes of the waste every two months until all waste was removed. Mr Floyd failed to comply with the 2009 orders, and the Council commenced further contempt proceedings. These contempt hearing was adjourned following consent orders being made ("the 2010 orders"). Relevantly, the 2010 orders required Mr Floyd to install a screening machine on the land, remove all waste material within three years, and provide quarterly reports to the Council.

Mr Floyd did not comply with the 2010 orders, and the Council subsequently relisted the contempt proceedings. On 28 June 2011, Mr Floyd entered a plea of guilty for contempt in relation to the 2001 orders as modified by the 2009 orders. Mr Floyd subsequently sought leave to withdraw his plea of guilty.

Issues:

(1) Whether Mr Floyd could withdraw his guilty plea.

(2) Whether Mr Floyd's guilty plea was attributable to a genuine consciousness of guilt.

(3) Whether there were "issuable" questions in relation to Mr Floyd's guilty plea.

(4) Whether the 2010 orders superseded the 2001 and 2009 orders.

(5) Whether a plea in bar of *autrefois convict* was available; and

(6) Whether the defence of impossibility was available.

Held: Granting leave to Mr Floyd to withdraw his plea of guilty:

(1) A court has the discretion to allow a defendant to withdraw a plea of guilty at any time and, although a court approaches such applications with caution, given the public interest in the finality of litigation, this principle will not be offended if a miscarriage of justice would otherwise occur: at [53];

(2) The test to determine whether this discretion should be exercised is whether a defendant is able to (i) demonstrate an absence of a genuine consciousness of guilt, and (ii) identify an "issuable" question about that guilt: at [143];

(3) It was not clear which set of orders Mr Floyd pleaded guilty to: at [151];

(4) While the Further Amended Statement of Charge related to the 2001 orders as modified by the 2009 orders, Mr Floyd gave evidence that he believed he was in contempt for not installing a screening machine, which was a requirement of the 2010 orders only. Either Mr Floyd did not appreciate the nature of the charge to which the plea was entered or the integrity of the plea was affected by mistake, either being sufficient to demonstrate an absence of a genuine consciousness of guilt: at [154];

(5) There were three issuable questions as to Mr Floyd's guilt, none of which were raised prior to Mr Floyd entering his guilty plea: at [157];

(6) It was not necessary to determine the answer to any of these questions; rather, all that was necessary was to determine whether the question was issuable: at [159], [176], [206] and [230];

(7) It was also arguable that the 2010 orders had the effect of superseding the 2001 orders and 2009 orders: at [158];

(8) It was arguable that a breach of the 2001 orders was a single offence which could only result in a single conviction and penalty for contempt. Any additional application to punish Mr Floyd for any subsequent contempt of the 2001 orders would require a fresh application to the Court, resulting in a fresh order that stipulated a time for compliance. The 2009 orders did not stipulate a time for compliance: at [168] and [171]-[172];

(9) It was arguable that the 2009 orders did not constitute fresh orders but were a continuation of the 2001 orders for which Mr Floyd had already been punished twice and the plea in bar of autrefois convict was therefore available. Alternatively, it was arguable that the breach of the 2009 orders constituted a continuing contempt for which Mr Floyd had already been punished: at [205];

(10) Proving that an order is possible to comply with is an element which the Applicant must establish: at [212] and [214];

(11) Once established, the onus shifts to the Respondent to show that they used their best endeavours to comply with the order but it was impossible to do so. It will not be enough for a respondent to do nothing: at [216]-[217];

(12) Where a respondent is partially able to comply with an order, a failure to partially comply will constitute contempt: at [221]-[222] and [231];

(13) The date from which impossibility is to be measured is the date the Statement of Charge for contempt is filed: at [209].

(14) It was factually arguable that the orders were impossible to comply with: at [229]; and

(15) Mr Floyd was of limited financial means, and the evidence established that removing the 20,000 to 33,000 tonnes of waste would cost between $3,750,000 and $4,870,000, money that Mr Floyd did not have: at [230].

Canterbury-Bankstown Council v Naji [2016] NSWLEC 101 (Pain J)

Facts: The Defendant pleaded guilty to an offence under s 125(1) of the *Environmental Planning and Assessment Act 1979 (NSW)* (EPA Act) that, contrary to s 76A(1) of the EPA Act, between 4 August 2014 and 13 February 2015, he carried out development otherwise than in accordance with a complying development certificate (CDC). At the time of the offence, the Defendant was constructing a new dwelling

on land at Chester Hill as an owner-builder, for which a CDC was obtained from Mr Kayellou, a private certifier (the certifier). On 13 February 2015, the Prosecutor, Canterbury-Bankstown Council, received from the certifier a notice of intention to issue an order relating to non-compliant building work and the illegal conversion of a subfloor area into a basement not in accordance with the CDC.

Issues:

(1) What were the objective circumstances of the offence; and

(2) What were the subjective circumstances of the Defendant.

Held: The Defendant was convicted and fined $28,000 and ordered to pay the Prosecutor's costs in the sum of $23,000:

(1) There was no evidence of any actual or potential environmental harm: at [19]. The Prosecutor was unable to prove beyond reasonable doubt that the Defendant had deliberately breached the CDC: at [23]. The offence was at the high end of the low range of objective seriousness: at [27];

(2) The Defendant had no prior record and there was no likelihood of his reoffending: at [29]-[30]. The Defendant made a genuine expression of remorse and contrition even absent any actions to regularise the unlawful development: at [32]. The Defendant pleaded guilty at the earliest opportunity and cooperated fully with the authorities: at [35].

