August 2011

Volume 3 Issue 3

Land and Environment Court of NSW Judicial Newsletter

Legislation

- **Statutes and Regulations**

Jurisdiction of the Court

The *Courts and Other Legislation Act* 2011 commenced on 7 June 2011. Among other miscellaneous changes, the Act amended the *Land and Environment Court Act* 1979 and the Environmental Planning and Assessment Regulation 2000. The amendments:

(a) expressly provide for appeals against modifications of development consents made under s 97AA of the *Environmental Planning and Assessment Act* 1979 to be dealt with as part of the Court's Class 1 jurisdiction;
(b) provide for civil proceedings that have been transferred to the Court from the Supreme Court under s 149B of the *Civil Procedure Act* 2005 to be dealt with as part of the Court's Class 4 jurisdiction;
(c) enable the Court to deal with proceedings in the Court that are related or ancillary to the transferred proceedings as Class 4 matters;
(d) enable appeals under s 97AA of the *Environmental Planning and Assessment Act* 1979 to be dealt with by means of on-site hearings;
(e) repeal provisions that are now outdated because of the enactment of s 97AA;
(f) Enable proceedings on applications made to the Court under s 14B of the *Trees (Disputes Between Neighbours) Act* 2006 (high hedges) to be dealt with by means of on-site hearings; and
(g) allow appeals under s 97AA of the *Environmental Planning and Assessment Act* 1979 and applications under s 14B of the *Trees (Disputes Between Neighbours) Act* 2006 that have been lodged or made (but not yet heard) to be dealt with by means of on-site hearings [full explanatory notes].

Planning and Development

The *Environmental Planning and Assessment Amendment (Part 3A Repeal) Act* 2011 was assented to on 27June 2011. It will repeal Part 3A of the *Environmental Planning and Assessment Act 1979* and introduce a new system for the assessment of State significant projects. The Act will also make a number of changes to the operation and make-up of the Planning Assessment Commission and Joint Regional Planning Panels.

A series of policy statements and a fact sheet on the Act have been released by the Department of Planning and Infrastructure:

- Policy statement: State significant development – procedures;
- Policy statement: Proposed State significant development and infrastructure classes;
- Policy statement: Ministerial 'call in' for State significant development

- New Instrument of Delegation to the Planning Assessment Commission [full explanatory notes].

The *Infrastructure NSW Act* 2011 commenced on 1 July 2011. The Act established a new government agency and board, called Infrastructure NSW whose goals are to:

(a) secure the efficient, effective, economic and timely planning, co-ordination, selection, funding, implementation, delivery and whole-of-lifecycle asset management of infrastructure that is required for the economic and social well-being of the community; and

(b) ensure that decisions about infrastructure projects are informed by expert professional analysis and advice [full explanatory notes].

Criminal and Evidence

The *Evidence Amendment (Journalist Privilege) Act* 2011 commenced 21 June 2011. It amends the *Evidence Act* 1995 with respect to the disclosure of the identity of persons who give information to journalists. If a journalist has promised not to reveal an informant's identity, the Act provides that the journalist (and his or her employer) will not be compelled to disclose the informant's identity in any proceedings in a NSW court, unless the court determines otherwise in accordance with a specified public interest test. The Act also made an amendment to the general provisions relating to professional confidential relationship privilege [full explanatory notes].

The Fines Amendment (Work and Development Orders) Regulation 2011 — published 8 July 2011, amends the Fines Regulation 2010 to remove the provisions that end the trial period for the scheme for the making of work and development orders, which allows disadvantaged people to "work off" unpaid fines, so as to make the scheme permanent [media release].

Water related

Water Management (General) Amendment (Aquifer Interference) Regulation 2011 — published 30 June 2011, amends the Water Management (General) Regulation 2004:

(a) to limit an exemption from the requirement for an access licence under the *Water Management Act* 2000 for the taking of water from a water source that currently applies to persons lawfully engaged in prospecting or fossicking for minerals or petroleum, so that the exemption applies only to their taking of up to 3 megalitres of water for that purpose in any year commencing 1 July;

(b) to provide that the limitation will not apply to such prospecting or fossicking pursuant to existing authorities;

(c) to omit an exemption from the requirement for an access licence for the taking of water from an aquifer in connection with mining or extracting material in certain circumstances; and

(d) to insert transitional provisions retaining until 1 February 2012 certain entitlements under the *Water Act* 1912 to take water for the purpose of prospecting or fossicking for minerals or petroleum.

Water Sharing Plan for the Lachlan Regulated River Water Source Amendment Order 2011 — published 1 July 2011, amends the *Water Sharing Plan for the Lachlan Regulated River Water Source* 2003.

Water Sharing Plan for the Murrumbidgee Regulated River Water Source Amendment Order 2011 — published 1 July 2011, amends the *Water Sharing Plan for the Murrumbidgee Regulated River Water Source* 2003.

Fisheries Management (Continuation of Activities in Lowland Lachlan River Catchment) Interim Order 2011 — published 17 June 2011, remakes the Fisheries Management (Continuation of Activities in Lowland Lachlan River Catchment) Further Interim Order 2010 to allow certain recreational and commercial fishing activities in the natural drainage system of the lowland catchment of the Lachlan River to continue for a further period of 6 months. The activities the subject of this interim Order may only continue subject to compliance with any applicable fishing regulatory controls imposed by or under the *Fisheries Management Act* 1994.

Fisheries Management (Continuation of Activities in Lowland Darling River Catchment) Interim Order 2011 — published 17 June 2011, remakes the Fisheries Management (Continuation of Activities in Lowland Darling River Catchment) Further Interim Order 2010 to allow certain recreational and commercial fishing activities in the natural drainage system of the lowland catchment of the Darling River to continue for a further period of 6 months. The activities may only continue subject to compliance with any applicable fishing regulatory controls imposed by or under the *Fisheries Management Act* 1994.

Miscellaneous

Aboriginal Land Rights Amendment Regulation 2011 — published on 3 June 2011, amended the provisions of the Aboriginal Land Rights Regulation 2002 relating to elections for councillors of the New South Wales Aboriginal Land Council to make those provisions consistent with those governing state and local government elections. Specifically, the Regulation:

(a) provides that returning officers and other electoral officers for such elections cannot be candidates in those elections;
(b) allows an alternate form of a candidate's given name to appear on ballot-papers;
(c) enables certain electoral notices to be published on the New South Wales Electoral Commission's website;
(d) expands the classes of voters entitled to postal vote to include persons with a disability and persons who believe that attending a polling place will place them or members of their family at risk;
(e) requires the act of postal voting (but not the content of a ballot-paper) to be witnessed and a declaration to be signed by the witness on the postal voting envelope;
(f) requires voters at polling places to answer the question "have you voted before in this election?";
(g) allows candidates to request a recount of votes within 24 hours of being informed of the result of the initial count of the votes;
(h) allows the New South Wales Electoral Commission to advertise information about the election; and
(i) makes other minor and machinery amendments.

The *Local Government Amendment (Elections) Act* 2011 commenced on 27 June 2011. The Act amended the *Local Government Act* 1993 in relation to the administration of local council elections, the process for reducing councilor numbers and the abolition of wards in a council area and by-elections for civic office; and for other purposes [full explanatory notes].

The Division of Local Government has released two circulars on the amendments:

- Conduct of Elections by Council (Circular No. 11–11); and
- Constitutional Arrangements for Local Councils (Circular No.11–12).

The *Local Government (Shellharbour and Wollongong Elections) Act* 2011 commenced on 10 May 2011. It provides for Councillor elections to be held in September and abolishes some awards [full explanatory notes].

The *Statute Law (Miscellaneous Provisions) Act* 2011 commenced on 8 July 2011. The Act makes minor amendments (housekeeping) to numerous Acts, regulations and LEPs and updates cross-referencing between related legislation.

Subordinate Legislation (Postponement of Repeal) Order 2011 — published 15 July 2011, postpones the repeal of some regulations from 1 September 2011 to 1 September 2012, including the:

- Crown Lands (Continued Tenures) Regulation 2006;
- Crown Lands (General Reserves) By-law 2006;
- Crown Lands Regulation 2006;
- Fisheries Management (Aquatic Reserves) Regulation 2002;
- Local Government (General) Regulation 2005;
- Lord Howe Island Regulation 2004;
- Native Vegetation Regulation 2005;
- Petroleum (Offshore) Regulation 2006;
- Privacy and Personal Information Protection Regulation 2005;
- Protection of the Environment Operations (Waste) Regulation 2005;
- Regional Development Regulation 2004; and
- Valuation of Land Regulation 2006.

Western Sydney Parklands Amendment Order 2011 — published 15 July 2011, adds new sites that are held on trust under the *Western Sydney Parklands Act* 2006.

Standard Instrument (Local Environmental Plans) Amendment (Miscellaneous) Order 2011 — published 13 July 2011, makes numerous amendments to the Standard Instrument (Local Environmental Plans) Order 2006.

- **State Environmental Planning Policy Amendments**

SEPP (Repeal of SEPP No 53—Metropolitan Residential Development) 2011 was repealed on 3 June 2011. For further information see the Department of Planning's Circular PS 11-016.

SEPP (Affordable Rental Housing) Amendment 2011, published 20 May 2011, aims to ensure that affordable rental housing is compatible with the locality and introduces new standards for boarding houses. The Department of Housing has released a fact sheet outlining the changes to the SEPP.

SEPP (Major Development) 2005 was amended by the SEPP (Major Development) Amendment 2011 — published 13 May 2011 that provided for transitional arrangements pending the repeal of Pt 3A of the *Environmental Planning and Assessment Act* 1979. The Department of Planning and Infrastructure released a number of explanatory documents on the changes:

- Planning circular (PS 11-014);

- Fact sheet – Projects being removed;
- Fact sheet – Projects remaining;
- Frequently asked questions;
- List of revoked and non-declared projects; and
- List of residential, commercial, retail and coastal projects remaining under Part 3A;

SEPP Amendment (SEPP 53 Transitional Provisions) 2011 — published 15 July 2011, enacts transitional provisions consequent on the repeal of SEPP No 53 — Metropolitan Residential Development.

State Environmental Planning Policy Amendment (Standard Instrument) 2011 — published 13 July 2011, amends a number of LEPs by, for instance, changing the maps in the Port Macquarie-Hastings LEP 2011.

- **Bills**

The Marine Parks Amendment (Moratorium) Bill 2011 seeks to impose a moratorium on the declaration of additional marine parks or the expansion of sanctuary zones within existing marine parks [full explanatory notes].

The Environmental Planning and Assessment Amendment (Maintenance of Local Government Development Consent Powers) Bill 2011 aims to change the procedures for appointing planning administrators, and to change the functions of such administrators, so that a council's development consent powers and other decision-making functions are maintained, except in the limited circumstances where an administrator can exercise them. The Bill also seeks to abolish planning assessment panels [full explanatory notes].

- **Miscellaneous**

On July 13 2011, the Department of Planning and Infrastructure announced the formation of a Planning Review Panel to oversee the review of the State's planning laws [fact sheet] [media release].

The Legislation and Policy Division of the Department is conducting a review of Judicial Review in NSW [discussion paper].

A comprehensive review of the *Valuation of Land Act* 1916 has been announced, in response to the recommendations of the Joint Standing Committee on the Office of the Valuer General's inquiry into the provisions of the Act [full report].

Powers of Attorney Regulation 2011, published 8 July 2011, remakes, with minor amendments, the provisions of the Powers of Attorney Regulation 2004, which will be repealed on 1 September 2011.

The Division of Local Government has released a Circular (No 11-15) advising councils of the maximum interest rate that can be charged on overdue rates and charges.

Judgments

United Kingdom

Jones v Kaney [2011] UKSC 13 (Lord Phillips P, Lord Brown, Lord Collins, Lord Kerr and Lord Dyson with Lady Hale and Lord Hope DP in dissent)

(related decision: *Jones v Kaney* [2010] EWHC 61 (QB) Blake J)

Facts: a road accident occurred on 14 March 2001 in which the applicant, Mr Jones, was involved. Mrs Kaney, the respondent and a consultant psychologist, was engaged to give expert evidence in the personal injury claim commenced by Mr Jones. Mrs Kaney initially prepared a report dated 29 July 2003, in which she expressed the view that Mr Jones was suffering from post traumatic stress disorder ("PTSD"). Mrs Kaney later resiled from this opinion in a second report dated 10 December 2004, in which she stated that Mr Jones did not have all the symptoms of PTSD, but was still suffering from depression and some of the symptoms of PTSD. Mrs Kaney and the respondent's expert, Dr El-Assra, were then ordered to hold discussions and prepare a joint report. Dr El-Assra prepared the joint report, which Mrs Kaney then signed without amendment or comment. The joint report was highly damaging to the case of Mr Jones. It stated that his psychological reaction was no more than an adjustment reaction that did not reach the level of PTSD. The personal injury claim was then settled for much less than it would have been based on Mrs Kaney's initial report.

A negligence claim was brought by Mr Jones against Mrs Kaney. It was initially struck out by Blake J on the grounds of expert immunity (*Jones v Kaney* [2010] EWHC 61(QB)). Mr Jones appealed.

Issues:

(1) whether the immunity from suit for breach of duty should be abolished for expert witnesses taking part in legal proceedings.

Held: by majority, abolishing the immunity of expert witnesses from suit for breach of duty, but retaining the absolute privilege that experts enjoy in respect of claims for defamation:

(1) there was no justification for the view that abolishing the immunity would have a "chilling effect" on the supply of expert witnesses. All who provided professional services that involved a duty of care were at risk of being sued for breach of that duty. Those professionals customarily insured against that risk: at [52]–[54];

(2) experts' immunity was not considered necessary to ensure that expert witnesses give full and frank evidence to the court. An expert was well aware of their duty to the court and if the expert frankly accepted that they had changed their view then they were performing their duty and should not fear being sued. The removal of advocate's immunity, for example, had not resulted in any diminution of the advocate's readiness to perform their duty to the court: at [55]–[57];

(3) the removal of the immunity would not result in vexatious claims for breach of duty or a multiplicity of suits. It was considered difficult for a lay litigant to mount a credible case that his/her expert witness had been negligent and it was a rare litigant who would throw away money on proceedings that they would be advised were without merit: at [58]–[60];

(4) the most likely consequence of denying expert witnesses the immunity accorded to them would be a sharpened awareness of the risks of pitching their initial views of the merits of their client's case too high or too inflexibly. The removal of the immunity would also tend to ensure a greater degree of care was taken in the preparation of the initial report or joint report: at [67] and [85];

(5) expert immunity was not necessarily in the public interest and there was not a sufficiently compelling reason to justify continuing to deny a remedy to a person who had suffered loss as a result of his or her expert's breach of the duty of care owed in contract and tort: at [124]; and

(6) in dissent, it was held that the lack of a secure principled basis for removing the immunity from expert witnesses, the lack of a clear dividing line between what was to be affected by the removal and what was not, the uncertainties that this would cause and the lack of reliable evidence to indicate what the effects might be, would suggest that the wiser course would be to leave matters as they stood until the Law Commission or, if appropriate, Parliament addressed the issue: at [173] and [189]–[190].

Practice Guidance: McKenzie Friends (Civil and Family Courts) [2010] 4 All ER 272 (Lord Neuberger MR, Sir Nicholas Wall P)

Practice Guidance: McKenzie Friends (Civil and Family Courts) [2010] 4 All ER 272 ("the Practice Guidance") restates the rights and obligations of a McKenzie Friend ("MF"), a non-lawyer who assists an unrepresented litigant in court proceedings.

Litigants in person have the right to reasonable assistance from a MF (at [2]), but the Court retains discretion to refuse such assistance (at [5]) in accordance with principles considered at [6]–[17] of the Practice Guidance. An MF may: provide moral support for litigants, take notes, help with case papers and quietly give advice on any aspect of the conduct of the case: at [3]. The MF may not act as the litigants' agent in relation to the proceedings, manage litigants' cases outside of court, address the court, make oral submissions or examine witnesses: at [4]. A MF has no independent right to provide assistance or to carry out the conduct of the litigation: at [2]. However, a litigant in person may make an application for a right of audience to be granted to a MF in accordance with principles considered at [18]–[26] of the Practice Guidance.

High Court of Australia

Jemena Gas Networks (NSW) Limited v Mine Subsidence Board [2011] HCA 19 (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel JJ, Bell J dissenting)

(related decisions: *Jemena Gas Networks (NSW) Limited v Mine Subsidence Board* [2010] NSWCA 146 Spigelman CJ, Allsop P, Giles, Basten and Macfarlan JJ; *Jemena Gas Networks (NSW) Limited v Mine Subsidence Board* [2009] NSWLEC 106 Sheahan J)

Facts: Jemena Gas Networks (NSW) Limited ("Jemena") owned and operated a gas pipeline that traversed an area the subject of an underground coal mining lease. The lease encompassed a block of parallel, adjacent panels of coal that had been approved for longwall mining. Jemena anticipated that the extraction of coal from Longwall 32 would cause subsidence that would endanger the pipeline. They did not anticipate damaging subsidence from the mining of the other panels. Prior to the mining of Longwall 32, Jemena carried out works to prevent and mitigate damage from the anticipated subsidence. Pursuant to the Mine Subsidence Compensation Act 1961 ("the Act"), Jemena made a claim to the Mine Subsidence Board ("the Board") to be compensated for the costs of the works carried out. The Board rejected the claim. Jemena appealed the decision.

Sheahan J, applying the decision in *Mine Subsidence Board v Wambo Coal Pty Ltd* [2007] NSWCA 137; (2007) 154 LGERA 60, held that the works were incurred in anticipation of future subsidence and, therefore, Jemena was not entitled to compensation pursuant to the Act. The Court of Appeal (by majority) dismissed an appeal, holding that *Wambo* correctly held that the Act did not authorise expenditure made in anticipation of a subsidence that had not yet occurred. Jemena appealed to the High Court.

Issues:

(1) whether s 12A(1)(b) of the Act required only that the subsidence had taken place before the Board formed its opinion about what damage could reasonably be anticipated; and

(2) whether s 12A(1)(b) required that a subsidence actually occur before a valid claim could be made or decided.

Held: allowing the appeal and setting aside the decision of the Court of Appeal, and answering the preliminary question that Jemena was entitled to an amount to meet the proper and necessary expense of mitigating the damage from cumulative subsidence:

(1) there were linguistic difficulties in all possible constructions of s 12A(1)(b) and it was necessary to look for the least irrational construction: at [30];

(2) s 12A should properly be seen as a beneficial provision not to be restricted by a close and technical reading, as to do so would arbitrarily restrict the rights of compensation offered in substitution for the rights destroyed by s 14: at [37];

(3) having regard to the serious consequences of subsidence, a construction of s 12A(1)(b) requiring an owner to wait until predicted subsidence occurred would have irrational effects: at [40];

(4) the construction advocated by the Board would have several inappropriate consequences in that it would prevent owners of improvements from obtaining an amount to meet expenses to prevent or mitigate damage, and would inhibit owners of improvements from responding early to the strong pressures of the criminal law and of commercial and political considerations, by the taking of steps to protect their interests and by dealing with threats to the safety of the improvements: at [44]–[45]; and

(5) the anticipation referred to in s12A(1)(b) was a looking forward to an uncertain event, and treating it as certain even though it was not. When the Board inquired into what it was that the owner could reasonably have anticipated, the object of the verb "anticipated" was damage which had not yet occurred (and may never occur if forestalled by preventative or mitigatory measures), arising from subsidence which had not yet taken place, or may not: at [47]–[48].

