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# Land and Environment Court of NSW

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## Legislation

- **Statutes and Regulations**

### Planning:

[Environmental Planning and Assessment Amendment \(Bush Fire Prone Land\) Regulation 2014](#), published 30 May 2014, amends the [Environmental Planning and Assessment Regulation 2000](#) to exclude certain development applications for the erection of various types of dwellings on bush fire prone land in urban release areas (as identified on a series of maps “Bush Fire Planning – Urban Release Area Map”) from the operation of [s 79BA](#) of the [Environmental Planning and Assessment Act 1979](#). Section 79BA generally prevents a consent authority from granting development consent unless the consent authority is satisfied, or has been provided with a certificate from a qualified consultant stating, that the development conforms to Planning for Bushfire Protection. New cl 273 provides the matters on which the consent authority is required to be satisfied, and the documents which must be provided to the consent authority, which include a bush fire safety authority for the subdivision of the land, and a plan of subdivision that shows bush fire attack levels for the land, a notation from the NSW Rural Fire Service (“RFS”) showing that the plan was considered when the application for the bush fire safety authority was determined, and accompanies a “post-subdivision bush fire attack level certificate” issued by the RFS or a recognised consultant. New cl 273A enables the Commissioner of the RFS to review the designation of land on a bush fire prone land map and revise the map accordingly if the land is in an urban release area and the Commissioner is of the opinion that the map needs to be revised.

[Rural Fires Amendment \(Bush Fire Safety Authorities\) Regulation 2014](#), published 30 May 2014, amends [cl 44](#) of the [Rural Fires Regulation 2013](#) to provide the information that must accompany an application for a bush fire safety authority for proposed development that is subdivision for the purposes of certain types of dwellings on property that is in an urban release area, and the applicant specifies that it wishes the Commissioner to consider whether it would be appropriate for the future erection of the dwellings to be excluded from the application of [s 79BA](#) of the [Environmental Planning and Assessment Act 1979](#).

[Environmental Planning and Assessment Amendment \(Three Ports\) Regulation 2014](#), published on 30 May 2014, amends the Environmental Planning and Assessment Regulation 2000 to make provision for inspections for certain building work carried out at Port Botany, Port Kembla and the Port of Newcastle and to exempt that building work from the requirement for an occupation certificate under the Environmental Planning and Assessment Act 1979.

[Environmental Planning and Assessment Amendment \(Subdivision Works\) Regulation 2014](#), published 24 April 2014, amends the [Environmental Planning and Assessment Regulation 2000](#) to prescribe works for the following purposes as subdivision works for the purposes of Schedule 5 to the [Environmental Planning and Assessment Act 1979](#):

- (a) gas supply;
- (b) remediation of contaminated land; and
- (c) demolition of a building or work if the demolition is required to carry out other subdivision works.

Subdivision works may be carried out on land subject to a subdivision order made in relation to paper subdivisions under Schedule 5 to the Act.

[Environmental Planning and Assessment Amendment \(Complying Development and Fire Safety\) Regulation 2014](#), published 21 February 2014, made the following changes to certain provisions about complying development and fire safety that were made by the [Environmental Planning and Assessment Amendment \(Complying Development and Fire Safety\) Regulation 2013](#):

- (a) to provide that the notices required to be given to neighbours about applications for certain complying development certificates must include the applicant's address and contact details (as well as the applicant's name);
- (b) to provide that the new requirement that an application for a complying development certificate be accompanied by a report from an accredited certifier about fire safety applies to existing buildings the approval for construction of which occurred before 1 January 1993, when the Building Code of Australia became the sole standard under which construction requirements are assessed (rather than only applying to buildings erected before 1 January 1993);
- (c) to allow a council to issue a complying development certificate where a report from an accredited certifier is required and where that report has been prepared by a Category A1 accredited certifier who is employed or engaged by the council;
- (d) to include demolition of a work or building, carried out on land adjacent to a public road, as a type of development for which the complying development certificate will be subject to a condition requiring payment of security to a council (if the council has publicised on its website that such a security must be paid); and
- (e) to provide that information must be included in a planning certificate about the extent to which land is land on which complying development may be carried out, or may not be carried out, because of a provision of the [State Environmental Planning Policy \(Exempt and Complying Development Codes\) 2008](#) that provides that development is only complying development if it is not carried out on land that comprises, or on which there is, a draft heritage item (continuing the current obligation, but referring to a provision that has been moved).

[Environmental Planning and Assessment Amendment \(Fire Sprinklers\) Regulation 2014](#), published 14 February 2014, amended the [Environmental Planning and Assessment Regulation 2000](#):

- (a) to amend the definition of Fire Sprinkler Standard to refer to the most recent Standard;
- (b) to provide that the Fire Sprinkler System Implementation Committee need not publish details of the capital investment value of installing a fire sprinkler system when publishing implementation plans and progress reports of approved providers of residential aged care facilities on the Department's website; and
- (c) to provide that a certifying authority issuing a complying development certificate or a construction certificate for the installation of a fire sprinkler system in a residential aged care facility must be satisfied that the system will comply with the Fire Sprinkler Standard in force at the time the application for the certificate was made.

**Local Government:**

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[Local Government \(General\) Amendment \(Minimum Rates\) Regulation 2014](#), published 28 February 2014, increased the minimum amount for an ordinary rate to \$485 – [see Circular: 14-16](#).

The [Local Government \(General\) Amendment \(Tendering, Accounting and Investigations\) Regulation 2014](#), published 28 February 2014, amends the [Local Government \(General\) Regulation 2005](#) in relation to provision of council accounting records and tabling of reports into investigations into any aspect of a council or of its work or activities at a council meeting.

#### **Criminal:**

[Bail Act 2013 No 26](#) and the [Bail \(Consequential Amendments\) Act 2014 No 5](#) commenced on 20 May 2014, together with the accompanying regulations:

- [Bail Amendment Regulation 2014](#), published 24 April 2014
- [Crimes \(Administration of Sentences\) Amendment Act 2014 No 6](#), published 11 April 2014
- [Bail Regulation 2014](#), published 7 February 2014

#### **Water:**

[Water Sharing Plan for the Greater Metropolitan Region Unregulated River Water Sources Amendment Order 2013](#), published 11 April 2014, amended the [Water Sharing Plan for the Greater Metropolitan Region Unregulated River Water Sources 2011](#) in respect of environmental water flows.

[Water Sharing Plan for the NSW Great Artesian Basin Groundwater Sources Amendment Order \(No 2\) 2013](#), published 14 February 2014, amended the [Water Sharing Plan for the NSW Great Artesian Basin Groundwater Sources 2008](#), in respect to compliance with the long-term average annual extraction limits.

[Water Sharing Plan for the Macquarie Bogan Unregulated and Alluvial Water Sources Amendment Order 2013](#), published 7 February 2014, amended the [Water Sharing Plan for the Macquarie Bogan Unregulated and Alluvial Water Sources 2012](#) in respect of certain water access licences.

[Repeal of Access Licence Dealing Principles \(No 1—Murray Darling Basin\) Order 2014](#), published 24 February 2014, repealed the [Access Licence Dealing Principles Order \(No 1\) 2013 – Murray Darling Basin](#) which prohibited certain dealings under [Division 4 of Part 2 of Chapter 3](#) of the [Water Management Act 2000](#) in the Murray Darling Basin in NSW.

#### **Pollution:**

The [Protection of the Environment Operations \(General\) Amendment \(Licensing Fees\) Regulation 2014](#), published 2 May 2014, amends the [Protection of the Environment Operations \(General\) Regulation 2009](#) to:

- (a) adjust the method of calculating the administrative fee for a licence holder to reflect the licence holder's performance in managing environmental risks;
- (b) enable the Environment Protection Authority to issue a protocol for assessing a licence holder's performance in managing environmental risks;
- (c) require a licence holder to pay an administrative fee within 90 days (rather than 60 days) after the beginning of a licence fee period;
- (d) enable the Environment Protection Authority to consider any information available to it for the purpose of determining the amount of a load-based fee for a licence holder if insufficient information is provided for that purpose within 60 days (rather than 150 days) after the end of the relevant licence fee period;
- (e) increase the amounts for an administrative fee unit and pollutant fee unit for the purposes of Part 1 of Chapter 2 of the Regulation; and

- (f) increase the fees payable for clean-up notices, prevention notices and noise control notices.

#### **Mining and Petroleum:**

[Mining and Petroleum Legislation Amendment Act 2014](#) commenced on assent on 14 May, and amends mining, petroleum and planning laws in relation to administrative decisions affecting mining rights and petroleum titles and the interrelationship between mining and petroleum laws and planning laws.

[Petroleum \(Onshore\) Amendment Regulation 2014](#), published 26 March 2014, increased from \$1,000 to \$50,000 the fee for an initial application for a petroleum title under the [Petroleum \(Onshore\) Act 1991](#).

[Protection of the Environment Operations \(Waste\) Amendment \(Coal Washery Rejects Levy\) Regulation 2014](#), published 28 February 2014, reduced, by 20 per cent, the rate of the levy payable by occupiers of licensed waste facilities used to dispose of coal washery rejects only, with effect on and from 1 March 2014.

#### **Miscellaneous:**

[Courts and Other Legislation Amendment Act 2014](#), which, among other amendments, amends [s 30](#) of the [Land and Environment Court Act 1979](#) providing the qualifications required to be held by Commissioners of the Land and Environment Court with respect to matters under the [Aboriginal Land Rights Act 1983](#), was assented to on 20 May 2014. The amendment to s 30 commenced on assent.

The [Aboriginal Land Rights Amendment \(Auditors\) Regulation 2014](#), published 7 March 2014, updates a reference in [clause 95](#) of the [Aboriginal Land Rights Regulation 2002](#) to the Institute of Public Accountants.

The [Trees \(Disputes Between Neighbours\) Regulation 2014](#), published 28 February 2014, repealed and remade the provisions of the [Trees \(Disputes Between Neighbours\) Regulation 2007](#), which would otherwise be repealed on 1 September 2014 by [section 10 \(2\)](#) of the [Subordinate Legislation Act 1989](#). In particular, this Regulation prescribes bamboo and any plant that is a vine as trees, within the meaning of the [Trees \(Disputes Between Neighbours\) Act 2006](#).

[Swimming Pools Amendment Regulation 2014](#), published 21 March 2014, amended the [Swimming Pools Regulation 2008](#) to:

- (a) prescribe each category of accreditation under the [Building Professionals Act 2005](#) that authorises the carrying out of inspections under the [Swimming Pools Act 1992](#) as an alternative qualification for accredited certifiers under [Division 5 of Part 2](#) of the Act; and
- (b) prescribe accredited certifiers within the meaning of Division 5 of Part 2 of the Act as authorised persons who may access the Register of Swimming Pools.

For information on exemptions under [s 22](#) of the [Swimming Pools Act 1992](#), see [Circular: 14-08](#) and [Practice Note No. 17](#).

[Residential Tenancies Amendment Regulation 2014](#), published 17 April 2014, postponed, until 29 April 2015, the inclusion of a term in the standard form residential tenancy agreement that requires the landlord to ensure any swimming pool on the residential premises is registered under the [Swimming Pools Act 1992](#) and to provide the tenant with copies of certain certificates under that Act at the time that the residential tenancy agreement is entered into.

The [Conveyancing \(Sale of Land\) Amendment Regulation 2014](#), published 17 April 2014, postponed, until 29 April 2015, the requirement that a contract for the sale of land of residential premises with a swimming pool (within the meaning of the [Swimming Pools Act 1992](#)) must be accompanied by:

- (a) a valid certificate of compliance under that Act, or

- (b) a relevant occupation certificate for the swimming pool within the meaning of that Act and evidence that the swimming pool is registered under [Part 3A](#) of that Act.

The [Liquor Amendment Act 2014](#), which enabled certain areas to be declared to be prescribed precincts in which licensed premises are subject to regulatory conditions; enabled periodic licence fees to be levied; and for other purposes, commenced 15 March 2014. Accompanying regulations amended the [Liquor Regulation 2008](#):

- [Liquor Amendment \(Transitional\) Regulation 2014](#), published 5 February 2014;
- [Liquor Amendment Regulation 2014](#), published 7 March 2014;
- [Liquor Amendment \(Sydney CBD Entertainment Precinct\) Regulation 2014](#), published 4 April 2014.

[Protection of the Environment Operations \(General\) Amendment \(Native Forest Bio-material\) Regulation 2013](#), published 7 March 2014, amends [clause 96](#) of the [Protection of the Environment Operations \(General\) Regulation 2009](#) to exclude certain categories of bio-material from the definition of native forest bio-material in order to permit the burning of such bio-material in any electricity generating work. These categories are as follows:

- (a) bio-material obtained from trees cleared in accordance with property vegetation plans that have been approved under [Part 4](#) of the [Native Vegetation Act 2003](#) after an assessment under Chapter 7 of the Assessment Methodology (within the meaning of the [Native Vegetation Regulation 2013](#));
- (b) bio-material obtained from trees cleared in accordance with a declaration relating to invasive species by an order under [clause 38](#) of the [Native Vegetation Regulation 2013](#) (and, if the order is subject to any conditions, in accordance with those conditions);
- (c) bio-material obtained from pulp wood logs and heads and off-cuts resulting from clearing carried out in accordance with a private native forestry property vegetation plan approved under Part 4 of the [Native Vegetation Act 2003](#) or forestry operations carried out in accordance with an integrated forestry operations approval under [Part 5B](#) of the [Forestry Act 2012](#); and
- (d) bio-material obtained from trees cleared as a result of thinning carried out in accordance with a private native forestry property vegetation plan approved under Part 4 of the [Native Vegetation Act 2003](#) or an integrated forestry operations approval under Part 5B of the [Forestry Act 2012](#).

**Bills:**

[Mine Subsidence Compensation Amendment Bill 2014](#), introduced into the Legislative Assembly on 15 May 2014, sets out:

- (a) to provide that the Mine Subsidence Board is not to pay out a claim for compensation from the Mine Subsidence Compensation Fund relating to preventative or mitigative expenses incurred or proposed before the relevant subsidence occurs;
- (b) to provide that the Board may reject a claim for compensation for preventative or mitigative expenses if the Board is of the opinion it is disproportionate to the expense of repairing or replacing the improvements or household or other effects concerned;
- (c) to make it clear that the Board must notify claimants of its decisions relating to claims for compensation and the reasons for those decisions;
- (d) to clarify the operation of provisions relating to Board approvals and certificates of compliance; and
- (e) to make savings and transitional amendments.

[Rural Fires Amendment \(Vegetation Clearing\) Bill 2014](#), introduced into the Legislative Assembly on 29 May 2014, proposes to amend the [Rural Fires Act 1997](#) to make provision for vegetation clearing work to be carried out in certain areas near residential accommodation or high-risk facilities to reduce bush fire risk. A new Div 9 is to be inserted in Part 4, to authorise the Commissioner of the NSW Rural Fire Service to determine what land is in a “10/50 vegetation clearing area” and to prepare a “10/50 Vegetation Clearing Code of Practice”. Under new s 100R the owner of land situated within a 10/50 vegetation clearing entitlement area will be entitled to remove, destroy or prune vegetation (including trees or parts of trees) within 10m, and remove, destroy or prune vegetation other than trees within 50m, of the external wall of a building containing habitable rooms that comprises or is part of residential accommodation or a high-risk facility. Consequential amendments are proposed to [ss 118A](#) and [118D](#) of the [National Parks and Wildlife Act 1974](#).

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

[SEPP \(Major Development\) 2005](#) has been amended by the following:

- [SEPP Amendment \(South Wallarah Peninsula\) 2014](#), published 17 April 2014, which prescribes the South Wallarah Peninsula as a state significant site;
- [SEPP \(Major Development\) Amendment \(Port of Newcastle\) 2014](#), published 28 March 2014, which allows for certain development within the site;
- [SEPP \(Port Botany and Port Kembla\) Amendment \(Port of Newcastle\) 2014](#), published 7 March 2014, which amends maps in the [SEPP \(Three Ports\) 2013](#).

[SEPP Amendment \(Gosford Cultural Precinct\) 2014](#), published 11 February 2014, amends the maps in the Gosford City Centre LEP 2007 and outlines provisions to be in DCPs for this site.

[SEPP Amendment \(Epping Town Centre\) 2013](#), published 14 March 2014, amends maps in the [Hornsby LEP 2013](#) and the [Parramatta LEP 2011](#).

[SEPP No 62—Sustainable Aquaculture \(Amendment No 5\)](#), published 11 April 2014, replaces the definition of NSW Oyster Industry Sustainable Aquaculture Strategy in the [SEPP No 62-Sustainable Aquaculture](#), with that in the second edition of the publication of that title, as published in 2014 by the Department of Primary Industries.

[SEPP \(Sydney Region Growth Centres\) Amendment \(Alex Avenue and Riverstone Precincts\) 2014](#), published 7 March 2014, amends the maps the [SEPP \(Sydney Region Growth Centres\) 2006](#).

[SEPP Amendment \(Newcastle\) 2014](#), published 30 May 2014, amends the [Newcastle Local Environmental Plan 2012](#), and the [SEPP \(Three Ports\) 2013](#).

- **On Exhibition**

The Office of Environment and Heritage has released three [Native Vegetation self-assessable codes of practice](#) (submissions closed 26 May 2014).

Submissions on the [Draft NSW Biodiversity Offsets Policy for Major Projects](#) closed on 9 May 2014.

Following a [review](#) of the management of Crown land in NSW, the Government has released a [White Paper](#) on Crown Lands Legislation. Submissions close on 20 June 2014.

The Law Reform Commission of NSW has released a [Consultation Paper](#) on Alternative Dispute Resolution.

The EPA has released a [Consultation Regulatory Impact Statement and Draft Proposed Protection of the Environment Operations \(Waste\) Regulation 2014](#). The Regulation is due to commence on 1 September 2014.

The NSW Government is also conducting a [statutory review](#) of the [Sporting Venues Authorities Act 2008](#).

The Federal Department of the Environment has the following drafts open for public consultation:

- [Draft Bilateral Agreement with NSW](#) under [s 49A](#) of the [Environment Protection and Biodiversity Conservation Act 1999](#) (Cth) (EPBC Act) seeks to:
  - (a) identify the NSW authorisation processes that will be accredited by the Commonwealth Minister under s 46 of the EPBC Act; and
  - (b) declare that the actions in the class of actions specified in Schedule 1 do not require approval under Part 9 of the EPBC Act for the purposes of the provisions of Part 3 of the EPBC Act specified in Schedule 1.

Submissions close on 13 June 2014

- [Draft A Strategy for Australian Heritage](#) – comments close 9 June 2014

The Australian Government Productivity Commission has a draft report on [Access to Justice Arrangements](#) on exhibition (submissions closed 21 May 2014).

- **Miscellaneous**

The NSW Parliamentary Research Service has released the following reports:

- [Burning native forest biomaterial for electricity generation](#) [issues backgrounder 3/2104]
- [Liquor licencing restrictions to address alcohol-related violence in NSW: 2008 to 2014](#) [e-brief 4/2014]

The National Construction Code (NCC) commenced 1 May 2014. The NCC 2014 comprises the Building Code of Australia (Volumes One and Two) and the Plumbing Code of Australia (Volume Three). Lists of amendments to the Codes may be accessed through this [link](#).

The Department of Planning and Environment has released the [Local Development Performance Monitoring Report for 2012-2013](#)

The [Administrative Arrangements \(Administration of Acts—General\) Order 2014](#), commenced 23 April 2014, lists in Schedule 1 which Acts are assigned to a particular Minister under the latest restructure as set out in the [Administrative Arrangements \(Administrative Changes—Ministers and Public Service Agencies\) Order 2014](#).

## Court Practice and Procedure

From 5 March 2014, a new summons ([Form 85 \(version 1\)](#)) is to be used in all Class 4 judicial review proceedings. Existing Form 4A or Form 4B (version 3) is to be used in all other Class 4 proceedings.

[Uniform Civil Procedure Rules \(Amendment No 65\) 2014](#), published 7 March 2014, provides that the email address required by [rule 4.2](#) need not be the email address of the solicitor on the record, but may be the email address of the solicitor with day-to-day conduct of the matter or may be an email address of the solicitor's firm which is regularly monitored and from which any emails can be forwarded to the solicitor on the record or the contact solicitor.

[Uniform Civil Procedure Rules \(Amendment No 63\) 2013](#), published 7 February 2014, sets out to:

- (a) to replace [Part 3](#) of the [Uniform Civil Procedure Rules 2005](#) to make provision with respect to the use of Online Registry and e-Court electronic case management systems; and
- (b) to update the list of documents that are to be filed by means of the electronic case management system in relation to proceedings in the Land and Environment Court.

On 14 May 2014 the delegation to the Registrar under s 13 of the [Civil Procedure Act 2005](#) was updated to empower the Registrar to make an order for costs, including charges and expenses, under any legislative provision where it is unlikely in the opinion of the Registrar that the costs will exceed \$30,000, and to empower the Registrar to make an order to set aside a notice to produce issued under Part 21 or Part 34 of the [Uniform Civil Procedure Rules 2005](#).

## Judgments

- **United Kingdom**

***Financial Services Authority v Sinaloa Gold Ltd*** [\[2013\] UKSC 11](#) (President Lord Neuberger, Baroness Hale, Lord Mance, Lord Clarke and Lord Sumption)

Facts: on 20 December 2010 the Financial Services Authority ("FSA") commenced proceedings against three defendants, Sinaloa Gold ("Sinaloa"), a person or persons trading as PH Capital Invest ("PH"), and Mr Hoover. The charges concerned various offences against [section 19](#) of the [Financial Services and Markets Act 2000](#) ("FSMA").

The FSA is a public authority governed by the FSMA. Its general functions include making rules, preparing and issuing codes, giving general guidance and determining general policy. The regulatory objectives include maintaining market confidence in the UK financial system, protecting and enhancing the stability of the UK financial system, securing the appropriate degree of protection for consumers, and reducing financial crime.