Environment Protection Authority v Foxman Environmental Development Services; Environment Protection Authority v Botany Building Recyclers Pty Ltd; Environment Protection Authority v Foxman (No 2) [2016] NSWLEC 120 (Sheahan J)

(related decision: *Environment Protection Authority (Prosecutor); Foxman Environmental Development Services (Defendant); Botany Building Recyclers Pty Ltd (Defendant); Phillip Foxman (Defendant)* [2015] NSWLEC 105 (Sheahan J))

Facts: Phillip Foxman (Foxman) and the two defendant companies – Foxman Environmental Development Services (FEDS) and Botany Building Recyclers Pty Ltd (BBR), both of which have Foxman as its dominant mind, were successfully prosecuted by the Environment Protection Authority (EPA) on six charges brought under the *Protection of the Environment Operations Act 1997* (POEO Act). The charges concerned transportation, and placement on land, of "waste", particularised as "material comprising processed construction and demolition waste and asbestos". The transportation was by truck from a "materials processing" plant at Banksmeadow, owned and operated by BBR. The offending material was transported to, and placed on, 76 hectares of land known as "Foxman's Valley", near The Oaks in Wollondilly Shire, purchased by FEDS with the stated objective of becoming Foxman's retirement home. The FEDS' site could not lawfully be used for "waste".

Issues:

(1) Considering the objective circumstances of the offence and the subjective circumstances of the three defendants, what were appropriate sentences; and

(2) The relevance of financial capacity, deterrence, totality and double punishment in sentencing a one-person company charged along with its dominant mind.

Held: Convicting Foxman, FEDS and BBR and fining them $250,000, $100,000 and $40,000 respectively; also ordering the Defendants, jointly and severally, to pay the costs and expenses of the Prosecutor; and making remediation orders.

(1) The deposition of waste materials on land causes both actual environmental harm, by contamination of existing ecological systems, and the potential for future environmental harm, through further contamination and pollution, including by leachate. Such contamination/pollution poses an ongoing threat to human health through direct contact with asbestos, and/or leachate, and/or contaminated stormwater entering local systems: at [68];

(2) Foxman (directly, and as the controlling mind of his companies) intentionally committed the offence, as he clearly intended to transport the offending material to Foxman's Valley and have it placed at particular locations on that property: at [74];

(3) Foxman displayed recklessness regarding the presence of asbestos in the fill material, and its possible impact, and acted very deliberately in transporting it to Foxman's Valley: at [78];

(4) The resulting harm was foreseeable, and within Foxman's control, and simple practical measures were available to Foxman to "prevent, control, or mitigate" that harm: at [79];

(5) Foxman was well-informed of the regulatory regime concerning waste disposal and exemptions. At the trial, he admitted consciousness of the material's non-compliance with that regime, but considered the regime impractical and strict, and structured his operations accordingly: at [75];

(6) The offence was committed for financial gain, which was one, but not the only, motive for the commission of the offences: at [92];

(7) The subjective considerations related to Foxman operated to mitigate the penalty to be imposed to some degree. Relevantly, there were some aggravating factors, eg only late expressions of remorse put in mitigation, and no satisfactory basis for any discount on grounds of financial capacity: at [119]. There were, however, positive character references tendered from prominent people: at [87], including an award from a Minister in the Israeli Government in recognition of Foxman's "outstanding voluntary activities in the field of environment in Israel": at [86];

(8) Specific deterrence was a relevant consideration in the determination of an appropriate penalty, as Foxman appeared energetic, remained active in relevant industry associations, and described himself as a "contractor": at [101]-[102]. General deterrence was also considered a relevant consideration: at [102];

(9) The major criminality in the case was on the part of Foxman himself. He was deeply, and personally, involved in every aspect of the behaviour proven against the two companies he dominated, as well as himself: at [118]. Whilst the financial penalty to be imposed must be proportionate to the proven criminality, viewed as a whole, the major burden should fall on Foxman as the author and chief manager of the scheme: at [121]; and

(10) It was appropriate to make the remediation orders sought by the Prosecutor: at [124].

Jenner v Richmond Valley Council [2016] NSWLEC 115 (Pain J)

Facts: The Appellant was issued with two Penalty Infringement Notices (PINs) by Richmond Valley Council (the Council), for carrying out development requiring consent under s 76A of the *Environmental Planning and Assessment Act 1979 (NSW)* (the EPA Act) without such consent, and for breaching the terms of a prevention notice issued under the *Protection of the Environment Operations Act 1997 (NSW)* (the POEO Act) in breach of s 97 of the POEO Act. Both PINs resulted from a noisy "doof" party held on the Appellant's property in Kippenduff on 3 and 4 July 2015. The Appellant chose to contest the PINs in the Local Court and pleaded not guilty to both charges at the outset. On 20 January 2016, the Appellant changed his plea to guilty to both offences. On 3 February 2016, the magistrate convicted the Appellant and imposed a penalty of $20,000 plus costs for the EPA Act offence and $16,000 plus costs for the POEO Act offence. The Appellant sought leave to appeal against the convictions and appealed against the sentences imposed.

Issues:

(1) What threshold must the Appellant satisfy in order to be granted leave to appeal against the convictions in the Local Court?

(2) Whether leave should be granted to allow the appeal from the convictions; and

(3) Whether the sentence appeal should be upheld.

Held: Refusing leave to appeal against conviction, dismissing the appeal against sentence, and ordering the Appellant pay the Respondent's costs:

(1) The Appellant must show, as a threshold, that a miscarriage of justice occurred in the Local Court in order for leave to be granted: at [18]);

(2) An appeal against conviction following a plea of guilty in the Local Court is only permitted on a ground that involves a question of law alone and only with leave of the Court (s 32 of the *Crimes (Appeal and Review) Act 2001 (NSW)* - the Appeal and Review Act). The application for leave to appeal against

conviction did not identify questions of law alone arising from the determination of the magistrate: at [15]; and

(3) An appeal against sentence is made as of right under s 31 of the Appeal and Review Act and the Appellant is sentenced afresh: at [32]. In light of the objective seriousness of the offences, the few mitigating circumstances, and the magistrate's experience with the subject matter of the offences and in the local area, the sentence imposed by the magistrate was confirmed: at [32] and [43].

- Civil Enforcement

Lismore City Council v Vivian [2016] NSWLEC 108 (Pain J)

Facts: The Respondent owns flood-prone land near Lismore that, pursuant to the terms of the *Lismore Local Environmental Plan* 2012 (the LEP), does not enjoy a dwelling entitlement. The Applicant, Lismore City Council (the Council), commenced civil enforcement proceedings seeking orders that the Respondent remove from the land three caravans and an attached building that had been used for residential purposes. There was evidence that some remedial work had occurred already but the work was unfinished. The Respondent did not appear at the hearing, or participate at any stage of the preparation for hearing. The Court determined that it was appropriate to proceed on an ex parte basis.