Kuhl v Zurich Financial Services Australia Ltd [2011] HCA 11 (Heydon, Crennan and Bell JJ, with French CJ and Gummow J dissenting)

(related decisions: *Kuhl v Zurich Financial Services Australia Ltd* [2009] WADC 4 Wisbey DCJ; *Kuhl v Zurich Financial Services Australia Ltd* [2010] WASCA 50 Martin CJ, Wheeler and Newnes JJA)

Facts: on 19 November 1999, Mr Geoffrey Kuhl suffered injuries in the course of his employment with Transfield Construction Pty Ltd ("Transfield"). Pursuant to s 93E of the *Workers' Compensation and Rehabilitation Act* 1981, Mr Kuhl was barred from bringing a claim in negligence against Transfield. In the District Court of Western Australia, Mr Kuhl brought a claim in negligence against WOMA (Australia) Pty Ltd ("WOMA") and Hydrosweep Pty Ltd ("Hydrosweep") who were suppliers of Transfield. In the place of WOMA and Hydrosweep stood their respective insurers, the first and second respondents, pursuant to s 601AG of the *Corporations Act* 2001 because WOMA and Hydrosweep were deregistered after Mr Kuhl's injury but before he commenced proceedings. Mr Kuhl was unsuccessful in both the District Court and on appeal before the Court of Appeal of the Supreme Court of Western Australia. Mr Kuhl appealed to the High Court.

The trial judge, in dismissing Mr Kuhl's claim, attacked his evidence regarding how he was injured. The trial judge noted that Mr Kuhl's evidence was less than expansive, leading the trial judge to form the view that Mr Kuhl was reluctant to say precisely what had happened.

Issues:

(1) what is the scope of the rule in *Jones v Dunkel* [1959] HCA 8; and

(2) what judges should do if they disbelieve a witness.

Held: the High Court in the course of deciding to allow the appeal, set aside the decisions of both the Court of Appeal of the Supreme Court of Western Australia and the District Court in favour of the first respondent, entered judgment against the first respondent in the amount of $265,000 and ordered the first respondent to pay Mr Kuhl's costs of the appeal and the proceedings below, made the following observations:

(1) the duty of a witness is to tell the truth, the whole truth, and nothing but the truth insofar as the questions asked of him/her. The duty of a witness to answer questions responsively involved not only a negative duty not to volunteer material for which the question did not call, but also a positive duty to proffer all material

within the witness's knowledge for which the question did call. To conclude, as the trial judge did, that a party-witness was reluctant to say what had happened was to conclude that the party-witness was deliberately failing to comply with the duty to tell the whole truth. This was a serious conclusion: at [62];

(2) the rule in *Jones v Dunkel* permits an inference not that evidence not called by a party would have been adverse to the party, but that it would not have assisted the party. A litigant did not have a duty to call particular witnesses or to procure that any witnesses called by that litigant were asked particular questions. A litigant who entered the witness box, on the other hand, was under a positive duty to tell the whole truth in answer to the questions asked: at [64];

(3) it was not sound judicial technique to criticise a party-witness for deliberately withholding the truth in a fashion crucial to a dismissal of that party's claim unless two conditions were satisfied. First, reasons were given for concluding that the truth had been deliberately withheld. Second, the party-witness must have been given an opportunity to deal with the criticism: at [67];

(4) the trial judge did not give reasons for the view that Mr Kuhl's evidence was less than expansive: at [68];

(5) there was a breach of the duty of procedural fairness where a plaintiff claiming compensation for injury was held to have feigned or exaggerated their symptoms but this had not been suggested in cross-examination and the defendant had disavowed that possibility. In the absence of any challenge from the cross-examiner to the frankness and completeness of Mr Kuhl's evidence, it was incumbent on the trial judge, if his conclusion that Mr Kuhl had not been frank and complete was material to his decision, to make that challenge: at [69]–[75]; and

(6) the failure of the trial judge to give Mr Kuhl an opportunity to deal with the criticism of his evidence or to give reasons would have justified a new trial, if that is what Mr Kuhl had sought: at [77].

Dasreef Pty Limited v Hawchar [2011] HCA 21 (French CJ, Gummow, Hayne, Heydon, Crennan, Kieffel and Bell JJ)

(related decisions: *Nawaf Hawchar v Dasreef Pty Ltd* [2009] NSWDDT 12 Curtis J; *Dasreef Pty Ltd v Hawchar* [2010] NSWCA 154 Allsop P, Basten and Campbell JJA)

Facts: Mr Nawaf Hawchar worked for Dasreef Pty Limited ("Dasreef") as a labourer and stonemason between 1999 and 2005. He was diagnosed with early stage silicosis in 2006. Mr Hawchar brought proceedings in the Dust Diseases Tribunal ("the DDT") claiming that he had been exposed to unsafe levels of silica dust while working for Dasreef. Mr Hawchar relied on opinion evidence from Dr Kenneth Basden, a chartered chemist, chartered professional engineer and retired academic. In his report, Dr Basden spoke of an operator of an angle grinder cutting sandstone being exposed to levels of silica dust "of the order of a thousand or more times" the prescribed maximum. The DDT admitted this as evidence of expressing an opinion about the numerical level of respirable silica dust in Mr Hawchar's breathing zone, in the sense that it could form the basis of a calculation of the level of exposure. The DDT entered judgment for Mr Hawchar. Dasreef appealed to the Court of Appeal on the primary basis of the admissibility of Dr Basden's report. The Court of Appeal dismissed the appeal in relation to that point. Dasreef appealed to the High Court.

Issues:

(1) what were the principles governing the admissibility of the evidence of Dr Basden.

Held: in dismissing the appeal, the High Court made the following observations in relation to expert evidence:

(1) it was noted that as a general rule a trial judge should rule on the admissibility of evidence as soon as possible after an objection has been made and argued. If an immediate ruling was not possible, then the ruling would ordinarily be given before the party who tendered the disputed evidence closed its case. It was only for a very good reason that a trial judge would defer ruling on the admissibility of evidence until the judgment: at [19], [20] and [135];

(2) there was an evident danger in relation to building estimates of one expert upon the estimate of another expert. In order to ensure that procedural fairness was afforded to the parties it was necessary for each estimate to be separately exposed during argument for consideration: at [24];

(3) the principle in *HG v The Queen* [1999] HCA 2; (1999) 197 CLR 414 at [39] was reaffirmed. Evidence is to be presented in a form that makes it possible to answer the question of whether the evidence is wholly or substantially based on specialised knowledge based on training, study or experience of the expert. Further, after reaffirming what was said by Heydon JA in *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305; (2001) 52 NSWLR 705 at [85], the Court noted that the "admissibility of opinion evidenced was to be determined by application of the Evidence Act rather by any attempt to parse and analyse particular statements in decided cases divorced from the context in which those statements were made": at [36];

(4) there was no basis on which the trial judge could conclude that a numerical or quantitative opinion by Dr Basden was wholly or substantially based on his specialised knowledge based on training, study or experience. Dr Basden had only seen an angle grinder used in the way Mr Hawchar used it once and he gave no evidence that he had ever measured directly, or sought to calculate indirectly, the amount of respirable dust an operator was exposed to: at [39] and [40];

(5) this conclusion did not seek to introduce "the basis rule" that excluded opinion evidence unless the factual basis upon which the opinion was proffered was established by other evidence: at [41]; and

(6) a failure to demonstrate that an opinion expressed by a witness is based on the witness's specialised knowledge based on training, study or experience was a matter that went to the admissibility of the evidence, not its weight: at [42] and [137].

Springfield Land Corporation (No 2) Pty Ltd v State of Queensland [2011] HCA 15 (French CJ, Gummow, Hayne and Crennan JJ, Heydon J dissenting)

(related decisions: *State of Queensland v Springfield Land Corporation (No 2) Pty Ltd* [2009] QSC 143; (2009) 169 LGERA 284 McMurdo J; *State of Queensland v Springfield Land Corporation (No 2) Pty Ltd* [2009] QCA 381; (2009) 171 LGERA 38 Keane, Fraser JJA, Atkinson J)

Facts: the Springfield Land Corporation Pty Ltd and Springfield Land Corporation (No 2) Pty Ltd ("the Springfield companies") entered into an agreement ("the agreement") with the State of Queensland that land part of a development near Ipswich ("the land") was to be transferred to the State in order for the development of a transport corridor, with the compensation for the land to be assessed under the *Acquisition of Land Act* 1967 (QLD) ("the AOLA"). The State of Queensland argued that the amount of compensation that the Springfield companies were entitled to was "nil", taking into account the increased value of the adjoining land owned by the companies, due to the purpose of transferring the land for the construction of the transport corridor, pursuant to s 20(3) of the AOLA. The parties had nominated an arbitrator under the agreement to determine the amount of compensation owed. The arbitrator awarded compensation in the amount of $1,468,806 to the Springfield companies for the transferred land. The State of Queensland appealed to the Supreme Court, which substituted "nil" as the amount of compensation owed to the Springfield companies. The Springfield companies appealed to the Court of Appeal. The Court of Appeal dismissed the appeal. The Springfield companies then appealed to the High Court.

Section 20(3) of the AOLA stated that any increase in the value of the land adjoining the land which was taken, due to the purpose for which it was taken, must be taken into account in assessing the compensation to be paid.

Issues:

(1) whether the purpose for which the land was transferred enhanced the value of the adjoining land so as to exceed the value of the transferred land.

Held: dismissing the appeal and finding the purpose for which the land was transferred enhanced the value of the adjoining land so that no compensation was required to be paid to the Springfield companies;

(1) there was no need to consider the *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565 principle, which established that when valuing resumed land any appreciation or

depreciation in the value of the resumed land brought about by the scheme underlying the resumption must be excluded, because the case turned on the requirement in s 20(3) of the AOLA. Further, there was no common law principle derived from *Pointe Gourde*, as described above, because that principle was developed in the context of particular statutory compensation systems starting with the *Land Clauses Consolidation Act* 1845 (UK): at [17]–[18];

(2) in considering s 20(3) of the AOLA it was necessary to determine the purpose for which the land was taken. The Supreme Court was correct in observing that the purpose was to be understood as the public benefit or end to be achieved, rather than some means to that end, and that the arbitrator's identification of the purpose, namely, as to realign an existing proposed corridor, was incorrect: at [19];

(3) the relevant purpose for which the land was taken was the purpose for which the land would have been taken under the AOLA if the agreement had not been made: at [20]; and

(4) the purpose was for future transport, including the facilitation of transport infrastructure for the transport corridor. The terms of the agreement emphasised the incorporation of the statutory description of "purpose", which was subsequently picked up, as described above, by cls 6, 2(b), 11.1 and 1.1 of the agreement in relation to the assessment of compensation for the transferred land: at [20]–[23].

NSW Court of Appeal

Pang v Bydand Holdings Pty Ltd [2011] NSWCA 69 (Beazley JA, with McColl JA and Lindgren AJA agreeing)

(related decision: *Bydand Holdings Pty Limited v Pineland Property Holdings Pty Limited* [2009] NSWSC 584 Einstein J)

Facts: Mr Vincent Pang, the appellant, gave an undertaking to the Supreme Court in proceedings in which he was a guarantor. The undertaking was that Mr Pang was to provide to Bydand Holdings Pty Ltd's ("Bydand") legal representatives 14 days notice of any intention of disposing or encumbering, or in any way dealing with the subject property, until further order of the Court. Mr Pang proceeded to enter into a contract of sale in relation to the subject property, without providing Bydand's legal representatives with 14 days notice. Bydand, by way of notice of motion, alleged that Mr Pang had breached the undertaking and sought orders that Mr Pang be found guilty of contempt. Mr Pang contended that the undertaking was ambiguous, but nevertheless admitted the breach and accepted that he was guilty of civil contempt. The Court found that the undertaking was not ambiguous and that Mr Pang was guilty of criminal contempt. Mr Pang appealed.

Issues:

(1) whether the terms of the undertaking were ambiguous;

(2) whether there remains a distinction between civil and criminal contempt;

(3) whether the breach amounted to criminal contempt;

(4) whether the trial judge erred in using lies as evidence of guilt of contempt; and

(5) whether the trial judge erred in the exercise of his sentencing discretion in failing to consider whether or not to convict notwithstanding that he had found the contempt proven.

Held: dismissing the appeal:

(1) it was clear from the authorities that if the terms of an undertaking are truly ambiguous there can be no contempt because it could not be said what was required to comply. The terms of an undertaking are to be given a sensible meaning, consistent with its actual terms. The undertaking must have been capable of being obeyed and must be considered in the context it was given. The undertaking by Mr Pang was not ambiguous: at [57]–[59], [62] and [165];

(2) there was a distinction between civil and criminal law. The case law acknowledged that the distinction was problematic and had largely disappeared, but at least at a procedural level it was of some importance. The

Supreme Court Act 1970 maintained the distinction between civil and criminal contempt, as by virtue of s 101(6) of that Act there was no appeal from a dismissal of a criminal contempt: at [68]–[71] and [141].

(3) the rules of the Court did not distinguish between criminal and civil contempt. All contempts whether criminal or civil must be proven on the criminal standard of proof. The punishment that the Court may impose applies regardless of whether the contempt was characterised as civil or criminal: at [70] and [72];

(4) breach of an undertaking to the Court did not constitute criminal contempt unless it involved deliberate defiance or was contumacious. It was open to the trial judge to find that the breach of the undertaking by Mr Pang was contumacious, and therefore, criminal contempt: at [101]–[104] and [167];

(5) the trial judge did not err in using lies as evidence of guilt by inferring that the breach of the undertaking was deliberate, given Mr Pang's attempt to conceal the breach in his affidavit and under cross-examination: at [129]–[130]; and

(6) the trial judge did not err in his discretion in sentencing Mr Pang to community service: at [135].

Abret Pty Ltd v Wingecarribee Shire Council [2011] NSWCA 107 (Beazley JA, with Campbell JA and Handley AJA agreeing)

(related decision: *Abret Pty Limited v Wingecarribee Shire Council* [2009] NSWLEC 132 Sheahan J)

Facts: Abret Pty Ltd ("Abret") sought a declaration in Class 4 proceedings in the Land and Environment Court that the development of a Seniors Living Development upon land in Moss Vale, which was zoned in Pt 1(a) ("zone 1(a)") and in Pt 7(b) ("zone 7(b)"), was permissible development with consent under the Wingecarribee Local Environmental Plan 1989 ("the LEP"). The trial judge refused to make the declaration on the basis that the proposal was a prohibited development under the LEP. Abret appealed.

Clause 9 of the LEP provided zone objectives and the development control table. The development control table for zone 1(a) ("the zoning table") stated at item 3 that any development for a purpose other than a purpose included in item 2 or 4 was to obtain development consent and listed at item 4 prohibited developments. Clause 13 of the LEP made provision for dwelling houses within zone 1(a), particularly, cl 13(3) stated that a dwelling house could be erected on land to which the clause applied if the land had an area not less than 40ha.

Issues:

(1) whether the proposed development was prohibited development under the LEP;

(2) whether the trial judge failed to determine the issue raised in the proceedings;

(3) whether cl 9 of the LEP was relevant to the determination of what uses were prohibited;

(4) whether the proposed development was prohibited by cl 13(3) of the LEP;

(5) whether the proposed development was for an innominate use for the purpose of item 3 of the zoning table and was thus permissible with consent; and

(6) whether the development proposal included a residential flat building within item 4 of the zoning table and was thus prohibited development under the LEP.

Held: dismissing the appeal:

(1) to the extent that the trial judge based his conclusion that the development was not to be approved on the objectives of the zoning table, he erroneously engaged in a merits consideration of the application. The objectives were not provisions of the LEP that controlled development, rather they set the framework in which the LEP operated and were relevant to the construction of provisions in the LEP: at [42] and [45];

(2) the trial judge's finding that cl 13(3) of the LEP applied to all housing was erroneous because it only governed dwelling housing: at [31] and [43];

(3) Abret's argument that because "seniors housing" was a defined term within the LEP and was not listed as a prohibited use in the planning table, it was permissible with consent, was rejected: at [62];

(4) it was necessary to characterise the use to which the land was to be put by reference to the purpose of the proposed development in order to determine whether it fell within item 3 of the zoning table or whether the development was prohibited by the LEP: at [62];

(5) there was no evidence that the development was to be limited by the requirements in the definition of "seniors housing". The development had overlapping purposes. It was clear that even if the development was intended to be used for dwellings for seniors, the purpose of the use was for "dwellings" as defined, that was, rooms or suites of rooms capable of being used as a separate domicile in either residential flat buildings or dwelling houses: at [67];

(6) if seniors housing was an innominate use falling within item 3 of the zoning table, residential flat buildings and dwellings were each independently controlled by the LEP. It was not necessary, therefore, where all uses were controlled by the LEP, to find a predominant use: at [67] and [68]; and

(7) residential flat buildings were prohibited development within item 4 of the zoning table, and because they were one of the purposes of the use that was independent and not incidental to the other purpose, the planning ordinance was being disobeyed: at [68].

Fabcot Pty Ltd and Woolworths Limited v Port Macquarie-Hastings Council [2011] NSWCA 167 (Sackville AJA, with Beazley and Campbell JJA agreeing)

Facts: in 2007, following failed negotiations with both Woolworths and Coles, Port Macquarie-Hastings Council ("the council") issued a second expression of interest ("EOI") to sell land (a carpark) in Port Macquarie's CBD, rather than enter into another exclusive arrangement. During the previous exclusive negotiations, Woolworths acquired adjoining land to construct a Dan Murphy's liquor store.

On 7 February 2008, the council notified Woolworths by letter that they had the successful bid on "*the condition that the sale be completed by 30 June 2008 and that the contract of sale was subject to development approval".* Woolworths lodged a development application with the council on 7 April 2008. On 19 November 2008 the council sent Woolworths notification that the levies and other charges for the proposed development would total $470,194. Woolworths objected as their proposal already included $3 million for public amenities and they could not afford the developer contributions.

On 19 December 2008, the council granted deferred commencement consent to the development application and adjoining land, subject to levies and other charges of $450,299. Over the next five months the parties negotiated on the charges with Woolworths seeking to have the council provide up to $500,000 towards land remediation costs. On 23 April 2009, the council agreed to contribute up to $300,000 towards remediation costs for asbestos contamination only. Woolworths took a hard approach to the offer, saying that the condition was a "deal-breaker". The council contacted Coles on 16 April 2009 and formally decided to commence negotiations with it on 19 May 2009. Negotiations with Woolworths continued. On 1 July 2009 the council finally exchanged contracts with Coles, on the same terms the council had offered to Woolworths.

Woolworths commenced proceedings in the Supreme Court for damages for loss of an opportunity due to the council's misleading and deceptive conduct. Hammerschlag J in the Supreme Court of NSW dismissed their claim. Woolworths appealed.

Issues:

(1) whether Woolworth's was entitled to damages under s 68(1) of the *Fair Trading Act* 1987;

(2) whether the council's conduct had created a reasonable expectation in Woolworths that the council would not negotiate with a third party for the sale of the land unless it notified Woolworths first; and

(3) whether it was industry practice that negotiations following a successful bid on an EOI were exclusive.

Held: dismissing the appeal:

(1) to show it had suffered loss or damage by the council's conduct, Woolworths had to establish that it would have changed its negotiating position had it known about Coles, and accepted the council's terms: at [181];

(2) Woolworths executives' belief that they would have changed their stance if they had known about the negotiations with Coles was the product of hindsight and of little probative value: at [186];

(3) Woolworths failed to established that it was industry practice that such negotiations were 'exclusive'. It had negotiated an exclusivity period in its earlier dealings with the council: at [221];

(4) a reasonable expectation was created in Woolworths by the EOI process. However, the process could not have created an expectation that Woolworths was entitled to an indefinite period to receive notification before Council commenced negotiations with a third party: at [223]–[225];

(5) as the council had originally notified Woolworths that the sale was to be completed by 30 June 2008, any expectation by Woolworths that it was entitled to a period of exclusivity by reason of the EOI process could not have reasonably continued beyond 30 June 2008. If the continuing negotiations generated any reasonable expectation of exclusivity, it could not have been an expectation that could reasonably continue indefinitely: at [225]–[226]; and

(6) as at 18 May 2009 Woolworths could not reasonably have expected the council to notify it before entering into negotiations with a third party. It follows that the council did not engage in misleading or deceptive conduct. This would have been another basis for dismissing the appeal: at [230].

