

Bates: Environmental Law in Australia

Updates to paragraphs 26 October - by Gerry Bates

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2.17

(1) In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 (at [47]) the High Court explained the process of statutory interpretation as follows:

“ This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself (105). Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text (106). The language which has actually been employed in the text of legislation is the surest guide to legislative intention (107). The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision (108), in particular the mischief (109) it is seeking to remedy”. Whilst on the use of Ministerial second reading speeches to help interpret the purpose of legislation, the High Court said in *SAEED v Minister for Immigration and Citizenship* (2010) 115 ALD 493 [32] that “the words of the Minister must not be substituted for the text of the law”

This approach was adopted by Pepper J in *Environment Protection Authority v Unomedical Pty Limited (No 3)* [2010] NSWLEC 198 to interpret the phrase ‘air pollution’ in the Protection of the Environment Operations Act 1997 (NSW) Dictionary. The Court said [182] and [193] “The language of the legislation is clear and there is no warrant for inserting, as was submitted by Unomedical, an obligation by the EPA to demonstrate that actual harm to the environment or to human safety is required before the emission constitutes “air pollution”, thereby narrowing the scope of the provision..... Accordingly, if the emission of EtO into the atmosphere satisfies the statutory definition of that term, then it amounts to “air pollution” for the purposes of s 128(2) of the Act irrespective of whether it has caused actual harm to the environment.”

(2) Designation by a council or Minister of a place as having local heritage value reflects matters of policy and evaluative judgments that, as a general rule, are not open to judicial review. Whilst it is not impossible for courts, assisted by expert evidence, to apply judicial method to evaluative judgments of this sort, it is likely that the legislation under which such decisions are made would evince an intention that the decision-maker, not the courts, would finally determine issues of social policy implicit in the heritage criteria laid down by the legislation: *Ilic v City of Adelaide* [2010] SASC 139

3.16

Whether a public authority is subject to a common law duty of care in carrying out its functions depends, amongst other things, on the legislation containing the statutory powers or duties. Where statutory provisions require an authority to be satisfied about certain things before

exercising a power, and the power is exercised without being so satisfied, then this may indicate want of reasonable care, and potential liability for economic loss to persons who are vulnerable, such as prospective purchasers of sub-divided lots. It is not reasonable to require prospective purchasers to take steps to check whether a council has improperly exercised a statutory power; see *Western Districts Developments P/L v Baulkham Hills Shire Council* [2009] NSWCA 283. This finding has implications, for example, for approval of sub-divisions in coastal zones that are potentially subject to impacts from climate change, where consent authorities are directed by legislation to be satisfied about certain matters before giving consent.

3.23A Statutory Liability

(1)

Another approach is to create a form of statutory liability for nuisance or negligence and thereby capture all the elements of liability within the statutory scheme. For example, the Water Act 1989 (Vic) s.157 creates a statutory claim for intentional or negligent conduct in relation to a flow of water that causes damage to property or persons, or causes economic loss. It has been held that this provision does not require that the damage be referable only to the flow of the water as opposed to its chemical composition; and that a case could be brought where the damage was caused by a flow that increased salinity levels in land and water and a consequent fall in production; *Pumpa v Goulburn-Murray Rural Water Corporation* [2010] VSC 169

(2)

Amendments to the *Trees (Disputes Between Neighbours) Act 2006 (NSW)* extend the jurisdiction of the NSWLEC to resolving neighbour disputes about high hedges that block sunlight or views on neighbouring properties.

Under the new laws, to commence on August 2, 2010, the Court must be satisfied that the applicant for relief has made a reasonable effort to resolve the matter with the owner of the land on which the hedge is situated. To support enforcement of court orders in respect of high hedges local councils may recover costs of trimming or removing any trees plus a prescribed administration fee.