Issues:

(1) Whether to exercise discretion to order the removal of the caravans and attached building; and

(2) Whether it was appropriate to make a gross sum costs order.

Held: Orders sought by the Council made, Respondent ordered to pay the Applicant's costs as a gross sum:

(1) The Respondent was ordered to remove the caravans and attached building and to cease using the property for residential purposes. There was no lawful entitlement to live on the land which was in an area of high flood risk. The breaches were not technical. Making the orders for removal of the caravans and structure would not cause undue hardship to the Respondent, as the evidence showed she no longer lived on the land: at [16]. A substituted performance order was made permitting the Council to remove the caravans and attached building if the orders had not been complied with in 90 days: at [17]; and

(2) In the interests of finalising the litigation and avoiding an expensive costs assessment process, a gross sum costs order was warranted. The amount sought by the Council was fair and reasonable in the circumstances: at [21].

- Section 56A Appeals

Welsh Property Consulting Pty Ltd v The Hills Shire Council (No 2) [2016] NSWLEC 107 (Sheahan J)

(related decisions: *Welsh Property Consulting Pty Ltd v The Hills Shire Council* [2016] NSWLEC 84 (Sheahan J); *Welsh Property Consulting Pty Ltd v The Hills Shire Council* [2015] NSWLEC 1288 (Dixon C))

Facts: Two joint applications were made by the parties, respectively, Welsh Property Consulting Pty Ltd (Welsh) and The Hills Shire Council (the Council), seeking to discontinue a s 56A appeal while judgment was reserved, and obtain the Court's approval of a modified application.

Despite Welsh having obtained approval from various other public authorities, the Council refused to grant consent to Welsh's application to relocate, by 300 metres to the west, a road identified in a precinct plan and a development control plan, on the basis it was inconsistent with the road's location identified in the current strategic framework for the precinct. Welsh appealed to the Court against that refusal, conceding the inconsistency, and proposing that Dixon C grant consent subject to a deferred

commencement condition. Dixon C dismissed the appeal on the basis that there were too many unresolved matters to enable her to carry out any proper assessment of the application.

An appeal of that decision under s 56A of the *Land and Environment Court Act 1979* (the Court Act) was heard by Sheahan J on 18 December 2015. While the decision remained reserved, the Council changed its position and decided to support the application. The parties then jointly applied to the Court to both set aside the Commissioner's decision and discontinue the s 56A appeal. As, under the Uniform Civil Procedure Rules 2005 (the UCPR) r 12(1)(a), a s 56A appeal may be discontinued by consent, Sheahan J discontinued the s 56A appeal. However, as no legal error had been found in Dixon C's reasoning, and as the new planning regime still awaited the Minister's determination, Sheahan J held that the commissioner's orders should stand: [2016] NSWLEC 84.

Subsequently, the parties then made two more joint applications to the Court: to set aside Orders (1)-(4) of Sheahan J's 14 July 2016 orders and for his Honour to resume consideration of the s 56A appeal on the basis that they did not consent to the course adopted by the Court and, rather, only consented to the discontinuance of the s 56A appeal if the Court was also willing to set aside Dixon C's decision and then make the consent orders granting consent. Noting that the relief sought was discretionary, in accordance with UCPR r 36.16 (subrule 3A), which was relied on by the parties, his Honour decided such relief was not "appropriate" and declined to grant it.

Issue:

(1) Whether it was appropriate for the judgment and orders of 14 July 2016 to be set aside on the basis that this was not the course consented to by the parties.

Held: Dismissing the appeal:

(1) The Court does not normally deal in packages of orders, nor does it make a suite of orders automatically on the basis that they are consented to by the parties, irrespective of the Court's position as to what is appropriate in the circumstances: at [7];

(2) A fair reading of the transcript of argument, and the subsequently filed joint written submissions, revealed that at no stage was "the parties' intent" that the orders be implemented as a "package" on an "all or nothing" basis, made clear to the Court: at [8];

(3) The use of the word "may" in UCPR r 36.16(3A), indicates that relief under this subrule is discretionary: at [18]; and

(4) The parties were bound by the way their representatives dealt with the matters, in accordance with the principles set out in *University of Wollongong v Metwally (No 2)* [1985] HCA 28; 60 ALR 68 at 71; *Coulton v Holcombe* [1986] HCA 33; 162 CLR 1; 65 ALR 656; and *Bankstown City Council v Mohamad El Dana* [2009] NSWLEC 69, at [44]-[55]: at [19].

- Separate Questions

Azizi v Roads and Maritime Services [2016] NSWLEC 97 (Pain J)

Facts: The Respondent acquired from the Applicants two substratum lots, commencing approximately 60 metres below ground level, for two car tunnels as part of the NorthConnex State Significant Infrastructure Project. Section 62(2) of the *Land Acquisition (Just Terms) Compensation Act 1991 (NSW)* (Just Terms Act) disentitles a landholder from receiving compensation where substratum land is acquired for the purpose of a tunnel and the surface of the land and its support or underground mines are not affected. A preliminary question of law arose for determination.

Issue:

(1) Was the land acquired for the purposes of constructing a tunnel within the meaning of s 62(2) of the Just Terms Act?

Held: Separate question answered in the affirmative, costs reserved:

(1) The land was acquired for the purposes of constructing a tunnel within the meaning of s 62(2):

(i) Section 62(2) is not qualified by the words in s 62(1): at [18]. The Applicants' submission that s 62(2) only applies where the compulsory acquisition relates to the construction of a tunnel and does not apply where that tunnel is to be used leads to an absurd result: at [17];

(ii) The Applicants' attempt to distinguish between "passive" and "non-passive" uses of a tunnel based on their interpretation of s 62(1) is not legally valid: at [18];

(iii) The Applicants' submission that the construction of two tunnels was only one component of the large privately built project and therefore s 62(2) did not apply was not accepted; and

(iv) The terms of s 62(2) are clear and unambiguous in specifying that compensation is not payable for the construction of a tunnel unless the circumstances in s 62(2) arise: at [19].