Prior to these proceedings, the FSA obtained without notice an injunction freezing the defendants' assets under [section 380\(3\)](#) of the FSMA. In Schedule B to the injunction, headed "Undertakings given to the Court by the Applicant", FSA did not offer a cross-undertaking in damages, however it did undertake to pay the reasonable costs of anyone other than Respondents, and furthermore to comply with any order the court may have made in respect to a third party. On 12 January 2011 FSA applied to have the latter undertaking removed, however this application was refused. FSA appealed the decision, which was reversed by the Court of Appeal. The effect was to preserve the undertaking in respect of costs incurred by third parties, but to eliminate any requirement that the FSA give an undertaking in respect of losses incurred by third parties.



Issues:

- (1) whether and how far the position of the FSA, seeking an interim injunction pursuant to its public law function and duty, is to be equated with that of a person seeking such an injunction in pursuance of private interests;
- (2) whether and how far the position regarding the giving of any cross-undertaking differs according to whether it is to protect a defendant and a third party; and
- (3) whether there is any coherent distinction between cross-undertakings in respect of third party losses and costs.

Held: dismissing the appeal:

- (1) there is a general distinction between private litigation and public law enforcement action. In private litigation, a claimant acts in its own interests and has a choice whether to commit its assets and energies to doing so: at [30]. Different considerations arise in relation to law enforcement action, where a public authority is seeking to enforce the law in the interests of the public generally, and enjoys only the resources which have been assigned to it for its functions: at [31];
- (2) the position regarding third persons differs to that of defendants: at [19]. An inquiry into damages will ordinarily be ordered where a freezing injunction is shown to have been wrongly granted, even though the claimant was not at fault: at [18]. However, the purpose of the cross-undertaking in respect to third parties is to protect them, so long as they are innocent parties, whether or not the freezing order was justified as against the defendant: at [19];
- (3) there is a pragmatic basis for a distinction between specific costs and general loss. Public authorities should be able to enforce the law without being inhibited by the fear of cross-claims in respect to third party loss; however this rationale does not apply in respect to third party expense: at [35]; and
- (4) the starting point in cases where a public authority is seeking an injunction in the public interest is that no cross-undertaking should be required unless circumstances appear which justify a different position: at [43].

***Archid Architecture and Interior Design v Dundee City Council*** [2013] CSOH 137 (Lord Glennie)

Facts: the applicants lodged a petition for judicial review of the decision by the Dundee City Council (“the Council”) to reject an application for planning permission, after a previous notice had been given granting permission. In October 2009, Archid Architecture applied for planning permission to convert an office located at Dundee, into a residential building. Permission was granted by the Council which issued a notice on 1 December 2009. The notice stated that planning permission was granted, yet the reasons for the decision stated that the application failed to comply with Policy 4 of the Dundee Local Plan. The applicants carried out the conversion. Once the work had been substantially completed, the Council issued a second notice on 11 May 2010 dated 1 December 2009 notifying the applicants that their application had been refused. This second notice did not purport to revoke or withdraw the first notice, but treated it as having been issued in error and replaced by the second notice.

The applicants lodged a petition for judicial review, seeking reduction of the second notice, and a declaration that the first notice was valid and continued to have full force and effect unless and until it was revoked by the Council in accordance with the [Town and Country Planning \(Scotland\) Act 1997](#) or otherwise lawfully reduced or set aside. The applicants also contended that the second notice was irrational and denied them natural justice, and that the first notice gave rise to a legitimate expectation that planning permission had been granted. The respondents contended that the first notice was a nullity, on the basis that the reasons included in the first notice supported refusal of the application and not its grant. They also contended that the issuing officer lacked authority to give notice that permission had been granted, as the decision taken by the authority was to refuse permission. The respondents entered pleas of mora, taciturnity and acquiescence, and contended that the first notice should be rectified so as to state correctly the decision that was taken. The main issues were the validity of the first and second notices.

Issues:

- (1) whether the first notice was valid; and
- (2) whether the Council was entitled to issue the second notice and whether it was valid.

Held: sustaining the pleas of the applicants and granting the decree of reduction of the second notice purporting to refuse planning permission and making a declaration in the terms sought in the petition:

- (1) the effect of the operative part of the first notice was to grant planning permission to the petitioners: at [29]. The Court applied the presumption of regularity that “an instrument is presumed to have been validly made and to have legal effect unless and until it is reduced”: at [31]. The absence of authority did not make the first notice invalid, and the lack of authority alleged in this case was no different from an alleged lack of capacity: at [50]. Similarly, the fact that the reasons provided in the first notice did not match the decision did not render the notice invalid: at [56]. In this case, the first notice gave reasons but they were inadequate in that they did not support the decision to grant planning permission: at [56];
- (2) in regards to the second notice, the alleged lack of authority and inadequacy of reasons did not render the first notice a fundamental nullity which could be ignored: at [50], [56]. The respondents could have sought to have the first notice reduced on the basis of lack of authority: at [50]. However, “unless and until the decision is reduced or set aside or otherwise declared invalid, it stands”: at [50]; and
- (3) there had been no attempt to have the first notice reduced, and therefore the second notice, being in effect a second decision on the one application, was ultra vires and must be reduced: at [55].

***Scrivens v Secretary of State for Communities and Local Government and Ashford BC*** [2013] EWHC 3549 (Admin); [2014] JPL 521 (Collins J)

Facts: the applicant made two applications under [s 288](#) of the [Town and Country Planning Act 1990](#) questioning the validity of two Inspectors dismissing the applicant’s appeals against the refusal by Ashford Borough Council (“the Council”) of planning permission or its failure to determine an application. There was also a claim for judicial review of a decision by one of the Inspectors to award costs against the applicant.

The applicant had sought planning approval to erect a replacement dwelling at Longberry Farm, Kent. This dwelling was designed to be “autarkic”, or self-sufficient. The Council disapproved the application. The applicant brought three conjoined appeals in relation to the application. Inspector Woolcock dismissed the appeals. The applicant also sought approval to erect a new dwelling at Longberry Farm, which would be similarly self-sufficient. The Council disapproved the application. The applicant appealed the decision, which was upheld by Inspector Bowden. Inspector Bowden also awarded costs on the basis of the excessive amount of material submitted by the applicant, which he decided was unreasonable.

The applicant submitted that the Inspectors failed to apply the concepts or wording of the National Planning Policy Framework (“NPPF”) since they failed to understand the true meaning of sustainable development. The applicant contended that sustainable development was synonymous with self-sufficiency.

Issues:

- (1) whether the Inspectors erred in having regard to factors other than energy efficiency in considering whether the dwellings constituted sustainable development;
- (2) whether the Inspectors erred in giving undue weight to factors other than energy efficiency;
- (3) whether the approval of a replacement dwelling at an adjacent property created a legitimate expectation that the application would be allowed; and
- (4) whether permission for judicial review should be granted on the ground that the order that the applicant should pay the council’s costs failed to specify with sufficient certainty what costs the applicant was required to pay.

Held: upholding the decisions of the two Inspectors dismissing the applicant’s appeals, quashing the order that the applicant should pay the council’s costs and ordering the parties to seek to produce an indication of what should be set out in the order:

- (1) it was undesirable to indicate what the definition of sustainable development should be: at [11]. The NPPF made it clear that there is a presumption in favour of sustainable development: at [11]. What is sustainable in any particular circumstance will depend on a number of material factors: at [15]. While the future exhaustion of energy services is very important, there has to be consideration given to the needs of the present as well as the future: at [16]. Thus, a development which, however autarkic, is entirely out of place or would adversely affect in economic terms a neighbouring community could properly be refused: at [16]. Furthermore, an unsightly development in the countryside could adversely affect future generations: at [16]. Therefore, the Inspectors were permitted to consider factors including the suitability of the location, whether the dwelling conserved or enhanced the rural area and whether the development would recognise the intrinsic character and beauty of the countryside: at [22], [30];
- (2) a balance had to be drawn between what is provided in any plan and other material considerations: at [16]. The weight to be attached to contravening considerations was a matter of judgment: at [22];
- (3) while the possibility of the application of legitimate expectation in a particular case could not be ruled out, it will normally not apply to a situation where a neighbour has obtained permission for a similar development but one which is not identical: at [23]. Inspector Woolcock identified what he regarded as material differences which rendered the application unacceptable: at [24]; and
- (4) a partial costs award was justified because the quantity of material lodged by the applicant was unreasonable: at [35]. However, the order failed to specify with sufficient certainty what the costs were which the applicant was required to pay: at [36]. Thus, the order could not stand and it was necessary to give more details: at [36].

***R (on application of Cherkley Campaign Limited) v Mole Valley District Council*** [2014] EWCA Civ 567 (Richards LJ, Underhill LJ and Floyd LJ)

(related decision: *R (on the application of Cherkley Campaign Limited) v Mole Valley District Council* [2014] EWHC 2582 (Admin) Haddon-Cave J)

Facts: Cherkley Campaign Limited (“the Claimant”) sought judicial review of a decision by Mole Valley District Council (“the Council”), by a 10 to 9 decision of its Development Control Committee, to grant planning permission to Longshot Cherkley Court Limited (“Longshot”) on 21 September 2012 to develop Cherkley Court and Cherkley Estate, near Leatherhead in Surrey, into a hotel and spa complex together with an 18-hole golf course. The development site was situated within the Surrey Hills Area of Great Landscape Value (“AGLV”), and part of the site was situated within the Surrey Hills Area of Outstanding Natural Beauty (“AONB”). The entire site also fell within the Metropolitan Green Belt (“the Green Belt”). Policy REC12 of the Mole Valley Local Plan (“the Plan”) set out the policy relating to golf courses.

There were numerous objections to the proposal. The claimant lodged their challenge by way of judicial review on 17 December 2012. The challenge was originally brought on seven grounds (to which an eighth ground was subsequently added); five of those grounds were pursued.

Issues:

- (1) whether the Council failed to consider whether there was a “need” for the golf course, and whether it could be “directed away” from area of high landscape quality, as required under [cls 12.71](#) and [12.72](#) of REC12 of the Plan (Ground 2);
- (2) whether the Council failed to consider whether the golf course proposal was consistent with the aim of “conserving and enhancing the natural landscape” under policy REC12 of the Plan (Ground 3);
- (3) whether the Council failed to have regard to the adequacy of water resources in breach of Policy ENV68 of the Plan (Ground 5);
- (4) whether the Council failed to properly apply the Green Belt policy by failing to consider whether the potential harm caused by the development was outweighed by “special circumstances” (Ground 1); and
- (5) whether the Council failed to determine part of the proposed development, comprising the proposed Glass House Cottages, in the context of Green Belt policies (Ground 8).

At first instance, the challenges on Ground 2 (“need”), Ground 3 (“landscape”) and Ground 1 (“Green Belt”), but not on Ground 5 (“water”) and Ground 8 (“Glass House Cottages”), were upheld, and the decision of the

Council to grant planning permission was quashed. The reasons of Haddon-Cave J ([\[2013\] EWHC 2582](#) (Admin)) were as follows:

- (1) the Council misunderstood the meaning of “need” or failed to direct themselves correctly to its meaning; at [123]. There was not a “need” for such facilities in the proper public interest sense: at [103]. The Council also failed to address the question of whether the golf course could and should be “directed away”: at [129], and failed to provide adequate reasons: at [118];
- (2) the Council failed to have regard to the policy aim of “conserving and enhancing the landscape”: at [159]. The Council majority’s conclusion that the overall landscape character “would not be compromised” by the imposition of a golf course on the Surry Hills AONB and AGLV was perverse: at [159], and contradicted the unanimous views expressed by the landscape experts that the effects would be major, adverse, long-term and permanent: at [155];
- (3) the Council planning officers did not ignore Policy ENV68. They put ample evidence before the Council to enable Council members to consider that adequate water resources would be “available” to sustain the proposed development: at [169];
- (4) the Council erred in failing to consider whether “very special circumstances” existed which outweighed the harm: at [195], and did not provide adequate reasons: at [195];
- (5) obiter: the “circumstances” must be “very special” as opposed to common or garden planning considerations: at [186];
- (6) the Glass House Cottages were not overlooked by the planning officers when advising on Green Belt Issues, and must be regarded as having been compendiously referred to in the Reasons as part of “the development”: at [202]; and failure to give adequate reasons was not pursued as a separate ground by the claimants, however the Court stated for completeness that the Council majority’s reasons for granting planning permission were inadequate in respect of Grounds 1, 2 and 3: at [205].

The Court of Appeal allowed the appeal and set aside the order quashing the planning permission and the related costs order:

- (1) on ground 2:
  - (a) the relevant policy was Policy REC12 and on its proper construction it contained no requirement to demonstrate “need”. Although paragraph 12.71 referred to such a requirement, that paragraph was not part of the policy, but was supporting text: at [17];
  - (b) in any event, the [Planning and Compulsory Purchase Act 2004](#) had introduced a new development plan making process under which local plans were to be replaced and under a direction of the Secretary of State the only relevant part of the Plan that continued in force was Policy REC12: at [18];
  - (c) while the Council officers had proceeded in practice on the basis that there was a policy requirement to demonstrate need, if on the proper interpretation of Policy REC12 there was no requirement to demonstrate need, nothing turned on the fact that the Council proceeded on the basis that there was such a requirement but concluded that it was satisfied: at [22];
  - (d) if Policy REC12 was to be read as containing a need requirement, it was an unexacting requirement and was capable of being met by demonstrating an unmet demand for an elite facility of the type proposed: at [30]; and
  - (e) for the same reasons, “directing away” was not a policy requirement of the Plan and in the absence of a policy requirement the reference to it in paragraph 12.72 did not convert it into a material consideration: at [38];
- (2) on ground 3: while there was a body of evidence that the development would be harmful to the landscape, there was also evidence the other way. The weight of evidence and advice was not such as to leave no room for the members of the Development Control Committee rationally to conclude as a matter of planning judgment that the overall landscape character would not be compromised: at [49], [53];

- (3) on ground 1: although the reasons did not use the language of the policies, the proper inference to be drawn was that the majority of the Development Control Committee had concluded that, to the extent that there would be inappropriate development, there existed very special circumstances that clearly outweighed the harm; and failure to use the language of the policy did not justify the adverse finding made at first instance: at [64]; and
- (4) on reasons: the summary of reasons for the grant was exceptionally lengthy and far fuller than would have been necessary if the majority of the Committee had accepted the recommendation in the officers' reports. The end result was an adequate summary, and there was not an unlawful deficiency of reasons whether in relation to the issues individually or when read as a whole: at [71].

***R (on the application of Mid Counties Co-operative Ltd) v Forest of Dean District Council*** [2013] EWHC 1908 (Admin) (Stewart J)

Facts: the claimant, Mid Counties Co-operative Ltd ("MCL") claimed judicial review of the Council's decision of 29 March 2012 to grant outline planning permission to Trilogy for a retail store located on land at Steam Mills Road, Cinderford, Gloucestershire. MCL owns and operates the Co-operative supermarket at Dockham Road, Cinderford. On 28 June 1999, the Secretary of State had refused an application for outline planning permission on the site for the construction of a Tesco food store. There had been further unsuccessful applications for extra retail provision in Cinderford over the years between 1999 and 2011.

MCL challenged the decision of the Council on six grounds, including failure to consider the importance of consistency with an earlier decision concerning the site, failure to ask a relevant question and take reasonable steps to obtain the relevant information before concluding that the benefits offset the harm, misconstruction of the Core Strategy prepared as part of the Council's local development framework, failure to mention policy CSP10 of the Core Strategy, failure to consider the Claimant's proposed investment in extending its town centre, and the imposition of an unlawful condition. The primary issue concerned the importance of the earlier decision of the Secretary of State.

Issues:

- (1) whether the Council failed to consider a material matter in failing to consider the importance of consistency with the earlier decision of the Secretary of State in 1999 that planning permission should not be granted for a Class A1 supermarket on the site (Ground 1(a)); and
- (2) whether the Council failed to provide reasons for departing from this earlier decision of the Secretary of State (Ground 1(b)).

Held: determining that MCL's case on ground 1 should succeed:

- (1) the Council failed to consider a material matter in that there was no proper analysis of the 1999 decision: at [22.8]. A decision is material unless it is distinguishable: at [16]. The Council submitted that the 2012 decision was distinguishable from the 1999 decision, as in that case the sequential test was not met: at [22.5]. However, the decision itself is not distinguishable merely because one of those separate reasons can be distinguished: [22.5]. The adverse impact on Cinderford town centre from a supermarket development should have been considered as a separate and free standing matter: at [22.6]; and
- (2) the duty on the Council was to give summary reasons, not detailed reasons as would be the case in an Inspector's Report: at [22.4]. It was unclear from the Officers' Report that there was any clear reason or reasoning on the basis of need to distinguish the present decision from the 1999 decision: at [22.8].

***San Vicente v Secretary of State for Communities & Local Government*** [2013] EWHC 2713 (Admin) (Collins J)

Facts: the appellants sought judicial review of the decision of a planning Inspector in June 2012 to allow the appeal of Taylor Wimpey UK Ltd ("Taylor") against the refusal by the local authority of planning permission for a residential development on a site on land in Great Dummow, Essex. The Council refused

the development application on four separate grounds. Taylor appealed the decision, and an Inspector held a hearing in the Council offices for a full day on 11 April 2012, with a site visit on 12 April 2012. Numerous persons had made written objections to the development, however proper notification was not given to those objectors that they were entitled to attend the hearing and make representations if they wished. At some stage of the hearing the Inspector became aware that proper notice had not been given. It was then necessary to decide what should be done.

On 18 May 2012 the Planning Inspectorate wrote to Taylor, stating that it would be necessary for the hearing to be re-run. The Inspectorate also stated that the main parties should rely on the case provided in their statements; and that the Inspector would not expect new material to be put forward. It was also determined that the same Inspector should deal with the subsequent hearing, which was held on 7 June 2012. On that occasion the hearing in the Council offices was over in half a day, with the site visit held in the afternoon.

The current appeal was brought by a number of objectors to the application on the basis that there was procedural unfairness, in that there was a failure to ensure that all parties were notified of the hearing in accordance with the [Town & Country Planning \(Hearing Procedure\) \(England\) Rules 2000](#), and by reason of the failure to restart with a different Inspector.

Issues:

- (1) whether the appellants suffered prejudice through the Inspector's decision to grant the appeal; and
- (2) whether relief should be granted.

Held: quashing the decision of the inspector to allow Taylor's appeal against the refusal by the local authority of planning permission:

- (1) while the objectors at the second hearing were not precluded from raising matters that they wished to raise, there was no doubt that the Inspector had regard to the hearing held not only on 11 April but also on 7 June: at [33]. The objectors were prejudiced in that there may have been matters that the Inspector relied on which, had they been present, they might have been able to deal with in a different way from that which the councillors raised: at [33];
- (2) a different Inspector should have presided over the re-hearing. The whole point of needing a fresh hearing was that it should indeed be a fresh hearing and not in any way dependent upon, or taking account of, what was raised at the unlawful first hearing: at [16]; and
- (3) it was not inevitable that an inspector would reach the same decision. Experienced members of a planning committee had taken the view that the particular development was not one which should take place. Equally, an Inspector dealing with other land on the north side of the road had decided that the objections outweighed the points in favour of the development: at [32]; and
- (4) while there was no guarantee that a fresh decision would be favourable to the objectors, the approach that should be adopted in deciding whether there had been prejudice was whether it was reasonably possible that there might be a different decision made: at [34].

Note: an appeal to the Court of Appeal was dismissed: *Secretary of State for Communities and Local Government v San Vicente* [2013] EWCA Civ 817.

***R (on the application of) Teresa Sienkiewicz v South Somerset District Council*** [2013] EWHC 4090 (Admin) (Lewis J)

Facts: the applicant brought a claim for judicial review of a decision of the South Somerset District Council ("the Council"), granting planning permission to Probiotics International Limited ("Probiotics") for the erection of a building for several uses on land forming part of the former Lopenhead Nursery in Lopenhead, South Somerset. Part of the former nursery was allocated for employment use under the South Somerset Local Plan. Industrial buildings had been constructed on the plot, which were used by Probiotics for the production of human and animal health care products. Probiotics wished to expand its operations and to erect another building on the application site.

On 30 April 2013, the Council issued planning permission for the development. The Council attached a number of conditions to the approval. Of relevance was condition eight which stated that: “the building hereby permitted shall only be carried out by Probiotics International Ltd (or any successor company) during its occupation of the land subject to this permission”. The reason given was that the Local Planning Authority wished to control the uses on the site. The claimant challenged the grant of planning permission on five grounds. Of interest was Ground 1, which raised the issue of whether condition 8 was unlawful because it was ambiguous and unenforceable, or irrational, or did not fairly and reasonably relate to the development.

Issue:

- (1) whether condition 8 was unlawful because it was ambiguous and unenforceable, or irrational, or because it did not fairly and reasonably relate to the development.

Held: granting permission to apply for permission for judicial review on all five grounds, and determining that the planning permission must be quashed:

- (1) the requirement in condition 8 that “the building hereby permitted shall only be carried out by Probiotics” should be construed as a condition concerning the use to be made of the land, rather than the erection of the building: at [39]. The reference to “any successor company” could be read as meaning any company or individual that acquires the shareholding in Probiotics: at [42];
- (2) the reason given for the condition was that the local planning authority wished to control the use of the land. However, condition 8 would not enable the local planning authority to control the use of the land: at [43]. The usual position is that planning permission is concerned with the use of the land, rather than the identity of the user: at [44]. There was nothing in condition 8 that would enable the Council to limit the use to which the land may be put: at [44]. Limiting the benefit of the planning permission to Probiotics or a successor company did not enable the Council to impose any control on the use of the application site: at [44]. It simply sought to control the identity of the person carrying on the permitted use: at [44];
- (3) furthermore, no rational reason was advanced for restricting the benefit of the planning permission to Probiotics or a successor company: at [43]. No planning reasons explain why an unconnected company should not be allowed to use the building and land for the permitted purposes: at [45];
- (4) the condition did not promote sustainability, as Probiotics was not limited by the condition to using the application site in connection with its existing business: at [46];
- (5) condition 8 was invalid as it did not serve a planning purpose, was not fairly and reasonably related to the proposed development and was irrational: at [49], [61]; and
- (6) the condition was not capable of being severed from the planning permission and the planning permission must therefore be quashed: at [49], [61].