Minister Administering the Crown Lands Act v Illawarra Local Aboriginal Land Council [2011] NSWCA 127
(per Sackville AJA, with Basten and Whealy JJA agreeing)

(related decisions: *Illawarra Local Aboriginal Land Council v Minister Administering the Crown Lands Act* [2008] NSWLEC 188; (2008) 161 LGERA 294 Sheahan J; *Minister Administering the Crown Lands Act v Illawarra Local Aboriginal Land Council* [2009] NSWCA 289 Hodgson and McColl JJA, with Basten JA dissenting; *Illawarra Local Aboriginal Land Council v Minister Administering the Crown Lands Act (No 2)* [2010] NSWLEC 124 Sheahan J)

Facts: the Illawarra Local Aboriginal Land Council ("the Land Council") lodged Aboriginal Land Claim 2675 ("the claim") for Lands at Tongarra Gap ("the lands") in 1986. In 2006, twenty years after the claim was lodged, the Minister Administering the Crown Lands Act ("the Minister") refused the claim because the Lands were needed, or likely to be needed, for the essential public purpose of nature conservation and thus were not "claimable Crown lands" for the purposes of s 36(1) of the *Aboriginal Lands Rights Act* 1983 ("the ALR Act"). The Land Council appealed the Minister's refusal to grant the claim to the Court pursuant to s 36(7) of the ALR Act. The Court upheld the appeal, determining that that the Minister had failed to establish that the lands were needed, or likely to be needed, for an essential public purpose. Accordingly, the lands were "claimable Crown lands" as defined by s 36(1) of the ALR Act. The Minister appealed the decision pursuant to s 57(1) of the *Land and Environment Court Act* 1979 ("the LEC Act"). The Court of Appeal determined that the primary judge erred in law by failing to address the correct question posed by s 36(1) of the ALR Act, which was "whether, having regard to the desire of NWPS [sic], the support of the Minister for Planning and Environment, the opposition of the Minister for Mineral Resources, the non-opposition from other departments, and all other relevant circumstances, was it objectively likely as at 3 March 1986 that the subject land would be needed for the essential public purpose of nature conservation". The Court of Appeal set aside the decision and remitted the matter to the Land and Environment Court. The Court heard the remitted matter and upheld the Land Council's claim, determining that the Minister had failed to satisfy the Court that the lands were needed, or likely to be needed, for an essential public purpose so as to be excluded from the definition of "claimable Crown lands" in s 36(1) of the ALR Act. The Minister appealed again.

Issues:

(1) whether the lands subject to the claim under the ALR Act were "claimable Crown lands" pursuant to s 36(1) of that Act;

(2) whether the lands were not likely to be needed for the essential public purpose of nature conservation;

(3) whether the Court erred in law in holding that the *National Parks and Wildlife Act* 1974 ("NPW Act"), as at the date of the claim, precluded mining in national parks;

(4) whether the Court constructively failed to exercise the jurisdiction conferred by s 36(7) of the ALR Act by not "grappling" with the Minister's submission that competing objectives of nature conservation and exploitation of coal reserves could be reconciled by a 15m limitation on coal mining;

(5) whether the Court erred in law by reason of illogicality and want of rationality; and

(6) whether the Court failed to consider whether any part of the lands, as distinct from the whole, were "claimable Crown lands".

Held: dismissing the appeal with costs:

(1) the Minister failed to establish that the Court's decision was affected by an error of law. Consequently, it was not appropriate to express an opinion as to whether the Minister's appeal pursuant to s 57(1) of the LEC Act would have been allowed: at [81];

(2) the primary judge did not express a view as to the legality of authorising mining in a national park: at [65];

(3) the Court did not constructively fail to exercise jurisdiction. The Court expressly accepted that there were legal mechanisms available by which the Department of Mineral Resources' ("the Department") concerns could have been accommodated, specifically a 15m limitation on coal mining: at [74] and [80]. Nevertheless the Court was not satisfied that the lands were likely to be needed for the purpose of nature conservation, in part because the need for appropriate access and pit-head infrastructure on the surface would be incompatible with achieving the public purposes of Aboriginal custody or nature conservation: at [73]. It was open to the Court to conclude that, as of 3 March 1986, the Department would continue to oppose the extension of the National Park of the lands regardless of the availability of the 15m depth restriction: at [74]–[75];

(4) it was assumed that illogicality and want of rationality could constitute errors of law for the purpose of s 57(1) of the LEC Act, but it flowed from the finding that the Court did consider the 15m depth restriction that the grounds of illogicality and want of rationality also failed: at [76]–[77] and [80]; and

(5) the Minister did not invite the Court to consider that a part or parts of the lands, as distinct from the whole were or were not "claimable Crown lands". In any event, the Court found that objections in relation to the extension of the National park related to all of the lands, not merely portions thereof: at [78]–[80].

Commissioner for Children and Young People v FZ [2011] NSWCA 111 (Hodgson, Young JJA; Handley AJA)

(related decisions: *FZ v Commissioner for Children and Young People* [2010] NSWSC 1144 Harrison J**;** *FZ v Commission for Children and Young People* [2009] NSWADT 267 Britton ADP)

Facts: FZ made an application to the Administrative Decisions Tribunal ("the ADT") for an order under the *Commission for Children and Young People Act* 1998 declaring that he was not a prohibited person. The ADT determined that FZ had not demonstrated that he was not a risk to the security of children. In doing so the ADT took into evidence a statement of KB, the daughter of FZ's de facto partner, which made some allegations of indecent assault by FZ against KB ten years ago, when she was 14. KB was not summoned to attend the ADT and no enquiries were made as to her whereabouts. Therefore, FZ's counsel did not have an opportunity to cross-examine her. FZ appealed to the Supreme Court. The Supreme Court held that FZ had been denied procedural fairness. The Commissioner for Children and Young People appealed the decision of the Supreme Court.

Issues:

(1) whether admitting the evidence of a key witness, notwithstanding the fact that the witness was not available for cross-examination, was a denial of procedural fairness.

Held: dismissing the appeal and remitting the matter to the ADT for a new hearing:

(1) it was necessary to consider how close to the core of the issue the evidence of KB was because a right to cross-examine was not to be recognised in every case as incident to the obligation to accord procedural fairness. It was dependent on whether the evidence was adverse in important respects to the party's case: at [25] and [26];

(2) it was rare for courts to act on evidence of unavailable witnesses where the witness goes to a core issue and, even so, there was no material before the ADT to suggest that KB was unavailable, only that she had a fear of FZ nine years previously: at [42];

(3) it would have been good practice for the ADT to have enquired about the exact position of KB: at [45];

(4) it was particularly important that the ADT ascertain whether the statement of KB was her own and that she had not been influenced by her mother: at [46];

(5) the principal decision the ADT needed to make was whether to admit KB's evidence. It did not address this issue. Despite the fact that KB was not available for cross-examination, the ADT noted that the question was one of the weight to be given to the evidence, not its admissibility: at [33] and [48];

(6) the primary judge was correct in considering that KB's evidence was at the core of the ADT's decision: at [49] and [59];

(7) the admission of KB's statement, when prima facie she was available, denied FZ the right to present an important part of his case. It deprived FZ of his only real chance of success in the proceedings. Therefore, the ADT's decision to admit the evidence was a denial of procedural fairness and a breach of FZ's right to a fair trial: at [75] and [83]; and

(8) it would have been a different situation if KB was truly unavailable following enquiries. In that situation a decision by the ADT to admit her statement would not have been a denial of procedural fairness: at [4], [69] and [84].

Shellharbour City Council v Minister for Planning [2011] NSWCA 195 (per Hodgson JA, with Giles and Campbell JJA agreeing)

(related decision: *Shellharbour City Council v Minister for Planning* [2011] NSWLEC 107 Pain J)

Facts: the appellant ("the council") challenged the decision by the respondent ("the Minister") to give concept plan approval, pursuant to s 75O of the *Environmental Planning and Assessment Act* 1979 for a project known as the Calderwood Project. The council challenged the approval on the ground that the concept approval applied to land located within "an environmentally sensitive area of State significance" pursuant to cl 8N(1) of the Environmental Planning and Assessment Regulation 2000. This term was defined within cl 3(1) of the Sate Environment Planning Policy (Major Development) 2005 ("the Major Development SEPP") to include "land identified in an environmental planning instrument ["EPI"] as being of…high biodiversity significance". The council contended that expressions in two EPIs were relevant to cl 3(1), namely the phrase "high biodiversity value" in the Major Development SEPP and "high conservation value" in the Shellharbour Rural Local Environmental Plan 2004 ("the LEP"). The council submitted that both these terms had technical meanings and sought to adduce expert ecological evidence regarding the technical meanings. Pursuant to r 31.19 of the Uniform Civil Procedure Rules 2005 ("the UCPR") the council sought directions from the Court regarding the proposed expert ecological evidence. The Court refused the application for directions. The council subsequently appealed the interlocutory decision.

Issues:

(1) whether the Court erred by precluding the council from arguing that the expressions "high biodiversity value" and "high conservation value" had technical meanings in respect of which expert evidence would be admissible;

(2) whether the Court erred in concluding that expert evidence would be of no assistance in defining those expressions;

(3) whether the Court considered an irrelevant consideration, namely the Court's status as a specialist court, in determining the relevance of the expert evidence proposed to be adduced;

(4) whether the proposed expert evidence needed to have more than "marginal relevance" to be admissible;

(5) whether the Court's consideration of the potential cost consequences for the other parties was an irrelevant consideration; and

(6) whether the Court erred in rejecting the principles in *Ex parte MacKaness and Avery Pty Ltd; Re Royce* (1943) 43 SR 239 at 244 concerning the admission of expert evidence on the meaning of technical terms.

Held: refusing leave to appeal with costs:

(1) the usual practice, particularly where it is plain that expert evidence would be relevant is detailed in *Chapman v Chapman* [2007] NSWSC 1109 where the Court held [at 6] that r 31.19 of the UCPR requires parties to "promptly" move the court for directions as soon as it becomes apparent that expert evidence may be adduced and that this obligation arises before an expert is retained. However, in situations where it "may very reasonably seem highly unlikely that expert evidence will be relevant to an issue", it may be necessary to provide "some specificity as to the proposition or propositions that the expert evidence is expected to support, rather than merely give a vague indication of the area in which the expert evidence will be given": at [26];

(2) it was open to the Court to take the view, in the absence of any specificity as to the propositions which the expert evidence was expected to support, that the proposed expert evidence was unlikely in the extreme to be material to the equivalence of the two expressions "high biodiversity value" and "high conservation value": at [22]–[25] and [27];

(3) it was not held that the Court's status as a specialist court justified the refusal of the application. Rather, the Court held that as a specialist court, it was well able to understand expressions such as "high conservation value" and "high biodiversity significance". This supported the Court's conclusion that the prospect of the proposed expert evidence being of assistance was extremely remote: at [28];

(4) the Court did not refer to the potential costs consequences of obtaining expert evidence in reply as a ground in itself for the rejection of the expert evidence: at [28];

(5) the Court did not reject the principle in *Ex parte MacKaness and Avery Pty Ltd; Re Royce* (1943) 43 SR (NSW) 239: at [28];

(6) the council was not entitled to a direction pursuant to r 31.19 of the UCPR merely by virtue of a possibility that the evidence might be relevant and admissible. Rather, the primary purpose of r 31.19 of the UCPR was to control the calling of expert evidence, restricting expert evidence to that which was reasonably required to resolve the proceedings having regard to the admonition of "just, quick and cheap". The indication that evidence may or may possibly be relevant and admissible was not the correct approach to a r 31.19 application: at [35]; and

(7) the unavailability of the transcript of the directions hearing did not justify the council's delay in filing the application for leave to appeal. The application for leave could and should have been brought promptly after the primary judge gave judgment: at [36]–[37].

NSW Criminal Court of Appeal

Queanbeyan City Council v Environment Protection Authority [2011] NSWCCA 108 (Whealy JA with Hall and McCallum JJ agreeing)

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

Facts: Queanbeyan City Council ("the council") was charged with a strict liability offence of polluting waters in contravention of s 120 of the *Protection of the Environment Operations Act* 1997 ("the Act"). The council operated a sewerage system that had been subject to historical incidents of overflows of sewage at the Morisset Street sewage pumping station. The Environment Protection Authority ("EPA") issued a series of statutory prevention notices that required the council to review the operation of the sewerage system, to construct an underground retention system at an appropriate location identified by the council and to prepare a maintenance and inspection

plan to reduce effluent surcharges. In compliance, the council designed, constructed and installed the Waniassa Street overflow outlet as an augmentation to the pumping station. The council did not apply for an environmental protection licence ("licence") in respect of either the pumping station or the outlet. The EPA indicated that it would not issue any such licence. On 4 and 5 November 2007, there were two overflow incidents resulting in the discharge of sewage into the Queanbeyan River caused by a pump and alarm failure at the pumping station. The council was charged with water pollution only in respect of the second pollution incident on 5 November 2007. The council pleaded not guilty.

At first instance, the council sought, and was subsequently refused, a permanent stay of the proceedings on the basis that they were an abuse of process because the EPA refused to issue a licence, thereby preventing the council from relying on the only statutory defence to the charge. The council applied for leave to appeal.

Issues:

(1) whether there was a denial of natural justice;

(2) whether there was an error of statutory construction;

(3) whether there was an error in the identification of the proper legal test for a permanent stay;

(4) whether there was a misuse of evidence;

(5) whether findings were made that were not supported by the evidence; and

(6) whether costs were ordered in the absence of power.

Held: refusing leave to appeal but vacating the order for costs:

(1) the finding of the trial judge that the unfairness alleged by the council had not been established was not attended with sufficient doubt to warrant the matter being argued on appeal. Her Honour took into account all relevant matters and did not overlook any matter of relevance: at [30]–[34];

(2) the decision that the public interest in permitting the prosecution to proceed outweighed any unfairness was a matter within her Honour's discretion: at [34];

(3) her Honour did address the case advanced by the council even though her Honour effectively examined the need for a licence with reference to the Morisset Street Pumping Station, rather than by reference to the New South Wales reticulation system. The reasons advanced by her Honour as to why a license was not required were applicable to not only the Morisset Street Pumping Station, but also to the New South Wales reticulation system as a whole: at [35];

(4) her Honour's construction of the relevant legislation was broadly correct. The council may have had an argument in relation to her Honour's conclusion that the pumping station fell within the definition of "sewage treatment system", but this aspect of the decision was favourable to the council: at [36];

(5) the argument in relation to the proper legal test for a permanent stay did not raise a question of principle, and in any event, the test noted by her Honour was settled and well established: at [37];

(6) the findings of her Honour did not contravene the limitation placed on the use of certain evidence, particularly that certain evidence was admitted only to be relied on as evidence of matters that the EPA was entitled to have regard to in exercising its prosecutorial discretion: at [38]–[40];

(7) the factual findings made by her Honour were based on evidence, and it was available to her Honour to consider this evidence on both the unfairness and discretion issues: at [43]; and

(8) the argument concerning the power to order costs was not sufficient to warrant the grant of leave, but considering the matter was not brought to either party's attention before it was made, and consequently neither party had an opportunity to make any submissions concerning the matter, the order was vacated: at [41].

NSW Supreme Court

Snowy River Alliance Inc v Water Administration Ministerial Corporation [2011] NSWSC 652 (Hislop J)

Facts: the Snowy Hydro Company was established under the *Snowy Hydro Corporation Act* 1997 ("the Act") to operate and maintain the Snowy Mountains Hydro Electric Scheme ("the Snowy Scheme") as successor to the Snowy Mountains Hydro-Electric Authority that built and formerly operated the Snowy Scheme. The Act provided for the holding of a Water Inquiry with respect to environmental issues arising from the pattern of water flows in rivers and streams caused by the operation of the Snowy Scheme, and for the issue of a water licence to the Snowy Hydro Company. In 2002 the governments of the Commonwealth, New South Wales and Victoria entered into the Snowy Water Inquiry Outcomes Implementation Deed ("SWIOID") which set out the agreement of those governments as to the volume of increased flows to be released into the Snowy River, and provided for a progressive increase in the targeted volumes of environmental releases. In 2002 the Water Administration Ministerial Corporation ("the Ministerial Corporation") issued a licence to the Snowy Hydro Company (the second defendant). Section 25(2) of the Act provided for a review of the licence after the first five years. The first defendant purported to perform the five year review and published a report of the review in November 2009; and in April 2010 the second defendant's licence was varied. The plaintiff sought judicial review in respect of the five year review and the variation of the licence.

Issues:

(1) whether the review process miscarried by reason of the exclusion of the topic of the adequacy of environmental flows with the result that the purported review was void and of no effect as it was not a review contemplated by s 25(1) of the Act;

(2) whether the Ministerial Corporation did not, as required by s 27(2)(b) of the Act, exhibit any state of the environment report of the Snowy Scientific Committee as required by that sub-section with the consequence that there was no power to vary the licence and the purported variation was therefore void and of no effect; and

(3) if the review did not happen according to law, what was the consequence of the variation of the licence that did occur.

Held: dismissing the application:

(1) the review process did not miscarry: the volume of environmental flows was a matter for determination under SWIOID and was outside the scope of a review; the licence merely made provision for how the annual volumes, once determined outside the bounds of the licence, were to be released by the second defendant; and it was clear from the final report that there had been consideration by the Ministerial Corporation on the topic of releases overall and that the conclusions reached were based on the facts that were available to it: at [46];

(2) the absence of a state of the environment report of the kind referred to in s 57(4) of the Act did not prevent the review being carried out and did not affect the validity of the review or variations: at [58];

(3) the review was conducted according to law: at [67]; and

(4) alternatively, the variation was made pursuant to the power conferred by s 26(1)(e) and was valid, because the instrument of variation of the licence stated that the variation was made in accordance with paragraphs 26(1)(b) and (e); the officer of the second defendant signing the variation instrument acknowledged acceptance of the variations; each amendment made to the licence by the variation instrument was made in reliance on both paragraphs 26(1)(b) and (e); and the second defendant in its submissions on the proposed variations stated that it supported the variations: at [68].

Land and Environment Court of NSW

Judicial Decisions

- **Development Applications**

Tricon Services Group Pty Ltd v Manly Council [2011] NSWLEC 69 (Biscoe J)

Facts: the parties sought the determination of two preliminary questions in a Class 1 planning appeal relating to three properties on the beachfront in Manly ("the subject land"). The applicant submitted a development application ("DA") to Manly Council ("the council") to redevelop the land for mixed residential commercial purposes. The council refused the DA on the basis that a "road widening order" referred to in s 26(1) of the *Roads Act* 1993 applied to the subject land. Section 26(1) of that Act prohibited construction or repair of building work on land subject to a road widening order. It was agreed that a road widening order under the *Roads Act* had not been issued by the council. However, the council contended that a deemed road widening order applied by virtue of notices in a standard letter served in 1961 on the past owners of the subject land, pursuant to s 262 of the now-repealed *Local Government Act* 1919 ("the 1961 letter"). The parties disputed whether the letter had been sent to the owners of the subject land, and if so, whether it constituted a valid notice under s 262.

Issues:

(1) whether a letter purporting to be a notice under s 262(3) of the *Local Government Act* had been served on the owners of the subject land by the date of the repeal of that Act;

(2) if the letter was served, whether it constituted a valid notice pursuant to s 262(3) of that Act because it did not clearly identify the land the subject of the realignment method; and

(3) whether the letter was an invalid notice pursuant to s 262(3) because the council did not elect to propose to apply the realignment method as required by s 262(3).

Held: answering the preliminary questions:

(1) the *Local Government Act* provided measures to prove service. The council did not avail itself of these options but invited the Court to draw the inference, from fragmentary evidence, that the letters had been sent. The Council did not discharge its burden of proving that the 1961 letter was served on the owners: at [41]–[53];

(2) where a provision effecting private property rights is ambiguous, such as s 262 of the *Local Government Act,* the Court favours the construction that interferes least with private property rights: at [13]. Accordingly s 262 was interpreted to require:

    (a) a two step process of realignment. First, the council needed to realign by gazettal. Secondly, the council needed to carry that realignment into effect. These were distinct processes. The subject land was not effected until both steps were completed: at [14];

    (b) an election by the council as to one of three methods of carrying out the realignment was necessary: at [15];

    (c) if the council elected the 'realignment method', as it claimed it had by virtue of the 1961 letter, then it was required to serve notice "accordingly" upon the owners of the subject land. This required the notice to identify the land and what part of the land was to be affected by realignment. It also required the council to identify that it had elected to employ the realignment method. Until the council satisfied these requirements, the interests of the owners remained unaffected: at [16]–[18]; and

    (d) the notice needed to be clear and distinct: at [19];

(3) the 1961 letter erroneously conveyed that the realignment by gazettal gave effect to the realignment. The letter did not sufficiently identify that the council had elected to employ the realignment method. Thus, the council failed to serve notice "accordingly": at [40];

(4) the 1961 letter failed to clearly identify the parts of the subject property subject to the realignment method. Consequently, the 1961 letter did not constitute valid notice under s 262: at [59]; and

(5) the council did not discharge its onus of proving that it elected to propose to apply the realignment method. Consequently, the 1961 letter did not constitute valid notice under s 262: at [60]–[70].