(3)

Rights of solar access were also discussed in *The Benevolent Society v Waverley Council* [2010] NSWLEC 1082. This case led to the amendment of a planning principle in relation to solar access as required by State Environmental Planning Policy (Housing for Seniors or People with a Disability). Basic principles in relation to access to sunlight are outlined in *Parsonage v Ku-ring-gai* [2004] NSWLEC 347. In this case the Commissioner amended the *Parsonage* principles to prevent developers from avoiding them, for example by building smaller windows.

3.24

The Gunns20 litigation has finally been brought to a close with the timber company agreeing to settle with the last four of the so-called "Gunns20". Gunns has accepted an offer of settlement from the remaining four defendants in the proceedings, which are estimated to have cost it \$2.8

million. The settlement involves the payment of a total of \$155,088 towards the legal costs of the defendants, and has the effect of disposing of all remaining claims. See <http://www.theaustralian.com.au/news/nation/gunns-settles-with-last-pulp-mill-opponents/story-e6frg6nf-1225824866593>

5.1

The provision in s.100 of the Constitution, which seeks to protect reasonable use of waters of state rivers for conservation or irrigation, does not extend to underground waters in aquifers. Artesian water would not have been within the contemporary understanding of the concept of waters in rivers at the time of drafting; *Arnold v Minister Administering Water Management Act 2000* [2010] HCA 3

5.30-31

The penultimate line on page 123 should read “potentially” (word added) “entitling the respondents to compensation”. [5.31] should begin “It will be noted, however, that compensation is only payable if property is ‘acquired’; and extinguishment or sterilisation of a right of property does not necessarily amount to an acquisition. In *Commonwealth v WMC Resources Ltd* [1998] HCA 8 the property right arose out of the scheme of the statute (the Petroleum (Australia-Indonesia Zone of Cooperation) Act 1990 (Cth) and the Petroleum (Australia-Indonesia Zone of Cooperation) (Consequential Provisions) Act 1990 (Cth)), and the continued existence of the right depended on continuing statutory support. Such rights would be capable of effecting an acquisition if transferred to a third party; but the effect of the legislation extinguishing such rights did not, in this case, have such an effect. Brennan CJ said, at [17];

“Where a law of the Commonwealth creates or authorises the creation of a right, a statutory modification or extinguishment of the right effects its acquisition if, but only if, it modifies or extinguishes a reciprocal liability to which the party acquiring the right was subject. Thus in *Newcrest Mining (WA) Ltd v The Commonwealth*, the law which sterilised Newcrest’s right under its mining lease to carry on “operations for the recovery of minerals” on land vested in the Commonwealth was, in my opinion, a law for the acquisition of property because it extinguished the liability of the Commonwealth to have those minerals extracted from its land and thereby enhanced the property of the Commonwealth. But where a law of the Commonwealth creates or authorises the creation of a right that does not impose on the Commonwealth a reciprocal liability, the mere extinguishment of the right effects no acquisition of the right by the Commonwealth. The Commonwealth’s position remains unchanged by the extinguishment”. A majority of the Court agreed therefore that (at [24]; “The statutory modification or extinguishment of a permit or an interest in a permit is not an acquisition of property by the Commonwealth, for the Commonwealth was under no liability reciprocal to the permit or interest and acquires no benefit by the modification or extinguishment. It follows that the Consequential Provisions Act is not a law for the acquisition of property and is therefore not a law falling within s 51(xxxi)”.

5.64

The final report of the EPBCA Review was released in October 2009. Key recommendations include:

- the Act be renamed as the *Australian Environment Act*
 - principles of ecologically sustainable development (ESD) be confirmed as the overarching principles underpinning decision-making under the Act
 - the primary object of the Act should be to protect the environment, through the conservation of ecological integrity and nationally important biological diversity and heritage.
 - new matters of NES be included in the Act:
 - ‘ecosystems of national significance’
 - ‘vulnerable ecologically communities’
- an interim greenhouse trigger with a threshold of at most 500,000 tonnes of carbon dioxide equivalent emissions be introduced by way of Regulation to sunset upon the commencement of the Carbon Pollution Reduction Scheme (CPRS)
- the Australian Government expand the role of strategic assessments and bioregional plans which must consider cost-effective climate change mitigation opportunities
 - Australia move to a single national list of threatened species, including marine species and ecological communities.
 - COAG develop a national biodiversity (biobanking) system and standards.
 - require the identification of critical habitat for listed threatened species at the time of listing
 - require the Threatened Species Scientific Committee to indicate in the listing process the areas necessary for an ecological community to maintain its function
 - give the Minister powers to make emergency listings of threatened species and ecological communities
 - allow the taking of listed migratory species if management arrangements are adequate for the survival of the species
 - allow flexibility in the making of recovery and threat abatement plans
 - revise provisions relating to Key Threatening Processes
 - that COAG work towards a list of controlled species for which risk-mitigation measures can be implemented
 - the Australian government develop an industry Code of Conduct for consultants involved in the EIA process
 - the Environment Minister be allowed to consider a wider range of environmental considerations when making approval decisions, and that the Minister be allowed to request information on alternatives for projects
 - mandatory criteria for consideration should be prescribed
 - persons who made formal public comments in relation to a proposal be given legal standing
 - an undertaking for damages not be required as a condition of granting an interim injunction
 - the ordering of security for costs in public interest proceedings be prohibited
 - the DEWHA Secretary be given power to issue Environment Protection Orders
 - an Environment Reparation Fund be established.

6.15

Interpreting the objects and purpose of legislation may convince courts that common law rules or principles, that would otherwise survive unless clearly abrogated by the legislation, must give way to the general purposive intent. In *Graymarshall P/L v Director-General DECCW* [2010] NSWLEC 54, which concerned an order under s.36 of the Native Vegetation Act 2003 (NSW) to

produce information, the court held that a corporation could not resist such an order on the basis of a common law privilege against exposure to penalties. The general rule of statutory construction that a provision will be presumed not to abrogate common law rights in the absence of clear legislative intent was, said the judge, now considered to be of 'minimal weight'; at least where the objective purpose and intent of the legislation justified such a departure. Similarly, common law rules of natural justice or procedural fairness may so be modified by the provisions of legislation that provide a clear purposive intent to do so; see [18.21]

6.33

Line 8, from the last word 'in' onwards should read:

" In *Commonwealth v WMC Resources Ltd* (1998) HCA 8, for example, the High Court interpreted, from the nature of the rights given, that petroleum exploration permits granted under the *Petroleum (Submerged Lands) Act 1967 (Cth)* had all the hallmarks of a right of property. The question then was whether they had been 'acquired' thus triggering rights of compensation (see [5.30-31] above)

The approach of the ACT Court of Appeal in *Rashleigh* has effectively been confirmed by the High Court in *ICM Agriculture P/L v Commonwealth* [2009] HCA 51. In this case the majority of the Court held that a reduction in volumes of water allocated by aquifer licences, which had replaced old style bore licences, did not amount to an acquisition of property. There can be no acquisition unless some identifiable and measurable advantage is derived by another from or in consequence of the replacement of the plaintiffs' licences or reduction of their entitlements. The plaintiffs' rights under the bore licences did not 'return' to the State upon cancellation of those licences. The State gained no larger or different right. Three justices however did accept that the licences that were cancelled were a species of property and therefore capable of being 'acquired'; while Heydon J, dissenting, held indeed that the licences had created property rights that had been acquired without just terms compensation, which could not be delivered by the 'structural adjustment payments' that had been offered. Three other justices concluded that, in the circumstances, it was not necessary (because there had been no acquisition anyway) to determine whether the bore licences "were of such an insubstantial character as to be no more than interests defeasible by operation of the legislation which called them into existence".