- **Federal Court of Australia**

***No TasWind Farm Group Inc v Hydro-Electric Corporation (No 2)*** [\[2014\] FCA 348](#) (Kerr J)

(related decisions: *No TasWind Farm Group Inc v Hydro-Electric Corporation (No 1)* [\[2014\] FCA 347](#), *No TasWind Farm Group Inc v Hydro-Electric Corporation (No 3)* [\[2014\] FCA 349](#), Kerr J)

Facts: a number of individual members of the King Island community formed an association and then an incorporated association to oppose the proposed construction by the Hydro-Electric Corporation (“HEC”) of a wind farm on King Island. The HEC undertook a program of community consultation, including paying for and facilitating a poll of the residents of King Island, before deciding to proceed with the proposal. The applicant No TasWind Farm Group Inc was incorporated under the [Associations Incorporation Act](#) 1964 (Tas) after the HEC indicated that it intended to proceed with its plans notwithstanding its alleged failure to secure the support of the King Island community. The applicant commenced proceedings asserting contravention of the *Australian Consumer Law*, alleging that the HEC had made representations “in trade or commerce” including that it would accept that any result obtained in the poll demonstrating less than

60% support of the community would not constitute broad support sufficient for the wind farm scheme to proceed. The HEC applied for an order that the applicant provide security for costs for a total amount of \$165,000. The applicant accepted that its resources would not enable it to meet in full any costs order if it was unsuccessful following a hearing but submitted that it had obtained pledges in the sum of \$20,000 towards any such adverse order, and that if the court were to order security in the sum sought by the respondent that would effectively terminate the proceedings.

Issues:

- (1) whether security for costs should be ordered; and
- (2) if so, what amount should be required.

Held: ordering the applicant to provide security for the respondent's costs by making payment into Court of \$20,000 within seven days and a further \$15,000 prior to the Court allocating a date for the trial, and staying the application pending compliance with the order:

- (1) it was not unlikely that a trial judge would conclude that all of the steps taken by the respondent to assess the viability of its project including expenditure on community consultations were actions taken in pursuit of the HEC's core business, that of facilitating the generation and sale of renewable energy. Understood in that context those steps appeared to fall within the ordinary meaning of something done by the HEC "in trade or commerce", and the applicant did not have a weak case in so far as it proceeded on the basis that the HEC was acting "in trade or commerce" within the meaning of the Australian Consumer Law: at [27];
- (2) earlier legal advice provided by the applicant's then lawyer as to the prospects of success were not relevant to the actual strength or otherwise of the applicant's case: at [34];
- (3) if the applicant's case was merely that the respondent had misleadingly claimed a "social licence" for the wind farm, the Court would conclude that the prospects of the applicant succeeding at trial were slight. However, the alleged 60% representation was different. If evidence led at trial established that that representation was made, and that that representation was in breach of the Australian Consumer Law, in principle there was no reason why, subject to the range of discretionary considerations that would apply, the applicant could not succeed: at [39],[40];
- (4) there was considerable evidence consistent with the proposition that the applicant was incorporated as a device to avoid the members of the previously unincorporated group being exposed to the risk of costs orders. While that circumstance was a relevant factor in favour of the Court making an order, it would be wrong to make too much of this point so as to regard it as decisive: at [49];
- (5) the evidence did not establish that the case was being pursued to vindicate the economic interests of the owner of a national tourism business who had provided financial support to the applicant, and aside from that remote prospect there was nothing to justify a finding that any member of the formerly unincorporated group possessed a relevant interest that would be vindicated by the proceedings: at [54];
- (6) the applicant had limited financial resources currently available to it. The applicant had a duty to the court to make a full disclosure of its financial position, and the picture was not complete. Despite the unsatisfactory nature of the evidence it could be concluded that the applicant was relevantly impecunious: at [61]-[71];
- (7) requiring the applicant to provide security in the sum of \$165,000 would place the applicant in a position where it could not further proceed and would stultify the action: at [74];
- (8) the applicant was entitled to be regarded as pursuing public interest litigation, not because the proceedings were being pursued in the interests of the environment or public health, but on the basis of the public interest in the enforcement of the laws of the Commonwealth. The provisions of the Australian Consumer Law articulated enforceable norms of acceptable corporate behaviour capable of being brought before the court by any person irrespective of any requirement on their part to establish standing. By passing the Australian Consumer Law, Parliament clearly intended that the standards be readily enforceable and that their enforcement would be consistent with the public interest: at [78]-[81];



- (9) it was a relevant factor that as a proportion of the total costs of the project overall, were it to proceed, any unmet costs in the proceedings would be of trifling significance: at [83]; and
- (10) considerations influencing the decision to make an order for security for costs included the failure of the applicant to fully disclose its financial position and the fact that its incorporation was facilitated as a device to avoid the former members of the unincorporated group being exposed to the risks of costs orders. However, the orders sought by the respondent would stultify the litigation and prevent a case brought in the public interest and which was not without possible legal merit going to trial. The length of the trial would be substantially less than the respondent initially contended for, and was estimated to be no more than five days: at [84]-[88].

- **NSW Court of Appeal**

**Ross v Lane Cove Council** [2014] NSWCA 50 (Meagher and Leeming JJA and Tobias AJA)

(related decision: *Lane Cove Council v Ross* (No 14) [2013] NSWLEC 87 Pepper J)

Facts: Mr Ross made alterations to his property in Northwood contrary to development consent granted by Lane Cove Council (“the council”). The Land and Environment Court (“the LEC”) ordered him to demolish the unauthorised works and reinstate the property in accordance with the consent. During the LEC proceedings, evidence was tendered demonstrating that Mr Ross had sold the property to a third party, Ms Chami. A solicitor for Ms Chami had appeared at an earlier directions hearing, saying she had no instructions from her client to apply to become a party to the proceedings. At the hearing before the LEC Mr Ross did not argue that Ms Chami should be joined as a party. In its judgment, the LEC rejected the council’s claim that the property transfer was a sham designed to avoid enforcement of any potential orders made against Mr Ross. Mr Ross appealed the LEC’s decision on a number of grounds.

Issues:

- (1) whether the LEC erred in proceeding without requiring the joinder of Ms Chami.

Held: appeal allowed, matter remitted to LEC for redetermination:

- (1) Ms Chami should have been joined to the proceedings:
- a person who is directly affected by court orders is a necessary party to the proceedings and ought to be joined. The joinder of a party directly affected by an order is not a matter of discretion; it is a matter of obligation upon the party seeking the order: at [46]-[63];
  - it was clear that Ms Chami, as owner, was directly affected by the orders made by the LEC. They involved extensive demolitions and alterations to her property: at [64]-[67]. Accordingly, there was a *prima facie* obligation on the council to join Ms Chami when it became clear that she was the owner of the property: at [68];
  - the fact that Ms Chami had been made aware of the proceedings and had elected not to be joined did not displace the onus on the council to join her to the proceedings: at [69].

**Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council** [2014] NSWCA 69 (Macfarlan and Barrett JJA, Bergin CJ in Eq)

(related decision: *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (Limbri)* [2013] NSWLEC 67 Pain J)

Facts: on 19 December 2005 the respondent (“NSWALC”) lodged Aboriginal Land Claims 8734 and 8736 (“the ALCs”) under the *Aboriginal Land Rights Act* 1983 (“the ALR Act”) in respect of Crown land situated near Tamworth. The land the subject of the claims had been declared, on 19 November 1982, pursuant to s 28 of the *Crown Lands Consolidation Act* 1913, reserved “for future public requirements”. ALC 8736 also applied to land that had been reserved for “public recreation”. The land the subject of ALC 8734 was subject to a licence granted on 17 September 1997 pursuant to s 34 of the *Crown Lands Act* 1989 to Mr and Mrs Knee (“the Licence”). Sch 1 of the Licence stated the “Purpose for which Premises may be used”

as “Grazing”. The Licence provided for an annual rent of \$100. The land the subject of ALC 8736 was the subject of a Permissive Occupancy in favour of Mr and Mrs Hertner granted in 1988, which provided for an annual rent of \$34, and stated that its purpose was “Grazing”. Both instruments included provisions prohibiting residence and overstocking or interference with trees, and requirements to control noxious plants and animals. The Minister refused the claims on the basis that the lands were “lawfully used or occupied” at the date of the claims and therefore not claimable Crown lands. An appeal against the refusals was upheld at first instance, the primary judge concluding that the land was not “lawfully used or occupied” at the date of claim because the occupancies pursuant to the Licence and Permissive Occupancy were not lawful as the Ministers who granted them had not power to do so in light of the gazetted reservations to which the land was subject. The Minister appealed under [s 57](#) of the [Land and Environment Court Act](#) 1979.

Issue:

- (1) whether the primary judge was correct in concluding that the occupancies pursuant to the Licence and Permissive Occupancy were not lawful.

Held: upholding the appeal, setting aside the orders made by the primary judge, dismissing the appeals to the Land and Environment Court insofar as the land claimed comprised Crown land reserved for the purpose of “future public requirements” and allowing the appeal to that Court insofar as the land claimed comprised Crown land reserved from sale for the purpose of “public recreation”:

- (1) the reserved purpose of “public requirements” was amorphous and stated to be related to the future, and the “public requirements” had yet to be identified. The inference could readily, and should, be drawn from the terms of the Licence and Permissive Occupancy that the relevant Ministers intended those instruments to facilitate the preservation of the lands for their use in the future for “public requirements” by placing the lands in the possession and under the care of Mr and Mrs Knee and Mr and Mrs Hertner who were to conduct on them the limited activity of grazing, subject to the various care and maintenance obligations: at [32], [33];
- (2) there was no commonsense in the suggestion that the Ministers acted for the purpose of enabling the licensees and occupants to conduct grazing on the lands. That was the outcome of the grant and not their purpose: at [33];
- (3) that the Permissive Occupancy and Licence sought to regulate to some degree the activity of grazing which each authorised to be carried out on the land did not detract from the inference that the relevant Ministers’ purpose in granting the Licence and Permissive Occupancy was to facilitate the use of the land in question for “future public requirements”: at [35];
- (4) while in some cases the inference might be drawn that Ministers acted for the purpose of generating public revenue from the rental to be paid by the licensee, the question of rental was not of significance in the present case as it was so low that no inference could be drawn that generation of it was a significant purpose of the grants: at [37];
- (5) the conclusion that the only reasonable inference available was that the Ministers made the grants for the purpose of having the land maintained to facilitate its use in the future for “public requirements” did not depend on the making of a presumption of regularity, but on the drawing of a commonsense inference: at [39];
- (6) the primary judge erred in finding that the Minister had not established that the claimed lands were “lawfully used or occupied”. Her reasoning unduly focussed on the use of the claimed lands, mandated by the Permissive Occupancy and Licence, for grazing, which led her to conclude that the Licence and Permissive Occupancy were for the private purpose of grazing. That did not address the critical question of why the relevant Ministers granted the Permissive Occupancy and Licence, which required attention to the potential benefits to the Crown from the grants as distinct from the obvious benefit to the grantees of the ability to graze cattle on the lands: at [40]; and
- (7) (Barrett JA, Bergin CJ in Eq agreeing): the purpose for which the permissive occupancy and licence had been granted had to be ascertained from the terms of the relevant instrument, viewed in the statutory context in which the concession was granted. Regard had to be had to the provisions of the instrument as a whole, and there was no reason why the permitted use provision deserved greater

attention or emphasis than other provisions such as that requiring eradication of noxious plants and animals and the prohibitions on residence and overstocking: at [56].

***El Boustani v Minister Administering the Environmental Planning and Assessment Act 1979*** [2014] NSWCA 33 (Beazley P, Basten JA and Preston CJ of LEC)

(related decision: *El Boustani v Minister Administering the Environmental Planning and Assessment Act 1979* [2012] NSWLEC 266 Pepper J)

**Facts:** Mr and Mrs El Boustani owned land in Leppington on which they grew tomatoes and other vegetables. On 23 July 2010 the Minister compulsorily acquired the northern two thirds (1.3446ha) of the land for the purposes of the South West Rail Link project. The acquired land contained a large multi-span igloo, two smaller single span igloos and a dam; the residue land contained the residence and two smaller single span igloos. At the time of acquisition vegetable crops had been planted but were not due to be harvested until late December 2010 to early January 2011. Those crops could not be harvested because the El Boustanis were required to vacate the land by 30 November 2010, and the parties agreed that the El Boustanis should be compensated for the costs thrown away (\$11,221). As a consequence of the acquisition of most of the land the El Boustanis were no longer able to carry out their horticulture business on the residue land, because of loss of access to the dam and most of the growing areas on the acquired land. The El Boustanis wished to re-establish their horticulture business elsewhere on suitable land and sought relocation costs; the parties agreed that if relocation costs were compensable the costs required to re-establish the facilities on a new site would be \$852,000, and the El Boustanis claimed another \$68,000 for fit out, stamp duty and legal fees, bringing the total amount claimed for disturbance to \$920,000. The El Boustanis also sought compensation for the profits they had lost from the date of acquisition until they would be able to re-establish their horticultural business elsewhere: the El Boustanis claimed four years (2010-2011, 2011-2012, 2012-2013, 2013-2014) while the Minister contended that only the first two years should be allowed. The primary judge determined that the amount of compensation to which the El Boustanis were entitled was \$1,436,059, comprising \$1,194,556 for market value of the acquired land, \$237,310 for loss of profits as a consequence of the acquisition and \$4,193 for other disturbance costs.

The El Boustanis appealed, seven weeks out of time, against the rejection of their claim for relocation costs on the basis of [s 61](#) of the [Land Acquisition \(Just Terms Compensation\) Act](#) 1991 ("the Just Terms Act") and the assessment of the amount of compensation for lost profits.

Section 61 of the Just Terms Act provides:

If the market value of land is assessed on the basis that the land had potential to be used for a purpose other than that for which it is currently used, compensation is not payable in respect of:

- (a) any financial advantage that would necessarily have been forgone in realising that potential, and
- (b) any financial loss that would necessarily have been incurred in realising that potential.

**Issues:**

- (1) whether the primary judge erred in the construction and application of the chapeau of [s 61](#) of the Just Terms Act concerning whether the market value of the acquired land was assessed on the basis that the land had the potential to be used for a purpose other than that for which it was currently used;
- (2) whether the primary judge erred in the construction and application of paragraph (b) of [s 61](#) concerning whether the relocation costs would "necessarily" have been incurred in realising the future urban potential;
- (3) whether the primary judge erred in failing to apply the statutory mandate of awarding "just compensation" under [s 54](#) of the Just Terms Act and in failing to have regard to the purpose of [s 61](#), namely the avoidance of double dipping; and
- (4) whether the primary judge erred in determining that the El Boustanis should be compensated under [s 55\(d\)](#) and [s 59\(f\)](#) of the Just Terms Act for only three years of lost profits.

Held: extending the time for the appeal, allowing the appeal and setting aside the orders of the Land and Environment Court, remitting the matter to determine the appellants' claim for compensation, and ordering the respondent to pay the appellants' costs of the proceedings on appeal:

- (1) in determining the compensation for relocation costs the primary judge erred on questions of law in determining that s 61 of the Just Terms Act operated to preclude the payment of compensation for the relocation costs that the primary judge had found were otherwise payable, in:
  - (a) asking herself the wrong question and failing to address the correct question in relation to the basis on which the market value of the land was assessed. The primary judge was required, in determining whether the precondition in the chapeau of s 61 was satisfied, to identify the basis on which the primary judge had assessed the market value: at [117];
  - (b) misdirecting herself by not inquiring whether "the basis" of the assessment of the market value of the land was that the land had the potential to be used for a purpose "other than" that for which it was currently used: at [122];
  - (c) asking the wrong question in relation to, or misconstruing, the requirement of "the basis" in the chapeau of s 61. Instead of asking whether the use for the purpose specified in the chapeau was "the basis", in the sense of the fundamental foundation of the assessment of the market value of the land, the primary judge employed a different approach as evidenced in the language the primary judge used in describing the assessment of the valuers of the market value of the land: at [124];
  - (d) asking the wrong question and failing to address the correct question of what was the "potential" the land "had" on the date of acquisition to be used for a purpose other than that for which the land was currently used on that date: at [127];
  - (e) misdirecting herself in relation to the need for temporal proximity of use for a purpose other than that for which the land was currently used. The need for temporal proximity flows from the concepts of "potential" and "the basis" in the precondition in the chapeau of s 61: at [134];
  - (f) in asking the wrong question and failing to address the correct question required by paragraph (b) of s 61 of whether the financial loss incurred by the El Boustanis could be said to be "necessarily" incurred in "realising" the potential for the land to be used for the other purpose of town centre or urban development: at [140];
- (2) it was unnecessary to address the alternative ground of whether the El Boustanis would be awarded "just compensation" under [s 54](#): at [145]; and
- (3) in determining that the El Boustanis should be compensated under s 55(d) and s 59(f) for only three years of lost profits, the primary judge erred on questions of law in two respects:
  - (a) the determination of "allowing" of only a year to find a new property and to construct facilities necessary to grow tomatoes was made without reference to any evidence and was without evidentiary foundation: at [154]; and
  - (b) the primary judge's allowance of only one year to find a replacement property and to construct the facilities necessary to grow tomatoes could be seen as a constructive failure to exercise jurisdiction. The primary judge was required to address the requirements of s 59(f) and in particular whether the lost profits for the years claimed were "reasonably incurred" or "might reasonably be incurred", and a "direct and natural consequence of the acquisition"; the primary judge was also required to deal with the El Boustanis' claim for four years of lost profits comprising the initial two years as well as the additional two years on the evidence before the Court: at [156]-[159].

***El Boustani v Minister Administering the Environmental Planning and Assessment Act 1979 (No 2)*** [\[2014\] NSWCA 114](#) (Beazley P, Gleeson JA and Preston CJ of LEC)

(related decisions: *El Boustani v Minister Administering the Environmental Planning and Assessment Act 1979* [\[2014\] NSWCA 33](#); *El Boustani v Minister Administering the Environmental Planning and Assessment Act 1979* [\[2012\] NSWLEC 266](#) Pepper J)

**Facts:** the appellants applied under [r 36.17](#) of the [Uniform Civil Procedure Rules 2005](#) (“UCPR”) to correct certain of the orders made by the Court on 28 February 2014. Order 1 extended the time for the appellants to file and serve the notice of appeal to 24 April 2014, and the appellants sought to correct the year of the date from “2014” to “2013”. Order 3 set aside all of the orders made by the Land and Environment Court of 6 December 2013, and the appellants sought to correct this order so as to limit the orders of the Land and Environment Court set aside to only Order 3 (determining the amount of compensation) rather than all of the orders, so that the orders of the court below setting aside the Valuer-General’s determination, upholding the objection to the Valuer-General’s determination and ordering the respondent to pay the appellants’ costs of the proceedings in the court below, should not be disturbed.

**Issue:**

(1) whether the corrections sought by the appellants should be made.

**Held:** making the correction to Order 1, and varying Order 3:

- (1) the proposed correction to Order 3 did not fall within the ambit of r 36.17 as it did not involve correcting a clerical mistake or an error arising from an accidental slip or omission: at [5];
- (2) Orders 1 and 2 of the court below ought not to have been made, and the Court of Appeal in setting aside Order 3 of the court below determining the amount of compensation also set aside the allied Orders 1 and 2: at [8];
- (3) the Court of Appeal had set aside the costs order in the court below with the expectation that a fresh costs order would be made after, and in light of, the redetermination of the appellants’ claim for compensation: at [12];
- (4) although there may be power under r 36.16(1) and (3A) of the UCPR to vary the Court of Appeal’s orders, not all of the variations sought by the appellants, with the consent of the respondent, were appropriate to be made. Orders 1 and 2 of the court below were not orders it had power to make in disposing of the appellants’ claim for compensation and it would not be appropriate to vary the orders setting aside those orders of the court below so as to reinstate orders that were outside power: at [15]; and
- (5) the parties consented to the decision and order as to the costs of the proceedings to date in the court below remaining, regardless of whatever might be the outcome on the redetermination of the appellants’ claim for compensation on the remitter or any determination of costs of the proceedings on the remitter. The Court was prepared to vary its Order 3 so as to except from its order setting aside the orders of the court below Order 4 of the court below, thereby reinstating the order as to the costs of the proceedings in the court below: at [17].

***Martin v State of New South Wales*** [\[2014\] NSWCA 103](#) (Basten and Leeming JJA, Sackville AJA)

(related decisions: *Martin v Highlake Resources Pty Ltd* [\[2013\] NSWLEC 31](#), Pain J; *Martin v State of New South Wales (No. 10)* [\[2011\] NSWCA 287](#), Basten JA, Handley AJA; *Martin v State of New South Wales (No. 14)* [\[2012\] NSWCA 46](#), Basten and Meagher JJA, Handley AJA; *Martin v State of New South Wales* [\[2011\] NSWLEC 20](#), Pain J)

**Facts:** Mr Martin commenced proceedings in the Land and Environment Court (“LEC”) on 13 December 2010 challenging an exploration licence that had been granted under the [Mining Act 1992](#) on 30 August 2010 and that was to continue for a period of two years (“EL 7613”). On 24 February 2011 the primary judge struck out Mr Martin’s points of claim, and made an order that Mr Martin provide security for costs of Highlake Resources Pty Ltd (“Highlake”) in the sum of \$49,378.00, with a further order for the proceedings to be stayed until such time as the security was provided. The Court of Appeal granted leave to appeal in

relation to the order for security for costs; the appeal was allowed and an order setting aside the order for security for costs was made on 21 March 2012. Further directions hearings in the LEC were held on 21 May 2012, 6 August 2012, and 22 October 2012. On the last occasion Mr Martin stated that EL 7613 had expired by effluxion of time. On 9 November 2012 Mr Martin filed amended points of claim, and another directions hearing was held on 15 November 2012. On 13 March 2013 the primary judge made an order dismissing the proceedings and ordered Mr Martin to pay Highlake's costs, finding that there was no discrediting conduct by Highlake and that the proceedings had been rendered unnecessary as a result of Mr Martin's behaviour in the proceedings.