Benedict Industries Pty Ltd v Minister for Planning; Liverpool City Council v Moorebank Recyclers Pty Ltd [2016] NSWLEC 122 (Robson J)

Facts: The Applicants, Benedict Industries Pty Ltd (Benedict) and Liverpool City Council (the Council) brought separate Class 1 proceedings against both the proponent, Moorebank Recyclers Pty Ltd (Moorebank), and the Minister for Planning (the Minister) in relation to a materials recycling facility (the MRF) that was granted consent by the Minister.

The site of the MRF was already the subject of a consent to undertake bulk earthworks that was granted on 29 June 2006, which had a lapse date of 27 June 2009 (the Earthworks Consent). Prior to the lapse date, various works were undertaken, including the clearing of 12 hectares of land, the digging of three boreholes, the installation of six monitoring wells, surveying undertaken on multiple occasions, the excavation of six large test pits and the sealing of 30 metres of the driveway.

On 26 July 2016, Sheahan J made an order that the question of whether the Earthworks Consent lapsed on 27 June 2009 be heard as a separate question.

Issues:

(1) Whether the Earthworks Consent lapsed on 27 June 2009.

Held: The Earthworks Consent had not lapsed on 27 June 2009:

(1) The statutory provision relating to whether a consent has lapsed is s 95 of the *Environmental Planning and Protection Act 1979 (NSW)* (the EPA Act), and the test was correctly summarised in *Hunter Development Brokerage Pty Ltd v Cessnock City Council* (2005) 63 NSWLR 124 by Tobias JA as involving:

(a) was the work relied on building, engineering or construction work?

(b) if so, did it relate to the approved development?

(c) if so, was it physically commenced on the land to which the consent applied prior to the lapsing date? (at [17], [58]);

(2) Engineering work includes all those activities associated with, and forming a necessary part of, the discipline of engineering in proceedings involving "works", as well as cases involving subdivisions: at [59]-[67]:

(a) the clearing works, digging of three boreholes, installation of six monitoring wells and at least some of the survey works constituted engineering work: at [92], [99], [104], [106];

(b) the sealing of part of the driveway constituted construction work: at [108];

(3) Whether works relate to the approved development involves at least some real relationship or connection, and constitutes a necessary part of the process: at [69]-[70]:

(a) the clearing works, digging of three boreholes, installation of six monitoring wells, some of the survey works and the driveway works related to the development: at [93], [105], [107], [109];

(b) the remaining survey works did not relate to the development as it was not clear whether they constituted a necessary part of the process: at [95], [100]-[103];

(4) Preparatory works that do not form part of the substantive works under a consent can still constitute works that relate to the approved development: at [72]-[78];

(5) The Earthworks Consent should not be read in a legalistic manner: at [79]-[82];

(6) If works are undertaken without preconditions under a consent being met, those works are unlawful and cannot be relied upon: at [83]:

(a) the test excavation works were undertaken without preconditions being met, and so could not be relied upon: at [85]-[86]; and

(7) The Consent works had physically commenced prior to 27 June 2009 for the purposes of s 95(4) of the EPA Act and had not lapsed: at [111].

Royal Motor Yacht Club (Broken Bay) New South Wales Pty Ltd v Northern Beaches Council [2016] NSWLEC 87 (Robson J)

Facts: The Applicant, Royal Motor Yacht Club (Broken Bay) New South Wales Pty Ltd (the RMYC), brought Class 1 proceedings against the Northern Beaches Council (the Council) regarding the Council's refusal of the RMYC's development application to demolish 28 existing berths, construct 67 new berths, and relinquish between six and 12 existing swing moorings.

The Council filed a motion which sought an order pursuant to r 28.2 of the *Uniform Civil Procedure Rules 2005 (NSW)* (UCPR) to hear a separate question. This question effectively asked whether the use of the site subject to the development application as a marina was a "lawful existing use" pursuant to the *Pittwater Local Environment Plan 2014* and s 106 of the *Environmental Planning and Protection Act 1979 (NSW)* (the EPA Act). This question was later amended also to include a second part which asked "if the answer to the question was yes, what was the extent and nature of the existing use?".

Issues:

(1) Whether a question should be heard prior to the primary proceedings.

Held: The proposed question should be heard separately:

(1) The considerations for determining whether the hearing of a separate question should be ordered were summarised by Biscoe J in *820 Cawdor Road Pty Ltd v Wollondilly Shire Council* (2013) 195 LGERA 170; [2013] NSWLEC 8: at [10];

(2) With regard to these principles, the separate question was likely to take a maximum of two days, relied only on documentary and some lay evidence, involved separate evidence that would likely not have any bearing on the balance of the issues in the proceedings, involved at least some agreed facts and, if the question was answered in a certain manner, would likely be entirely dispositive of the proceedings: at [13]-[17];

(3) The hearing of the separate question would likely facilitate the just, quick and cheap resolution of the proceedings pursuant to s 56 of the *Civil Procedure Act 2005 (NSW)*, and should therefore be ordered: at [18].

Royal Motor Yacht Club (Broken Bay) Pty Ltd v Northern Beaches Council (No 2) [2016] NSWLEC 110 (Pepper J)

(related decision: *Royal Motor Yacht Club (Broken Bay) New South Wales Pty Ltd v Northern Beaches Council* [2016] NSWLEC 87 (Robson J))

Facts: By Notice of Motion, Royal Motor Yacht Club (the RMYC), with the consent of Northern Beaches Council (the Council), sought to vacate hearing dates for a separate question. The separate question had earlier been granted by the Court on the basis that three discrete categories of evidence, which did not include planning evidence, would be required to resolve the separate question, and potentially dispose of the matter. It was accepted that a significant volume of planning evidence would be required if the matter went to a full hearing.