- **Judicial Review**

Conquest Constructions (NSW) Pty Ltd v Sutherland Shire Council [2011] NSWLEC 52 (Sheahan J)

Facts: this case concerned a Class 4 proceeding that was expedited in order to resolve the question of the validity of the Sutherland Shire Development Control Plan 2006 ("DCP") prior to the expedited hearing of a related Class 1 proceeding. The applicant was granted development consent ("DC") on 18 October 2010, for a mixed residential/commercial development with associated demolition and strata subdivision. The development application ("DA") included the dedication of a rear laneway and was approved on that basis. However, the applicant preferred to keep it as a private driveway rather than dedicate it to council for public use as required under the DCP and the DC. The applicant subsequently lodged a s 96(2) modification application under the *Environmental Planning and Assessment Act* 1979 ("EPA Act") seeking the removal of this requirement, and some other changes. The council refused the application. The Class 1 proceedings challenged that refusal, and the Class 4 proceedings sought a declaration that the relevant provisions of the DCP were invalid and void.

Issues:

(1) whether the DCP requiring the dedication of a public laneway was valid;

(2) in the event that the challenged provisions were found to be invalid:

  (a) whether the invalid provisions can be severed from the balance of the DCP; and/or

  (b) whether the applicant should be denied relief on discretionary grounds.

(3) whether the council was required to compensate the applicant pursuant to the *Land Acquisition (Just Terms Compensation) Act* 1991 for the dedication of land to the council for the purpose of a public laneway.

Held: dismissing the challenge to the validity of the DCP:

(1) the DCP was valid as its role was to make more detailed/specific provisions to achieve the purposes set out in the Sutherland Shire Local Environmental Plan 2006 ("LEP"): at [133];

(2) the DCP and the LEP were made in accordance with the EPA Act: at [136];

(3) the requirement to dedicate the laneway was not mandated by a condition of consent; rather, the applicant, abiding by the strategy in the DCP, had proposed a voluntary dedication of land for the laneway, and the council had incorporated this dedication into the DC: at [138]–[139]; and

(4) there was nothing contrary to law in the council:

  (a) applying the *quid pro quo* principle in making its planning and development decisions: at [140]; and

  (b) requiring the provision by an applicant of land for public purposes without consideration: at [124].

Oshlack v Rous Water [2011] NSWLEC 73 (Biscoe J)

Facts: the parties sought the determination of two preliminary questions in relation to the interplay between ss 111 and 112 of the *Environmental Planning and Assessment Act* 1979 ("EPA Act") and the *Fluoridation of Public*

Waters Supplies Act 1957 ("Fluoridation Act"). The respondents were water supply authorities under the Fluoridation Act. The duty or discretion to fluoridate a water supply conferred by a direction or approval under ss 6(1) and (1A) of the Fluoridation Act applied "notwithstanding anything contained in any other Act". Section 6A(5) of the Fluoridation Act provided that a water supply authority contravening a direction or any terms attached to the direction was guilty of an offence. Sections 111(1) and 112(4) and (6) of the EPA Act also applied in terms "notwithstanding the provisions of any other Act". The parties disagreed as to which legislative scheme prevailed, and thus whether regard had to be had to the EPA Act provisions.

Issues:

(1) whether an activity by a water supply authority, pursuant to an approval or direction under the Fluoridation Act, to fluoridate water was subject to ss 111 and 112 of the EPA Act.

Held: answering the preliminary questions:

(1) the construction of the EPA Act and Fluoridation Act provisions was complicated by the "notwithstanding" provision common to the relevant provisions of both statutes: at [35];

(2) it was relevant that the fluoridation regime was specific and the EPA Act was more general. It was also relevant that the s 6(1A) of the Fluoridation Act was introduced after ss 111 and 112 of the EPA Act: at [51];

(3) s 6(1A) obliged the respondent to obey a fluoridation direction. The provisions of ss 111 and 112 of the EPA Act applied as follows:

(a) s 6(1A) was inconsistent with s 112(4) and (6) of the EPA Act, which permit the authority to refrain from the activity upon satisfaction of certain criteria. To the extent of this inconsistency the Fluoridation Act prevailed: at [53];

(b) s 112(1) of the EPA Act was not governed by the "notwithstanding" provision of s 112(6). Consequently, the "notwithstanding" provision in s 6(1A) prevailed over the EPA Act: at [54]; and

(c) s 111 of the EPA Act was not inconsistent with s 6(1A) of the Fluoridation Act. The authority could not determine whether it should carry out the fluoridation activity. However, it could consider how to carry out the activity. The requirement under s 111 was to examine to the "fullest extent possible" all relevant matters. This qualifying word "possible" permitted account to be taken of any time limit specified in the direction. Such a limit may impact the extent of consideration required: at [55];

(4) s 6A(5) of the Fluoridation Act did not apply to a contravention of a direction where compliance was impossible without contravening another law: at [41]; and

(5) an approval under s 6(1) empowered the respondent to fluoridate. The provisions of ss 111 and 112 of the EPA Act were not inconsistent with this discretion because the authority was not obliged to carry out the activity. The combined effect of the EPA Act and Fluoridation Act was to required the authority to comply with ss 111 and 112 before adding fluoride: at [56].

Capital Airport Group Pty Ltd v Director-General of the NSW Department of Planning (No 2) [2011] NSWLEC 83 (Biscoe J)

Facts: the applicant challenged two decisions made at the intermediate stage of the making of a Local Environmental Plan ("LEP"). First, the decision made by the second respondent, Queanbeyan City Council ("the council"), to submit a draft LEP to the Director-General of the NSW Department of Planning ("DG") pursuant to s 64 of the since amended *Environmental Planning and Assessment Act* 1979 ("EPAA") and to request that the DG issue a certificate under s 65 of the EPAA certifying that the draft LEP may be exhibited ("Submission Decision"). Second, the decision made by the DG pursuant to s 65 to issue that certificate ("Certificate Decision").

Issues:

(1) whether the council failed to prepare an environmental study of the land ("LES") as required by s 57(1) of the EPAA. Specifically:

(a) whether the LES was not an objective, disinterested study of the land; and

(b) whether the LES was uncertain in its operation;

(2) whether the council failed to have regard to a LES when preparing the LEP as required by s 61;

(3) whether the council failed to consult in the preparation of the LES and the draft LEP as required by s 62 of the EPAA;

(4) whether the council failed to comply with an implied obligation to take account of submissions made in response to consultations under s 62 of the EPAA;

(5) whether the council failed to take into account mandatory relevant considerations;

(6) whether the council's General Manager acted in excess of delegated power because the decision to submit the draft LEP and LES to the DG was inconsistent with a council policy;

(7) whether the council's Submission Decision was infected by apprehended bias;

(8) whether the power of the DG to issue the certificate under s 65 of the EPAA was enlivened; and

(9) if the power of the DG under s 65 of the EPAA was so enlivened, whether the DG failed to take into account mandatory relevant considerations.

Held: dismissing the proceedings:

(1) the purpose and context of the term "environmental study" and the definition of "environment" indicated that the purpose of the environmental study of the land, required by s 57(1) of the EPAA, was to inform the council and the public about the land to which a draft LEP may apply. The study could inform the council and the public of the environmental implications of making a particular draft LEP involving a particular rezoning: at [62];

(2) the LES, as supplemented by a previously written LES, was not uncertain in its operation: at [84];

(3) even if the LES were uncertain, the uncertainty principle on which the applicant relied was inapplicable to a LES: at [84]. The LES was a preliminary step to assist the process of producing a LEP. It did not require complete precision: at [83];

(4) the applicant's complaints concerning uncertainty attempted to engage in impermissible merits review: at [84] and [92]–[93];

(5) a public authority under a statutory obligation to consider a study must allow sufficient time to properly consider that study. Although the council submitted to the DG within a very short period of receiving the final LES, the council had been closely involved in the preparation of the LES, through comment and review of various drafts. The council also had comprehensive knowledge of the environmental issues arising from previous LES. In the circumstances, the applicant had not discharged its onus of proving that the council did not have regard to the LES: at [101]–[105];

(6) the council had a duty under s 62 of the EPAA to consult with such public authorities or bodies as, in its opinion, might be affected by the LEP and such other persons as it determined. It was implicit within s 62 of the EPAA that the council had to take into account submissions received from those with whom it consulted. Responses to those submissions that simply used the term "noted" did not evidence a failure to consider: at [116]–[131];

(7) the council took into account the 2031 Strategy and Addendum and its resolution to implement both: at [141] and [144]. The council was not required to take into account inter-governmental agreements.

(8) the council's General Manager did not act in excess of power in submitting the draft LEP to the DG because the policy was not inconsistent with the submission decision: at [148];

(9) although the third respondent, Village Building Co Ltd, paid for and commissioned a number of reports considered in the LES, paid the salary of one council officer and was a member of a group which made recommendations taken into account in one of the reports commissioned by the council, a well informed lay observer would not apprehend bias: at [150]–[208]. This was because:

(a) the studies paid for and commissioned by the second respondent were peer reviewed and given independent consideration by the council: at [160] – [166];

(b) s 57(5) of the EPAA made provision for the council to "recover the costs and expenses" incurred in the preparation of the environmental study and this included the salary of the council officer; [167]-[176];

(c) the council officer had no decision-making capacity within the council: at [177]; and

(d) the developer was prohibited from communicating with the consultants to the traffic study, unless it was through the council: at [187];

(10) the voluntary planning agreement entered into by the council and the developer did not give rise to apprehension of bias because the agreement was expressly contemplated by s 93F of the EPAA: at [200]; and

(11) the resolution of the council to "prepare the necessary plans and documentation and forward the relevant documentation to the Department of Planning requesting certification" did not constitute prejudgment: at [206]–[207];

(12) the receipt of a valid draft LEP was a precondition to the valid exercise of the DG's power pursuant to s 65 to issue the certificate. In light of the Court's finding that the LES was valid, this precondition was satisfied. Consequently, the power of the DG to issue the certificate was enlivened: at [225]–[228];

(13) in deciding whether to issue the certificate as requested by the council it was mandatory for the DG to consider the documents submitted by the council to the DG under s 64. These documents had been considered: at [223]; and

(14) it was not mandatory for the DG to consider the other documents claimed by the applicant, and in any event, most had been considered: at [234]–[235].

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

Facts: the applicant challenged the validity of the State Environmental Planning Policy (Major Development) Amendment ("Huntlee New Town Site") 2010 ("the SEPP Amendment"). The SEPP Amendment rezoned land through the mechanism of listing the proposed Huntlee New Town Site as a State Significant Site in Sch 3 of the State Environmental Planning Policy ("Major Development") 2005 ("the MD SEPP"). The applicant contended that the SEPP Amendment was invalid because the recommendation to the Governor ("the Recommendation") by the first respondent, the Minister for Planning ("the Minister"), to make the SEPP Amendment was invalid.

Issues:

(1) whether the SEPP 55 and the MD SEPP were inconsistent;

(2) whether the Minister's Recommendation to the Governor to make a State environmental planning policy ("SEPP") was justiciable;

(3) whether the Minister was a "planning authority" under cl 6 of State Environmental Planning Policy No 55 Remediation of Land ("SEPP 55");

(4) whether cl 6 of SEPP 55 applied to the Minister;

(5) whether the Minister failed to comply with cl 6;

(6) whether failure to comply with cl 6 of SEPP 55 spelt the invalidity of the Minister's recommendation;

(7) whether the SEPP Amendment was invalid because of the Minister's recommendation;

(8) whether the planning agreement failed to comply with s 93F(3)(g) of the *Environmental Planning and Assessment Act* 1979 ("the EPAA");

(9) whether, if the planning agreement failed to comply with s 93 F(3)(g) of the EPAA, the agreement was invalid;

(10) whether the Minister, who must have assumed that the planning agreement complied with s 93F(3)(g) of the EPAA, thereby took into account an irrelevant consideration or whether there was jurisdictional error; and

(11) whether there was a reasonable apprehension of bias by the Minister in the form of predetermination of whether to recommend that the SEPP Amendment be made.

Held: upholding the appeal:

(1) SEPP 55 and MD SEPP were not inconsistent but gave rise to harmonious goals. The specific and mandatory provisions of cl 6 of SEPP 55 required consideration of contamination and remediation in zoning and rezoning proposals. The general provisions of the MD SEPP empowered the Minister, in the Minister's discretion, to require a study to assist the Minister when determining a proposal for a State Significant Site listing. They operated in different spheres, and even if they did not, both could be obeyed: at [78];

(2) the Minister's recommendation to make a SEPP was justiciable: at [101]–[104];

(3) the identity of a "planning authority" under cl 6 of SEPP 55, being the entity statutorily responsible for the preparation of SEPPs, must be established by implication: at [56];

(4) the Minister was responsible for preparing SEPPs (at [58]), because the Minister's recommendation function is part of the preparation of a SEPP: at [59];

(5) "preparation" covers all aspects of the plan making process up to the "making" of the plan, including investigations, drafting, considering and recommending: at [61];

(6) alternatively, even if the recommendation was not part of "preparation" the Minister was the person ultimately responsible for the SEPP. It is not inappropriate that the Minister would be responsible for the preparation of delegated legislation, albeit the actual preparation would be done by others. It is also not inappropriate that the person with responsibility for recommending that the Governor make a SEPP was the person responsible for its preparation: at [63];

(7) a Department briefing note may be a "report" referred to in cl 6(2) of SEPP 55 if it specifies the findings of a preliminary investigation of the land carried out in accordance with the contaminated land planning guidelines. The relevant findings were contained in a State Significant Site Study which were not specified in documents before the Minister, nor did the Minister otherwise see them. Consequently, the Minister failed to comply with the prescriptive requirements of cl 6(2): at [89]–[90];

(8) the Minister did not have the requisite documents to form the state of satisfaction required by cl 6(1)(b)–(c) of SEPP 55 and thus failed to comply with these clauses: at [92]–[94];

(9) the Minister's failure to comply with cl 6 of SEPP 55 invalidated the Minister's recommendation and therefore the SEPP Amendment;

(10) s 93F(3)(g) of the EPAA required, by its reference to "suitable means, such as a bond or guarantee", additional, independent and enforceable assurance that the developer's promises under the agreement would be honoured: at [126];

(11) the planning agreement failed to comply with s 93F(3)(g) of the EPAA because the agreement's provisions (including requiring the planning agreement be registered and that a caveat may be lodged pending registration) did not constitute "suitable means" of enforcement: at [126];

(12) the planning agreement failed to comply with s 93F(3)(g) of the EPAA and was therefore an irrelevant consideration: at [131]. Consequently, the Minister's recommendation decision was invalid: at [138];

(13) there was no reasonable apprehension of bias in the form of predetermination. A government policy which identifies strategic planning opportunities in particular areas does not necessarily give rise to a reasonable apprehension of bias in the form of predetermination: at [173]; and

(14) the briefing note and other documents relied upon would not cause a reasonable person to apprehend that the Minister may have made the decision to recommend the making of the Amending SEPP other than on the factual and legal merits: at [179].

- **Valuation and Compulsory Acquisition**

Graham Trilby Pty Ltd v Valuer-General [2011] NSWLEC 68 (Biscoe J)

(related decision: *Graham Trilby Pty Ltd v Valuer-General* [2009] NSWLEC 1087 Parker AC)

Facts: the applicant, Graham Trilby Pty Limited ("Trilby"), appealed the Valuer-General's valuation of land in Kellyville ("the subject land") under s 37 of the *Valuation of Land Act* 1916.

Issues:

(1) whether the subject land should be valued by applying the hypothetical development method or comparable sales method;

(2) whether comparable sales evidence was sufficiently comparable;

(3) whether the Court should depart from the Commissioner's findings of fact in a previous appeal concerning the subject land;

(4) whether the Commissioner's judgment in the previous appeal, which applied the hypothetical method to the subject land, was distinguishable;

(5) whether interest rates in the hypothetical sales method should be determined objectively; and

(6) whether the unusable residential zoned land should be attributed a monetary value, and if so, on what basis.

Held: allowing the appeal:

(1) if sufficiently reliable comparable sales were available, the comparable sales method was preferable to the hypothetical development method: at [24];

(2) it was a question of fact and degree whether comparable sales evidence was sufficiently reliable. Comparable sales evidence routinely needs adjustment, but excessive adjustment would render that evidence unreliable: at [25];

(3) in consecutive valuation appeals relating to the same land, the Court should strive to be consistent with previous findings of fact: at [32];

(4) the reasons given by the Valuer-General to distinguish the findings in an earlier appeal were not sufficient. Accordingly, the findings of fact in the earlier appeal as to the comparability of sales evidence were adopted and the hypothetical methodology applied: at [39]–[44];

(5) when applying a hypothetical development analysis it was preferable to adopt an objective interest rate: at [74]; and

(6) value should have been attributed to unusable residential zoned land at a rate which was 50% of the rate attributed to land zoned open space in an earlier appeal. That was because of the higher risk arising from the fact that a compulsory acquisition clause in the council's Local Environmental Plan applied to open space zoned land, but not to unusable residential zoned land.

Trust Company Limited ATF Opera House Car Park Infrastructure Trust No 1 v The Valuer-General (No 3) [2011] NSWLEC 85 (Pain J)

(related decisions: *Trust Company Limited ATF Opera House Car Park Infrastructure Trust No 1 v the Valuer-General* [2010] NSWLEC 161; (2010) 178 LGERA 1 Pain J; *Trust Company Limited ATF Opera House Car Park Infrastructure Trust No 1 v The Valuer-General (No 2)* [2011] NSWLEC 34 Pain J)

Facts: the owner of the Opera House car park and trustee for Opera House Car Park Infrastructure Trust No 1, Trust Company Limited ("the applicant"), lodged four Class 3 appeals under s 37(1) of the *Valuation of Land Act*

1916 ("VL Act"). The re-ascertainments by the Valuer-General ("the respondent") related to four base date years previously valued. The applicant challenged the land values re-ascertained. Following *Trust Company Limited ATF Opera House Car Park Infrastructure Trust No 1 v the Valuer-General* [2010] NSWLEC 161; (2010) 178 LGERA 1, the land had to be valued as car park under s 6A of the VL Act and not as stratum under s 7B.

Issues:

(1) whether the concept of fee simple in s 6A(1) includes an appurtenant easement that benefits land; and

(2) whether rock anchors, steel bolts and the Bennelong drain were land improvements within the meaning of s 4 of the VL Act, which must be assumed to be made under s 6A(1) of the VL Act.

Held:

(1) fee simple is an interest in land which enables the holder to enjoy the benefit of the land to its greatest extent. This suggested that easements benefiting the land should be considered as part of the fee simple for the purpose of valuation under s 6A of the VL Act: at [19]. *Gollan v Randwick Municipal Council* [1961] AC 82 distinguished: at [25];

(2) s 6A(2) identifies a statutory assumption that must apply when valuing the fee simple of land under s 6A(1). The dominant tenement (lot 101) was assumed to be able to continue to enjoy the benefits over the neighbouring burdened land: at [20]. A statutory assumption that the dominant tenement was being, or was to be, used for a car park at the base dates applied. That use required that the easements benefiting the land to be in place: at [22]. Consequently the costs of obtaining the easements enabling the use of the dominant tenement for its highest and best use as the Opera House car park were immaterial to the valuation exercise: at [24];

(3) as the rock anchors and steel bolts inserted in the top of the cavity excavated for the car park were indispensable to the excavation (a defined land improvement under s 4), these were also land improvements: at [35]; and

(4) the Bennelong drain met the definition of a land improvement in s 4 as an underground drain: at [38] and [41].