Issue:

- (1) whether the exercise of discretion in ordering costs under [r 42.20](#) of the [Uniform Civil Procedure Rules](#) 2005 had miscarried.

Held: allowing the appeal and setting aside the costs order:

- (1) the primary judge had overlooked that for the period of 13 months from when the order for security for costs was made until it was set aside on 21 March 2012 Mr Martin was prevented from taking any steps in the proceedings in the LEC by the stay order: at [19];
- (2) the basis for the costs order was that Mr Martin was responsible for the delays in the proceedings that led to EL7613 expiring before the matter could be heard. In the absence of any explanation as to why Mr Martin should have been held responsible for the delay of 13 months while the stay order was in effect, the exercise of discretion proceeded on an incorrect factual basis. The exercise of discretion was affected by a material error of fact and therefore miscarried: at [20]; and
- (3) because Mr Martin continued the proceedings for some time after it had become apparent that they would serve no useful purpose, there should be no order as to the costs of the proceedings in the LEC. Having regard to Highlake's stance in the Court of Appeal, it was appropriate for it to pay Mr Martin's costs on the basis that he was a litigant in person: at [23].

***Ralph Lauren 57 Pty Limited v Byron Shire Council*** [\[2014\] NSWCA 107](#) (Beazley P, Ward JA and Preston CJ of LEC)

(related decisions: *Ralph Lauren 57 Pty Ltd & Ors v Byron Shire Council & Minister for Climate Change and the Environment* [\[2012\] NSWLEC 274](#) Sheahan J, *Ralph Lauren 57 Pty Ltd v Byron Shire Council*; *Ralph Lauren 57 Pty Ltd v Byron Shire Council* [\[2013\] NSWCA 307](#) Leeming JA)

Facts: in 2010, Byron Shire Council adopted a draft coastal zone management plan ("CZMP") under the [Coastal Protection Act](#) 1979. The applicants, a number of affected residents, commenced proceedings in the Land and Environment Court seeking a declaration that the draft CZMP was void, unlawful and of no effect. On 14 April 2011, the council withdrew the draft CZMP and resolved to begin drafting afresh. As a result, the applicants discontinued the proceedings. They sought an order that the council pay the applicants' costs, contending that the withdrawal of the plan was effectively a surrender or capitulation by the council. However, Sheahan J ordered the parties to pay their own costs of the proceedings. The applicants sought leave under [s 101\(2\)\(c\)](#) of the [Supreme Court Act](#) 1970 to appeal the decision of Sheahan J.

The applicants also sought leave under [s 101\(2\)\(e\)](#) of the Supreme Court Act to appeal the decision of Sheahan J to dismiss the applicants' notice of motion seeking leave to reopen their case after the hearing on costs. The applicants had sought to reopen their case and tender further documents on the basis that the Council's case had changed at the end of the hearing and was misleading.

After the applications for leave to appeal these two decisions had been filed, the applicants sought, by notice of motion, access to the same documents of the Council that had been the subject of the application in the Court below to reopen. The applicants contended that particular written submissions served by the Council had the effect of waiving client legal privilege. A single judge of the Court of Appeal (Leeming JA) dismissed the notices of motion and ordered the applicants to pay the Council's costs of the notices of motion.

The applicants sought, pursuant to [s 46\(4\)](#) of the *Supreme Court Act 1970*, an order of the Court of Appeal discharging the single appeal judge's decision and orders. The applicants also applied by further notice of motion for the appellate court to receive into evidence certain documents pursuant to [s 75A\(7\)](#) of the *Supreme Court Act 1970*.

Issues:

- (1) whether the primary judge erred in ordering the parties to pay their own costs;
- (2) whether the primary judge erred in refusing to grant the applicants leave to reopen;
- (3) whether the single appeal judge erred in finding that the council had not waived privilege by serving written submissions; and
- (4) whether there were special grounds justifying receiving certain documents into evidence.

Held: refusing to grant leave to appeal from the decisions of Sheahan J, dismissing the application to review the decision of Leeming JA and the notice of motion to receive further evidence, and ordering the applicants to pay the respondents' costs of the proceedings in the Court of Appeal:

- (1) the primary judge did not err in ordering the parties to pay their own costs: at [89]. The council's resolution of 14 April 2011 did not deliver "the very relief" which the applicants sought in either of their proceedings in the court below: at [93]. Even if the applicants achieved the relief they sought in the proceedings, this did not by itself and without more justify the awarding of costs in favour of the discontinuing plaintiff: at [108]. There usually needs to be in addition some unreasonableness in the conduct of the defendant: at [108]. The applicants failed to prove that the council's conduct involved unreasonableness: at [110];
- (2) the primary judge did not err in refusing leave to the applicants to reopen their case: at [137]. The applicants' assertion that the primary judge was wrong and that the decision denied them procedural fairness was simply to dispute the outcome: at [138]. The applicants did not demonstrate that the primary judge's decision involved an error of law, or caused substantial injustice: at [138];
- (3) the applicants did not establish that the single appeal judge erred in finding that the council had not waived privilege by serving written submissions: at [158]. The fact that the single appeal judge dealt with the applicants' argument on a paragraph by paragraph basis did not reveal any error: at [160]. The assertion that the single appeal judge failed to consider [s 122\(2\)](#) of the *Evidence Act 1995* was without foundation: at [162]. The single appeal judge's statements concerning whether waiver could be effected merely by service of submissions did not error sufficient to warrant the discharge of the decision: at [163]; and
- (4) the applicants had failed to demonstrate special grounds justifying receiving the documents into evidence: at [176]. The applicants had failed to establish that, had they been tendered at the costs hearing, the primary judge's decision on costs would have been any different: at [177].

***Warkworth Mining Limited v Bulga Milbrodale Progress Association Inc*** [\[2014\] NSWCA 105](#) (Bathurst CJ, Beazley P and Tobias AJA)

(related decision: *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Ltd* [\[2013\] NSWLEC 48](#) Preston CJ)

Facts: Warkworth Mining Limited ("Warkworth") appealed under [s 57](#) of the *Land and Environment Court Act 1979* the decision of Preston CJ of the Land and Environment Court to disapprove an application made by Warkworth for a major infrastructure project approval under the then in-force Part 3A of the *Environmental Planning and Assessment Act 1979* ("the EPA Act"), to extend the existing Warkworth mine located in the Hunter Valley.

Warkworth operated an open cut coal mine located a few kilometres north east of the village of Bulga in the Hunter Valley. In 2010, Warkworth lodged a major project application for approval under the then in-force Part 3A of the EPA Act to extend the existing mine. On 3 February 2012, the Planning Assessment Commission, as delegate to the Minister for Planning and Infrastructure, approved Warkworth's application. The Bulga Milbrodale Progress Association Inc ("the Association"), a community group, brought an appeal

from the Commission's decision in the Land and Environment Court, pursuant to s 75L(3) of the EPA Act. Preston CJ re-exercised the statutory power of the Minister and disapproved the project application.

Preston CJ, in allowing the Association's appeal, found that the Project would have significant and unacceptable impacts on biological diversity, noise and dust levels and the social amenity of the surrounding communities, which were not outweighed by the substantial economic benefits and positive social impacts that the Project would bring to the State and the region.

On appeal, Warkworth contended that it had been denied procedural fairness in respect to a number of factual matters relating to its application, and that Preston CJ had erred in law by failing to have regard to the [Mining Act](#) 1992. The Minister also appealed the decision by way of cross-appeal. Both Warkworth and the Minister contended that Preston CJ had erred in failing to give weight to the Director-General's report and its recommendations for approval as a "focal point" or "fundamental element" in his determination.

Additionally, Warkworth brought proceedings pursuant to [s 69](#) of the [Supreme Court Act](#) 1970 for orders in the nature of prerogative relief, in the event that any of its grounds of appeal did not involve a question of law. Warkworth submitted that relief was available pursuant to s 69 on the basis that the Court exceeded its jurisdiction in making the order disapproving Warkworth's application.

Issues:

- (1) whether Warkworth was denied procedural fairness:
  - (a) in respect of his Honour's finding that background noise levels were set at levels that were too high (ground 1);
  - (b) in respect of his Honour's finding that there was insufficient evidence to establish that the impacts on the relevant threatened fauna would be offset by the remote biodiversity areas (ground 2);
  - (c) through the use of a polycentric approach (ground 2A);
  - (d) through departure from the balancing exercise required by the Act (ground 6); and
  - (e) through his Honour's failure to deal with the question raised by Warkworth that the natural regeneration of the Warkworth Sands Woodland ("the Woodland") supported an inference that assisted regeneration would be successful (ground 9);
- (2) whether his Honour erred in law:
  - (a) in failing to give weight to the Director-General's report as a fundamental elements in his determination (ground 2B);
  - (b) in failing to consider or give weight to the public interest including in the Director-General's Report (ground 2C);
  - (c) in failing to address the significant economic benefits and positive impacts of the Project such that there was a failure to exercise jurisdiction (ground 3);
  - (d) in failing to have regard to relevant legislation, namely, the *Mining Act* 1992 (ground 5);
  - (e) in considering the fact that the Project did not avoid or mitigate impacts on the Woodland (ground 7); and
  - (f) in holding that only an offset of precisely the same ecological community that would be impacted by the Project could be considered in addressing the impact of the Project (ground 8); and
- (3) whether his Honour failed to exercise jurisdiction:
  - (a) by failing to address Warkworth's submission that the evidence established that the Woodland would regenerate (ground 9); and
  - (b) by failing to consider whether the risks of the Woodland not regenerating would be mitigated by new condition 41A (ground 10).

Held: dismissing the appeal, the cross-appeal and the summons:

- (1) the primary judge did not deny Warkworth procedural fairness:



- (a) in respect of his Honour's finding that background noise levels were set at levels that were too high (ground 1). If evidence is required to meet an issue, the party asserting the factual basis for the issue raised bears the responsibility for adducing the necessary evidence: at [112]. It is not sufficient to expect that the underlying basis of an opinion would be revealed in cross-examination: at [112]. Nor was the Association's failure to cross-examine the experts productive of procedural fairness: at [112]. Warkworth was given an opportunity to adduce evidence on this issue of the background noise level: at [112];
  - (b) in respect of his Honour's findings in regards to offsetting impacts on the relevant threatened fauna (ground 2). The primary judge's findings in regards to the biodiversity offsets were directed to the affected endangered ecological communities ("EECs"): at [140]. Six of the seven reasons the primary judge gave to support that conclusion related to the inadequacy of the offsets insofar as they related to the vegetation communities of the EECs: at [140]. Only the second reason related to some other aspect of biodiversity, namely the conservation of fauna: at [140]. Further, the impacts on fauna were in issue. Warkworth's failure to adduce evidence to demonstrate that the offsets proposed were adequate lay at its own feet: at [144]; and
  - (c) through the use of a polycentric approach (grounds 2A and 6). There was no failure to afford procedural fairness in rejecting Warkworth's economic evidence on the ground that it inadequately dealt with the polycentric nature of the decision making process: at [168], [169]. In any event, it would not have led to a different result: at [170]. The polycentric concept was used as a catchphrase to describe the multifaceted nature of the issues that had to be determined: at [171]. It is preferable to deal, therefore, with what the primary judge did and ascertain whether he erred in law in the ways alleged by Warkworth: at [171]. The primary judge did not err in describing the task as balancing all the relevant matters and determining whether the preferable decision was to approve or disapprove the project: at [172]. As Warkworth asserted that the determination to be made under s 75J did not involve a polycentric problem, the error of law in not applying a polycentric approach is not apparent: at [173]. The primary judge did not err in determining the weight to be assigned to relevant matters was subjective: at [174];
- (2) the primary judge did not err in law:
- (a) in failing to give weight to the Director-General's report (ground 2B). It would be wrong to conclude that the primary judge did not have regard to general propositions in the Director-General's report: at [246]. The primary judge's references to specific data indicated that he understood that this was important economic information that formed part of the basis for the Director-General's recommendation: at [247]. The primary judge engaged in an "active intellectual process" when considering the material presented to him, including the Director-General's report: at [248]. It was not necessary for the primary judge to make the Director-General's report a focal point of, or focal element in, his determination: at [248], [265]. The primary judge did not overlook the reports of the Department's independent expert or the references in the Director-General's report on the appropriateness of the biodiversity offsets: at [259]-[263]. The primary judge could not have failed to understand that the Director-General considered the project to be in the public interest: at [268];
  - (b) in failing to have regard to public interest considerations (grounds 2C and 3). The primary judge was not required to evaluate the reasoning on the public interest of the Minister's delegate, the Commission, and explain why it was wrong: at [276]. There was no statutory imperative for the primary judge to make findings in relation to the economic benefits of the project in the prescriptive way argued by Warkworth: at [290]. The primary judge did make an express finding that there would be substantial economic benefits: at [290]. The primary judge did not fail to give reasons for this finding – it was the conclusion reached after a detailed consideration of the economic evidence presented: at [291]. The primary judge did not err in considering that the public interest embraced ecologically sustainable development and community responses to the project: at [296]. The primary judge did not confine his consideration of the public interest to only community responses to adverse effects on amenity. The primary judge's judgment was divided into seven sections, and addressed the impacts on biological diversity, noise and dust impacts, social impacts and economic issues: at [300]. Each of these matters was relevant to the public interest: at [301]. The determination as to whether the Project was in the public interest required
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- an overall assessment of these relevant matters. That was the assessment the primary judge undertook: at [301];
- (c) in failing to consider relevant legislation (ground 5). There was sufficient overlap in the objects of the *Mining Act* 1992 and of the EPA Act that a failure to have regard to the *Mining Act* 1992 would not have vitiated the decision: at [324];
  - (d) in considering measures of avoidance (ground 7). It was a relevant consideration to ascertain the measures, if any, that Warkworth proposed to avoid an undeniable impact: at [334]. Avoidance measures were available but rejected by Warkworth. The primary judge was factually correct to state that “the consequence is that there would be no reduction in the scale and intensity of these impacts”: at [335]; and
  - (e) in the approach adopted to EEC offset measures (ground 8). The primary judge made a finding of fact in relation to the EEC offset measures that was available on the evidence: at [340]; and
- (3) the primary judge did not fail to exercise jurisdiction:
- (a) by failing to consider natural regeneration (ground 9). There was evidence to support the primary judge’s conclusion that there was not a demonstrated natural regeneration of the Woodland: at [355]; and
  - (b) by failing to consider mitigation of risks to natural regeneration (ground 10). The primary judge did have regard to the terms of Condition 41A, however, he did not consider that Condition 41A provided an adequate compensatory or ameliorative solution to the impact of the Project on the Woodland: at [376], [377].

***Botany Bay City Council v Minister for Planning and Infrastructure*** [2014] NSWCA 141 (Beazley P, Ward and Gleeson JJA)

(related decision: *Botany Bay City Council v Minister for Planning and Infrastructure* [2014] NSWLEC 14 Sheahan J)

Facts: Botany Bay City Council (“the council”) instituted Class 4 proceedings in the Land and Environment Court seeking declarations that a Project Approval granted under the former Part 3A of the *Environmental Planning and Assessment Act* 1979 by the respondent Minister, by his delegate the Planning Assessment Commission, for the redevelopment of the Eastlakes Shopping Centre was void and of no effect. The council filed and served affidavits from two experts without obtaining the prior leave of the Court as required by r 31.19 of the *Uniform Civil Procedure Rules* 2005. The council subsequently sought leave to adduce expert evidence at trial from Mr Bewsher, a flooding and stormwater drainage expert, and Mr Taylor, an architect, in the form of the affidavits already filed and served. The council contended that the affidavits were relevant to two of the five claims against the Project Approval in the Points of Claim. The respondents objected to leave being granted, contending that it was clear from the instructions given to each of the experts that the affidavits addressed the merits of the Minister’s decision in granting the Project Approval. The primary judge declined to examine the affidavits in detail and noted that his attention had been drawn to the instructions recorded in the affidavits, and accepted that the affidavits addressed only the merits of the Minister’s decision. The primary judge concluded that the council had failed to establish that the evidence of either expert was “reasonably required” to resolve the real issues before the Court and refused leave. The council sought leave to appeal under s 58(3)(b) of the *Land and Environment Court Act* 1979.

Issue:

- (1) whether it was appropriate to grant leave to appeal from the interlocutory decision on a matter of practice and procedure.

Held: dismissing the application for leave to appeal with costs:

- (1) there was no substance to the complaint that the primary judge’s reasons were inadequate. The decision was interlocutory and concerned a matter of practice and procedure and the reasons did not

need to be necessarily lengthy or elaborate. The primary judge dealt with the matters critical for the decision arrived at: at [17];

- (2) there was no error in the primary judge taking into account the instructions given to the experts: at [18];
- (3) it was tolerably clear from the instructions given to Mr Bewsher that he was asked to address matters relating to the merits of the assessment process, and it was appropriate for the primary judge to deal with the application on the basis that his affidavit complied with the instructions he had been given as recorded in his affidavit: at [19]. Neither of the matters addressed in the affidavit of Mr Taylor required expert evidence: at [20]; and
- (4) having regard to the instructions given to the experts, there was no error in the primary judge concluding that the evidence was not reasonably required rather than deferring the question of whether the expert evidence transgressed into the merits of the assessment process closer to or at the hearing of the judicial review proceedings. Further, that course would have undermined the central purpose of the “filtering process” which r 31.19 was directed to achieving: at [23].

***Tolson v Roads and Maritime Services*** [\[2014\] NSWCA 161](#) (Beazley P, Basten JA and Preston CJ of LEC)

(related decision: *Tolson v Roads and Traffic Authority of New South Wales* [\[2012\] NSWLEC 170](#) Sheahan J)

Facts: the first appellants owned land leased to a company preparing compost for mushroom farms. The lessee was a company owned and controlled by the first appellants, which had sublet the whole of the land to the second appellant, Elf Farm Supplies Pty Ltd. The leases were not registered. In 2009 the respondent acquired a strip of the land for construction of a raised roadway that cut across the land diagonally, cutting off direct access to the north-eastern corner of the land. The construction of the roadway for the Windsor Flood Evacuation Route resulted in a change in the use to which parts of the land could be put by allowing a larger area to be filled and the level thus raised above the surrounding floodplain. The appellants claimed compensation under the [Land Acquisition \(Just Terms Compensation\) Act](#) 1991 (“the Just Terms Act”). The respondent offered approximately \$30,000 on account of disturbance; the appellants commenced proceedings in the Land and Environment Court seeking compensation in the order of \$3.2 million. At first instance the trial judge accepted the evidence of the respondent’s valuer that there had been an improvement in the value of the land because of the roadway as the land could now be used for greater industrial purposes, and aside from an amount of \$36,000 for disturbance, no compensation was awarded. The appellants appealed, and the respondent cross-appealed on the basis that no amount should have been allowed even for disturbance.

Issues:

- (1) whether the trial judge erred in determining the amount of compensation, either by offsetting the improved value of the remaining land against the market value of the acquired land or (on the cross-appeal) by failing to offset the cost of disturbance against the improved value of the land;
- (2) whether the trial judge made an error of law in accepting the findings of the respondent’s valuer;
- (3) whether the trial judge erred in considering the effect of the leases in determining compensation; and
- (4) whether the trial judge erred in rejecting a claim for special value.

Held: dismissing the appeal and cross-appeal with costs:

- (1) there was nothing in the statutory language of [ss 54](#) or [55](#) of the Just Terms Act that required the market value of the acquired land at the time of acquisition not to be offset against any increase in the value of the remaining land: at [37]-[40] (Basten JA, Beazley P agreeing), [118]-[119] (Preston CJ of LEC);
- (2) losses attributable to disturbance related to costs that were entirely separate from the value of the acquired land or the retained land and it was consistent with the legislative purpose to provide

compensation for disturbance without having regard to the value of the acquired or remaining land involved: at [9]-[11] (Beazley P), [83]-[84] (Basten JA), [114]-[115] (Preston CJ of LEC);

- (3) there were no errors in the approach adopted by the trial judge to the valuation evidence that could be characterised as an erroneous decision on a question of law. Nor could it be said that there was any constructive failure by the trial judge to exercise his function as a judicial valuer or his judicial function of giving reasons for his decision: at [63]-[66] (Basten JA, Beazley P and Preston CJ of LEC agreeing);
- (4) it was not necessary to resolve whether the trial judge should have disregarded the leases if, as a practical matter, no compensation was payable. If the trial judge had been mistaken in failing to disregard the leases, the mistake would not have warranted intervention: at [69], [75] (Basten JA, Beazley P and Preston CJ of LEC agreeing); and
- (5) the trial judge had rejected the claim for special value in favour of the first appellants, preferring the view that the hypothetical purchaser would continue to operate the farm as the company did. The basis on which the market value of the fee simple held by the first appellants was assessed did not contradict or present any degree of inconsistency with that conclusion, and the evidence of the respondent's valuer that the factors which might have supported a claim of special value had been taken into account in assessing the market value was not challenged. The ground of appeal relating to special value was without substance: at [78] (Basten JA, Beazley P and Preston CJ of LEC agreeing).

- **NSW Court of Criminal Appeal**

***Harris v Harrison*** [\[2014\] NSWCCA 84](#) (Simpson, Hall and Schmidt JJ)

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

**Facts:** this was an appeal from a sentence handed down in the Land and Environment Court ("LEC"). Mr Ronald Harris, the appellant, had pleaded guilty to an offence against [s 91K\(1\)](#) of the [Water Management Act 2000](#) (NSW) ("the WM Act") of interference with a water meter. He had placed a steel rod into a water pump in order to interfere with the operation of the meter and prevent it recording the volume of water pumped from the Murrumbidgee. He then pumped water into a channel on his property. Only the insertion of the rod into the pump constituted the offence. The trial judge had found that a significant proportion of the 30 to 40 ML pumped was for the irrigation of Mr Harris' wheat crop, and therefore, for financial gain. She found that this was not a permissible purpose under [s 52](#) of the WM Act, and that a lawful exercise of rights under s 52 only authorised the extraction of sufficient water to fill the dam Mr Harris used for domestic water use ("the house dam"). Section 52 provides landholders with water rights relating to domestic consumption and watering of stock. The trial judge also made findings in relation to the objective seriousness of the offence that included the following: that real harm was caused to the regulatory regime in the WM Act; that the extraction of water upset the equitable sharing system in place under the WM Act; that there was a water shortage at the time of the offence; that the harm caused by the offence was reasonably foreseeable; that there were practical measures available to avoid the harm; and that the appellant was in control of the causes of the offence. The LEC ordered Mr Harris to pay a fine of \$28,000 plus costs and to publish a notice of his offence in two local newspapers.