The affidavit evidence in support of the Notice of Motion only identified that a slippage in the timetable, the latter of which had been agreed by consent between the parties, occurred as a result of the preparation of expert planning evidence, thereby necessitating the vacating of the hearing dates. No reason was given, however, for the slippage. At the hearing of the vacation application, the Court was

additionally informed that the RMYC intended to adduce expert heritage evidence which was another cause of delay.

Issue:

(1) Whether the Court should exercise its discretion and vacate the hearing date.

Held: Dismissing the Notice of Motion and retaining the hearing dates:

(1) Critical information about the evidence required for a separate question, that may have caused the Court to exercise its discretion differently, was not put before the Court on the application for the separate question: at [18];

(2) The evidence in support of the application was inadequate. The RMYC failed to provide a sufficient explanation as to why the expert evidence could not be finalised, and failed to identify any steps the parties had taken to avert the delay, such as attempts to retain other experts: at [20];

(3) The power to adjourn proceedings is contained in s 66 of the *Civil Procedure Act 2005 (NSW)* (the CP Act). This power is to be exercised having regard to the matters set out in ss 56-60 of the CP Act, including the overriding purpose in s 56 of the CP Act and the dictates of justice in s 58 of the CP Act. The bald statement that there had been a slippage in the timetable without a reasonable explanation as to why was a breach by the parties of their duty to assist the Court in furthering the overriding purpose: at [21]-[24]. Further, this failure meant the Court was not in a position to assess where the dictates of justice lay: at [25]; and

(4) That the application was by consent did not mandate the vacation of the hearing dates: at [27].

Royal Motor Yacht Club (Broken Bay) Pty Ltd v Northern Beaches Council (No 3) [2016] NSWLEC 114 (Pepper J)

(related decisions: *Royal Motor Yacht Club (Broken Bay) New South Wales Pty Ltd v Northern Beaches Council* [2016] NSWLEC 87 (Robson 0J); *Royal Motor Yacht Club (Broken Bay) New South Wales Pty Ltd v Northern Beaches Council (No 2)* [2016] NSWLEC 110 (Pepper J))

Facts: By Notice of Motion, Northern Beaches Council (the Council) sought to vacate hearing dates for a separate question. The evidence in support of the motion demonstrated that the Royal Motor Yacht Club (the RMYC) had comprehensively failed to comply with the Court-ordered timetable and had only served part of its evidence. It was conceded by the parties that the matter had now become more detailed and difficult than originally envisaged, and that a large amount of evidence was required for the purpose of the hearing of the separate question, which had not been originally identified when the application for the hearing of a separate question was initially made. The Council further submitted that it was not in a position to meet this evidence.

There was also evidence that the consent of the Council to the RMYC's previous motion seeking to vacate the hearing dates (*Royal Motor Yacht Club (Broken Bay) New South Wales Pty Ltd v Northern Beaches Council (No 2)* [2016] NSWLEC 110) had been conditional on the RMYC paying the Council's costs of the motion. The solicitor representing the RMYC, appearing *ex parte* at that application, had failed to inform the Court of this fact.

Issue:

(1) Whether the Court should exercise its discretion and vacate the hearing date.

(2) Whether the RYMC should pay the Council's costs of the motion.

(3) Whether the RYMC should pay the Council's costs of the RYMC's previous motion.

Held: Setting aside the earlier order for a separate question, and ordering the RYMC to pay the Council's costs of both motions:

(1) Given the complexity of the legal and factual issues now raised by the parties, and the length of time that any hearing of the separate question would take, rather than vacate the hearing date it was appropriate to set aside the order for a separate question. Doing so would facilitate the just, quick and cheap determination of the matter: at [12];

(2) While in Class 1 proceedings costs do not usually follow the event, the wholesale breach by the RYMC of the Court-ordered timetable made it fair and reasonable that the RYMC pay the Council's costs of the motion: at [14]-[15]; and

(3) The failure of the RMYC's solicitor to notify the Court that the Council's consent to the previous motion was conditional on the RMYC paying the Council's costs of the motion was a serious breach of the duty of candour owed to the Court in an *ex parte* application. It was therefore appropriate to order the RMYC to pay the Council's costs of the earlier motion: at [21].

Royal Motor Yacht Club (Broken Bay) Pty Ltd v Northern Beaches Council (No 4) [2016] NSWLEC 126 (Pepper J)

(related decisions: *Royal Motor Yacht Club (Broken Bay) New South Wales Pty Ltd v Northern Beaches Council* [2016] NSWLEC 87 (Robson J); *Royal Motor Yacht Club (Broken Bay) New South Wales Pty Ltd v Northern Beaches Council (No 2)* [2016] NSWLEC 110 (Pepper J), *Royal Motor Yacht Club (Broken Bay) Pty Ltd v Northern Beaches Council (No 3)* [2016] NSWLEC 114 (Pepper J))

Facts: By Notice of Motion, the Northern Beaches Council (the Council), made a fresh application for the hearing of a separate question. This time, the application was opposed by the Royal Motor Yacht Club (the RMYC). The separate question was the same as the original separate question initially asked for by the parties (*Royal Motor Yacht Club (Broken Bay) New South Wales Pty Ltd v Northern Beaches Council* [2016] NSWLEC 87).

Issue:

(1) Whether the Court should grant the hearing of a separate question.

Held: Dismissing the application:

(1) The estimated saving of hearing days was not a sufficient saving of time, especially in circumstances where evidence was likely to be replicated in both proceedings (being the separate question hearing and the Class 1 appeal): at [24(a), (c), (i)];

(2) While the merit issues were yet to be finally articulated, the Council had indicated to the RMYC that the only merit issues related to parking, traffic and height, matters which could be dealt with easily and relatively inexpensively if the proceedings were not bifurcated by a separate question hearing: at [24(d), (e)];

(3) It was not uncommon for existing use rights issues to be heard simultaneously with merit issues: at [24(j)];

(4) The separate question was heavily dependent on findings of fact which tended against the granting of a separate question: at [24(f)]; and

(5) The Council's case was not so overwhelmingly strong that it all but compelled the ordering of a separate question: at [24(h)].