Maloney v Minister Administering the Environmental Planning and Assessment Act 1979 [2011] NSWLEC 121 (Biscoe J)

Facts: the applicants objected to the determination of compensation under the *Land Acquisition (Just Terms Compensation) Act* 1991 ("the JTA") for the compulsory acquisition of land in Marsden Park ("the Land"). The acquisition was initiated by the applicants under s 23(1) of the JTA on the grounds of hardship and acquisition took place on 21 August 2009. The Land, containing an area of 10.7 ha, is located in the North West Growth Centre and was zoned Public Recreation – Regional under the State Environmental Planning Policy ("Sydney Region Growth Centres") 2006 ("the SEPP"). Prior to the Public Recreation – Regional zoning in 2006, the Land was zoned 1(a) General Rural under the Blacktown Local Environmental Plan 1988 ("the LEP").

The applicants submitted that, ignoring the actual zoning of the Land, pursuant to s 56(1)(a) of the JTA, the Land would have been included in the Marsden Park Industrial Precinct ("the MPIP") and zoned Urban Capable under the SEPP (with the land ultimately to be zoned either Industrial or Residential). The applicants submitted the Land would have also had the benefit of biodiversity certification under the *Threatened Species Conservation Act* 1995, meaning that development would take place on the Land in the knowledge there would not be significant impacts on endangered ecological communities. The applicants submitted that the appropriate amount of compensation would be $14,980,000 on a light industrial basis, or $15,250,000 for low density residential. In the event that only one third of the Land could be developed, the applicants submitted that the compensation would be $4,690,000 for light industrial, or $4,777,500 for residential.

The applicants also proposed a further approach to valuation, which involved the calculation of funds from special infrastructure contributions ("SICs"), collected from developers in the Growth Centres. The Department of Planning, which collected the SICs, had published a practice note stating that 32.5% of SICs collected (amount

projected to be collect was $143,588,000) would be used for the acquisition of lands zoned Public Recreation – Regional within the Growth Centres. Based on a total of 46.74 ha of land zoned Public Recreation – Regional, the applicants calculated, and submitted, that the compensation payable was $10,600,000 ($989,815 per hectare based on 32.5% x $143,588,000 divided by 46.74 hectares).

Issues:

(1) what would have been the Land's underlying zoning, but for the public purpose and the actual zoning;

(2) whether the Land, or any part of it, would have been included in the MPIP, had the benefit of biodiversity certification, and could be developed;

(3) what would the value, if any, be of the remainder of the Land if only part of it could be developed;

(4) whether potential development constraints would impact of the value of the Land; and

(5) whether the applicants' alternative valuation method based on SIC calculations should be accepted.

Held: in determining that the applicants were entitled to compensation in the amount of $3,943,000:

(1) the eastern 1/3 of the Land would have been included in the MPIP, zoned Urban Capable, and would have received biodiversity certification as it had been partially cleared and could be offset by the conservation of the remainder: at [123];

(2) the zoning would have been industrial, having regard to the industrial zones immediately opposite the Land and to the south: at [124];

(3) works to be done on the Land would be minor and did not justify deductions from other comparable sales: at [127]–[139] and [171];

(4) two-thirds of the Land would be used for offsetting development on the eastern 1/3 and should be attributed a value of $500,000: at [173];

(5) the applicants' alternative approach to valuation based on SIC calculations should not be accepted, as the compulsory acquisition of land by the Minister would proceed on the basis of the market value of the Land determined by an independent valuer: at [184]; and

(6) there was no sales evidence to suggest that developers purchased land zoned the same as the subject at rates near $989,000 per ha in anticipation of compulsory acquisition: at [186].

- **Administrative Orders**

Jeffman Pty Ltd and Lawrence Dry Cleaners Pty Ltd v EPA [2011] NSWLEC 89 (Preston CJ)

Facts: the applicants operated a dry cleaning business on an industrial site since 1984. Chemical solvents used in dry cleaning contaminated the soil and groundwater beneath the site and groundwater contaminants migrated onto adjoining lands. On 3 June 2010, the Environment Protection Authority ("the EPA") issued a management order under s 14 of the *Contaminated Land Management Act* 1997 ("the Act"). The applicants disputed the terms of the EPA's management order and applied to the Court for a new management order. Two of the adjoining landowners, who were joined as parties to the proceedings, sought a management order in terms different from the management order sought by the applicants.

Issues:

(1) whether a choice of remediation technologies to achieve remediation standards should be left to the polluter;

(2) whether uncertainty as to the efficacy of the polluter's preferred remediation technology of bioremediation should preclude its use; and

(3) the process for approval of the remediation action plan.

Held: in upholding the appeal, the Court revoked the EPA's management order and made a new management order annexed to the judgment:

(1) the management order set remediation standards and dates for containment (13 months) and treatment (10 years) of contaminants at the source site: at [118]–[119];

(2) the management order set an interim remediation standard for treatment of the groundwater plume, other than at the source site, of a maximum combined concentration of contaminants of 5mg/L, to be achieved within two years and a final remediation standard of 0.5mg/L, to be achieved within five years: at [95]–[96] and [121]–[122];

(3) consistent with the principle of subsidiarity, the applicants would be afforded latitude in choice of remediation technologies to achieve these outcomes: at [97];

(4) the management order incorporated safeguards to improve the prospects that the chosen remediation technology would work. These included: a requirement that the draft remediation action plan be peer reviewed by independent experts; a requirement that the applicants provide the draft remediation action plan to the affected landholders for their comment; and a requirement that the remediation action plan be approved by the EPA: at [114], [137], [140], [142] and [143];

(5) the management order incorporated requirements for monitoring and adaptive management, so that if the monitoring data failed to demonstrate that the chosen remediation technology would achieve the remediation standards, the applicants would be required to change their remediation approach: at [115];

(6) the management order incorporated measures for reporting and providing access to information on the results of the investigations and monitoring: at [116];

(7) collectively, these requirements would reduce the uncertainty as to the efficacy of bioremediation and in achieving the remediation standards in the times required, and would justify retention of bioremediation as an available technology: at [92], [99] and [117]; and

(8) the EPA, and not the site auditor appointed by the polluters, should be responsible for approving the remediation action plan: at [137].

- **Civil Enforcement**

Director-General, Department of Environment, Climate Change and Water v Venn [2011] NSWLEC 118 (Preston CJ)

Facts: Mr Venn owns and occupies land at Colongra Point on the southern shore of Lake Munmorah adjoining the Colongra Swamp Nature Reserve ("the Reserve"). Between about May 2007 and July 2008, Mr Venn arranged for earth moving contractors to clear part of the Reserve and deposit and spread fill over the cleared area. The applicant brought civil enforcement proceedings alleging two breaches of the *National Parks and Wildlife Act* 1974 ("the Act"): a breach of s 118A(2), in that Mr Venn picked plants of two endangered ecological communities ("EECs"); and a breach of s 156A(1)(b), in that Mr Venn damaged and/or removed vegetation, soil, sand or similar substance from land that was reserved under the Act or acquired under Pt 11 of the Act.

Issues:

(1) whether the clearing and filling of land constituted picking of plants;

(2) whether plants picked were of an endangered ecological community;

(3) whether, at the time of the clearing and filling, the land was validly reserved under the Act or acquired under Pt 11 of the Act; and

(4) what were the appropriate orders to remedy and/or restrain the breach.

Held: finding and declaring that Mr Venn's past conduct was in breach of s 118A(2), but not s 156A(1) and issuing several injunctions:

(1) the wide definition of "pick" in s 5 of the Act meant that a variety of actions undertaken in the clearing and filling involved picking, including pushing over trees, digging up reeds and sedges, and injuring trees by placing fill around the base of trunks. The evidence of picking plants was extensive: at [43]–[101];

(2) the plants picked were part of one or both of the Swamp Oak Floodplain Forest or River-Flat Eucalypt Forest EECs. Disturbance caused by Mr Venn's use of the land since 1975 and mine subsidence did not cause the vegetation no longer to be part of either EEC: at [134], [140], [177], [183], [191] and [197]–[201];

(3) at the time of clearing and filling, the land was not effectually reserved under the Act, nor was it acquired under Pt 11, because the transfer of land to the Minister was not registered until 2009. Therefore, the past conduct was not in breach of s 156A(1): at [218], [225], [228], [237]–[238] and [260]–[261];

(4) there was a threatened or apprehended breach of both ss 118A and 156A because the evidence established that, unless restrained by the Court, Mr Venn intended to continue clearing and filling. This future conduct would involve the picking of plants of the EECs and damage to land acquired under the Act (which occurred on registration of the transfer in 2009): at [263] and [268];

(5) the circumstances of the case made it appropriate for the Court to make a declaration of breach of a s 118A(2): at [276]–[284]; and

(6) the Court made orders restraining Mr Venn from carrying out specified actions on the Reserve, requiring Mr Venn to arrange a survey of the boundary between his land and the Reserve, requiring Mr Venn to arrange the erection of a fence, and requiring Mr Venn to arrange for an assessment of the environmental harm caused by the fill and the preparation of a remediation action plan: at [348].

Kempsey Shire Council v Thrush [2011] NSWLEC 93 (Pain J)

Facts: Mr Thrush, the first defendant, owns a property with a right of carriage way over the property of Mr Gullotto, the second defendant, which is the only access to his property. The first defendant conducted work in the area of a State Environmental Planning Policy No 14 – Coastal Wetlands ("SEPP 14") wetland on the right of carriage way in July 2009. Kempsey Shire Council, the applicant, sought orders requiring the first defendant to lodge a development application and a restoration plan. In the alternative it sought the same orders against the second defendant. The applicant also sought declarations specifying that the work was in breach of cl 7 of SEPP 14. Failure to comply with SEPP 14 is a breach of the *Environmental Planning and Assessment Act* 1979 ("EPA Act") pursuant to s 125. The second defendant cross-claimed against the first defendant seeking similar declarations and orders. The first and second defendants were litigants in person.

Issues:

(1) whether work carried out on right of carriage way without development consent was in breach of SEPP 14; and

(2) whether the Court should exercise its discretion to make the declarations and orders.

Held: refusing to grant the relief sought:

(1) the applicant did not establish that the first defendant cleared vegetation in the SEPP 14 area in breach of cl 7(1)(a) or that he filled land in breach of cl 7(1)(d): at [41] and [44];

(2) in relation to cl 7(1)(b), the building up of a road surface could constitute construction of a levee. The applicant had established a breach of SEPP 14 as the work undertaken was more than minimal, suggesting that it required development consent: at [42];

(3) cl 7(1)(c) applied because the first defendant had installed two pipes with the aim of draining water under the track in the SEPP 14 wetland area. The work done was more than minimal and required development consent: at [43];

(4) it was not appropriate to exercise the Court's broad discretion to make remedial orders in light of numerous factors including the following: the first defendant's access route to his property deteriorated substantially in 2006 and 2007; the fact that he acted under the misapprehension that he did not require development

consent; the second defendant had never provided the necessary owner's consent for any development application lodged by the first defendant with the council; and the first defendant was of very limited financial means. The fact that the works were of a relatively modest scale and the environmental impact was limited to the immediate locality were also relevant: at [45]–[57]; and

(5) it was inappropriate to exercise the Court's discretion to make bare declarations given that it was not an egregious breach of the EPA Act, and because the breach arose through unfortunate circumstances. The declarations, if made, would have been disproportionate to the first defendant's actions: at [58].

- **Criminal Jurisdiction**

Environment Protection Authority v Big River Group Pty Ltd [2011] NSWLEC 80 (Pepper J)

Facts: Big River Group Pty Ltd ("Big River"), the defendant, pleaded guilty to an offence of polluting water contrary to s 120(1) of the *Protection of the Environment Operations Act* 1997. The resin pump at Big River's plywood manufacturing factory was activated during the nightshift on 29 November 2009 causing 6000 litres of resin to be pumped into the mixing tank, which subsequently overflowed. The spilt resin then escaped from an internal stormwater system to an external stormwater system and on to a nearby wetland. At the time the incident occurred, Big River failed to immediately inspect whether the resin had escaped into the external storm water system. It was submitted by Big River that it was an employee who had deliberately and maliciously turned on the pump thereby causing the pollution event.

In August 2009, a similar spillage of resin occurred at the factory and resin was found in the external stormwater system. Big River had two previous convictions for environmental offences. In 1990, Big River was convicted of breaching conditions 1 and 3 of a pollution control licence, contrary to s 17(5)(k) of the *State Pollution Control Commission Act* 1970.

Issues:

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

Held: the defendant was convicted of the offence and fined $67,000. The defendant was also ordered to pay the prosecutor's legal costs in the sum of $35,000 and the prosecutor's investigation costs in the sum of $24,644.80:

(1) objectively, the offence was of moderate gravity. Actual and potential environmental harm were caused by the spilt resin. The environmental harm was in the low to moderate range. There were practical measures that Big River could have taken to prevent, abate and mitigate the harm to the environment. Particularly, Big River could have mitigated the harm by more thoroughly investigating the possibility of whether the resin had escaped into the external stormwater system. Big River had control of the causes of the spill. But the offence was not deliberately committed and Big River gained no commercial advantage from its occurrence: at [71]–[75], [82] and [93]–[95];

(2) the foreseeability of the cause of the spill by an employee activating the resin pump was slight. However, given that there was resin found in the external stormwater system in August 2009, it was held to be foreseeable that escaped resin could end up in the external stormwater system: at [91]–[92];

(3) subjectively, no aggravating factors were applicable. Little weight was placed on the previous convictions of Big River because they arose out of circumstances materially different from the commission of the present offence; they occurred over 20 years ago; they were relatively minor in nature; they were related to each other; and they did not manifest a continuing disobedience with environmental laws: at [55] and [100]–[101];

(4) there were several mitigating factors taken into consideration. First, Big River was generally found to be environmentally responsible and of good character. Second, Big River expressed contrition and remorse. Third, Big River entered an early plea of guilty, and fourth, it provided exemplary assistance to the prosecutor: at [102]–[107];

(5) general deterrence was a necessary factor to take into account because the spill was caused in part by the failure of Big River to implement a system to ensure spilt resin did not escape into the external stormwater system. There was also a necessity to send a message, through the imposition of an appropriate penalty, to those engaged in manufacturing where toxic chemicals are used to ensure that all precautions were taken to avoid harm to the environment: at [111]; and

(6) specific deterrence was also a necessary factor to take into account given the previous resin spill in August 2009: at [114].

Director-General, Department of Environment, Climate Change and Water v Source & Resources Pty Limited; Alexander (No 2); Gordon Plath of the Department of Environment, Climate Change and Water v Source & Resources Pty Limited; Alexander (No 2) [2011] NSWLEC 87 (Pepper J)

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

Facts: Mr Kelvin Alexander was charged with offences contrary to s 12 of the *Native Vegetation Act* 2003 ("the NVA") and s 118D(1) of the *National Parks and Wildlife Act* 1974 ("the NPWA"). Mr Alexander was charged with the offences by reason of being a director of Source & Resources Pty Limited, the company that allegedly committed the unlawful clearing of native vegetation and caused the damage to the habitat of a threatened species. During the hearing into Mr Alexander's guilt, an issue was raised as to Mr Alexander's fitness to stand trial.

Issues:

(1) whether Mr Alexander was fit to stand trial for the offences charged.

Held: finding on the balance of probabilities that Mr Alexander was unfit to stand trial:

(1) the *Mental Health (Forensic Provisions) Act* 1990 did not apply to proceedings conducted in the Land and Environment Court, and therefore, any determination of Mr Alexander's unfitness to stand trial was to be determined by application of common law principles: at [4]–[6];

(2) the minimum standards necessary at common law for trying a defendant without unfairness or injustice were set out in *R v Presser* [1958] VR 45 ("the *Presser* test"): at [5];

(3) Mr Alexander was suffering from dementia that had resulted in significant cognitive impairment not only in relation to his short-term memory, but also with respect to his executive functioning, together with a decline in verbal fluency and intellectual function. As a result, Mr Alexander was not able to understand the content of the charges brought against him, the facts and circumstances that gave rise to those charges or the substance of the evidence relied upon by the prosecution, in order to make a defence. In addition, Mr Alexander was unable to provide his counsel with his version of the facts and would not be able to follow proceedings in order to provide instructions during the trial: at [19]–[22];

(4) the prosecution could not resume after a temporary stay and appropriate medical intervention. Mr Alexander's dementia was progressive and would not ameliorate overtime, but would deteriorate: at [24];

(5) the unfairness that would result from Mr Alexander standing trial could not be cured by adjustments to Court processes: at [25];

(6) the minimal standards outlined in the *Presser* test, which were necessary for trying an accused without unfairness and injustice, were not met in these proceedings: at [5] and [20]; and

(7) it was unnecessary to decide whether a permanent stay should be granted as a result of finding Mr Alexander unfit to stand trial because the prosecutor indicated that consequent upon the finding of unfitness it would withdraw both charges against Mr Alexander. The fact that the limitation periods for bringing proceedings under both the NVA and the NPWA had now passed meant that Mr Alexander could not be charged with the offences the subject of these proceedings again: at [29].

Environment Protection Authority v Unomedical Pty Limited (No 4) [2011] NSWLEC 131 (Pepper J)

(related decision: *Environment Protection Authority v Unomedical Pty Limited (No 3)* [2010] NSWLEC 198 Pepper J)

Facts: Unomedical Pty Limited ("Unomedical") manufactured medical instruments at its facility that required the operation of a steriliser. Ethylene oxide ("EtO"), a known carcinogen, was the principal chemical used in the sterilisation process and 99% of the EtO used in the manufacturing process was released directly into the atmosphere. Unomedical knew that EtO was carcinogenic, that the use of a catalytic converter would reduce the EtO emissions and that if it had been operating the steriliser in Denmark or the United States, it would have been required to install a catalytic abatement system. A catalytic converter was installed by Unomedical in 2007 after two prevention notices had been issued to it. Unomedical was found to be in breach of its duty imposed by s 128(2) of the *Protection of the Environment Operations Act* 1997 ("the POEOA") to carry on any activity on the premises "by such practicable means as may be necessary to prevent or minimise air pollution" from on or around 1 January 2002 to 26 July 2007. This was so notwithstanding that no specific emission standard or rate had been prescribed by law limiting the release of EtO and that Pittwater Council ("the council") had granted a development consent for an expansion of Unomedical's facility knowing that EtO was being used during the sterilisation process. The steriliser at the plant had since been shut down. Unomedical was before the Court for sentencing.

Section 241 of the POEOA set out the matters that the Court was to have regard to when imposing a penalty for an offence against the Act.

Issues:

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

(2) whether it was appropriate in the circumstances of the case to impose a daily penalty;

(3) what was the actual or likely harm caused to the environment by the commission of the offence;

(4) whether the offence involved a series of criminal acts or just one criminal act;

(5) whether the offence was committed without regard for public safety; and

(6) whether Unomedical was entitled to a discount because of the assistance it provided to the authorities.