**Issues:**

- (1) whether the water taken during the commission of the offence fell within Mr Harris' domestic consumption rights provided by s 52 of the Act;
- (2) whether Mr Harris had committed the offence for financial gain;
- (3) whether the trial judge erred in assessing the objective gravity of the offence;
- (4) whether the sentence was manifestly excessive;
- (5) whether the costs order against Mr Harris ought to have been made; and
- (6) whether the Court of Criminal Appeal had jurisdiction to make the publication order.

Held:

- (1) the trial judge erred in the construction of s 52. The provision imposed no limit on the quantity of water that could be taken for domestic or stock purposes. The sole limitation imposed by s 52 was as to the use to which the water taken could be put: at [70];
- (2) the trial judge erred in finding that Mr Harris had committed the offence for financial gain. Since Mr Harris had a right to take unmetered water for s 52 purposes, it could not be concluded that the fact that he took water in excess of that which could be stored in the house dam was an indicator that he did so for financial gain: at [72]-[73];
- (3) the trial judge erred in assessing the objective gravity of the offence by effectively treating the offence as one of unlawful taking of water: at [81]:
  - (a) if it were accepted that Mr Harris was entitled to take the quantity of water he did for s 52 purposes, there could be no environmental harm caused by an offence that facilitated the exercise of that right. Similarly, there could be no damage to the regulatory system of the equitable sharing system, since the water was taken within the bounds of that system: at [83];
  - (b) the trial judge failed to take into account the fact that Mr Harris was not legally obliged to use the pump's meter. The fact that the meter the subject of the offence was not required to be installed is a significant matter of mitigation: at [84]-[86]; and
  - (c) that there was a water shortage and a drought had no bearing on the offence of tampering with a meter; it might have been different if the offence were of taking water unlawfully: at [87];
- (4) given the known circumstances of the offence and the assessment of the offence as one of low objective gravity, the trial judge attention should have been, but was not, drawn to the fact that the offence could have been prosecuted in the Local Court. Therefore, the total sentence imposed ought not to have exceeded the jurisdictional limit of the that Court, ie, \$22,000: at [96]-[98];
- (5) because the offence was one of low objective gravity, it ought to be dealt with by a good behaviour bond pursuant to [s 9](#) of the [Crimes \(Sentencing Procedure Act\) 1999](#) (NSW): at [101];
- (6) Mr Harris should not be liable to pay the entire costs of the proceedings as a good deal of the LEC proceedings were devoted to issues that he won on appeal: at [102];
- (7) because, by [s 17](#)(1) of the [Criminal Appeal Act 1912](#) (NSW), Mr Harris was not entitled to recover any costs of the appeal, the costs order against him should be set aside: at [103];
- (8) the publication order fell under the definition of "sentence" in [s 2](#) of the [Criminal Appeal Act](#) and was therefore subject to appeal to the Court of Criminal Appeal under s 5AB of the same Act: at [110]-[111]; and
- (9) the provision of a publication order had a significant educative and deterrent function and that order was appropriate. However, the publication order should be changed to reflect the nature of the conviction and sentence on appeal: at [128].

- **Supreme Court of NSW**

***Hutchins Pastoral Co Pty Ltd v Minister Administering the Water Management Act 2000*** [\[2014\] NSWSC 46](#) (Slattery J)

(related decision: *Hutchins Pastoral Co Pty Ltd v Minister Administering the Water Management Act 2000* (No 2) [\[2014\] NSWSC 117](#))

**Facts:** the plaintiffs were three companies, each of which owned a separate parcel of land used for irrigation. Each parcel overlies the Lower Murrumbidgee Groundwater Sources, near Narrandera. Mr and Mrs Hutchins are the controlling shareholders and directors of each of the plaintiffs and co-ordinate their respective irrigation operations. Each of the plaintiffs held a separate water licence under [s 115](#) of the [Water Act](#) 1912 ("the 1912 Act"), issued between 1998 and 1999, with water allocations of 1615ML,

1900ML and 1384ML respectively. As authorised by the licences, one bore was constructed on each of the properties, in 1997/1998 for one property and 2000/2001 for the other two. In 2001 a new condition was introduced into each of the three licences, providing an aggregated extraction limit for all three licences of 4,899ML in any 12 month period (“the linking condition”). The effect of the change in conditions was that although the plaintiffs’ three licences remained separate, the plaintiffs could extract the whole amount of 4,899ML from a bore on any one of the properties and then the whole or any part of the water could be used on the other two properties. The [Water Management Act 2000](#) (“the 2000 Act”) commenced with respect to water access licences in the Lower Murrumbidgee water management area on 1 October 2006, when the *Water Sharing Plan for the Lower Murrumbidgee Groundwater Sources 2003* (“the 2003 Plan”) came into force. Because of the linking condition, the Minister considered the licences to be “linked Part 5 licences” within the meaning of the 2000 Act, Sch 10, cl 17, and the three licences were replaced with a single water access licence (“WAL”) and a single supplementary water access licence (“SWAL”) under the 2000 Act. The WAL and SWAL are held by the plaintiffs as tenants in common, with 1925 units as shares in the available water within the Lower Murrumbidgee water management area for the WAL, and 250 units for the SWAL.

The plaintiffs commenced proceedings in 2009 seeking declarations as to the correct calculation of their water access rights under the 2000 Act, orders correcting the Minister’s previous calculations of their rights, consequential orders rectifying and reissuing records of their rights, and compensation. The plaintiffs contended that their share component of 2175 units was incorrectly calculated by the methodology mandated by a combination of the operation of Sch 10 of the 2000 Act, reg 29B of the Water Management (General) Regulation 2004 (“the 2004 Regulation”), and cl 25C and 25D of the 2003 Plan, and that correctly calculated their share component would be 3167 units. The difference arose from the application of the conversion formula for adjusting the quantum of entitlements of each plaintiff to one of the three licences issued under the 1912 Act in respect of the property of which that plaintiff was the registered proprietor into the single WAL issued under the 2000 Act issued to all three plaintiffs as tenants in common in respect of all three properties. The conversion formula in cl 25C of the 2003 Plan included as a variable the licensee’s history of extraction (“HOE”) being the average of the licence holder’s water usage under the 1912 Act taken over a number of years, excluding years in which no or low extraction occurred. The plaintiffs contended for an approach using each plaintiff’s history of extraction in respect of each individual property; the Minister’s approach used the three plaintiffs’ notionally combined history of extraction. Reg 29B of the 2004 Regulation provided that each group of linked licences listed in Column 1 of Sch 4A was taken to have been replaced by an aquifer access licence with a share component of the volume specified in Column 2, and those volumes were declared to “have been calculated in accordance with” the methodologies in the 2003 Plan. The Minister contended that the share components of the WAL and SWAL were determined according to the rules and methodology provided in the 2000 Act, the 2004 Regulation and the 2003 Plan, and in the alternative, the share components were specifically listed in and therefore mandated by Sch 4A of the 2004 Regulation.

Issue:

- (1) whether the plaintiffs’ water entitlements had been calculated correctly.

Held: finding that the Minister had correctly calculated the plaintiffs’ entitlements under the 2000 Act:

- (1) while by cl 6(5) of the 2003 Plan the Rules in Appendix 4 to the 2003 Plan did not form part of the 2003 Plan, they could inform the construction of cl 25C of the 2003 Plan: at [115];
- (2) Rule 10, which stated that where properties had been amalgamated, all extraction years prior to amalgamation were to be combined and together with extraction occurring after amalgamation were to be used to calculate HOE, applied. The three properties were relevantly “amalgamated” even though they were formally registered on separate titles, because they were operated as one commercial entity: at [117];
- (3) Rule 10 was the only one of the 2003 Plan Appendix 4 rules which could describe the necessary calculation for linked licences, which were an established feature of the 1912 Act licensing scheme. Rule 10 gave guidance to the computation and did so by selecting the Minister’s combined licence calculation approach at [120];

- (4) Rule 10 was not unfair. Having had the benefit of a single aggregation extraction limit for all three properties since 2001, it was not inappropriate that the plaintiffs' dependence on groundwater should be assessed for the purposes of conversion under the 2000 Act on the basis of a single history of extraction for three properties: at [121];
- (5) the text of cl 25C did not mandate the plaintiffs' approach in performing the calculation according to the formula: at [130];
- (6) clause 17(2) of Sch 10 to the 2000 Act replaced linked licences and merged them into a single WAL, and when it did so it gave the single WAL the specific quantity of water that was already specified in the linking condition, namely 4899ML: at [137];
- (7) the 2003 Plan and the 2004 Regulation both co-ordinately, under cl 3(1)(a)(ii) of Sch 10, indicated a different quantity of water that could be taken: at [139];
- (8) the 2000 Act, the 2003 Plan and the 2004 Regulation operated as an integrated legislative scheme coming into effect on 1 October 2006. It was permissible to have regard to one instrument in such a scheme in construing the other instruments and the Court should prefer a construction that gave a coherent operation to all aspects of the scheme: at [143];
- (9) reg 29B, Sch 4A of the 2003 Regulation operated as a kind of deeming provision, declaring or deeming that the methodology of the 2003 Plan produced a set of particular share component volumes as set out in the Schedule. Reg 29B(3) was declaring that the methodologies had been correctly applied and the 2004 Regulation determined the plaintiffs' entitlements in the event of any inconsistency of the type the plaintiffs alleged between the methodology of the 2003 Plan, cl 25C and 29D and Sch 4A of the 2004 Regulation: at [144];
- (10) the relief the plaintiffs sought could not be granted consistently with the provisions of the 2004 Regulation, Sch 4A Table which listed WAL's and SWAL's current share components. If the plaintiffs were successful, any orders that the Court might make correcting the volume of WAL and SWAL share components would mean that the table would have to be rewritten. The plaintiffs did not challenge the validity of the 2004 Regulation, and had not identified any basis on which the Court could rewrite it: at [147];
- (11) even if the plaintiffs were correct that the Sch 4A table created a rebuttable presumption only, there was no basis to rebut the presumption because the Sch 4A result was consistent with at least one available application of the methodology in cl 25C of the 2003 Plan: at [151]; and
- (12) the SWAL share components volumes specified in the 2004 Regulation Sch 4A table Column 3 were deemed by cl 29B(3)(c) of the 2004 Regulation to be and to have been calculated in accordance with the methodologies in the 2003 Plan, and the same considerations as governed the correctness of the WAL share component governed the validity of the SWAL share component: at [158].

*Note:* in *Hutchins Pastoral Co Pty Ltd v Minister Administering the Water Management Act 2000 (No 2)* [2014] NSWSC 117 Slattery J ordered the plaintiffs to pay the defendants' costs of the proceedings.

## • Land and Environment Court of NSW

### Judicial Review

***Gold and Copper Resources Pty Ltd v Hon Chris Hartcher MP, Minister for Resources and Energy, Special Minister (No 2)*** [2014] NSWLEC 30 (Pain J)

Facts: Gold and Copper Resources Pty Ltd challenged by way of judicial review the renewal in 2009 for five years of an exploration prospecting licence ("EPL") by the Minister through his delegate, Mr New, to Newcrest Operations Ltd ("Newcrest"), the second respondent. Newcrest had lodged with the Department an application for renewal of EPL1024 for two years (by letter dated 24 March 2009), enclosing a Form 9 Application for Renewal of Exploration Licence, a submission relating to special circumstances under s 114(6) of the *Mining Act* 1992 ("Mining Act") and certified that all of the particulars required to accompany

the application had been supplied and were correct. On 13 May 2009 a Part 5 determination under the [Environmental Planning and Assessment Act](#) 1979 (“EPA Act”) was made. On 20 May 2009 (outside the time limit prescribed by the Mining Act) Newcrest sent a new page 1 of Form 9 to Mr Capnerhurst of the Department seeking renewal for five years. On 25 May 2009 Newcrest sent Mr Capnerhurst a new special circumstances submission. The Minister admitted that Mr New did not have before him at any stage Newcrest’s amended special circumstances submission relating to a five year period. The Exploration Titles Committee (“ETC”) considered the renewal of EPL1024 and recommended renewal for five years.

The Minister’s delegate Mr New granted the renewal application for five years. The Minister did not dispute that the original first page of the Form 9 application for renewal seeking two year renewal sent by Newcrest on 27 March 2009 to the Department was not on the departmental files. That page was discovered by Newcrest.

Issues:

- (1) whether there was a valid application for the renewal of EPL1024 because the removal of the first page and its replacement destroyed the renewal application so that no application capable of being determined was in existence after 20 May 2009;
- (2) whether satisfaction of special circumstances under s 114(6) was reached because no special circumstances submission for five years was before Mr New the delegate;
- (3) whether the renewal was invalid because there had been no determination under Part 5 of the EPA Act of environmental impact for the five year renewal period, in breach of [s 111](#) of the EPA Act, which also gave rise to a breach of [s 112](#) of the EPA Act; and
- (4) whether the renewal was procured by fraudulent misrepresentation to the ETC due to actions of a Newcrest employee and three departmental officers including Mr New the delegate.

Held: the Class 8 summons was dismissed:

- (1) a valid application for the renewal of EPL1024 was in existence. The removal and replacement of a page of the written application and lodgement of a new special circumstances submission did not destroy the legal status of the application made within time and otherwise complying with the statute: at [44];
- (2) the applicant had not discharged its onus of proving that Mr New was not satisfied of special circumstances under s 114(6): at [80]-[81];
- (3) there was no need to determine if the absence of determination under Part 5 of the EPA Act for a five year period resulted in invalidity of the renewal as a breach of s 112 based on a breach of s 111 of the EPA Act, as that was not legally available as a ground of review: at [92]-[94]; and
- (4) the renewal was not procured by fraudulent misrepresentation by any of the four alleged conspirators. The making of the alleged fraudulent misrepresentations to the ETC by any of them was not established: at [199]-[201]. Further, Mr New had discretion to determine the renewal separately from the ETC’s recommendation: at [196]-[197].

## **Criminal**

***Simpson v Office of Environment and Heritage*** [\[2014\] NSWLEC 34](#) (Pain J)

Facts: Neil Simpson appealed against the severity of the sentences imposed by the Local Court in relation to four offences concerning the illegal and interstate importation, exportation and possession of protected fauna contrary to [s 106](#) (three offences, fine of \$5,000 for each offence in the Local Court) and [s 101](#) (one offence, fine of \$6,000 in the Local Court) of the [National Parks and Wildlife Act](#) 1974 (“the NPW Act”).

Issue:

- (1) what was the appropriate sentences for the offences.

Held: the appeal was dismissed, each party to pay its own costs:



- (1) the s 101 offence was objectively more serious than the s 106 offences: at [36]. All offences were of medium objective seriousness (at [38]) taking into account the importance of the statutory scheme of the NPW Act (at [18]-[23]), the Appellant's state of mind in knowingly applying for licences under another person's name (at [30] and [33]) and the maximum penalties: at [34]-[35];
- (2) other sentencing factors were the timing of the plea of guilty during the contested hearing in the Local Court (at [39]), lack of contrition and remorse (at [40]), the appellant's prior criminality (at [46]), and the need for general and specific deterrence: at [47]-[50]. The totality principle was not applied given the period of years over which the offences were committed: at [56]; and
- (3) each party should pay its own costs given the broad costs discretion: at [61].

***Environment Protection Authority v Bulga Coal Management Pty Ltd* [2014] NSWLEC 5 (Pain J)**

Facts: Bulga Coal Management Pty Ltd ("Bulga") was charged with having committed an offence against s 152 of the *Protection of the Environment Operations Act* 1997 ("the PEO Act") by contravening s 148(2). It was alleged that from about 9 October 2011 and continuing to about 10 October 2011 Bulga was a person carrying on an activity where a pollution incident occurred in the course of the activity so that material harm to the environment was caused or threatened, and as soon as practicable after it became aware of the pollution incident, it failed to notify the appropriate regulatory authority of the incident, and all relevant information about the incident. At approximately 11.30am on Sunday, 9 October 2011, an employee of Bulga became aware that tailings had escaped into Nine Mile Creek as a result of a failure in a steel T-piece in its tailings pipeline. At approximately 11.05 am on Monday 10 October 2011 the Prosecutor was notified via the Environment Line Service of the pollution incident. Bulga pleaded not guilty to the charge. Bulga admitted that a pollution incident had occurred on 9 October 2011.

Issue:

- (1) whether the fact that pollution incident caused, threatened or had the potential to cause material harm to the environment must be established as an objective fact, as submitted by the Prosecutor, or as a matter of subjective awareness by the defendant, as submitted by Bulga.

Held: the Prosecutor had not proved the elements of the offence under s 152 for contravening s 148(2), and the summons should be dismissed:

- (1) the Court had regard to the language and context of the relevant provisions (at [84]), the unfairness that would occur if the Prosecutor's construction was adopted (at [85]-[86]), the lack of certainty of whether a criminal offence was committed if the Prosecutor's approach was adopted (at [87]) and that Bulga's construction would not result in incentives for a potential defendant not to find out whether or not material harm had been caused or threatened and so avoid the obligation to notify: at [91]-[92];
- (2) the Prosecutor had to prove subjective awareness by the defendant that a pollution incident caused or threatened material harm: at [94]. Bulga was not subjectively aware during the charge period (at [124]), and the pollution incident was reported as soon as practicable after it became subjectively aware: at [136]; and
- (3) expert opinion evidence of whether harm to the environment was caused or threatened prepared after the pollution incident was not relevant: at [96].

***Environment Protection Authority v Forbes Shire Council* [2014] NSWLEC 26 (Pain J)**

Facts: Forbes Shire Council ("the Defendant") pleaded guilty to a charge that it polluted waters in breach of s 120 of the *Protection of the Environment Operations Act* 1997 ("PEO Act") (offence 1). The Defendant also pleaded guilty to a charge of failing to immediately notify the relevant authorities of the pollution incident which was the subject of the offence in contravention of s 148 of the PEO Act (offence 2).

Issue:

- (1) what was the appropriate sentences for these offences.

Held: the Defendant was convicted of the offences as charged, fined \$130,000 for offence 1 and \$35,000 for offence 2, the Defendant was to pay the Prosecutor's costs as agreed of \$47,000:

- (1) the Court considered the factors set out in [s 241](#) of the PEO Act (at [13], [16]-[25], [26]-[28] and [29]-[32]), the maximum penalty (at [33]) and assessed the objective seriousness of offence 1 as firmly in the medium range (at [34]);
- (2) the objective seriousness of offence 2 was at the lower end of the range (at [55]). The factors in s 241 of the PEO Act were considered (at [54]);
- (3) subjective factors taken into account for offences 1 and 2 were the early plea of guilty (at [57]), the Defendant's cooperation with the Prosecutor (at [58]-[59]), no prior convictions (at [60]), that the Defendant was unlikely to re-offend (at [61]) and contrition (at [62]); and
- (4) general and specific deterrence (at [63]-[65]), denunciation and retribution (at [66]) and evenhandedness were also considered (at [67]-[79]).

## Contempt

**Camden Council v Rafailidis (No 4)** [\[2014\] NSWLEC 22](#) (Sheahan J)

(related decisions: *Camden Council v Rafailidis* [\[2012\] NSWLEC 51](#), Lloyd AJ; *Rafailidis v Roads and Maritime Services (No 2)* [\[2014\] NSWLEC 9](#), Craig J; *Rafailidis v Roads and Maritime Services (No 3)* [\[2014\] NSWLEC 21](#), Sheahan J)

Facts: Koula and Efrem Rafailidis ("the Defendants") were charged on 12 November 2013 with contempt of court in respect of orders made in relation to a dwelling erected on their property in Catherine Fields. The orders the subject of the charge were those made by Lloyd AJ in Camden Council's Class 4 proceedings on 5 March 2012, as later amended by Biscoe J. Order 2 required the removal of the existing dwelling from the Defendants' property within 90 days, or otherwise required the Defendants to obtain development consent permitting its retention, in "one form or another". The Defendants lodged a development application ("DA") seeking such approval to retain the dwelling. This DA was refused, and a Class 1 merits appeal was commenced. Following a conciliation conference conducted under [s 34\(3\)](#) of the [Land and Environment Court Act](#) 1979 by Hussey C, a development consent was granted by consent, allowing the dwelling to remain, subject to the Defendants completing certain works on the property. The works were not done.

At the same time as the contempt charge was heard, an application by the Defendants to reopen their Class 3 proceedings against Roads and Maritime Services, concerning acquisition of part of the same property, was also dealt with. Separate judgments were delivered.

Koula Rafailidis was present at the hearing, but was removed for continually disruptive conduct. Efrem Rafailidis did not appear, and an affidavit of service was relied upon by Council to obtain leave of the Court to proceed in his absence.

### Issues:

- (1) whether the Court had power to deal with the charges of contempt;
- (2) whether the Class 3 proceedings should be reopened;
- (3) whether the Defendants were in contempt;
- (4) if so, what were the appropriate penalties; and
- (5) whether costs should be awarded.

Held: recording convictions against both Defendants, fining Koula Rafailidis \$10,000, plus \$2,000 each month commencing on 1 June 2014 until the works ordered had been completed, granting liberty to the council to approach the Registrar to fix a date for Efrem Rafailidis's sentencing hearing, and ordering Koula Rafailidis to pay the Council's costs of the contempt proceedings on an indemnity basis:

- (1) the Court had power to deal with the charges of contempt. The authorities recognise three classes of contempt: technical, wilful and contumacious. General criminal sentencing principles are applied, and the fact that the orders were made by consent is a relevant consideration: at [20] – [23];
- (2) the Defendants had failed to comply with the Class 4 orders, and were, therefore, held to be guilty of wilful contempt: at [25];
- (3) in the unexplained absence of Efrem Rafailidis, the Court deferred imposing any sentence on him: at [30].