Woolworths Limited v Randwick City Council [2016] NSWLEC 82 (Moore J)

Facts: Woolworths Limited (Woolworths) applied to Randwick City Council (the Council) for development consent to convert Randwick Rugby Club into a Dan Murphy's retail liquor store. The development application was refused by the Council on several grounds, one being that the development was prohibited given the premises was located in the R3 - Residential zone and that the proposed development did not satisfy the test set in cl 6.13(3)(a) of the *Randwick Local Environmental Plan* 2012 (the LEP). The clause precludes development consent, to which the clause applies, unless the development relates to a building that existed when the LEP commenced and was designed or constructed for the purpose of commercial premises. As the Council's contention would ultimately be dispositive of the proceedings, a separate question dealing with the contention was set down for determination.

The term "commercial premises", as defined in the LEP, includes the "business premises" and "retail premises". The premises were used for the purposes of a "registered club" and, in order to determine the separate question, required consideration of whether such an enterprise could fit within the definition of

either "business premises" or "retail premises" and thus "commercial premises" for the purpose of satisfying cl 6.13(3)(a) of the LEP. For the purposes of the characterisation process, his Honour determined that the proper approach was to consider the relevant statutory provisions of "registered clubs", particularly in light of the decision of *Sevenex v Blue Mountains Council* [2011] NSWCA 223 (*Sevenex*) which discussed how the concept of business and retail uses worked together in considering the provisions of the relevant LEP.

Issues:

(1) Whether the services provided by a "registered club" could be construed as a provision of services to the public within the definition of "business premises" or "retail premises" in order to satisfy cl 6.13(3)(a) of the LEP; and therefore

(2) Whether the development was capable of being granted approval by the Council.

Held: Dismissing the appeal:

(1) Services as are provided by a "registered club" are not ones that are provided to the public but are only ones provided to members of the registered club or their guests: at [39]. Therefore, on the specific basis set out by Young JA in *Sevenex*, the premises for the purposes of cl 6.13(3)(a) of the LEP could not constitute "business premises" and, therefore, could not satisfy that limb of the definition of "commercial premises" as a way through the preliminary gate set by the LEP: at [45];

(2) The restriction in s 18(1) of the *Liquor Act 2007 (NSW)* makes it clear that any retail sale of liquor on the licensed premises is confined to members or members guests, a restriction that takes this limited scope of activity outside the broad nature of "retailing" as to be understood from the approach in *Sevenex*: at [50];

(3) Therefore, although food and drink may have been sold to members and their guests, or to those who might attend the premises pursuant to an authorisation granted under s 23 of the *Registered Clubs Act 1976 (NSW)*, such sales would not constitute retailing (to the public) but would fall within the scope of activities undertaken on premises that should be categorised as a "registered club": at [51]; and

(4) Therefore it was not open to the Council to grant approval to the development application: at [52].

- Miscellaneous

Temelkovski v Wright [2016] NSWLEC 112 (Pain J)

Facts: By Notice of Motion, the Applicants sought leave for an extension of time beyond three months to commence judicial review proceedings to challenge the First Respondent's development consent pursuant to r 59.10 of the *Uniform Civil Procedure Rules* 2005 (NSW) (the UCPR). The Applicants live next door to the First Respondent's land, over which the First Respondent holds a development consent for demolition of the existing dwelling and construction of a new dwelling. The *Newcastle Development Control Plan* 2012 (the DCP) provides for notification of development applications (DAs) to owners of neighbouring land. The Applicants became the registered proprietors of their property one day before the First Respondent lodged the DA on 11 August 2015. The Second Respondent, Newcastle City Council (the Council), issued a notification letter to the Applicants' address. The letter was addressed to the previous owners.

Issues:

(1) Whether the Applicants had an arguable case.

(2) Whether there was prejudice to other persons if leave to file out of time granted.

(3) Whether the delay in commencing proceedings was unreasonable; and

(4) Whether any relevant public interest justified the extension.

Held: Notice of Motion dismissed, Applicants ordered to pay the Respondents' costs:

(1) The Applicants had an arguable case in challenging the development consent granted to the First Respondent: at [24]. The Respondents conceded, for the purpose of the Notice of Motion proceedings, that there was a serious question to be tried in relation to the failure of the Council to notify the Applicants of the First Respondent's DA: at [19];

(2) There was substantial financial prejudice to the First Respondent and her family in light of their reliance on the consent granted by the Council in November 2015. No work was commenced until the three-month period in r 59.10 had expired. Much work had been done, with demolition already completed and construction of the new house under way: at [26];

(3) The delay in commencing proceedings was unreasonable. The proceedings were commenced five months after the expiry of the three-month time limit, a substantial delay: at [27].

(4) The Applicants could have commenced proceedings in April 2016, by which time they had obtained legal advice and were on notice of a potential legal claim: at [29]-[30];

(5) The Applicants were aware that building work was ongoing from early April 2016. The delay was largely unexplained: at [30];

(6) The public interest did not justify the extension. There was more than one public interest at issue: at [28]; and

(7) The Applicants relied on the public interest in the enforcement of the public notification of development applications, and the First Respondent relied on the public interest in finality of decision making about development consents: at [28].

- Commissioner decisions

GM Architects Pty Ltd v Strathfield Council [2016] NSWLEC 1216 (Maston AC)

Facts: Appeal against refusal of development consent under Pt 4 of the *Environmental Planning and Assessment Act 1979 (NSW)* for a 13-storey mixed use development containing two commercial tenancies and 72 residential strata units with direct access to Parramatta Road, Homebush.

Issues:

(1) Whether proposal was permissible under the "key sites" provisions of the *Strathfield Local Environmental Plan 2012* (the LEP) when the site proposed does not include the whole of the land in a key site as defined in the LEP.

(2) If not, whether the proposed development can be permitted notwithstanding the contravention of the general height and floor space standards in the LEP; and

(3) Whether clause 101 of *State Environmental Planning Policy (Infrastructure) 2007* (SEPP Infrastructure) required vehicular access to the land by a road other than Parramatta Road (a classified road) to be provided.