Held: Unomedical was convicted of the offence and fined $90,000. Unomedical was also ordered to pay the prosecutor's costs in the sum of $140,000 and ordered to place a publication notice:

(1) the offence was of low objective gravity. In coming to this conclusion the Court considered the nature of the offence; the high maximum penalty; that the offence did not involve a series of criminal acts; that the actual and potential harm to the environment caused by the offence was low; that in committing the offence Unomedical did not act without regard for public safety; that Unomedical did not wilfully, intentionally or recklessly commit the offence; there were practical measures that Unomedical could have taken to prevent the harm, namely, the installation of a catalytic converter; that the harm to the environment was foreseeable; that Unomedical had control over the causes that gave rise to the offence; and that there was insufficient evidence before the Court to make a finding that the offence was committed for financial gain: at [32]–[95];

(2) there was insufficient evidence to warrant the imposition of a daily penalty, given there was uncertainty as to when EtO was first emitted from the premises, when EtO ceased to be emitted from the premises and the number of days and length of time the steriliser was in operation. Instead, the fact that this was not a discrete instance of emission of EtO by Unomedical, but that it occurred on multiple occasions and over a significant period of time, was taken into account as a factor augmenting the objective seriousness of the offence: at [44]–[50];

(3) there was no evidence of actual harm to the environment caused by the emission of EtO from Unomedical's facility, but there was a very real potential for harm to the environment given EtO's toxicity and the absence of any knowledge of the extent of its dispersion into the atmosphere once it left the facility. The Court was able

to take into account the "potential" or "possible" harm to the environment because the meaning of "likely" in s 241(1)(a) of the POEOA encompassed the "potential" for harm to the environment and because s 241(2) of the POEOA allowed the Court to take into consideration other matters that it considered relevant when imposing a penalty on Unomedical: at [54]–[70];

(4) subjectively, there were no aggravating factors. The Court took into account in imposing the penalty that Unomedical had no prior convictions; there was no expression of contrition or remorse; Unomedical did not plead guilty; Unomedical was of prior good character; Unomedical provided assistance to the authorities and as a result was entitled to a 15% discount on the penalty to be imposed; the harm caused by the offence was not substantial; Unomedical was unlikely to re-offend; and Unomedical had agreed to pay the prosecutor's costs: at [96]–[116];

(5) general deterrence was a necessary factor to take into account in order to encourage corporations engaged in manufacturing processes where toxic chemicals are used to adopt best practical means to prevent or minimise pollution, and avoid harm to the environment: at [118]–[124]; and

(6) specific deterrence was not a necessary factor to take into account because this was an isolated incident of a company that had operated faultlessly until the commission of the offence and the steriliser had been shut down so the chance of recidivism was extremely low: at [125].

Director-General, Department of Environment and Climate Change v Walker Corporation Pty Limited (No 4) [2011] NSWLEC 119 (Pepper J)

(related decision: *Director-General, Department of Environment and Climate Change v Walker Corporation Pty Limited (No 2)* [2010] NSWLEC 73 Pepper J)

Facts: the defendant, Walker Corporation Pty Limited ("Walker"), engaged a third party to clear seven species of native vegetation over 23ha of its land, in contravention of s 12(1) of the *Native Vegetation Act* 2003 ("the NVA"). The seven plant species were widespread throughout areas of New South Wales and were not recognised as having national, state or regional significance. However, the clearing of the plant species degraded habitat suitable for various fauna species and had other ramifications for biodiversity in the local area. The defendant was convicted of the offence and the issue before the Court was the determination of the appropriate sentence.

Issues:

(1) consideration of the objective gravity of the offence committed including: the extent of the environmental harm caused by the offence; whether the offence was committed intentionally or recklessly; and whether the offence was commercially motivated;

(2) consideration of the subjective circumstances of Walker;

(3) whether the third party's claim to be a specialist in environmental clearing could mitigate the penalty imposed on Walker; and

(4) whether the earlier disturbance of the land was a mitigating factor.

Held: imposing a fine in the sum of $200,000 and ordering the defendant to pay the prosecutor's costs:

(1) evidence that went to supporting an offence more serious than that which the offender was convicted of was not to be taken into account as a matter of aggravation. However, the evidence that the degree of environmental harm caused by the clearing of the native vegetation extended beyond the seven species of native vegetation the subject of the conviction did not offend this principle. Rather, the environmental harm caused encompassed not just the immediate aftermath of the clearing, but also included the indirect, individual and cumulative adverse impacts of the clearing on flora and fauna: at [44]–[46] and [83];

(2) the pre-existing state of the environment affected by the commission of the offence may be relevant to the assessment of the environmental harm caused by that offence, but past disturbance to the defendant's land did not mitigate the penalty to be imposed: at [88]–[90];

(3) the actual environmental harm caused by the Walker's clearing of the native vegetation was of medium or moderate seriousness: at [93];

(4) Walker instructed the third party to clear the land in reckless disregard of the lawfulness of removing the plant species. Walker's state of mind was an aggravating circumstance that increased the objective seriousness of the crime: at [98];

(5) the evidence did not prove beyond reasonable doubt that Walker sought to improve the capital value of its land or otherwise committed the offence for financial gain: at [101]–[103];

(6) Walker should not have engaged the third party without taking measures to ensure that native vegetation was not cleared unlawfully. Even if Walker had assumed that the third party would carry out the work lawfully because of its purported expertise in environmental clearing, this assumption could not have been maintained after the receipt of a report that questioned the legality of the clearing of native vegetation: at [99] and [105]–[106];

(7) the offence committed by Walker was of moderate objective gravity: at [110];

(8) the penalty imposed reflected the need to specifically deter Walker, particularly in light of Walker's desire to continue to maintain the property with a view to future development and Walker's extensive land ownership and property development endeavours. The penalty also served as a general deterrent in contemplation of long standing difficulties in restraining unauthorised native vegetation clearance: at [132]–[133]; and

(9) it was fundamentally important to ensure that persons engaging third parties to undertake the clearing of native vegetation ensure that the clearing was lawful. To otherwise absolve landowners of responsibility for illegal clearing would have disserved the objectives and purpose of the NVA: at [133].

- **Contempt**

Gerondal v Eurobodalla Shire Council (No 5) [2011] NSWLEC 104 (Pain J)

(related decisions: *Gerondal v Eurobodalla Shire Council* [2009] NSWLEC 160 Pain J; *Gerondal v Eurobodalla Shire Council* [2010] NSWLEC 52 Biscoe J; *Gerondal v Eurobodalla Shire Council (No 3)* [2010] NSWLEC 60 Sheahan J; *Gerondal v Eurobodalla Shire Council* [2011] NSWLEC 58 Craig J).

Facts: on 25 September 2009 in Class 6 appeal proceedings from the Local Court the Court ordered under s 245 of the *Protection of the Environmental Operation Act* 1997 ("POEA") Mr Gerondal ("the defendant") to remove specified items from his property by 25 December 2009. The date for compliance was subsequently extended twice by this Court. On 16 July 2010, the Court further extended the date for compliance to 30 August 2010. Earlier, Local Court proceedings commenced by the Eurobodalla Shire Council ("the council") to enforce the POEA order were dismissed without a hearing. The council sought orders that the defendant be found guilty of contempt of court for the failure to comply with the Court order made on 16 July 2010.

Issues:

(1) whether the defendant's failure to comply with a court order in criminal proceedings was civil or criminal contempt;

(2) whether the principle of double jeopardy applied in light of the earlier dismissed Local Court proceedings;

(3) whether personal service requirements were satisfied;

(4) whether the court order to be complied with by the defendant was ambigious; and

(5) whether contempt was established beyond reasonable doubt.

Held: finding beyond reasonable doubt that the defendant was in contempt of court:

(1) a breach of what were in effect injunctive orders was a civil contempt unless the contemnor was deliberately defying the authority of the court. This was not pressed in relation to the defendant. The form of punishment sought was not definitive. Where imprisonment was sought for coercive, not punitive purposes, this could be

consistent with civil contempt. In these proceedings orders imposing a fine and costs were sought as sufficient to punish the contempt: at [35]. These were therefore civil contempt proceedings: at [38];

(2) the principle of double jeopardy did not apply in civil proceedings. Even if the proceedings were criminal in nature, no double jeopardy principle applied because there was no resolution of any matter by the Local Court when the proceedings were dismissed. The principle applied only if there had been a hearing on the merits of the case, which there had not been in the Local Court: at [41]–[44];

(3) in Class 6 proceedings personal service of the original order the subject of the charge of contempt was not required and r 40.7 of the Uniform Civil Procedure Rules 2005 did not apply: at [45] and [48]. Although personal service was not effected despite many attempts, the defendant was present when the order was made and he was aware of its terms: at [47] and [49]. The requirements of Pt 55 r 9 of the Supreme Court Rules 1970 were satisfied. There was evidence that the defendant was personally served with the documents specified in that rule. The statement of charge was identified in, and considered by all the parties at the April 2011 hearing: at [50];

(4) there was no ambiguity in the identification of the items required to be removed in the court order: at [59]–[61]; and

(5) the evidence established beyond reasonable doubt that the items the subject of the order were on the property when the order was made and the items identified in the charge continued to be there as at April 2011: at [62]–[64]. Consequently it was not necessary to resolve the issue of whether the civil or criminal standard of proof applied in civil contempt proceedings: at [40] and [51].

- **Costs**

Australians for Sustainable Development Inc v Minister for Planning (No 2) [2011] NSWLEC 70 (Biscoe J)

(related decision: *Australians for Sustainable Development Inc v Minister for Planning* [2011] NSWLEC 33 Biscoe J)

Facts: the applicant challenged the validity of two project approvals for the carrying out of projects at Barangaroo. After the trial concluded, but before judgment was delivered, the Minister, by order, amended the State Environmental Planning Policy No 55 – Remediation of Land ("SEPP 55") upon which the applicant's appeal had been substantially based. The amendments were such that the two contested projects were entirely removed from the ambit of SEPP 55. Consequently, the proceedings were dismissed. Costs were reserved. After judgment the parties applied for various costs orders.

Issues:

(1) whether the applicant should be awarded costs;

(2) whether costs should be apportioned for the applicant's abandonment of expert evidence;

(3) whether costs should be apportioned for discrete issues on which the applicant failed; and

(4) whether, in light of the order amending SEPP 55 after the hearing, the Minister should be ordered to pay costs on an indemnity basis.

Held: ordering the respondents to pay 75% of the applicant's costs and ordering the Minister to pay that proportion of costs on an indemnity basis:

(1) but for the Minister's conduct, the applicant would have succeeded in the substantive proceedings: at [1];

(2) generally costs follow the event, however, where the successful party has engaged in disentitling conduct the Court may order costs against the successful party: at [7]–[8];

(3) where a supervening event alters the subject matter of the dispute, the Court would ordinarily not make an order as to costs unless:

(a) one of the parties has acted so unreasonably that the other party should obtain the costs of the proceedings; or

(b) even if the parties have acted reasonably, where one party would have almost certainly succeeded if the subject matter of the dispute had not changed or been rendered inutile, that party should obtain the costs of the proceedings: at [11]. This justified an award of costs in the applicant's favour against all respondents, subject to apportionment: at [12];

(4) ordinarily, costs would be awarded to the successful party without differentiating between those issues on which the party was successful or unsuccessful. However, the Court has a discretion to apportion costs. Exercise of the discretion does not require mathematical precision, but is a matter of impression and evaluation: at [13] The matters of impression and evaluation considered were:

(a) if the successful applicant raised an unsuccessful and severable issue, and was unreasonable in doing so, it may be fair and just to order the successful party to pay the unsuccessful party's costs on the severable issue. The applicant filed and served expert evidence but did not rely upon it at the hearing. This conduct justified ordering the applicant to pay its costs in relation to that evidence, and also the costs the second and third respondents incurred in meeting that evidence: at [23];

(b) several of the issues raised by the applicant at trial, including the ground upon which the applicant would have been successful but for the Minister's order, related to the one core factual issue. Accordingly, those costs would have been incurred for the successful ground regardless. Consequently there was no reduction in costs: at [25];

(c) some of the applicant's grounds were partially severable: at [26];

(d) one of the applicant's unsuccessful grounds raised a separate factual issue and was entirely severable: at [27];

(e) the applicant's abandonment of one of their grounds of claim before submissions, and the applicant's amendment of its point of claim before the respondents filed and served their points of defence did not significantly impact costs: at [28]–[29]; and

(f) the combination of these matters warranted an order that the respondents pay 75% of the applicant's costs (except for the aforementioned expert evidence) at [30]–[31];

(5) the Minister's amendment to SEPP 55 was distinguishable from cases in which litigation was rendered inutile by parliamentary amendment, because the Minister was directly responsible for that amendment: at [11];

(6) there must be sufficient, special or unusual circumstances connected with the litigaton to justify an award of costs on an indemnity basis: at [32]. It was relevant that the Minister's order did not render SEPP 55 inapplicable to Pt 3A projects generally, rather it specifically targeted only those projects the subject of the litigation: at [41]. In this context it was infered that the Minister had "come to fear defeat and sought to move the goal posts": at [42]; and

(7) s 56(1) and (3) of the *Civil Procedure Act* 2005 created a duty on parties to assist the Court in the just, quick and cheap resolution of the real issues in the proceedings. The efficient use of public resources was an important consideration in this regard. The Minister's conduct wasted the resources of both the applicant and the public. In ordering the amendment of SEPP 55, in the manner it did, the first respondent acted unreasonably thereby justifying an award of apportioned indemnity costs: at [32]–[44].

Halley v Minister Administering the Environmental Planning and Assessment Act 1979 [2011] NSWLEC 94 (Pepper J)

(related decisions: *Halley v Minister Administering the Environmental Planning and Assessment Act 1979* [2010] NSWLEC 6; (2010) 170 LGERA 449 Lloyd J; *Halley v Minister Administering the Environmental Planning and Assessment Act 1979* [2010] NSWCA 361; (2010) 178 LGERA 327 Tobias JA, with Giles and Hodgson JJA agreeing)

Facts: this was an application by the Minister Administering the Environmental Planning and Assessment Act 1979 ("the Minister") that the applicant in Class 3 compulsory acquisition proceedings, Ms Halley, pay his costs of the proceedings. On 18 July 2008, the Minister compulsory acquired one of the last remaining privately owned pieces of bushland along the foreshore of Woodford Bay ("the acquired land"). Ms Halley rejected the Minister's offer of compensation in the sum of $2,016,500 under the *Land Acquisition (Just Terms Compensation) Act* 1991 ("the Just Terms Act"), claiming compensation in the amount of $3,500,000, together with disturbance. The amount of compensation claimed by Ms Halley was later reduced to $2,385,000. The main point of difference between the valuations was whether the land prior to acquisition was capable of further subdivision. The matter proceeded to hearing before Lloyd J who determined the amount of compensation to which Ms Halley was entitled was $1,315,000. In coming to this conclusion, Lloyd J considered that the land prior to acquisition had little, if any, potential for further subdivision. Ms Halley appealed. The Court of Appeal dismissed the appeal.

Issues:

(1) whether costs follow the event in cases concerning compulsory acquisition; and

(2) whether Ms Halley should pay the Minister's costs of the proceedings in circumstances where she was awarded compensation but "lost" the proceedings.

Held: ordering that Ms Halley pay the Minister's costs of the proceedings before Lloyd J on a party/party basis and the costs of this motion:

(1) the starting point for any consideration of an award of costs in compulsory acquisition cases was s 98 of the *Civil Procedure Act* 2005 ("the CPA"). The general discretion conferred by s 98 of the CPA was subject to the Uniform Civil Procedure Rules 2005 ("the UCPR"), the Just Terms Act and any specific legislative provisions governing an award of costs in the Court, pursuant to either the *Land and Environment Court Act* 1979 or the Land and Environment Court Rules 2007 ("the 2007 Rules"): at [35]–[39];

(2) given the proximity of the promulgation of the 2007 Rules to the passage of the CPA and the UCPR, the exclusion of the Just Terms Act from r 3.7 of the 2007 Rules could not be ignored. It manifested an unequivocal intention by the legislature that, albeit by omission from the terms of r 3.7(2), the ordinary rule that costs follow the event was to apply to claims for compensation for compulsory acquisition: at [40];

(3) there was a tension between the statutory framework referred to above and the "general principle" that had evolved outside this legislative context in cases concerned with compulsory acquisition, namely, that a person who has had their land acquired by compulsion should generally not bear their own costs and should be permitted to access this Court to present an arguable and well organised case undeterred by any prospect of suffering an adverse costs order should the case fail: at [47];

(4) the "general principle" could no longer be maintained on the existing authorities: at [48]–[59];

(5) the fact that the litigation concerned compulsory acquisition proceedings was, nevertheless, a relevant factor to be considered in the exercise of the Court's discretion in awarding costs: at [60]; and

(6) other factors to be considered included that Ms Halley was unsuccessful in the litigation; the first amount of compensation claimed by Ms Halley appeared to be wholly untenable; this was not a case where reasonable expert minds differed (the Court preferred the evidence of the town planner retained by the Minister and rejected the evidence of the valuer engaged by Ms Halley premised on the ability of the land to be subdivided); the finding of Lloyd J that the chance of subdividing the land was remote was upheld on appeal; but neither party engaged in disentitling conduct; and Ms Halley's claim was not vexatious, dishonest or disorganised: at [72]–[77].

NA & J Investments Pty Ltd v Minister administering the Water Management Act 2000 (No 2) [2011] NSWLEC 98 (Pain J)

(related decisions: *Hutchins Pastoral Company Pty Ltd v Minister Administering the Water Management Act 2000* [2010] NSWLEC 30 Pain J; *Hutchins Pastoral Company Pty Ltd v Minister Administering the Water Management Act 2000 (No 2)* [2010] NSWLEC 241 Pain J).

Facts: Hutchins Pastoral Company Pty Ltd, Danwillach Pty Ltd and Delta Creek Pty Ltd ("the applicants") sought a wasted costs from their former solicitors and barrister after having discontinued their involvement in the substantive proceedings which were on-going in this Court. They were ordered to pay the costs of the Crown upon discontinuance. These costs were sought together with the costs they incurred in the proceedings under s 99 of the *Civil Procedure Act* 2005 ("CP Act").

Issues:

(1) whether costs were incurred as a result of a failure to comply with a solicitor's and/or barrister's retainer where no wasted court costs identified were able to be claimed as wasted costs under s 99, and;

(2) whether the circumstances gave rise to a valid claim for a wasted costs order under s 99 of the CP Act, that is, was there serious neglect or serious incompetence by the former solicitors and barrister justifying an award of costs in favour of the former clients?

Held: dismissing the application:

(1) professional negligence claims were not permissible under s 99 of the CP Act: at [241]–[245];

(2) no wasted court costs were demonstrated to have arrisen from any breach of a solicitor's and/or barrister's retainer, which was essential to establishing a claim under s 99: at [249]–[254];

(3) lengthy costs applications under s 99 should be discouraged: at [255]–[256];

(4) where material which was subject to legal professional privilege and could not have been be disclosed and was relevant to the defence of a claim under s 99, caution should be exercised in making adverse findings against the legal representative in question: at [257]-[260]; and

(5) an applicant for a wasted costs order bore the onus of establishing serious neglect and incompetence to a high standard and that this resulted in unnecessary costs being incurred: at [261]–[264].

McGinn v Ashfield Council [2011] NSWLEC 105 Biscoe J)

(related decision: *McGinn v Ashfield Council* [2011] NSWLEC 84 Biscoe J).

Facts: Ms McGinn, the applicant, challenged the validity of a development consent granted by the respondent, Ashfield Council ("the council"), to the owners of an adjoining property ("the property") to build an additional detached house at the rear of their existing house. The application was dismissed and costs were reserved. At the costs hearing the council consented to the applicant re-opening her case and amending her points of claim to raise a new ground of challenge to the validity of the development consent.

Issues:

(1) whether the council had formed an opinion based on incorrect information;

(2) whether proceedings were brought in the public interest; and

(3) whether the Court should exercise its discretion under the Land and Environment Court Rules 2007 ("LECR") r 4.2 not to make a costs order against the unsuccessful applicant.

Held: dismissing the application and determining costs:

(1) the council was not misled by incorrect information because the council was aware that one of the "two street frontages" was a lane. Consequently, the council did not base its decision on incorrect information: at [5];

(2) the first development consent, upon which the proceedings were originally challenged, was surrendered by the Council. This necessitated the applicant's amended points of claim challenging the second consent. Accordingly, the respondent should pay the applicant's costs for this period: at [8]–[10];

(3) generally, costs follow the event. However, where the unsuccessful party has brought proceedings in the public interest the Court, pursuant to LECR r 4.2, may exercise its discretion not to make a costs order against the unsuccessful party: at [15]–[16];

(4) although the proceedings were in essence, an objection to a neighbouring development which would impact the applicant's amenity, this did not preclude the Court finding that the proceedings were brought in the public interest: at [27]–[29] and [35]. The motivation of the applicant in bringing the proceedings is not determinative of whether the proceedings are brought in the public interest, as long as there is a public interest, r 4.2 is engaged: at [28];

(5) the proceedings sought to uphold and enforce public law obligations and to ensure that the exercise of power was lawful, and thus were brought in the public interest: at [29]; and

(6) although the proceedings had been brought in the public interest, the discretion under r 4.2 requires "something more" than mere characterisation of the litigation as being brought in the public interest (at [17]). The applicant did not demonstrate "something more", sufficient to enliven the discretion. The fact that the applicant was a resident objecting to development consent was not determinative to the exercise of the discretion in r 4.2. The applicant's proceedings did not raise novel issues of general importance, contribute more broadly to the development of administrative law or affect a significant section of the public. Consequently, the quality of the public interest in the applicant's case was not sufficient to warrant departing from the general rule: at [35].