Note: in *Rafailidis v Roads and Maritime Services (No 3)* [\[2014\] NSWLEC 21](#) the Court refused an application to re-open the Class 3 proceedings, with no order as to costs.

***Burwood Council v Steve Nolan Constructions Pty Ltd ACN 07222854 and Stephen Micheal Nolan***  
[\[2014\] NSWLEC 54](#) (Sheahan J)

Facts: these proceedings dealt with an oral application from the first defendant for the summary dismissal of two contempt charges. The consent orders the subject of the charges were made by Pain J on 16 November 2012, in two separate matters involving the same development at 1 Railway Parade, Burwood.

The relevant orders were that the “Respondent, by itself, its servants, agents, contractors or assigns”, be restrained from carrying out development on the subject land outside the times of 7am - 5:30pm Monday to Friday and 7am - 1pm on Saturday (12/40039), and from carrying work in, on or over Railway Parade otherwise than with the consent of the applicant (12/41152).

The first defendant was responsible for the overall co-ordination and control of work on the site. The second defendant is the sole director of the first and was joined for execution purposes only. The first defendant went into liquidation following the hearing but prior to judgment being delivered.

The statements of charge in each matter particularised that “the Respondent, by itself, its servants, contractors or assigns” acted contrary to the orders outlined above.

The defendant claimed that the statements of charge were deficient, in that they failed to adequately define any “actor”, or “class of actor”, through which the defendant company was said to have acted in Contempt.

Issue:

- (1) whether the contempt charges were particularised in a manner which gave the defendants a fair picture of the gist or substance of the charges brought.

Held: the defendant was provided with fair information and reasonable particularity, and more than the gist or substance of its alleged breaches, and its application to dismiss the charges was refused.

- (1) a statement of charge must provide fair information and reasonable particularity as to the nature of the offence charged: at [44];
- (2) what is required in a statement of charge for contempt is that the person alleged to be in contempt shall know, with sufficient particularity to enable him to defend himself, what exactly he is said to have done or omitted to do which constitutes a contempt of court: at [53]; and
- (3) the defendant entered consent orders which clearly specified categories of “actors” in respect of which it agreed with the Court to be bound by the orders. Also the defendant had full control of the site, of access to it, and of the development work at all relevant times. As such the particulars provided were sufficient: at [61].

## **Aboriginal Land Claims**

***Coffs Harbour and District Local Aboriginal Land Council v Minister Administering the Crown Lands Act*** [\[2013\] NSWLEC 216](#) (Craig J)

Facts: in 1993 Coffs Harbour and District Local Aboriginal Land Council (“the Land Council”) lodged a claim with the Minister under [s 36\(3\)](#) of the [Aboriginal Land Rights Act 1983](#) (“the ALR Act”) in respect of land which, at the date of claim, was vacant and unreserved Crown land. The claimed land comprised a strip of land on the New South Wales North Coast and included about 3.7km of beach and foreshore. In 2009, the Minister refused the claim on the basis that the claimed land was not claimable Crown land because it was “likely to be needed” for the essential public purposes of coastal and environmental protection, public access and public recreation: [s 36\(1\)\(c\)](#) of the ALR Act. The Land Council appealed to the Court under [s 36\(6\)](#) of the ALR Act.

Issues:

- (1) whether the whole of the claimed land was “likely to be needed” for an essential public purpose;
- (2) whether part of the claimed land was “likely to be needed” for an essential public purpose;
- (3) whether events which occurred after the date of claim were relevant when considering if the claimed land was likely to be needed for an essential public purpose; and
- (4) whether, if an order was made under [s 36\(5A\)](#) of the Act granting the claim subject to the imposition of a condition, the essential public purpose of access would be met.

Held: upholding the appeal:

- (1) the evidence adduced by the Minister did not establish there to have been a “real and not remote chance” that the executive government or one or more of its agencies would require the whole of the claimed land for an essential public purpose. The fact that the land may have been suitable for or have had the capacity to fulfil such a purpose was, of itself, insufficient to satisfy the statutory requirement under [s 36\(1\)\(c\)](#) of the ALR Act: at [159]-[160];
- (2) part of the claimed land was needed for the essential public purpose of access to the beach and intertidal zone and to that extent, was not claimable Crown land: at [161];
- (3) post claim events were relevant only for the purpose of assessing the likely need for an essential public purpose at the date of claim. Facts that merely reflected hindsight could not be brought to bear upon the determination of a likely need at that date: at [76]; and
- (4) the capacity to resort to and gain access to the ocean below mean high water mark by the provision of an ambulatory easement for public access landward of the high water mark would adequately secure the State’s interests in maintaining the public access to the beach: at [163].

## **Development Appeals**

*Howarth v Gosford City Council (No 2)* [\[2014\] NSWLEC 40](#) (Sheahan J)

Facts: the Respondent granted Development Consent (“DC”) to the Applicants for a proposed tourist facility at Avoca Beach, on 25 November 2003. It was subject to six deferred commencement conditions (“DCCs”), which, if complied with to the Respondent’s satisfaction, would have rendered the consent operative. The Applicants sought orders that they had the benefit of an operative consent.

DCC A(iv) required the Applicants to amend and submit development plans which incorporated the requirements of the Commissioner of the Rural Fire Service (“RFS”), without further impacting on the existing vegetation. If the DCCs were not satisfied by 3 December 2008 the consent would lapse. Condition 6 of the RFS conditions required that all forested areas on slopes less than 18 degrees were to be maintained in a manner which did not provide a continuous path for the transfer of fire, and for fuel loadings to be maintained, below 8 tonnes per hectare. Amended plans were submitted to the Council on 16 September 2008 reflecting the RFS requirements, and these were assessed as a [s 96](#) modification application.

The Council expressed concern that there was conflict on the plans between the Asset Protection Zone, mandated by the RFS, and a Riparian Buffer Zone mandated by the Department of Water and Energy ("DWE"). This conflict was the subject of discussion between the parties, but was not resolved prior to the lapse date. Discussion continued throughout 2009, during which time the Respondent indicated that it was of the opinion that the development consent had lapsed, but it continued assessing the s 96 application. Amended plans were eventually submitted which satisfied both the DWE and RFS requirements.

However, on 29 June 2010, Council wrote to the Applicants, stating they were not satisfied that DCC A(iv) had been complied with, due to vegetation removal required by RFS Condition 6. On this basis the s 96 application was refused. On 22 August 2011, the Respondent confirmed to the Applicant that the deferred commencement consent had lapsed on 3 December 2008.

Issues:

- (1) whether DCC A(iv) was invalid for uncertainty and/or lack of finality;
- (2) if invalid, whether it could be severed from the DC, and whether s 25B of the [Environmental Planning and Assessment Act 1979](#) was applicable;
- (3) if valid, whether the council satisfied that DCC A(iv) had been complied with prior to the lapse date, such that the DC became operative;
- (4) whether the Respondent's position that DCC A(iv) was not satisfied was unreasonable; and
- (5) whether the Respondent was estopped from asserting that the DC lapsed.

Held: DCC A(iv) was valid. It was reasonable for council to be not satisfied that it had been complied with prior to 3 December 2008, and the consent lapsed on this date. The Applicant's summons was dismissed:

- (1) conditions such as DCC A(iv), which leave final details to be settled, should be approached with a degree of flexibility. Therefore, the condition was not invalid for uncertainty or lack of finality: at [198];
- (2) in the case of a subjective jurisdictional fact, the court determines whether the relevant decision maker was satisfied or held the opinion that a certain circumstance exists or occurred: at [205]. At no time did the council indicate its satisfaction prior to or on the lapsing date, nor was there any evidence of there being a state of satisfaction within council: at [216];
- (3) a subjective jurisdictional fact is open to challenge on the basis that the subjective state of mind was irrational, illogical and not based upon findings or inferences of fact supported by logical ground, yet not every rational or logical lapse will suffice: at [205] – [206]. The decision that condition A(iv) was not satisfied was not one that no rational or logical decision maker would have made, and was therefore, reasonable: at [222] – [224]; and
- (4) principles of estoppel do not extend into the public law of planning controls, which binds everyone: at [232].

## **Easements**

***Arinson Pty Limited v City of Canada Bay Council*** [2014] NSWLEC 43 (Biscoe J)

Facts: three plaintiffs sought orders pursuant to [s 88K](#) of the [Conveyancing Act 1919](#) imposing easements over the defendant's ("Council") land ("1A Chapman"), and benefiting the plaintiffs' adjoining land. The plaintiffs are closely related family companies. 1A Chapman comprised most of Chapman Street before 1A Chapman was closed as a public road in 2003. The closure of 1A Chapman landlocked the plaintiffs' land at Nos 11-19 Chapman Street Strathfield. Consequently, the plaintiffs' land could not be put to any effective use or development. The closure of 1A Chapman was arranged with the consent of the plaintiffs and it was originally intended that 1A Chapman would be sold into the plaintiffs' proposed amalgamated development. However, negotiations for the sale fell through. Until recently, the plaintiffs' primary claim was for 1A Chapman to be transferred to them. However, they abandoned that claim and instead claimed easements over 1A Chapman because of special circumstances. The main proposed easement was a 6.65 metre right of way running between Chapman Street and Bakers Lane along the eastern boundary of 1A Chapman,

giving Nos 11-21 Chapman access to the remnant of Chapman Street to the south, and giving No 19 Chapman access to Bakers Lane. The Council suggested a number of alternatives, including widening Bakers Lane, cross easements between Nos 11-21 Chapman, and a 3 metre wide easement along 1A Chapman with a central passing bay.

Issues:

- (1) whether the proposed easements were “reasonably necessary for the effective use or development” of the plaintiffs’ land: s 88K(1);
- (2) whether the Court was satisfied that the use of the plaintiffs’ land “will not be inconsistent with the public interest”: s 88K(2)(a);
- (3) whether the Court was satisfied that the Council could be adequately compensated for any loss or other disadvantage that would arise from imposition of the easement: s 88K(2)(b);
- (4) whether the Court was satisfied that the plaintiffs had made all reasonable attempts without success to obtain the easement or an easement having the same effect: s 88K(2)(c);
- (5) if the above four preconditions were established, whether the Court should exercise its discretion to impose an easement: s 88K(1);
- (6) whether the Court should determine that no compensation was payable because of the special circumstances of the case: s 88(4); and
- (7) the quantum of compensation.

Held: granting the proposed easements (with some amendments), and with compensation:

- (1) the requirement that the easement be “reasonably” necessary was not one of absolute necessity. There could be no effective use or development of the plaintiffs’ land without vehicular access to a public road. The proposed easements were reasonable compared with the alternatives suggested by the Council, and were reasonably necessary for the effective use or development of the plaintiffs’ land: at [60]-[61];
- (2) the provision of an easement that permitted vehicular access to a permissible development on landlocked land was entirely consistent with the public interest. The plaintiff’s consent to the closure of 1A Chapman reinforced this conclusion: at [64];
- (3) the Council “can” be adequately compensated for any loss or other disadvantage that would arise from the imposition of the easements: at [65];
- (4) it was not a requirement that all reasonable attempts to obtain the easements within the meaning of s 88K(2)(c) needed to be made before proceedings were commenced. At least from the time these proceedings were commenced, the plaintiffs had made all reasonable attempts to obtain the easements within the meaning of s 88K(2)(c): at [67];
- (5) the discretion should be exercised to order imposition of the easements, notwithstanding that it would have a significant impact on 1A Chapman, because the Council could be appropriately compensated. The Council should have foreseen that the sale of 1A Chapman to the plaintiffs might have fallen through, and the possibility of an easement application thereafter, such as that made by the plaintiffs: at [71];
- (6) there were no special circumstances sufficient to justify not awarding compensation. The proposed easements would be a blight which would reduce the potential sale price of 1A Chapman. Although the plaintiffs abandoned their case to have 1A Chapman transferred to them, it was still possible for a plaintiff or a related company to purchase 1A Chapman for an amalgamated development. If this occurred, and if the plaintiffs had been granted the easements without compensation, the plaintiffs would have received a windfall gain: at [73]; and
- (7) compensation should be ordered in the sum of \$550,000: at [83].

**Compulsory Acquisition*****De Battista v Transport for New South Wales*** [\[2014\] NSWLEC 39](#) (Pain J)

**Facts:** on 21 September 2012 the respondent, Transport for NSW, compulsorily acquired the whole of 71 Schofields Road, Rouse Hill (“the acquired land”). Mr and Mrs De Battista appealed against the Notice of Compensation as provided by [s 66](#) of the [Land Acquisition \(Just Terms Compensation\) Act 1991](#) (“the Just Terms Act”). The public purpose of the acquisition was the North West Railway corridor. At the acquisition date the land was zoned general rural. The underlying zoning assumed in the absence of the acquisition was low to medium density housing. The acquired land was in an identified residential growth precinct near the Rouse Hill town centre. The acquired land had ready access to sewer and water services.

**Issues:**

- (1) what was the market value of the acquired land; and
- (2) whether [s 61](#) of the Just Terms Act applied so that certain disturbance amounts could not be claimed.

**Held:** compensation payable for the acquired land was determined at \$3,766,053.02:

- (1) a comparable sales approach was undertaken by the Court to assess market value of the acquired land at \$175/sqm. The most comparable sale was a sale of land at a similar time in the same growth precinct which could be applied to the acquired land with minor adjustments. No basis to substantially adjust more distant sales due to lack of access to a sewer was established: at [107]-[108]; and
- (2) the chapeau of [s 61](#) applied as the acquired land had potential to be used for a purpose (low to medium density residential) other than its current purpose (rural residential): at [119]. Section 61(b) was not applicable because the disturbance costs claimed would not necessarily (inevitably) be incurred in order to realise the potential for the acquired land to be used for the purpose of low to medium residential development. The disputed disturbance amounts could be claimed: at [120]).

**Note:** Order 1 was subsequently varied to include an agreed amount for solatium, so that the total compensation payable was \$3,791,073.02.

***Attard & Ors v Transport for NSW*** [\[2014\] NSWLEC 44](#) (Biscoe J)

**Facts:** these eight proceedings were for compensation under the [Land Acquisition \(Just Terms Compensation\) Act 1991](#) (“the Just Terms Act”) in relation to the compulsory acquisition of seven similar, neighbouring rural residential properties in the Sydney suburb of Schofields or, in one case, Rouse Hill, near the popular urban development known as The Ponds. The respondent, Transport for NSW, acquired the properties in September 2012 for construction of the North West Rail Link. The properties are located on the southern edge of the Riverstone East precinct of the North West Growth Centre under [State Environmental Planning Policy \(Sydney Region Growth Centres\) 2006](#) (“Growth Centres SEPP”). At the acquisition date, it was virtually certain that in about two and a half years time Riverstone East precinct would be released and rezoned for residential subdivision under the Growth Centres SEPP. One of proceedings (“Camilleri partnership”) was for disturbance of a one-tuck haulage business previously operated from one of the acquired properties, which the respondent argued was unlawfully conducted on the acquired land.

**Issues:**

- (1) which comparable sales provided the most reliable guide to market value of the acquired properties, and determination of the adjusted rate to be derived therefrom;
- (2) whether four potentially comparable sales in Alex Avenue precinct for a school were out of line;
- (3) whether [s 61](#) of the Just Terms Act prevents recovery of relocation disturbance costs on the basis that they would necessarily have been incurred in realising the potential use which forms the basis of the market value assessment; and

(4) whether [ss 55\(d\)](#) and [59](#) of the Just Terms Act have a lawfulness requirement.

Held: compensation determined: Attard 53 Schofields Road \$2,612,667; Attard 55 Schofields Road \$2,695,815; Xiguis 57 Schofields Rd \$2,645,290; Hsia 59 Schofields Rd \$2,644,434; Sultana 61 Schofields Rd \$2,575,573; Camilleri 67 Schofields Rd \$3,230,603; Milicevic 31 Tallawong Rd \$3,397,226; Camilleri partnership \$94,349:

- (1) the Alex Avenue and Area 20 precinct sales were not directly comparable mainly because those precincts had already been rezoned. The Riverstone East precinct sales were not directly comparable because, at the acquisition date, the market would consider the creep or flow of urban development from The Ponds would likely influence the earlier development (by about two to three years) of the subject properties. Since no sales were directly comparable, it was appropriate to take a bottom up approach and make a substantial upward adjustment to the “bottom” sales rate derived from the Riverstone East precinct sales. A further upward adjustment was required for the more valuable acquired properties fronting Tallawong Road: at [65];
- (2) the school sales were out of line and at a premium because of adjoining owner influence and should not be relied on. Internal documents from the Department of Education indicated that the Department was paying more than market value (on the Department’s own valuation). The sale rates were substantially higher than other Alex Avenue precinct sales: at [87];
- (3) section 61 did not apply to any of the applicant’s disturbance losses. Section 61 only applies where the potential for use for the other purpose is temporally very proximate; that is, the land would be virtually certain to be developed for the other purpose within the very near future. The release and rezoning of Riverstone East precinct in about two and a half years time, while virtually certain, did not satisfy this temporal requirement: at [152]; and
- (4) neither ss 55(d) nor 59 contain any explicit requirement that the purpose of a use be lawful, in contrast to [s 56\(1\)\(c\)](#). Section 59 contains its own filters (namely that the cost or loss be “reasonably incurred”) under each of its sub-heads to ensure that only appropriately incurred losses are compensable. As a matter of construction, to add an additional restriction that those costs are automatically not recoverable if the acquired land was being used for an unlawful purpose is unwarranted. Further, s 59(f) refers to ‘the actual use of the land’, focusing attention on the factual question of what the land was being used for rather than the legal question of what was or was not permissible. However, lawfulness of the purpose of a use is a factor in determining whether the claimed costs were “reasonably” incurred, which is a requirement of all the provisions of s 59. Where a use was for a prohibited or intrinsically unlawful purpose, for example where the acquired land was used for the business of manufacturing unlawful drugs, the costs of relocating that business would not be “reasonably” incurred: at [183]-[188].

***Willoughby City Council v Roads and Maritime Services*** [\[2014\] NSWLEC 6](#) (Biscoe J)

Facts: in 2011, the respondent, Roads and Maritime Services (“RMS”), compulsorily acquired land and easements from the applicant, Willoughby City Council (“Council”), for the purposes of the Gore Hill Freeway or Lane Cove Tunnel. The Council objected under [s 66](#) of the [Land Acquisition \(Just Terms Compensation\) Act 1991](#) (“the Just Terms Act”), claiming compensation of over \$65 million. The Council’s claim included \$33 million for mesne profits relating to two periods, 1988-2001 and 2008-2011, during which the RMS occupied the land without payment to Council. At the date of acquisition, the land was zoned public open space or similar, or was unzoned. A portion of the land was held on trust for public purposes. A portion of the land was subject to a public ways reservation under a crown grant.

Issues:

- (1) whether the trusts for public purposes were relevant to the determination of compensation, and whether authorisation or joinder of the Attorney-General was required to bring the claim;
- (2) whether the public ways reservation in the crown grant was relevant to the determination of compensation;
- (3) whether residential sales were reliable comparables, and what adjustments were appropriate; and



- (4) whether the compulsory acquisition deprived Council of a cause of action for mesne profits in relation to the two periods when RMS occupied the land without payment to Council, namely 1988-2001 and 2008-2011.

Held: \$12,746,000 compensation awarded to Council:

- (1) a trustee of land for a public purpose has an “interest” within the meaning of “land” in [s 4](#) of the Just Terms Act, both as an estate and as a right or power in connection with the land. The trustee owner, the Council, was entitled to claim and receive compensation for the full market value of the land subject to the trusts. Further, the legislative prohibition on the sale of “community land” by council is a species of restriction that applies only to the trustee owner and should be disregarded when determining market value under the Just Terms Act. Since the proceedings were for the protection of trust property, the authorisation of the Attorney General was not required by the [Charitable Trusts Act 1993](#). No rule requires joinder of the Attorney General in all proceedings involving a charity: at [26], [29]-[30], [37];
- (2) the public ways reservation was a restriction that affected only the trustee owner and should be disregarded when determining market value under the Just Terms Act: at [48];
- (3) the best evidence of market value of compulsorily acquired open space land was comparable open space lands sales in the locality, with no compulsion to purchase, requiring very few adjustments. However, valuation of open space land had often used residential land sales as comparables, including where a council had acquired residential land for open-space purposes. Residential sales might be relevant where there were no reliable comparable sales of open space land, but such sales should be discounted to reflect the open space zoning of the acquired land: at [56]; and
- (4) since Council was in physical possession prior to 1988-2001, the 2011 acquisition did not deprive Council of any cause of action for trespass for that period (although any such cause of action would now be statute barred). Further, Council had impliedly consented to RMS’s occupation during 1988-2001. However, the 2011 acquisition did deprive Council of the ability to claim mesne profits for 2008-2011 because Council could no longer lawfully enter into physical possession, nor succeed in any claim for possession. The claim for mesne profits for 2008-2011 fell within s 59(f) of the Just Terms Act as a financial cost, relating to the actual use of the land, as a direct and natural consequence of the acquisition: at [138].

### **Practice and Procedure**

***Florence Amelia Vorhauer v Armidale Dumaresq Council*** [\[2014\] NSWLEC 7](#) (Pepper J)

Facts: the applicant appeared in person in civil enforcement proceedings that had been brought against her by Armidale Dumaresq Council (“the council”). Before substantive submissions began, the applicant made an oral application to recuse the trial judge on the basis of actual and apprehended bias. The alleged bias related to the fact that the trial judge had appeared against the applicant as counsel in unrelated proceedings in 2002 (*R v Vorhauer* [\[2002\] NSWCCA 483](#): “the Court of Appeal proceedings”) and that the constitutional arguments put by the applicant in the Court of Appeal proceedings mirrored the constitutional arguments she was relying upon in the present proceedings. It was contended by the applicant that this previous association had led, and would lead, the trial judge to pre-judge the issues for determination in the trial.