Held: Granting development consent to the proposal subject to agreed conditions:

(1) The development site does not "comprise a key site shown in the table" to cll 4.3A and 4.4A of the LEP as it does not contain the whole of the land in a key site as defined. The word "comprises" in this context means "consists of": at [47]-[48], [50]-[51]:

(2) The development site is not "identified as a key site on the Key Sites Map" which forms part of the LEP: at [39];

(3) The development standards as to height and floor space in cll 4.3A and 4.4A did not apply to the proposal: at [27], [53], [63];

(4) The Applicant's written request, made in the alternative, to vary the general development standards for height of building and floor space in cll 4.3 and 4.4 of the LEP in order to accommodate those of the proposed development, made pursuant to cl 4.6, was found to satisfy the requirements of cl 4.6, generally and specifically, that compliance was unreasonable or unnecessary and that there were

sufficient environmental planning grounds to justify the contravention of the two standards: at [75], [79], [85];

(5) Allowance of the contraventions was in the public interest and reflected the almost identical proposal for the present site to which the Council had already granted consent when the site was consolidated with the adjoining land at 16 Hillcrest Street, Homebush, a consolidation which was no longer commercially available to the applicant: at [81], [82];

(6) Clause 101 of SEPP Infrastructure did not operate to require the proposal to provide vehicular access to the land by a road other than Parramatta Road and, on merit, the access arrangements proposed were satisfactory: at [94]-[95].

Urbis v Inner West Council and Transport for NSW [2016] NSWLEC 1444 (Tuor C)

Facts: The Applicant appealed under s 97(1) of the *Environmental Planning and Assessment Act 1979 (NSW)* (the EPA Act) against the deemed refusal of a development application (D/2015/438) by the Joint Regional Planning Panel (the JRPP). The application was for the demolition of existing buildings, remediation of the site and construction of mixed use development including retail, commercial, club and residential uses at 138-152 and 154-156 Victoria Road, 697and 699 Darling Street, and 1, 3, 5 and 7 Waterloo Street, Rozelle (the site). The application was made on behalf of Rozelle Village Pty Ltd (the Applicant), the owner of the site (the owner). The application also involved the construction of a pedestrian bridge over Victoria Road and works on the footpath on the north-eastern side of Victoria Road. Most of the site had previously been owned and occupied by the Balmain Leagues Club and has been vacant for a number of years.

The site was a deferred matter under *Leichhardt Local Environmental Plan* 2013 (LEP 2013) and subject to site specific controls in Schedule 1, Pt 3 of *Leichhardt Local Environmental Plan* 2000 (LEP 2000). The site is within the Business Zone under LEP 2000 and the development is permissible with consent. *Leichhardt Development Control Plan* 2000 (DCP 2000) includes site-specific controls for the Balmain Leagues Club Precinct in Pt D1.

Issues:

(1) Whether the proposal met the objectives of the site-specific controls in LEP 2000.

(2) Whether the development provided acceptable solar access and cross-ventilation to the residential units and solar access to the plaza.

(3) Whether the development should include a pedestrian bridge over Victoria Road, as owner's consent had not been provided and whether the proposed design of the bridge was acceptable; and

(4) Whether the development would promote the long-term viability of the Balmain Leagues Club on the site (an objective of the site-specific controls in DCP 2000).

Held: Dismissing the appeal and refusing the development application:

(1) The site-specific controls in LEP 2000 provide that "[d]espite any other provisions of this plan … consent may be granted for mixed use development on the site, but only if, in the opinion of Council, the following objectives are met". This is a precondition to the exercise of the Court's power to grant consent: at [39];

(2) The site-specific controls in DCP 2000 are a relevant matter in determining whether the objectives in cl 2 are met: at [40];

(3) The consideration in previous development applications for the site provide no greater weight to the LEP controls: at [41];

(4) The objectives of the site-specific controls in LEP 2000 are not met in that the development would not contribute to the vibrancy and prosperity of the Rozelle Commercial Centre with an active street life while maintaining residential amenity (Objective b): at [65]-[77]; is not well designed … providing a high quality transition to the existing streetscape (Objective c): at [86]-[87]; and the traffic generated by the development would not have an acceptable impact on local traffic (Objective d): at [100]-[107];

(5) Objective (b) does not focus on the impact of the development on the economic viability of the existing retailers but on the contribution of the development to the "vibrancy" and "prosperity" of the Rozelle Commercial Centre, which includes the site: at [66];

(6) “Vibrancy” relates to the activity and the number of pedestrians using the centre and the surrounding streets. Similarly, the concept of “active street life” would be achieved by a design that encourages use of the centre and its integration with the surrounding streets by facilitating the flow-on effects of people attracted to the supermarket also using the existing shops: at [68];

(7) The design of the development is focused on facilitating access for both pedestrians and cars to the supermarket and is likely to function as a stand-alone centre that can operate independently of the existing centre: at [71];

(8) The western forecourt would be a convenient entry point to the supermarket and this is likely to result in an increased intensity of non-residential use that would impact on existing residential amenity: at [74];

(9) The competitive effect of the proposed development is unlikely to be balanced with flow-on benefits to the Rozelle Commercial Centre: at [78];

(10) The level of traffic generation for the site is not an inevitable consequence and reasonable expectations arising from compliance with the applicable planning controls as the achievement of these limits is dependent upon the satisfaction of the objectives for the site in LEP 2000: at [102];

(11) In circumstances, where the existing road network is already congested and at overcapacity during peak periods, there appears to be no relevant standard to apply. The measure of 10% increase in travel times is appropriate in the absence of any adopted standard to determine whether the traffic generated by the development will have an acceptable impact on the local streets: at [103] and [104];

(12) While DCP 2000 proposes envelopes and setbacks, there is flexibility under s 79C(3A) of the EPA Act for adjustments, particularly to the West Tower, to achieve better solar access objectives and the residential apartments should be able to achieve compliance with the cross-ventilation requirements of the Apartment Design Guide: at [113];