- **Security for Costs**

John Williams Neighbourhood Group Inc v Minister for Planning & Murlan Consulting Pty Limited [2011] NSWLEC 100 (Sheahan J)

Facts: this case concerned an interlocutory hearing of two notices of motion in Class 4 proceedings – one filed on behalf of the applicant seeking both a maximum costs order for $20,000 recoverable by either party on the substantive proceedings, and a maximum costs order for the interlocutory hearing for $5,000; and another filed by the second respondent seeking the applicant to provide security for costs for the substantive proceedings in the sum of $50,000. The substantive proceedings concern a challenge under s 123 of the *Environmental Planning and Assessment Act* 1979 (NSW), on five grounds, to a Pt 3A approval that was granted by the first respondent to the second respondent. The grounds relating to the endangered ecological community of trees, the need to conserve a heritage building and the public interest were the only grounds addressed in the interlocutory proceedings.

Issues:

(1) whether the proceedings could be classified as public interest litigation such that they would invite a maximum costs order; and

(2) whether the Court should use its inherent or implied power to make a security for costs order against the applicant.

Held: dismissing the applicant's notice of motion and upholding the second respondent's notice of motion:

(1) the applicant was ordered to provide security for the costs of the second respondent in the sum of $50,000, and the substantive proceedings were stayed until compliance with that order. The applicant was ordered to pay the costs of both respondents in respect of the notices of motion on a party-party basis as agreed or assessed: at [67]–[75];

(2) while there were some elements of broader public interest, especially regarding the endangered ecological community of trees, the aim of the applicant was to preserve the amenity of its local neighbourhood in the face of the development, and therefore, the proceedings could not be classified as public interest litigation: at [49]–[50];

(3) the applicant failed to provide the Court with special reasons to make a maximum costs order or to demonstrate that such an order would be in the interests of justice: at [64];

(4) in light of the fact that the "real" applicants were the individual members of the applicant group, because no member of the group had given any personal undertaking in respect of any liability of the applicant for

costs, the second respondent should not be forced to bear the risk of not being able to recover costs if it were successful in the substantive proceedings: at [70]; and

(5) the applicant had advanced no argument in support of a limitation on a costs order in response to the interlocutory hearing: at [75].

CTI Joint Venture Company Pty Ltd v CRI Chatswood Pty Ltd (in Liq) (No 1) [2011] NSWLEC 90 (Craig J)

Facts: the applicant claimed that a stratum subdivision of land had been carried out in breach of the *Environmental Planning and Assessment Act* 1979. It sought an interlocutory injunction to restrain completion of the sale of one of the lots purportedly created by the impugned subdivision. The respondents accepted that the claim raised a serious question to be tried and that the balance of convenience favoured the grant of an interlocutory injunction.

Issues:

(1) whether the undertaking as to damages offered by the applicant should be supported by security for costs.

Held: refusing the application:

(1) the evidence adduced by the applicant, tendered on a confidential basis, sufficiently indicated that it was able to meet any claim for damages likely to arise pending final determination of the proceedings. The applicant had significant sums to its credit with a major Australian bank, substantial assets that could be realised and an entitlement to call upon its joint venturers for a contribution if required. It was not a case in which any undertaking given by the applicant was worthless: at [15]–[16];

(2) the giving of an undertaking is not an absolute precondition in this Court for the grant of interlocutory relief. Further, a realistic approach should be adopted when assessing the capacity of an applicant to honour an undertaking. Moreover, the amount claimed as likely damages does not necessarily reflect the amount awarded, should the undertaking be called upon: at [17] and [19]; and

(3) finally, consideration of the public interest in requiring that development be carried out in accordance with development consents weighed in the balance when determining that an order for security for costs was appropriate: at [18].

- **Practice and Procedure**

Leichhardt Municipal Council v O'Neil [2011] NSWLEC 78 (Pepper J)

Facts: Leichhardt Municipal Council ("the council"), the applicant, and Rubbells Pty Ltd ("Rubbells"), the second respondent, sought an order by consent to vacate the hearing dates of 11–12 May 2011. The hearing dates were allocated by the Registrar with the consent of both the parties on 11 February 2011. The proceedings related to the noise generated by the rear courtyard of a hotel, namely, Ruby L'otel, and were commenced on 25 November 2009, but have had a long history of delay. The delay had been caused at times by the default of the parties in complying with Court orders and at other times by genuine attempts by the parties at resolving the matter, for example, through mediation. The result was that the matter had come before the Court several times and the parties had been granted additional time to either get the matter ready for hearing or to allow settlement discussions to take place. An amended plan of management, together with a s 96 modification application, was submitted to the council on 12 April 2011 in order to resolve the proceedings. After this date there was no communication from the council that they were unhappy with the amended plan of management until 03 May 2011, when the solicitor for Rubbells finally contacted the council. The only explanation for this delay in communication between the parties was that the legal officer of the council had been on medical leave.

Issues:

(1) whether a consent application to vacate hearing dates should be allowed where the matter had been characterised by unexplained delay.

Held: declining the consent application:

(1) while there was some strength in the submission that to force the matter on for hearing having regard to the genuine attempts that had and were continuing to be made by the parties to finally resolve the proceedings would be neither "just, quick" nor "cheap" as required by s 56 of the *Civil Procedure Act* 2005, the attempts to resolve the proceedings had not proceeded with the degree of expediency necessary, either generally given the history of this matter, or as required after the matter was set down for hearing on 11 February 2011, given the impending hearing dates: at [21]–[25];

(2) the fact that Rubbells did not offer any explanation whatsoever for the failure to progress resolution of the matter after the lodgement of the amended plan of management, together with the s 96 modification application, on 12 April 2011 until 3 May 2011 was indefensible. And, despite the incapacity of the council's legal officer, the failure of the council to contact Rubbells with any concerns the council had with the amended plan of management was similarly inexcusable, given the immediacy of the hearing dates: at [26]–[27];

(3) in regards to the efficient utilisation of the Court's resources, two days of the Court's time had been set aside to hear this matter. While this factor alone could not be determinative, when combined with the specific delay between 12 April 2011 and 3 May 2011 and the general history of delay in the preparation of the matter, the Court declined to grant the vacation: at [28]; and

(4) the wasted costs of a hearing would not be overly burdensome insofar as the parties claimed the proceedings were close to resolution, and therefore, many of the issues initially forming part of the proceedings no longer existed, obviating proof or determination: at [29].

Shellharbour City Council v Minister for Planning (No 2) [2011] NSWLEC 107 (Pain J)

(related decisions: *Shellharbour City Council v Minister for Planning* [2011] NSWLEC 59 Biscoe J; *Shellharbour City Council v Minister for Planning* [2011] NSWCA 195 per Hodgson JA, Giles and Campbell JJA)

Facts: Shellharbour City Council sought a direction under Pt 31 r 31.19 of the Uniform Civil Procedure Rules 2005 ("the UCPR") to adduce expert ecological evidence to support an argument that certain terms in the Shellharbour Local Environmental Plan 2000 and State Environmental Planning Policy (Major Development) 2005 have a technical meaning.

Issues:

(1) whether a direction allowing the filing of expert ecological evidence ought to be granted in judicial review proceedings raising statutory construction issues.

Held: refusing the application:

(1) the purpose of the requirement to obtain a direction for expert evidence is to restrict the use of expert evidence to that which is reasonably required having regard to the overriding purpose of facilitating the fair, just and economic resolution of proceedings: at [6]; and

(2) expert evidence in judicial review proceedings, including in cases which raise issues of statutory construction, is typically of very limited assistance. Most of the terms about which expert evidence was sought in the application were defined in the instrument in question: at [7]. Thus if called, the evidence would have had marginal relevance: at [9]. As a specialist court, judges of the Court can deal with submissions made as to the meaning of the phrases the subject of the proceedings: at [10].

Hanna v Council of the City of Ryde [2011] NSWLEC 74 (Craig J)

Facts: the council applied by motion to have the proceedings dismissed on the basis that the applicants' appeal, brought pursuant to s 97 of the *Environment Planning & Assessment Act* 1979 against the council's decision to refuse consent of a development application, was an abuse of process: the Uniform Civil Procedure Rules 2005 s 13.4(1)(c)). The subject of the appeal was a building converted by the applicants for use as two separate dwellings or for "dual occupancy". The applicants had appealed to the Court on two prior occasions seeking consent for a dual occupancy. Both appeals had been dismissed.

Issues:

(1) whether the appeal was an abuse of process in that it caused the administration of justice to be brought into disrepute.

Held: dismissing the motion:

(1) the appeal was not an abuse of process. The council relied upon the decision of the Court of Appeal in *Russo v Kogarah Municipal Council* [1999] NSWCA 303. In *Russo* the subject of the appeal was "more or less precisely the same application" (at [9]) as in prior appeals, and therefore, an abuse of process. The present case could be distinguished from *Russo* on the basis that there had been some important changes to the development application, particularly the reconfiguration of private open space and car parking arrangements: at [17]–[20];

(2) in determining that the appeal was not an abuse of process, the differences in the planning regime relied upon by the applicants were significant. Previous appeals were decided on the basis that the principal planning instruments were the Ryde Planning Scheme Ordinance and Ryde Development Control Plan 2006, which prohibited dual occupancy development in the form proposed by the applicants. However, the current appeal invoked the provisions of State Environmental Planning Policy (Affordable Rental Housing) 2009, which differed in important respects and prevailed over any inconsistent provision of another planning instrument (cl 8). The difference, for example, in relation to acceptable car parking arrangements, was material and reflected a change from the two applications previously considered by the Court and the present application: at [30];

(3) changes in both site utilisation and planning regime were changes of a material kind. Such changes did not permit the application of the principles supporting the dismissal of the proceedings as an abuse of process: at [31]; and

(4) the council was ordered to pay costs of its unsuccessful notice of motion. The making of such an order was "fair and reasonable" in the circumstances pursuant to Land and Environment Court Rules 2007 r 3.7(3)(a)(ii). The application by the Council was a preliminary question, potentially determinative of the main proceedings and did not involve examination of the merits of the appeal: at [36].

CTI Joint Venture Company Pty Ltd v CRI Chatswood Pty Ltd (in Liq) (No 2) [2011] NSWLEC 91 (Craig J)

Facts: the respondent sought to join four further parties as respondents to the main proceedings pursuant to Uniform Civil Procedure Rules 2005 at r 6.24(1). An issue in the substantive proceedings was whether a registered subdivision plan accorded with the development consent for subdivision. The respondent submitted that the parties it sought to join, being the surveyor, the certifier and their respective companies, were responsible in their respective capacities for the final form of the deposited plan. The respondent submitted that the parties sought to be joined could be directly affected by the outcome of the proceedings.

Issues:

(1) whether the parties sought to be joined were necessary parties.

Held: application granted:

(1) it was necessary to join the parties as respondents to the proceedings. The outcome of the proceedings "directly affected" the legal interests of the parties sought to be joined: at [10]; and

(2) there was an "arguable possibility" that the potential respondents "may be affected" by the grant of relief in favour of the applicant in the substantive proceedings: at [17].

Wren Investments Pty Ltd v Hunter [2011] NSWLEC 122 (Pepper J)

(related decision: *Wren Investments Pty Ltd v Willoughby City Council* [2011] NSWLEC 1167 Brown C)

Facts: in 2006 Wren Investments Pty Ltd ("Wren") obtained consent for development of property in Chatswood. To satisfy the conditions of consent Wren required the imposition of a stormwater easement over adjoining land. Negotiations with adjoining land owners, the respondents ("the Hunters"), were unsuccessful. The consent was modified in October 2008 to fix an agreed lapsing date of 23 August 2011. Wren subsequently made a modification application pursuant to s 96 of the *Environmental Planning and Assessment Act* 1979 to vary the conditions of the consent by way of removing the stormwater easement requirement. This application was dismissed on 10 May 2011. On 20 June 2011, Wren commenced Class 3 proceedings for the imposition of an easement over the Hunters' land. On 1 July 2011, Wren applied, in view of the impending lapsing of consent, to have the proceedings expedited. The Hunters opposed the application for expedition.

Issues:

(1) whether expedition should be granted taking into account Wren's delay in filing proceedings and seeking expedition; prejudice to the Hunters; and the imminent lapsing consent contingent upon the imposition of the easement; and

(2) whether a costs order should be made.

Held: granting expedition and awarding costs in favour of the Hunters irrespective of the outcome of the application:

(1) the interests of the efficient administration of the Court's business must be taken into account when determining whether to expedite proceedings: at [38(g)];

(2) Wren had not proceeded with "due speed" up to the date of the application for expedition, rather the necessity for the application was "born out of the manifest inaction of Wren given the immediacy of the expiration of the consent": at [38(d)] and [40];

(3) Wren's efforts to avoid litigation by way of negotiation with the Hunters were insufficient to account for Wren's delay in commencing and seeking to have expedited the Class 3 proceedings: at [38(c)];

(4) if expedition was granted, the Hunters would be subject to prejudice. However, both parties were willing to do all in their power to prepare the matter for hearing: at [38(e)-(f)]. With an appropriate timetable it was not impossible for the Hunters to meet an expedited hearing: at [39];

(5) in view of Brown C's findings that an easement was reasonably necessary for the effective use or development of Wren's land, the Class 3 proceedings were not speculative: at [13] and [38(f)];

(6) if expedition was not granted the subject matter of the Class 3 litigation would be lost by reason of the lapsing of the consent. The Court was aware that a development consent is a valuable commodity, which once lapsed cannot be revived. Wren would suffer loss as a consequence of that lapsing: at [38 (a)–(b)] and [41];

(7) the application was "extremely finely balanced": at [39]. The consequences of the lapsed consent, coupled with the not insurmountable prejudice likely to be suffered by the Hunters justified the grant of expedition, but not on the terms sought by Wren: at [41]; and

(8) the costs incurred in the expedition application resulted from Wren's delay in bringing the Class 3 proceedings and subsequent application for expedition. Accordingly, an order pursuant to the usual rule that costs follow the event would be "grossly unfair". Although Wren succeeded in its application, it was appropriate to award costs to the Hunters to compensate them for the legal costs they had incurred in relation to the application for expedition: at [44]–[46]

- **Section 56A Appeals and Reviews of Commissioner Decisions**

Gerondal v Eurobodalla Shire Council [2011] NSWLEC 77 (Craig J)

(related decision: *Gerondal v Eurobodalla Shire Council* [2010] NSWLEC 1217 Murrell C)

Facts: an appeal was brought pursuant to s 56A of the *Land and Environment Court Act* 1979 ("LEC Act") by the applicant on the basis that the Commissioner erred when modifying an order given to the applicant by the Council pursuant to s 96 of the *Protection of Environment Operations Act* 1997 ("POEO Act"). The notice required that the applicant's land cease to be used as a "waste facility" and required removal of "waste" from her land.

Issues:

(1) whether evidence considered during a s 34 conciliation conference was admissible;

(2) whether evidence was obtained unlawfully and therefore wrongly admitted; and

(3) whether the Commissioner failed to comply with requirements of s 96 in framing the order ultimately made.

Held: appeal dismissed there being no error of law.

(1) the applicant submitted that s 34(11) of the LEC Act had been breached when the Commissioner allowed photographs to be tendered that had been shown to her at the conference. The photographs had been taken some years earlier as part of the council's investigation. They were not prepared for the purpose of or in the course of a conciliation conference. There was no breach of s 34(11): at [27];

(2) the evidence was not obtained unlawfully. The applicant contended that council officers breached s 197 of the POEO Act when they entered the applicant's land without a warrant. However, the purpose of the section is to prohibit entry without warrant into the building, structure or place physically used as residential accommodation. The Commissioner found that there was no residential accommodation on the applicant's land and hence the provisions of s 197 were not engaged: at [46]; and

(3) the order specified that action was to be taken to remove the waste from the land (s 96(2) of the POEO Act). The orders also specified the requirement that a plan was to be submitted by the applicant to the Council, which the Council was then to approve (s 96(3)(i)). The fact that the items to be removed were not specifically identified in the order but only by their description as "waste" was not a submission that could be resolved by an appeal confined to error of law: at [65]–[71].

Council of the City of Sydney v Wilson Parking Australia 1992 Pty Ltd [2011] NSWLEC 97 (Sheahan J)

(related decision: *Wilson Parking Australia 1992 Pty Ltd v Council of the City of Sydney* [2010] NSWLEC 1204 Dixon C)

Facts: this was an appeal under s 56A of the *Land and Environment Court Act* 1979 against a decision of a Commissioner to overturn a council's refusal of a development consent ("DC") for an interim open-air valet car park. The site had been used as a tenant car park for many years and then as a public car park, without consent during 2008. On 13 October 2008, the council issued an order for this use to cease. Enforcement of this order was deferred pending the council's decision on a development application ("DA") for the use of the site as a commercial car park. The DA was rejected by the council and an appeal to the Small Permits Appeals Panel was lodged on 14 July 2009, and rejected on 1 December 2009. The Commissioner, in Class 1 proceedings, heard an appeal against this decision on 17–18 June 2010. In order to approve the DC, the Commissioner was required to grant a dispensation under the State Environment Planning Policy 1 ("SEPP 1") of a development standard in the Sydney Local Environmental Plan 2005 ("LEP"). The Commissioner upheld the SEPP 1 objection, finding that the proposed car park would fall within the identified uses of the LEP.

Issues:

(1) whether the Commissioner misconstrued the LEP in holding that cl 64(e) was the sole underlying objective of cl 66(1)(d), rather than consisting of a combination of sub cls 64(a),(b),(c),(e) and (g);

(2) whether the Commissioner, in deciding not to apply cl 66(1)(d) of the LEP, failed to take account of the relevant considerations in sub cls 64(a),(b),(c) and (g);

(3) whether the Commissioner committed an error of law in asking the wrong question when construing cl 66(2) of the LEP, and consequently, in erroneously finding that subclause (a) of the clause was satisfied on the basis that not all trips were suitable for public transport; and

(4) whether the Commissioner committed an error of law in asking the wrong question when construing cl 66(2) of the LEP, and consequently, in erroneously finding that subclause (b) of the clause was satisfied on the basis that there was no adequate public car park servicing the area.

Held: upholding the appeal:

(1) the Commissioner was correct in considering cl 64(e) as the relevant underlying objective in respect of cl 66(1)(d). While the other sub-clauses were relevant, they were only subsidiary or peripheral to the operation of cl 66(1)(d): at [65];

(2) the Commissioner was correct in deciding that compliance with the development standard was not necessary: at [65];

(3) the Commissioner failed to correctly address cl 66(2)(a) because she did not need to consider all trips when construing the provisions, but rather, whether the services available were sufficient: at [71]. Furthermore, a use, if declared to be inadequately serviced, needed to be identified: at [73]; and

(4) the Commissioner's factual finding was not beyond the reach of the appeal because the Commissioner committed an error of law when she applied the wrong test: at [84]–[85]. The correct test to be applied under cl 66(2)(b) was whether the proposed car park adequately or reasonably serviced uses that were not already being adequately serviced: at [83].