Issues:

- (1) whether it was likely that the trial judge would pre-judge the merits of the issues that the applicant was relying on, such that the trial judge would be unable to decide the present proceedings other than on their legal and factual merits, by reason of
  - (a) actual bias; and
  - (b) apprehended bias.

Held: application dismissed:

- (1) there was no actual bias. The application misconceived the role of counsel, who acts on instructions. The judge did not remember the constitutional arguments or issues in the Court of Appeal proceedings. In these circumstances, it could not be said that the trial judge had pre-determined the merit of the constitutional issues the applicant would raise in the present proceedings: at [10] and [11]; and
- (2) there was no apprehended bias. The fair-minded lay-observer would not reasonably apprehend that the trial judge would not decide the case impartially or without prejudice: at [12] and [16]. This was because of the considerable period of time that had passed between the Court of Appeal proceedings and the present proceedings; the unrelated nature of the two cases; and the lack of any other dealings between the trial judge and the applicant: at [15]. The fact that a judge has had an association with a litigant while acting in his or her capacity as a legal representative does not automatically give rise to an apprehension of bias: at [18].

***Wingecarribee Shire Council v Paul O'Shanassy (No 2)*** [\[2014\] NSWLEC 32](#) (Pepper J)

Facts: the principal proceedings concerned an alleged offence by Mr O'Shanassy against [s 125\(1\)](#) of the [Environmental Planning and Assessment Act 1979](#) ("EPA Act") in that he allegedly breached [s 76A](#) of the EPAA by carrying out excavation works on his property without having obtained necessary development consent. During the trial, Mr O'Shanassy made various allegations as to the credit of several prosecution witnesses, particularly that of his neighbour, Mr Joe Lorincz. He alleged that Mr Lorincz had been, to use his word, "coercing" people into giving evidence, colluding with other witnesses, and providing information to the council relevant to the proceedings. Mr O'Shanassy also alleged that Mr Lorincz had deliberately failed to produce phone records and emails pursuant to an earlier subpoena issued to him. Mr O'Shanassy issued subpoenas seeking documents in relation to Mr Lorincz and the other prosecution witnesses, to the NSW Commissioner of Police ("the police") and to Telstra Corporation ("Telstra"). The council applied, pursuant to [r 33.4](#) of the [Uniform Civil Procedure Rules](#), to set aside paragraphs of the subpoenas on the basis that there was no legitimate forensic purpose for the seeking of those documents.

Issues:

- (1) whether there was a legitimate forensic purpose for the production of the documents:
  - (a) whether the documents sought in the subpoenas would materially assist on an identified issue in the proceedings; or
  - (b) whether there was a reasonable basis beyond speculation that they would assist; or
- (2) whether the documents were sought merely for the purpose of attacking the credit of Mr Lorincz and other prosecution witnesses, and were therefore in breach of the credibility rule contained in [s 102](#) of the [Evidence Act](#) 1995.

Held: the relevant paragraphs of the subpoenas were set aside:

- (1) there was no legitimate forensic purpose for the production of the documents listed in the subpoena to the police. Mr O'Shanassy was unable to articulate any direct or indirect connection between the issues raised for determination in the proceedings, that is, whether there had been a breach of s 76A of the EPA Act, and the production of documents relating to Mr Lorincz's previous dealings, if any, with the police: at [31]-[32];
- (2) Mr O'Shanassy was similarly unable to demonstrate a legitimate forensic purpose for the production of the material from Telstra: at [35]; and
- (3) the seeking of the documents in both subpoenas amounted to a fishing expedition by Mr O'Shanassy in the hope of eliciting information that was to be used solely for the purpose of attacking the credit of witnesses appearing for the council, in breach of the credibility rule: at [33] and [37].

***McCullagh v Autore*** [\[2014\] NSWLEC 46](#) (Pepper J)

Facts: Nicolle and Paul McCullagh ("the McCullaghs") sought urgent interlocutory injunctive relief against their neighbours, Rosario and Jane Autore ("the Autores"), to halt the building of a wall on the Autores'

property in Tamarama. The McCullaghs disputed the granting of a complying development certificate to the Autores by the third respondent, Peter Boyce, an accredited certifier. They claimed that the Autores had used an incorrect ground level measurement (i.e. they had used “ground level (finished) instead of “ground level (existing)”) to calculate the height of the wall, which would result in the wall being taller than the 1.8m height permissible under [cl 3.35\(2\)](#) of the [State Environmental Planning Policy \(Exempt and Complying Development Codes\) 2008](#) (“the SEPP”). The solicitor for the McCullaghs originally came before the duty judge on an ex parte basis, without having served the summons commencing the proceedings on the other side. Asked why the matter was so urgent that the ex parte orders were required, he said that the wall was close to completion, and that once completed, it would partially obscure the McCullaghs’ view to the south. The Court stood the matter down until 3pm for the McCullaghs to notify the Autores and Mr Boyce of the application. At 3pm, when the hearing resumed, all parties were present.

Issues:

- (1) whether the application should be heard on an ex parte basis;
- (2) whether there was a serious question to be tried; and
- (3) whether the balance of convenience favoured the granting of the injunction.

Held: application refused:

- (1) the application should not be heard on an ex parte basis because:
  - (a) it was a fundamental tenet of our system of justice that a party whose interests would be adversely affected should be given the opportunity to be heard. This was an aspect of the rule of law: at [16];
  - (b) the reasons given for the ex parte nature of the application were, on any view, inadequate. There was no valid reason why the matter was so urgent that the respondent ought not be notified. In addition, the wall, if unlawfully constructed, could be removed and the harm would not have been irreparable: at [20];
- (2) there was no serious question to be tried:
  - (a) the evidence indicated that the Autores had used the correct ground level to measure the wall, that is, “ground level (existing)”: at [28];
  - (b) in the alternative, the McCullaghs submitted that the proper construction of “ground level (existing)” was the ground level prior to any development on the Autores’ property. The Court rejected this submission for the purposes of the application, holding that it was unlikely that Parliament intended to require landowners to establish ground levels prior to the first development consent in order to determine the existing ground level for the purposes of the SEPP: at [31]; and
- (3) the balance of convenience weighed heavily against the granting of interim injunctive relief because any harm to the McCullaghs would have been minimal, transient and reversible. The McCullaghs had also delayed making the application until construction on the wall began: at [35].

***Armidale Dumaresq Council v Florence Amelia Vorhauer (No 3)*** [\[2014\] NSWLEC 50](#) (Pepper J)

(related decisions: *Armidale Dumaresq Council v Vorhauer* [\[2012\] NSWLEC 154](#) Biscoe J, *Armidale Dumaresq Council v Vorhauer (No 2)* [\[2014\] NSWLEC 7](#) Pepper J)

Facts: in previous proceedings brought by Armidale Dumaresq Council (“the council”) heard in 2012, the Court had held that Mrs Vorhauer was in breach of the [Environmental Planning and Assessment Act 1979](#) (“the EPA Act”) by causing a shipping container and two transportable construction site offices to be placed on her land without development consent from the council (“the 2012 proceedings”). The Court ordered that Mrs Vorhauer remove the unlawful items, in which she and her disabled daughter were living, by January 2013. It also made a finding that Mrs Vorhauer’s daughter, Ms Vorhauer, was the owner of the shipping container and the site offices, although this did not affect the judgment. Finally, the Court dismissed a cross-claim that Mrs Vorhauer had brought with Ms Vorhauer, which raised constitutional

challenges to the powers of local councils and to the jurisdiction of the Court. Mrs Vorhauer did not comply with the 2012 orders. Accordingly, by way of notice of motion, the council sought orders from the Court that it be permitted to remove the unlawful items itself from the property. The basis of the Court's power to make such orders was not disclosed by the council in its notice of motion. The Court requested that the parties file further submissions as to the issue of power.

Issues:

- (1) whether the Court had the power to make the orders sought by the council under:
  - (a) the liberty to apply order made in the 2012 proceedings; or
  - (b) [rule 40.8](#) of the [Uniform Civil Procedure Rules](#) ("UCPR"); and
- (2) whether Ms Vorhauer ought to have been joined as a party to the notice of motion given that the orders sought by the council directly affected her as the owner of the shipping container and site offices.

Held: notice of motion dismissed:

- (1) r 40.8 of the UCPR, which provided for the making of substituted performance orders, gave the Court the power to make the orders sought by the council. It had been utilised by the Court to make substituted performance orders in the past: at [23];
- (2) the liberty to apply order did not give the Court the power to make the orders. It was circumscribed in scope and only extended to the parties applying for an extension of time within which to comply with the removal order: at [14];
- (3) Ms Vorhauer ought to have been joined to the motion because:
  - (a) a person directly affected by the orders sought in the proceedings should be joined as a party: at [41]-[42]. Therefore, the failure to join Ms Vorhauer to the proceedings, the owner of the items and someone who could potentially be rendered homeless by the execution of the orders, had to result in the dismissal of the notice of motion: at [49] and [51];
  - (b) no inference could be drawn that Ms Vorhauer had notice of these proceedings by reason of the fact that she lived with and was being cared for by Mrs Vorhauer. In any event, merely having notice of the proceedings was not necessarily sufficient: at [47];
  - (c) the fact that Ms Vorhauer had been a party to the cross-claim proceedings did not matter because that claim had been dismissed by the Court in the 2012 proceedings, which terminated her participation in the 2012 proceedings from that point onward. Ms Vorhauer was never a party to the present proceedings and had never had the opportunity to comment on whether the orders sought by the council should be made: at [49]; and
- (4) it was not in the interests of justice to further adjourn the proceedings to formally notify Ms Vorhauer of the motion, as suggested by the council, particularly in circumstances where the council had been granted two further opportunities to file written submissions concerning the Court's power to make the orders it sought: at [50].

***The Hills Shire Council v Mouawad*** [\[2014\] NSWLEC 59](#) (Pepper J)

Facts: the defendant, Paul Mouawad made an application that the trial judge recuse herself from hearing the proceedings on the basis of apprehended bias. The application was made on the basis of an adverse finding of credit against Mr Mouawad made by the judge in previous unrelated proceedings in 2013, namely, that in a critical respect Mr Mouawad's evidence was "implausible".

Issues:

- (1) whether a fair minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide.

Held: the judge disqualified herself:

- (1) even though the hypothetical reasonable observer would have some understanding that the finding of implausibility made in the 2013 proceedings was made on different evidence, in the context of a different factual matrix and in respect of a different offence, that observer could not be presumed to reject the possibility of pre-judgment. The clear expression stated by the trial judge in the 2013 proceedings of her assessment of Mr Mouawad's credit could be perceived as influencing her determination of Mr Mouawad's credit in the 2014 proceedings: at [33]-[34];
- (2) the similarity between the allegation in the 2014 proceedings and its likely denial, and the denial by Mr Mouawad and rejection by the trial judge in the 2013 proceedings of a similar allegation, would not be readily ignored or easily discounted by even the most reasonable of hypothetical observers: at [35];
- (3) not every negative comment made about a witness can properly be considered to be a comment on their credibility leading inexorably to an apprehension of pre-judgment: at [36]; and
- (4) similarly, the authorities do not support the proposition that, whenever a judge is faced with an adverse finding of credit against a witness in a previous case whose credibility is in issue in subsequent proceedings before the same judge, disqualification must follow: at [38].

***Gold and Copper Resources Pty Ltd v Minister for Resources and Energy*** [\[2014\] NSWLEC 33](#)  
(Craig J)

Facts: by notice of motion, Gold and Copper Resources Pty Ltd ("Gold & Copper") sought leave to amend the pleadings in its Points of Claim. The pleadings, as they were originally framed, sought to challenge the validity of two mining leases granted by the respondent Minister to Cadia Holdings Pty Ltd ("Cadia"), the second respondent. Gold & Copper claimed that the development consent which was in force in relation to land over which the leases related, did not authorise activities for the purposes of mining on that land but only authorised activities that were characterised as "mining purposes". As the mining leases granted by the Minister were for the purposes of "prospecting and mining" for nominated minerals, Gold & Copper claimed that the leases were invalidly granted as the development consent was not "an appropriate consent" to found the grant of a mining lease conformably with [s 65](#) of the [Mining Act 1992](#) ("Mining Act"). The amended pleadings sought to add, among other matters, further averments in support of the claim of invalidity of the leases on the ground that s 65 of the Mining Act had been breached. These averments were added by Gold & Copper as a consequence of an amendment to the [Mining Act](#) in November 2013 by the [Mining Amendment \(Development Consent\) Act 2013](#) ("the Amendment Act"). Gold & Copper submitted that these legislative amendments did not override the requirements of s 65, even in its amended form, having regard both to the terms of the leases and s 73 of the Mining Act – the development consent only authorised activities for "mining purposes". The Minister and Cadia submitted that the pleadings in relation to the alleged contravention of s 65 were untenable; the fact that the mining purposes for which the leases were granted were activities associated with the extraction of minerals did not make them any less activities for "mining purposes" and were therefore saved by the Amendment Act.

Issues:

- (1) whether the mining purpose for which the challenged mining leases were granted was confined to activities associated with mining for minerals conducted within the area of the respective mining leases;
- (2) whether the amending legislation denied the ground of challenge in relation to s 65 of the Mining Act; and
- (3) whether the original pleadings and the amended claims in relation to s 65 of the Mining Act were fairly arguable.

Held: disallowing the amendments sought by Gold & Copper in so far as they related to s 65 of the Mining Act:

- (1) while [s 73\(1\)\(c\)](#) of the Mining Act empowered the holder of a mining lease granted in respect of a mineral or minerals to carry out "on that land" a mining purpose, the legislation did not, in terms or by inference, limit the mining purpose to the mineral or minerals being mined on that land: at [41]. The provisions of the mining leases demonstrated that, at the time of grant of each lease, a "mining purpose" was an activity permitted under that lease. The grant in each case was intended to give effect to the entitlement of the holder of the lease to exercise the right afforded by s 73(1): at [38];

- (2) even if the mining purpose comprehended by the grant of the mining leases pursuant to s 73(1) was confined in the manner submitted by Gold & Copper, that did not deny the operation of the legislative amendments in rendering the mining lease compliant with s 65. Applying the provisions of the amendments: there was a development consent in force at the time at which the leases were granted; that consent related to land over which the leases were granted and related to a “mining purpose” permitted under those leases, both by reference to the terms of each lease and the operation of s 73(1). In accordance with the amendments, the leases were therefore taken always to have complied with s 65: at [45]; and
- (3) the amendments to the Mining Act effected by the Amendment Act made it apparent that the claims by Gold & Copper alleging breach of s 65 were not fairly arguable. The paragraphs in the original Points of Claim alleging breach of s 65 were struck out and the amendments sought in so far as they related to s 65 were refused: at [49].

***Hoxton Park Residents Action Group Inc v Liverpool City Council*** [\[2014\] NSWLEC 42](#) (Craig J)

Facts: by notice of motion, Hoxton Park Residents Action Group Inc (“Hoxton Park”) sought an order, pursuant to [s 149B](#) of the [Civil Procedure Act 2005](#) (“CP Act”), that these proceedings be transferred to the Supreme Court of New South Wales, to be heard together with proceedings brought in the Equity Division of that Court. The proceedings in this Court, brought under Class 4 and commenced in August 2013, challenged a decision made by the Sydney West Joint Regional Planning Panel to grant development consent, subject to conditions, for a school and associated facilities in the suburb of Hoxton Park. The four grounds upon which Hoxton Park challenged the development consent were of a kind that regularly arise in proceedings brought in the Land and Environment Court by way of judicial review. The proceedings in the Supreme Court commenced in July 2009. The pleaded claims of Hoxton Park, as plaintiff in those proceedings, challenged the decision of the Commonwealth Minister to provide funding for the proposed school. Challenge was also made to the validity of an agreement between the Commonwealth and the defendants which purported to authorise the funding of the school project. Further, the validity of Commonwealth legislation by which funding had been or would be provided to the operator of the school was challenged. These challenges had their foundation in s 116 of the Constitution.

Issue:

- (1) whether the Court should order the transfer of the Class 4 proceedings.

Held: dismissing the motion for transfer and ordering Hoxton Park to pay the respondents’ costs in respect of the motion:

- (1) while the issues raised in the two proceedings may have sought to achieve a common goal, they were logically separate and distinct and were not “so closely associated” that they formed part of the one controversy: at [32]. The first element of s 149B(2) of the CP Act founding a claim for transfer to the Supreme Court could not be established: at [33]; and
- (2) it was not more appropriate for the proceedings in this Court to be heard with the Supreme Court proceedings and transferred to that Court, having regard to the fact that the Supreme Court proceedings had been fixed for hearing and the proceedings in this Court were not yet ready for hearing, as well as to the differences between the two proceedings, namely, the issues, the parties and the evidence: at [34]-[39]. The second element of s 149B(2) of the CP Act founding a claim for transfer to the Supreme Court had not been established: at [40].

Note: on 11 April 2014 Young AJA dismissed a motion to transfer the proceedings commenced in the Supreme Court to the Land and Environment Court: *Hoxton Park Residents Action Group Inc v Liverpool City Council* [\[2014\] NSWSC 433](#).

## **Costs**

***Boensch v Parramatta City Council (No 3)*** [\[2014\] NSWLEC 15](#) (Craig J)

(related decisions: *Boensch v Parramatta City Council* [2013] NSWLEC 94 Biscoe J, *Boensch v Parramatta City Council (No 2)* [2013] NSWLEC 1262 Brown C)

**Facts:** prior to the final hearing of Class 1 proceedings, the council filed an Amended Contention asserting that the development consent founding Mr Boensch's present development applications had lapsed by operation of [s 95](#) of the [Environmental Planning and Assessment Act 1979](#). It was agreed between the parties that a determination sustaining the council's contention would be sufficient to dispose of the appeals without the necessity to proceed to a merits hearing. Mr Boensch filed a notice of motion seeking an order for the lapsing issue to be determined as a preliminary point. Upon that order being made by Biscoe J (*Boensch v Parramatta City Council* [2013] NSWLEC 94), documents were identified, including those emanating from the council's own files, that effectively answered the lapsing question. After considering the documents, the council withdrew the contention. Mr Boensch sought an order that the council pay his costs of and incidental to the motion pertaining to the separate question.

**Issues:**

- (1) whether it was fair and reasonable in the circumstances to order costs under [r 3.7](#) of the [Land and Environment Court Rules 2007](#).

**Held:** ordering the council to pay Mr Boensch's costs of his notice of motion:

- (1) in addressing the claim for costs, focus must primarily be upon the action of the council in raising the contention, rather than on the actions of the council once the determination of the separate issue had already been ordered: at [38];
- (2) it was necessary for the council to have had a reasonable basis upon which to found its contention, having regard to [s 56](#) of the [Civil Procedure Act 2005](#) which states that the Court should facilitate the "just, quick and cheap resolution of the real issues in the proceedings" and Schedule B of the Court's Practice Note for Class 1 Development Appeals which requires the contentions of a respondent consent authority to have a "reasonable basis": at [44];
- (3) the council did not have a reasonable basis upon which to found its contention, nor was it reasonable for the council to have raised the contention in the terms in which it was framed, having regard to the material which was available to the council at the time of raising the contention: at [43] and [45]; and
- (4) in the circumstances, it was fair and reasonable to order the council to pay Mr Boensch's costs of and incidental to his notice of motion: at [66].

***Agricultural Equity Investments Pty Ltd v Westlme Pty Ltd (No 2)*** [2014] NSWLEC 53 (Pepper J)

**Facts:** during the principal proceedings, Agricultural Equity Investments Pty Ltd ("AEI") made an oral application on 6 May 2014 to set aside a notice to produce issued by the second respondent, Parkes Shire Council ("the council"). The notice to produce had been filed in Court on Tuesday, 6 May 2014, although a copy of the notice had been served on AEI on Friday, 2 May 2014. Some of the documents sought in the notice dated back to 2008. The council submitted that the truncated time given to AEI to comply with the notice (two business days) was the result of AEI's failure to comply with Court orders for the filing and serving of its evidence.

**Issues:**

- (1) whether requiring compliance with the notice to produce was reasonable pursuant to [r 21.11](#) of the [Uniform Civil Procedure Rules 2005](#) ("UCPR").

**Held:** notice to produce set aside:

- (1) requiring compliance with the notice in two working days was manifestly unreasonable in all the circumstances. AEI's non-compliance with the Court orders was materially irrelevant. While the date it served the sworn affidavits it was clearly in breach of the Court timetable, it had already served identical unsworn copies of the affidavits on the council. Although the exhibits did not accompany the service of the unsworn affidavits, the exhibits were not required to be served, and at no time prior to the

servicing of the sworn affidavits did the council request a copy of the exhibits. The council could and should have sought the material much earlier than 2 May 2014.

***Tempe Recreation Reserve Trust v Sydney Water Corporation (No 2)*** [\[2014\] NSWLEC 23](#) (Biscoe J)

(related decision: *Tempe Recreation (D.500215 & D.1000502) Reserve Trust v Sydney Water Corporation* [\[2013\] NSWLEC 221](#) Biscoe J)

**Facts:** the basis of this costs notice of motion was an offer of compromise for judgment in an earlier compensation proceeding under the [Land Acquisition \(Just Terms Compensation\) Act](#) 1991 (“the Just Terms Act”) relating to the compulsory acquisition of easements across Tempe Reserve (in this case by reference only to the matters in [s 106A](#) of the [Crown Lands Act](#) 1989). The respondent acquiring authority (applicant on the motion), Sydney Water Corporation (“SW”), acquired the easements for the purposes of the [Sydney Water Act](#) 1994, and in particular for a large water pipeline for the Kurnell desalination plant. The applicant (respondent on the motion), Tempe Recreation (D.500215 & D.1000502) Reserve Trust (“Tempe”), is a statutory reserve trust charged with the care, control, and management of Tempe Reserve. The main question in the substantive proceeding was whether the easements permitted SW to place a large water pipeline above the surface of Tempe Reserve, which could have greatly diminished the public enjoyment of Tempe Reserve, with compensation potentially running into millions of dollars. The Valuer-General first determined compensation in the amount of \$6,000. In February 2013, SW made an offer of compromise in the amount of \$268,000 (“Offer”), under [r 20.26](#) of the [Uniform Civil Procedure Rules](#) 2005 (“UCPR”). Tempe did not accept. Subsequently, SW’s case changed. SW had maintained that the award of compensation was governed by [s 55](#) of the Just Terms Act and denied the application of [s 106A](#) of the [Crown Lands Act](#) 1989. This position was abandoned without explanation the day before the hearing commenced (being a Sunday). The proceeding was heard and determined in December 2013, and the Court determined compensation in the amount of \$106,000, which was less than SW’s offer. SW was also ordered to pay Tempe’s costs. In this notice of motion, SW moved for vacation of that costs order and for orders under [r 42.15\(2\)](#) that SW pay Tempe’s costs on the ordinary basis up to the date of the offer, that Tempe pay SW’s costs of the proceedings on an indemnity basis on and from the date following the offer, and that Tempe pay SW’s costs of the notice of motion.