(13) The pedestrian bridge is an obligation not only under a Voluntary Planning Agreement but also under DCP 2000. Therefore, if it is not required, this should be addressed strategically by the Council through amendments to these documents. The proposed pedestrian bridge does not correspond exactly to the location shown in DCP 2000 and there are issues with its design and the manner in which it arrives in the development that would require further consideration if consent were to be granted: at [119];

(14) Consideration of the objective in the site-specific controls of DCP 2000, “To promote the long term viability of the Balmain Leagues Club on the site, for the benefit of the local community”, serves a “proper planning purpose”: at [131]; because the site-specific controls in LEP 2000 and DCP 2000 are premised on the history of the use of the site by the Balmain Leagues Club and provide incentives to facilitate that continued use. Planning is not usually concerned about the user but, rather, the use (*Jonah Pty Limited v Pittwater Council* (2006) 144 LGERA 408) and the zoning in LEP 2000 refers to a generic "club" use. However, the genesis of the controls and the requirements of the DCP relate not just to a generic club but specifically to the Balmain Leagues Club and extend the principles in *Jonah*: at [126];

(15) To be satisfied that this development will be promoting the long-term viability of the Club, the Court should be satisfied that the ground-floor area provided for club use will be occupied by the Balmain Leagues Club for its long-term viable usage: at [127]; and

(16) Questions in relation to the calculation of floor space ratio for the club use and the development overall, and doubts about the area to be provided for use by the Balmain Leagues Club to promote its long-term viability, would need to be addressed before any consent could be granted: at [135]-[142].

Waldrip v Lake Macquarie City Council and Johnson Property Group Pty Ltd No.2 [2016] NSWLEC 1365 (Tuor C and Speers AC)

(related decision: *Waldrip v Lake Macquarie City Council and Johnson Property Group Pty Ltd* [2016] NSWLEC 1212 (Tuor C and Speers AC))

Facts: Johnson Property Group Pty Ltd (the Second Respondent) filed amended plans and supplementary ecology information on 15 June 2016 and 18 July 2016, in accordance with the Commissioners' orders at first instance. The plans concerned the impact of a water recycling facility on the potential to conserve a wildlife corridor on the land and adjoining property. Amended conditions were filed on 1 July 2016. On 7 July 2016, the Commissioners advised the parties that further amendments were required, principally Condition 37, that dealt with odour control. The Applicant had argued that monitoring mechanisms of achieving acceptable levels of odour should be included in the condition, and would make the Second Respondent more accountable to the community. The Second Respondent submitted that the existing conditions already provided for accountability and were not necessary. On 22 August 2016, the parties filed an agreed Condition 37.

Issues:

(1) Whether the Second Respondent's amended plans and conditions were in accordance with the Court's findings in *Waldrip* and, therefore, whether the appeal against the First Respondent's decision to grant development consent was approved.

Held: Appeal dismissed, amended development consent approved:

(1) The commissioners were satisfied that the relocation of the water treatment facility was in accordance with its finding in *Waldrip,* and the monitoring will sufficiently address odour impacts on the community: at [10];

(2) The amended plans and conditions were satisfactory and the development application could be approved: at [12]; and

(3) The Applicant's appeal from the First Respondent's decision to grant development consent was dismissed: at [13].

- Registrar decisions

Project 28 Pty Ltd v Minister for Planning [2016] NSWLEC 1363 (Registrar Gray)

Facts: Two Notices of Motion were filed in response to a Notice to Produce to Court (the Notice to Produce) issued by the Applicant (Project 28 Pty Ltd). The substantive proceedings involve a merits appeal by the Applicant, against a decision made by the Minister for Planning (the Respondent) to disapprove a modification of a project approval previously granted under Pt 3A of the *Environmental Planning and Assessment Act 1979 (NSW)* (the EPA Act). On 16 August 2016, the Applicant filed a Notice to Produce issued to the Respondent for the production of documents recognised as draft assessment reports and internal correspondence that concerned the modification request. The documents related to the performance of functions, specifically those performed by the Secretary of the Department, which were antecedent to the Minister's decision that is currently the subject of the substantive appeal proceedings. The Applicant formed the opinion that the Respondent would not comply with the Notice to Produce and subsequently filed a Notice of Motion on 19 August 2016 seeking orders for the production of documents under s 68 of the *Civil Procedure Act 2005 (NSW)*. On 24 August 2016, the Respondent filed a Notice of Motion seeking to set aside the Notice to Produce.

Issues:

(1) Whether the Notice to Produce should be set aside on the basis of a failure by the Applicant to establish the requisite relevance of the documents; and

(2) Costs.

Held: Notice of Motion filed by the Respondent granted, Notice to Produce and Notice of Motion filed by Applicant dismissed, Applicant to pay Respondent's costs of the Notice of Motion filed 24 August 2016 and the Notice to Produce, each party to pay their own costs of the Notice of Motion filed by the Applicant on 19 August 2016.

(1) The Applicant failed to identify any issue in the proceedings to which the documents are relevant: at [25];

(2) There is no obligation on the Court to consider the Secretary's decision not to request environmental assessment requirements in making a modification request. The contention relating to why the Secretary made that decision is beyond the scope of the Court's decision-making function in a merit appeal concerning the modification request: at [27]; and

(3) Having been successful in setting aside the Notice to Produce, it was fair and reasonable for the Respondent to be reimbursed for the costs of the Notice to Produce and for the application to be set aside: at [40].

Court News

Retirements/Appointments

Commissioner Linda Pearson retired on 12 July 2016. Commissioner Pearson had, prior to this edition, been editor of the Newsletter.

Commissioner Judy Fakes retired on 1 October and was appointed as an Acting Commissioner from 2 October until 28 February 2018.

Commissioner Annelise Tuor retired on 27 October 2016.

Commissioner Susan Dixon was reappointed for a further seven-year term from 6 July 2016.

Commissioner Danielle Dickson was appointed for a seven-year term from 18 July 2016.

Commissioner Michael Chilcott was appointed for a seven-year term from 25 July 2016.

Acting Commissioner Jenny Smithson was appointed as a full-time Commissioner for a seven-year term from 1 August 2016.

Senior Commissioner Rosemary Martin was appointed as Senior Commissioner for a seven-year term from 17 October 2016.