Ashton Coal Operations Pty Ltd v Director General, Department of Environment, Climate Change and Water (No 2) [2011] NSWLEC 116 (Sheahan J)

(related decision: *Ashton Coal Operations Pty Ltd v Director-General, Department of Environment, Climate Change and Water* [2011] NSWLEC 1162 Pearson C and Sullivan SC)

Facts: this was an application by a witness, Mr Scott Franks, to set aside the judgment of two Commissioners rejecting his application to be joined as a party to Class 1 appeal proceedings. The substantive proceedings before the Commissioners concerned an appeal by Ashton against the Director-General for the deemed refusal of an Aboriginal Heritage Impact Permit ("AHIP"), the granting of which is regulated by ss 90–90R of the *National Parks and Wildlife Act* 1974 and Pt 8A of the National Parks and Wildlife Regulation 2009. The appeal was brought by Ashton and heard by the Commissioners on 31 May and 2 June 2011. Mr Franks gave oral evidence on 2 June 2011. He was one of six Aboriginal witnesses and is a Traditional Owner, spokesperson and representative for the Wonnarua people on cultural, archaeological and heritage issues. As such, he was entitled to be consulted on the granting of the AHIP. The hearing was adjourned to 7 June 2011 for submissions. On that date Mr Franks filed a NOM seeking to be joined as a party. The Commissioners heard the NOM on 16 June 2011, and gave their judgment on 17 June 2011. On 20 June 2011, Ashton and the Department handed up proposed consent orders to resolve the appeal and sought their ratification by the Commissioners. The Commissioners reserved judgment. On 22 June 2011, Mr Franks filed the NOM to set aside the Commissioners' judgment on the joinder issue.

Issues:

(1) whether the Court has the power to reopen or set aside the proceedings pursuant to Uniform Civil Procedure Rules 2005 ("UCPR") rr 36.15(1) and 36.16(3) on the basis that the order of the Commissioners was made improvidently or was tainted by irregularity, illegality, or lack of good faith;

(2) whether Mr Franks had been adequately consulted on the AHIP;

(3) whether the test for joinder under UCPR r 6.24(1) and the judgment of Lord Diplock in *Pegang Mining Co Ltd v Choong Sam* [1969] 2 MLJ 52 was satisfied in this case;

(4) whether the judgment of the Commissioners should be set aside in the "interests of justice";

(5) whether the Court had been misled in regard to Mr Franks' qualifications and the reasons for the absence of a particular Departmental witness;

(6) whether the AHIP complied with the conditions of consent; and

(7) whether the Commissioners were provided with relevant documentation.

Held: the hearing was reopened to enable Mr Franks to give further evidence and the matter was remitted to the Commissioners for expeditious finalisation:

(1) the same principles should be applied to setting aside/reopening the Commissioners' decision not to join Mr Franks as are exercised by the Court when a party seeks to reopen or set aside a judgment or order on a substantive issue (at [29]), and applying those principles, there was no evidence that the Commissioners' decision was made irregularly, illegally, against good faith, or improvidently: at [76];

(2) the Court was not satisfied that Mr Franks was adequately consulted in the sense required by the Act or the Regulations, but that was a matter for the Commissioners: at [73];

(3) Mr Franks did not meet the test for joinder: at [74];

(4) the Commissioners' decision should not be set aside for error of law (at [39]), nor in the interests of justice: at [74]–[75];

(5) the allegations that the Commissioners were misled and that the lawyers and public servants had been guilty of other misconduct and lack of good faith were unfounded: at [77];

(6) there was no inconsistency between the AHIP and the consent: at [78];

(7) during the hearing before the Commissioners, all relevant policy documents were before the Court: at [78]; and

(8) the hearing before the Commissioners should be reopened on a limited basis, in the interests of justice, to consider the evidence before Sheahan J and to take further evidence from Mr Franks: at [85].

Commissioner Decisions

- **Practice and Procedure**

Ashton Coal Operations Pty Ltd v Director General Department of Environment Climate Change and Water [2011] NSWLEC 1162 (Pearson C and Sullivan AC)

(related decision: *Ashton Coal Operations Pty Ltd v Director General, Department of Environment, Climate Change and Water (No 2)* [2011] NSWLEC 116 Sheahan J)

Facts: Mr Scott Franks applied pursuant to r 6.24 of the Uniform Civil Procedure Rules 2005 ("UCPR") to be joined as a party to an appeal by Ashton Coal Operations Pty Ltd ("Ashton") under s 90L of the *National Parks and Wildlife Act* 1974 against the deemed refusal of the Director-General of an application for the issue of an Aboriginal Heritage Impact Permit ("AHIP"). Ashton operates underground and open cut coal mining operations in the Upper Hunter Valley subject to a development consent granted in 2002. In December 2010 the consent was modified under Pt 3A of the *Environmental Planning and Assessment Act* 1979 to permit the diversion of two sections of Bowmans Creek, and Ashton applied for an AHIP in accordance with the conditions of the modification approval. The parties had reached agreement and were seeking consent orders that the AHIP be issued. Mr Franks and the organisation of which he is a director were included in the consultation undertaken by Ashton with registered Aboriginal stakeholders. Mr Franks gave oral evidence at the hearing of the appeal, in which he stated his opposition to the grant of the AHIP. Mr Franks foreshadowed that if joined as a party he would seek to call evidence from two archaeologists, and make submissions as to how the evidence before the court should be considered. Ashton opposed the application for joinder and the respondent did not oppose or consent to the application. Mr Franks sought, as an alternative to joinder, that he be permitted under s 38(2) of the *Land and Environment Court Act* 1979 ("the Court Act") to provide further evidence and make submissions. That application was opposed by Ashton. Rule 6.24 of the UCPR provides:

(1) If the Court considers that a person ought to have been joined as a party, or is a person whose joinder as a party is necessary to the determination of all matters in dispute in any proceedings, the court may order that the person be joined as a party.

Issues:

(1) whether UCPR r 6.24 applied;

(2) if so, whether Mr Franks met the requirements of r 6.24;

(3) if he did, whether in the exercise of discretion he ought to be joined as a party; and

(4) whether he should be permitted under s 38(2) of the Court Act to provide evidence and make submissions in the proceedings.

Held: dismissing the application:

(1) the application for joinder should be determined on the basis that the power to do so is that conferred in UCPR r 6.24: at [42];

(2) Mr Franks had not identified a right against, or liability to, any party to the proceedings that would be affected by the outcome of the proceedings: at [44];

(3) acceptance of his evidence that he was a Wonnarua Traditional Owner and that there were sites the subject of the AHIP application that are of great significance to his people could support an argument that Mr Franks had an "interest" in the proceedings such that he could be joined as a party: at [44];

(4) even if Mr Franks met the requirements of r 6.24 there was still the issue of whether any discretion to join him as a party should be exercised in his favour: at [45];

(5) the fact that the parties were seeking consent orders would not of itself warrant the joinder of Mr Franks: at [49];

(6) the Court was not persuaded that Mr Franks had been disadvantaged in the manner in which he had given evidence during the hearing: at [51];

(7) any delay in Mr Franks making the application for joinder would not be a factor on which it would be proper to refuse the application if his joinder were necessary to ensure the proper determination of all the matters in issue: at [52];

(8) the Court was unable to identify any further evidence or submissions that Mr Franks might call, or make, that would be necessary for the making of a proper and lawful decision: at [53]; and

(9) there were no issues in the proceedings that were not likely to be sufficiently addressed in the absence of some special order being made for Mr Franks' involvement in the proceedings: at [56].

- **Hedges**

Haindl v Daisch [2011] NSWLEC 1145 (Moore SC, Hewett AC)

Facts: the applicants sought an order under Pt 2A of the *Trees (Disputes Between Neighbours) Act* 2006 ("the Act") with respect to three Weeping Fig trees (*Ficus benjamina*) located on the boundary of a property in Mosman. The fig trees had been planted in the mid 1990s following the removal of a number of Camphor Laurel trees. The fig trees were approximately 9m high, and had interlocking canopies and formed an unbroken vegetated screen approximately 10m in length. The adjoining property owned by the applicants had extensive Leighton Green (*Cupressocyparis leylandii*) hedges along two boundaries. The owner of the property on which the fig trees were located had entered into a contract of sale of the property, and the incoming purchaser was joined as a party to the proceedings. The applicants sought orders requiring the removal of the fig trees and that any replacement plantings be of species that would not grow to a height that would obstruct views. The applicants relied on the evidence of an arborist, and a visual impact assessment expert.

Issues:

(1) whether the visual impact assessment evidence should be admitted;

(2) whether the three trees formed a hedge;

(3) whether there was power to make orders requiring ongoing maintenance pruning of the most northern tree if the other two trees had been ordered to be removed;

(4) whether any impact on view from any of the viewing locations was severe; and

(5) whether the benefits to be obtained by the applicants by removal of the obstruction of their views outweighed the factors in favour of retaining the fig trees.

Held: dismissing the application:

(1) under the general circumstances in which matters under the Act were conducted it was neither appropriate nor possible to determine whether visual impact assessment was an area of expertise that was appropriate to be recognised by the Court: at [15]–[16];

(2) the visual impact assessment evidence contained a flaw in understanding how Pt 2A of the Act was to be applied, arising from an interpretation of s 14F(2)(a)(ii) and s14B as permitting an analysis of the totality of the outlook from any viewing point as constituting a number of separate views rather than a single composite view comprising the totality of the outlook from that point: at [21];

(3) the words "a view" used in s 14 related to the totality of what could be seen from a viewing location and did not permit some slicing up of that outlook: at [26];

(4) the three trees were in a linear arrangement, located close to but not directly on the common boundary, and had interlocking canopies. The fact that they did not have the neatly rectilinear form of the Leighton Green hedges did not mean that the three fig trees did not presently constitute a hedge for the purposes of the Act: at [41];

(5) provided the orders were made at the time a residual tree formed part of a hedge, s 14A clearly envisaged orders of an ongoing nature with respect to any or all of the trees that constituted a hedge at the time of making of the orders: at [47];

(6) the assessment of severity involved both quantitative and qualitative elements: at [64];

(7) the balancing of the interests of the applicants with those of the owner of the property on which the trees were located meant that even if the obstruction of the views from the three viewing points from the upper level of the applicants' house was severe, it was not appropriate to intervene to effect rectification of that obstruction: at [81];

(8) there were two separate and individually significant practical benefits for the property on which the fig trees were located for those trees to be retained, being the shading effect to the private open space of the property, and privacy protection: at [88]–[90];

(9) where there was a council policy in implementation of its Tree Preservation Order of not permitting the removal of trees for the purposes of enhancing views and that policy had been consistently applied by that council, that was a matter to be given significant weight: at [99];

(10) a temporally short interruption to an element of an outlook from a balcony off a bedroom to New Year's Eve fireworks would not of itself warrant removal of the trees: at [110];

(11) in considering the views from the ground floor deck, qualitatively and quantitatively, given what was behind the fig trees coupled with the fact that the applicants chose to retain their own obstruction to the view caused by the Leighton Green hedge, the view was not severely obstructed: at [131]; and

(12) even if that assessment was incorrect, the interests of the owner and future owner of the property to preserve the shading and privacy benefits afforded by the trees outweighed the benefits to the applicants from that viewing area and did not warrant intervention with or removal of any of the fig trees: at [132].

- **Development Appeals**

Champions Quarry Pty Ltd v Lismore City Council [2011] NSWLEC 1124 (Moore SC and Sullivan AC)

(related decision: *Reavill Farm Pty Limited v Lismore City Council* [2010] NSWLEC 1207 Moore SC)

Facts: the applicant appealed against the refusal of development consent for the extension of quarrying activities at a small sandstone quarry in the Lismore region, to increase the extracted material to approximately 200,000 tonnes per annum over 20 years and to expand the number of extraction areas from a single area to two further extraction areas – one to the north and one to the south. Extensive tree planting and earth mounding were proposed for visual amelioration. The quarry was located in a low valley in a rural area including a number of rural allotments where residences are permitted when associated with rural activities. An earlier modification application concerning an earth bund that had been erected, without development consent, had been refused on jurisdictional grounds, and a reconstructed bund was an essential element of the present proposal. The development application had to be considered pursuant to State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 ("the Mining SEPP"), cl 12 of which required a three-step assessment process: a merit assessment; consideration of any public benefits that could outweigh adverse impacts; and a review of ameliorative measures proposed by the proponent or imposed by the Court. The aggregation of the second and third elements had to be weighed against adverse impacts leading to a determination of whether or not it should result in an approval of the project notwithstanding any otherwise unacceptable impacts. The Mining SEPP also required separate assessment of a number of other issues including traffic; site rehabilitation; and greenhouse gas emissions.

Issues:

(1) whether the acoustic impacts on residences located on surrounding properties during both construction and operation of the quarry extension were acceptable;

(2) whether significant acoustic exceedences during the construction stage should be permitted in order to provide operational acoustic attenuation;

(3) whether the visual impact of the proposal on surrounding residences, residences with a longer regional view to the quarry and from a nearby public road were acceptable; and

(4) whether there was a broader public benefit in quarrying the sandstone that could offset the direct adverse impacts.

Held: dismissing the appeal:

(1) the proposed reconstructed earth bund was necessary if operation of the quarry were to be acoustically acceptable: at [245];

(2) the proposed reconstruction of the unapproved earth bund, located on the boundary in the immediate vicinity of an adjacent residence was visually unacceptable and this warranted refusal: at [180];

(3) the acoustic impact of the re-construction of the earth bund was also unacceptable and separately warranted refusal: at [260];

(4) the public benefits claimed by the applicant to the proposal were not as extensive as submitted and did not warrant setting aside the unacceptable impacts: at [345]; and

(5) attenuation measures when added to any public benefits did not sufficiently offset the adverse impacts: at [363].

Wren Investments Pty Ltd v Willoughby City Council [2011] NSWLEC 1167 (Brown C)

(related decision: *Wren Investments Pty Ltd v Willoughby City Council* [2006] NSWLEC 542 Brown C and Wren Investments Pty Ltd v Hunter [2011] NSWLEC 122 Pepper J)

Facts: the applicant appealed the refusal by the Council of an application under s 96 of the *Environmental Planning and Assessment Act* 1979 to modify a development consent granted by the court in August 2006 for the demolition of existing improvements and construction of a development for older people or people with a disability. The modification sought the removal of a deferred commencement condition that required the applicant to obtain and register a drainage easement from one of the adjoining downstream properties to convey stormwater from the development to the council's underground system. The applicant proposed a stormwater drainage system that included a mechanical pump out tank and construction of a new stormwater line approximately 400m in length.

Issues:

(1) whether the proposed amended drainage proposal was appropriate; and

(2) whether the condition should be modified.

Held dismissing the appeal:

(1) no attempt had been made to obtain an easement under s 40 of the *Land and Environment Court Act* 1979 or s 88K of the *Conveyancing Act* 1919: at [12];

(2) considering condition 7 of the development consent which required a basement stormwater pump out system limited to the driveway ramps and subsoil drainage, in conjunction with condition 8 requiring a stormwater management plan, the general thrust of the Willoughby Development Control Plan was to provide gravity disposal of stormwater except for driveway runoff and subsoil drainage: at [16];

(3) gravity disposal of stormwater was the preferred method of stormwater disposal, and an easement was reasonably necessary for the effective use and management or development of the land: at [18];

(4) full and proper negotiations had not taken place with owners of the downstream properties: at [20]; and

(5) the applicant had not provided sufficient evidence to indicate that there were physical reasons why an easement could not be created over one of the downstream properties: at [22].

McDonalds Australia Ltd v Ashfield Council [2011] NSWLEC 1140 (Brown C)

Facts: the applicant appealed under s 97 of the *Environmental Planning and Assessment Act* 1979 against the refusal of a development application for demolition of existing structures and the construction of a refreshment room/drive-in take away establishment with associated car parking and signage to be operated by McDonalds on Parramatta Road, Haberfield, at the intersection of Dalhousie Street. The site was adjacent to the Haberfield Conservation Area, and opposite Ashfield Park which was a designated heritage item, under the Ashfield Local Environmental Plan 1985. The court made findings on issues (1)–(6) and made directions requiring amended plans and conditions. On hearing further evidence, the Court considered issue (7).

Issues:

(1) whether considering the design and location, the gateway status of the Dalhousie Street and Parramatta Road intersection, and the impact on Ashfield Park, the heritage impacts warranted refusal;

(2) whether in addressing traffic impacts a median should be provided in Dalhousie Street and an additional signalised pedestrian crossing provided at the intersection of Parramatta Road and Dalhousie Street;

(3) whether a noise monitoring system was required;

(4) whether the proposed signage complied with the requirements of the DCP and State Environmental Planning Policy No 64 – Advertising and Signage;

(5) whether the proposed landscaping was satisfactory;

(6) whether the proposed 24 hour, 7 days per week, hours of operation were appropriate;

(7) whether there was power to agree to the amendment of the plans; and

(8) whether the proposed development as amended should be approved.

Held, upholding the appeal and granting development consent:

(1) the impact on the heritage significance of the items and the Haberfield Conservation Area was not that significant that a refreshment room/drive-in take away establishment with associated car parking and signage could not be located on the site: at [24];

(2) the site called for a design that was more neutral or moderate than that proposed, and the design of the proposed building should be reconsidered: at [25];

(3) the median and additional pedestrian crossing should not be provided: at [34]–[36];

(4) a noise monitoring system should be put in place prior to operation of the development and its effectiveness assessed at the end of the 12 month trial period;

(5) the signage should be reassessed in light of the redesign of the proposed building: at [47];

(6) the proposed grass verge on Parramatta Road would improve the visual amenity of the street and help create a "green mark" relationship with Ashfield Park: at [50];

(7) it was appropriate to allow a 12 month trial of 24 hour, 7 days per week, operation, subject to amendment of the Plan of Management to provide more detail on security personnel: at [58]; and

(8) the proposed development as modified in consequence of the Court's directions was not significantly different to the development initially considered by the Court, and there was power to agree to the amendment: at [72].

WWL Consulting Pty Ltd v Marrickville Council [2011] NSWLEC 1161 (Tuor C)

(related decisions: *Waugh Hotel Management v Marrickville Council* [2007] NSWLEC 775 Jagot J; *Waugh Hotel Management v Marrickville Council* [2009] NSWCA 390 Hodgson, Campbell and Young JJA; *JPR Legal Pty Ltd v Marrickville Council* [2009] NSWLEC 1216 Murrell C)

Facts: the applicant appealed under s 97 of the *Environmental Planning and Assessment Act* 1979 ("the Act") against the refusal of a development application to demolish part of and carry out alterations to existing premises in Illawarra Road Marrickville for use as a hotel. The application sought approval of hours of operation from 8am to 2am Monday to Saturday and 8am to 12 midnight Sunday. Two previous applications to use and fit out part of the ground floor of the building as a hotel had been refused by the court. The parties agreed that by operation of s 209 of the *Gaming Machines Act* 2001 the social impacts of gaming were excluded from assessment of the social impacts of the proposed development under s 79C(1)(b) of the Act. The applicable planning instruments and policies included the council's Hotel Trading Hours Policy which provided that any approval granted for extended hotel trading hours would be limited to a trial period.

Issues:

(1) whether the proposed development would have an unacceptable social impact within a locality with a high level of vulnerability to alcohol related harm which was likely to be exacerbated by the proposal.

Held: upholding the appeal and granting development consent subject to a trial period for hours of operation:

(1) while there were pockets of significant disadvantage within the locality, the locality as a whole did not have a high level of disadvantage associated with vulnerability to alcohol related harm. The risk profile of the locality was not cohesively one of disadvantage which would warrant refusal of the application, however the pockets of significant disadvantage warranted a precautionary approach to any approval: at [89];

(2) the existing impacts that could be directly attributable to alcohol in the locality were not unacceptable or disproportionately high such that the risk associated with the establishment of a new hotel was unacceptably high and would warrant refusal of the application: at [104];

(3) careful consideration needed to be given to factors such as hours of operation, patron numbers and management to mitigate the potential impacts of an additional hotel in the locality: at [112];

(4) approval of the hotel should include a condition approving hours of operation from 10am to 10pm with an initial one year trial period of extended hours up to 12 midnight, and the trial period should be monitored: at [118]; and

(5) at the successful conclusion of the initial trial period it would be open for the applicant to apply for further extended hours up to 2am which should also be subject to a trial period which should be monitored: at [119].

New Developments

- Practice Note Class 3 Compensation Claims dated 30 April 2007 is replaced by the new Practice Note for Class 3 Compensation Claims, effective 15 July 2011.

Court News

- Moore SC has been appointed to jointly chair a Planning Review Panel established to oversee a review of planning system in New South Wales and to provide independent advice to the Minister for Planning and Infrastructure and the New South Wales Government.
- The Registry refurbishment is now complete and the Registry services have moved back to level 4.