**Issues:**

- (5) whether [r 42.15](#) of the UCPR was engaged; and
- (6) in the event [r 42.15](#) of the UCPR was engaged, whether the Court should make an “otherwise order” under [r 42.15\(2\)](#).

**Held:** notice of motion dismissed with costs:

- (5) rule 42.15 (as at the date of the offer, it has since been amended) is engaged where an offer is made by the respondent and not accepted by the applicant, and the applicant obtains an order on its claim that is as favourable, or less favourable, to it than the terms of the offer: [r 42.15\(1\)](#). Assuming that the determination of compensation by the Court was an “order or judgment on the claim” within the meaning of [r 42.15\(1\)](#), [r 42.15](#) was not engaged because the determination of compensation was not as or less favourable to Tempe than the terms of the offer. Although the dollar amount of the determination (\$106,000) was less than the amount of the offer (\$268,000), the Court also made the antecedent finding that SW’s rights under the easements did not permit works above the surface of Tempe Reserve. That result was more valuable than the mere dollar amount offered by SW: at [10]; and
- (6) should the Court be in error in concluding [r 42.15](#) was not engaged, SW was prima facie entitled to an order for indemnity costs against Tempe from the day following the day of the offer of compromise, unless the court ordered otherwise: [42.15\(2\)](#). The mere nature of compulsory acquisition compensation proceedings was insufficient to justify an “otherwise order” since that rule has been specifically identified as applying to such proceedings. However, there were four circumstances that provided a sufficient basis for an “otherwise order” (even if it was necessary to establish exceptional circumstances beyond a justification for exercising the discretion). First, in general and in accordance with the exceptional costs principle expressed in *Dillon v Gosford City Council* [\[2011\] NSWCA 328](#),



(2011) 184 LGERA 179 at [70], an "otherwise order" should not be made where the claimant for compensation for compulsory acquisition of land has acted reasonably in pursuing the proceedings and has not conducted them in a manner which gives rise to unnecessary delay or expense. It was reasonable that the underlying issue of interpretation of the easement was resolved. Tempe conducted its case efficiently and economically. Second, it was reasonable, and in the public interest, that the issue of interpretation of the easement be resolved. Its interpretation was not resolved by the offer. Third, since SW's case changed significantly between the date of its offer and the hearing of the proceeding, it would be unfair to Tempe for the Court to make an order for indemnity costs. Fourthly, because this was the first case to consider s 106A of the *Crown Lands Act 1989*, it was very difficult to answer whether the offer should be accepted: at [15]-[24].

## Valuation

### *Fivex Pty Ltd v Valuer-General* [2014] NSWLEC 27 (Craig J)

Facts: Fivex Pty Ltd ("Fivex") appealed pursuant to [s 37](#) of the *Valuation of Land Act 1916* (NSW) ("Valuation Act"). Its appeal related to the land value of land occupied by a retail/commercial building in Double Bay for the base dates 2009, 2010 and 2011. Fivex submitted that the land values were approximately \$2,000,000 lower than those determined by the Valuer-General. At each relevant base date, the primary land use controls applying to the land were those imposed by Woollahra Local Environmental Plan 1995 ("LEP"). Under cl 11(3) of the LEP, the erection of a building upon a particular site is permitted if the floor space ratio of the building does not exceed 3.0:1 and the council consents to the floor space ratio. That was the planning control under which the Council had consented to the erection of the modern four level building standing on the land. It had been constructed with a floor space ratio of 3.66:1, conformably with the consent. It was submitted by the Valuer-General that this "more intense use" of the land than was otherwise provided for under the LEP, required the assumptions identified in s 6A(2) to be made for the purpose of determining the result of the notional sale required by s 6A(1). The values for which the Valuer-General contended were calculated on the assumption that the building with its existing floor space ratio of 3.66:1 could be continued, as it was only by so doing that the land could continue to be used in the manner in which it was being used at each base date. It was agreed that the highest and best use of the land at each base date was that use to which the land was being put, namely a use for retail and commercial office purposes. It was submitted by Fivex that the assumptions identified in s 6A(2) were not engaged. The values for which Fivex contended were calculated having regard to the use of the land for the purpose of retail and commercial development, in so far as the use was lawful and permissible under the LEP at each base date.

#### Issue:

- (1) whether the land value should be determined solely by reference to [s 6A\(1\)](#) of the Valuation Act without applying the assumptions available under [s 6A\(2\)](#).

#### Held: appeal upheld and values determined:

- (1) the assumptions identified in s 6A(2) of the Valuation Act were not engaged: at [32]. The land value was to be determined conformably with s 6A(1) on the basis that the highest and best use of the land was for retail and commercial purposes and on the assumption that the existing building had not been erected: at [32]. That use was the permissible form of land use under the LEP at each base date: at [31]; and
- (2) the fact that s 6A(2) allows an assumption of use for any lawful purpose when addressing the notional sale required by subsection (1), gainsays a submission that present use of existing improvements must be assumed for the purpose of determining land value. That assumption is only required and permitted if the present use, having been lawfully commenced, represents a higher order of use in attaching value to the land than would be achieved by reason of a legal constraint imposed upon that present use subsequent to its commencement: at [22].

## Section 56A Appeals

### ***Wilson Parking Australia 1992 Pty Ltd v Council of the City of Sydney*** [\[2014\] NSWLEC 12](#)

(Pepper J)

(related decision: *Wilson Parking Australia 1992 Pty Ltd v Council of the City of Sydney* [\[2012\] NSWLEC 1319](#) Brown C)

**Facts:** a Commissioner of the Land and Environment Court (“the Commissioner”) dismissed an appeal by Wilson Parking Australia Pty Ltd (“Wilson”) against a decision by the Council of the City of Sydney (“the council”) to refuse its development application for the use of a vacant site in Sydney’s CBD as a temporary car park. Wilson appealed the Commissioner’s decision. [Clause 66](#) of the [Sydney Local Environment Plan 2005](#) (“the LEP”) provided criteria applicable to decisions granting consent to development applications for car parks in the city centre.

**Issues:**

- (1) whether clause 66(2) of the LEP, by its terms, engaged [State Environmental Planning Policy No 1 – Development Standards](#) (“SEPP 1”) and therefore whether the discretionary power to dispense with any development standard was available;
- (2) whether the Commissioner had erred in law when he held that, according to the two-stage process described in the case of *Strathfield Municipal Council v Poynting* [\[2001\] NSWCA 270](#), cl 66(2) was a prohibition and not a development standard under the [Environmental Planning and Assessment Act 1979](#) (“EPAA”); and
- (3) whether the Commissioner had erred when he failed to uphold the objection to a development standard under SEPP 1.

**Held:** appeal dismissed:

- (1) SEPP 1 was not engaged because there was non-compliance with the provisions of cl 66(2). The Commissioner (as the consent authority) failed to be satisfied that the proposed car park would directly service major retail, cultural, recreational or entertainment uses, because Wilson had not shown that the site was not already reasonably or adequately serviced by public transport or existing public car parking: at [27];
- (2) the Court followed the two-limbed approach in *Poynting* in holding that cl 66(2) was not a development standard. The Court held that the location of cl 66(2) within the LEP; the clause as a whole; its plain and unambiguous language; and the objectives of the LEP, made it clear that the clause was a prohibition: at [52]-[73]; and that the pre-existing need required by cl 66(2) did not specify a requirement or fix a standard generated by the development, and therefore the clause could not be characterised as a development standard: at [81]; and
- (3) the Commissioner did not err in rejecting the SEPP 1 objection because the objection was not well founded. The central objectives of the car parking controls in the LEP were to foster public transport and discourage motor vehicle use and the granting of consent to the development application would be inconsistent with the LEP: at [89], [92] and [95].

## Commissioner and Registrar Decisions

### ***Wingecarribee Shire Council v O’Shanassy*** [\[2014\] NSWLEC 1025](#) (Walton AR)

**Facts:** in the course of preparing for hearing in Class 5 proceedings relating to charges of carrying out development without consent, a number of subpoenas and Notices to Produce had been served. Both parties made claims of privilege over some of the documents produced to the Court. The defendant claimed privilege in relation to two emails, including a number of attachments contained in one of them. The prosecutor claimed privilege over 22 documents including notes of telephone conversations, correspondence, and emails, including notes for and drafts of witness statements.

Issues:

- (1) whether any or all of the documents were privileged under [ss 118](#) or [119](#) of the [Evidence Act 1995](#); and
- (2) whether the prosecutor's duty of disclosure applied.

Held: examining the documents and upholding all the claims for privilege:

- (1) the two emails over which the defendant claimed privilege were privileged under s 119: at [6];
- (2) while the defendant would not have been able to maintain a claim for privilege in relation to the original documents that were attachments to one of the email messages, the documents were copied for the dominant purpose of the defendant being provided with professional legal services relating to an anticipated Australian legal proceeding in which the defendant might be a party and therefore privilege would also attach to them: at [8];
- (3) it was not appropriate for the Court, as requested by the defendant, to direct the prosecutor to examine the file notes of conversations with prosecution witnesses so as to ensure that there was no material subject to the prosecutor's duty of disclosure. That would be supervising the prosecutor's exercise of his duty: at [21]; and
- (4) the fact that the prosecutor had a duty of disclosure did not mean that the documents lost their privileged status. However the fact that the documents were privileged did not exclude them from the prosecutor's duty of disclosure. Once it was determined whether any of the documents were privileged and whether the privilege had been lost, it was up to the prosecutor to determine if the duty of disclosure applied to the communications or documents. If the documents were subject to the duty to disclose they should be disclosed whether or not they are privileged: at [23], [24].

***Bourke v North Sydney Council*** [\[2014\] NSWLEC 1035](#) (O'Neill C)

Facts: the applicant appealed under [s 97\(1\)](#) of the [Environmental Planning and Assessment Act 1979](#) ("the EPA Act") against the refusal by the council of an application to demolish the existing dwelling and construct a seniors living development, consisting of ten apartments over a basement carpark for twelve cars. The existing dwelling is identified as a contributory item to the Wollstonecraft Conservation Area ("the WCA") and is within the vicinity of a number of heritage items identified in the [North Sydney Local Environmental Plan 2001](#) and the [North Sydney Local Environmental Plan 2013](#). The heritage experts agreed that the existing dwelling dated from the core period of development within the WCA and contributed to the identified heritage significance of the WCA, although the heritage experts disagreed on the extent of that contribution. The applicant relied on the compromised visual setting of the existing dwelling, as a result of the uncharacteristic residential flat buildings on either side of the existing dwelling, as being detrimental to the contribution the existing dwelling made to the heritage significance of the WCA. The council refused the application because the demolition of the contributory item would have a detrimental impact on the heritage significance of the WCA and the form and scale of the seniors housing development would detract from the character and significance of the WCA.

Issues:

- (1) whether the proposal to demolish the existing dwelling and construct a seniors living development achieved the principles set out in [cl 33](#) of the [State Environmental Planning Policy \(Seniors Living\)](#) ("SEPPSL"), to:
  - (a) recognise the desirable elements of the location's current character (or, in the case of precincts undergoing a transition, where described in local planning controls, the desired future character) so that new buildings contribute to the quality and identity of the area, and
  - (b) retain, complement and sensitively harmonise with any heritage conservation areas in the vicinity and any relevant heritage items that are identified in a local environmental plan

Held: dismissing the appeal, concluding that the demolition of the contributory item and the design of the seniors living development did not demonstrate that adequate regard had been given to the design principles set out at subcl 33(b) of SEPPSL:

- (1) retaining the WCA was dependent on retaining the contributory items within it, as the incremental loss of contributory items and other historic elements diminishes both the historic and aesthetic values of the conservation area. This is because it is not each individual contributory building in isolation that is significant, but the group as a whole, along with the heritage items, that has collective significance and their retention as a group is essential to preserving the character of the WCA. The demolition of the existing dwelling would diminish the collective significance of the WCA: at [37];
- (2) subclause 33(b) of SEPPSL requires the proposal to “retain, complement and sensitively harmonise with any heritage conservation areas in the vicinity and any relevant heritage items”. The proposal to demolish the existing dwelling would retain, but diminish, the identified heritage significance of the WCA. “Retain” does not mean “retain but diminish”. The proposal did not satisfy the design principles set out at subcl 33(b) of SEPPSL, to retain any heritage conservation area in the vicinity: at [38]; and
- (3) the proposal would be of a scale and bulk well in excess of the characteristic and predominant scale of development in the WCA and of a scale that was not warranted for a “neutral” building within the WCA. The amended proposal would create a row of three uncharacteristic buildings, which would dominate the streetscape to an inappropriate degree and detract from the setting of the heritage items at 25, 36, 42 and 46 Shirley Road, in the vicinity of the site: at [53].

***Radray Constructions Pty Ltd v Hornsby Shire Council*** [2014] NSWLEC 1024 (Hussey C and Dixon C)

Facts: the applicant appealed under [s 97\(1\)](#) of the [Environmental Planning and Assessment Act 1979](#) (“the EPA Act”) against the refusal by council of an application for a seniors living development (as defined under [State Environmental Planning Policy \(Housing for Seniors or People with a Disability\) 2004](#) (“the SEPP”)). The site is located within a high hazard floodway. There is an existing creek running through the site that floods so that the majority of the site is inundated in the 1:5 year storm and other less frequent storm events. The proposed development comprised the construction of 13 dwellings over basement car parking, together with flood mitigation works and the restoration of a watercourse. The council refused the application because the proposal, although permissible under the [Hornsby Local Environmental Plan 1994](#), did not provide safe access to and egress from the site or an acceptable level of residential amenity for its occupants (as required under the design principles in the SEPP); the high velocity of the floodwater in storm events and the frequent inundation of the site would impede safe pedestrian access and egress to the development and cause damage to buildings, landscaping, communal areas and private open space within the development; and the development was contrary to the planning controls that seek to restrict the development of flood prone land.

Issues:

- (1) whether the site was suitable for the seniors living development due to the frequency of flooding;
- (2) whether the frequency and extent of the flooding of the site would cause anxiety, inconvenience and emotional stress for the occupants of the development (seniors or people with disabilities);
- (3) whether the proposal achieved a built form that satisfactorily responds to the constraints of the site and provides satisfactory amenity for the occupants of the building;
- (4) whether the proposal would have an unacceptable impact on the streetscape by reason of the flooding mitigation works and through increased flooding on downstream properties;
- (5) whether the proposal would have an unacceptable impact on significant trees onsite; and
- (6) whether the development was in the public interest due to privacy and visual impacts, excavation around trees, flooding frequency, lack of visitor parking, overdevelopment of a sensitive site and loss of residential amenity.

Held: dismissing the appeal:

- (1) the central issue concerned the flooding impacts on the development arising from the fact that the site is predominantly situated within a high hazard floodway, as determined by flood modelling. The design of the development generated unacceptable safety risks for the occupants (seniors and people with disabilities) due to the high velocities and depth of flood water in a range of flood events, when assessed against the provisions of the SEPP and the NSW Floodplain Development Manual: at [93];
- (2) the proposal would result in the intensification of development within the floodway and thereby increase safety risks to the occupants of the development: at [118];
- (3) the evidence about the cognitive responses of the range of likely occupants of the development had limited application to the proposal, particularly due to the lack of actual studies on psychological impacts arising from comparable flooding experiences, and it was difficult to accurately define the cognitive responses of the range of likely occupants: at [110], [111];
- (4) as the proposal would necessitate the construction of a significant flood holding basin in the front set back area it would not satisfy the requirement to minimise impacts on the streetscape: at [122];
- (5) there was a limitation on the useability of the designated common open space areas, which were regularly compromised by regular flooding events: at [125]; and
- (6) the removal of existing mature trees to facilitate the construction of the basement tunnel was contrary to the design principle in cl 33 (f) of the SEPP which requires the retention of major existing trees wherever possible: at [127].

**Mac Services Group v Mid-Western Regional Council** [2014] NSWLEC 1072 (Dixon C)

Facts: Mac Services Group (“the Mac”) appealed under [s 97\(1\)](#) of the [Environmental Planning and Assessment Act](#) 1979 (“the EPA Act”) against the refusal by the Western Joint Regional Planning Panel (“the JRPP”), on behalf of the respondent council, of its development application for the construction of a workers’ accommodation facility on rural land on the outskirts of the historic mining town of Gulgong (“the site”). The proposed development was to service and accommodate the fly in/fly out or drive in/drive out (“FIFO/DIDO”) workers contracted to the surrounding mines in the area. The council refused the application because it characterised the proposed development as “tourist and visitor accommodation” which was a prohibited use on the site under the repealed *Mid-Western Regional Interim Local Environmental Plan* 2008 (“LEP 2008”) which applied by dint of a savings provision in cl1.8A of the current [Mid-Western Regional Local Environmental Plan](#) 2012 (“LEP 2012”).

Issues:

- (1) whether the proposed development was “tourist and visitor accommodation” as defined under LEP 2008 and, therefore, within the prohibited category of development in the Agriculture zone under the zoning table of LEP 2008, or an innominate use because it was not included in either the prohibited or permitted category of development under the zoning table of LEP 2008, and therefore permissible in the Agriculture zone;
- (2) what weight, if any, the Court should give to LEP 2012 in its assessment of the proposed development under [s 79C](#) of the EPA Act and the public interest in circumstances where the application was lodged before the gazettal of LEP 2012 and LEP 2012 contained a savings provision in cl1.8A that required the development to be assessed under the repealed LEP 2008;
- (3) whether as a general proposition a Commissioner is bound by the determination of a single judge sitting in the same class of proceedings (unless on a preliminary question in the same matter or on remitter of a [s 56A](#) appeal under the [Land and Environment Court Act](#) 1979 (“LEC Act”));
- (4) whether a Commissioner and a Judge of the Court exercise the same jurisdiction of the Court when determining (relevantly) a Class 1 appeal;

- (5) whether the town's water and sewerage infrastructure had the capacity to accommodate the connection of this proposed development to that infrastructure; and
- (6) whether the development generated unacceptable impacts in respect of the social cohesion of Gulgong and was in the public interest.

Held: upholding the appeal and granting consent subject to conditions:

- (1) the dispute as to characterisation related to whether the accommodation was either temporary or short term: at [136];
  - (2) the proposed development offered long term or permanent accommodation for mineworkers whilst they were contracted to service the mines. Therefore, the development was not within the definition of "tourist and visitor accommodation" as defined under LEP 2008. Accordingly, the proposed use was for something else and as it was not nominated in any other category under the zoning table, it must be an innominate use, which was permissible with consent on the site: at [144];
  - (3) the whole of LEP 2012 was a relevant consideration under s 79C of the EPA Act notwithstanding the terms of the savings provision in cl1.8A. The Court's overall assessment of the development had to consider whether the development was contrary to the aims of LEP 2012 and the objectives of the RUI Primary Production zone: at [202];
  - (4) the LEC Act does not import a hierarchy of decision makers as a general proposition such that the Commissioners are bound by the decision of a single judge sitting in the same class of proceedings (unless on a preliminary question of law in the same matter): at [54] and [56]-[67]. Obviously, in the case of an appeal under s 56A the Commissioner determining the matter from which the appeal is brought is bound by the decision of the Judge hearing the appeal on remitter unless the judge otherwise disposes of the appeal under s 56A(2): at [55];
  - (5) the absence of a hierarchy of the kind to put an obligation on Commissioners generally to follow decisions of Judges emerges from a consideration of the legislation: at [56]. These are functions to be exercised in the name of the Court by either a Judge or Commissioner: at [57]. The decision of the Commissioner is deemed to be a decision of the Court under [s 36](#) of the LEC Act: at [60];
  - (6) the social impact concerns expressed by the objectors about the strain on the town's health and community services, local housing pressures, increased traffic and pressures on roads, loss in house values, loss of local mining employment opportunities (especially for the youth of the town), and the loss of social cohesion in Gulgong were all adverse impacts that are representative of the volatile mining industry generally and were not specific to this development. The reality was that the Court could not stop the development of a temporary workers' accommodation within the local government area in circumstances where the current planning controls anticipate and facilitate this style of development: at [82];
  - (7) the social planning evidence and economic evidence was that the use of tourist accommodation and conventional housing to accommodate an influx of FIFO/DIDO workers in an upswing of mining was more detrimental to the town's economy and social fabric than placing them in a purpose built facility such as the development: at [82]-[83]; and
  - (8) the evidence was that the town's existing water and sewerage infrastructure could accommodate the development : at [240], [247].
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## **Court News**

Three new Acting Commissioners of the Court have been appointed on 28 May 2014 with their term expiring on 25 February 2015. The Acting Commissioners are:

- Ms Lisa Durland is an arborist and horticulturist;
- Mr Norman Laing is a qualified lawyer with knowledge and experience concerning land rights for Aborigines, disputes involving Aborigines, and Aboriginal cultural heritage. He is an Aboriginal man from the Dunghutti people on the mid north coast of NSW; and
- Mr Ross Speers is a chartered professional engineer. He has extensive experience in civil and structural engineering.