For a full analysis of this case see Fisher '*Water law, the High Court and techniques of judicial reasoning*' (2010) 27 EPLJ 85

This case has also been subsequently followed in *Arnold v Minister Administering Water Management Act 2000* [2010] HCA 3

7.19

(2) A strategic planning instrument is not open to judicial review on grounds that the views of the decision-making authority as to the best way in which to facilitate sustainable development and protection of the environment are objectively mistaken. These are matters of evaluative social judgment that reflect matters of policy not law: *Ilic v City of Adelaide* [2010] SASC 139

(3) Adaptive management may also be encouraged by conditions of approval that utilize the precautionary principle for the purpose of guarding against residual risks from unexpected

trends or events by requiring continual monitoring and response management. In *Lawyers for Forests v Minister for Environment Heritage and the Arts* [2009] FCA 114, conditions on the operation of a pulp mill *inter alia* requiring the mill to stop operating if maximum effluent standards were likely to be exceeded and response strategies were unlikely to prevent this occurring, were held to be lawfully imposed under EPBCA s.134 (conditions of approval)

7.23

In *Kennedy v NSW Minister for Planning* [2010] NSWLEC 129 [32], Biscoe J confirmed his interpretation of the Court of Appeal decision in *Walker*:

“the Court of Appeal supported much of my reasoning and conclusions, as I discussed in *Aldous v Greater Taree City Council* [2009] NSWLEC 17, 167 LGERA 13 at [25]-[32]. The Court of Appeal held that it is mandatory that the Minister consider the public interest when determining a concept plan approval application under Pt 3A: at [39], [65], [66]. The majority (the third member of the court expressing no opinion) held:

- (a) if the concept plan approval had not been given in 2006 but at some later time, there would be a strong prospect that failure to consider the principles of ecologically sustainable development would invalidate the decision because of a growing public perception that ecologically sustainable development is plainly an element of the public interest: at [56];
- (b) the Minister had failed to consider the principles of ecologically sustainable development. Such consideration in relation to this project would have required consideration of long term threats of serious or irreversible environmental damage, not inhibited by lack of full scientific certainty, and this almost inevitably would have involved consideration of the effect of climate change flood risk: at [60];
- (c) it was surprising and disturbing that the Director-General’s report to the Minister did not address this aspect of ecologically sustainable development and that the Minister did not postpone his decision until he had a report that did: at [62];
- (d) since the Minister did not consider these aspects at the concept plan approval stage, the Minister or consent authority was bound to consider them at the development approval stage and must not regard approval of the concept plan as carrying any weight in that consideration. Failure to do so could be considered as evidence of failure to take into account the public interest: at [62]-[63]”.

8.1

The ability of a decision-maker to reject the policy underlying a strategic planning instrument would be antithetical to the fundamental objective of promoting consistency in decision-making; that individual decisions should be consistent with the overall plan; *Botany Bay City Council v Premier Customs Services P/L* [2009] NSWCA 226.

8.32

The process of public consultation by exhibition of a draft plan may lead to invalidity if the material presented would be misleading to a reasonable reader. ‘Misleading’ may be demonstrated by the fact that the document requires accompanying explanatory material that is not exhibited and that a decision not to exhibit that material is manifestly unreasonable. Where a local plan is being amended however a person is assumed to be able to understand the inter-related nature of the documentation placed on public exhibition; and it is not ‘misleading’ if all

the relevant documentation needed to understand those relationships is placed on exhibition; see *Homeworld Ballina P/L v Ballina Shire Council* [2010] NSWCA 65

8.40

Development plans are to promote the overall Planning Strategy. Plans and the Strategy serve as guidelines against which any proposed development is to be assessed. The minister, in approving such plans, must routinely assess and give weight to competing interests such as benefits, opportunities lost, cost and resources. Nothing in the Act or the Planning Strategy expressly requires the Minister to give consideration to whole of catchment flood mitigation in considering whether to approve a proposed Development Plan; *Cheltenham Park Residents Association Inc v Minister for Urban Development and Planning* [2010] SASC 93

9.3

Where a potential conflict exists between a strategic planning instrument and a development proposal, a court must interpret the planning instrument purposively to determine the extent of any conflict. A statutory direction that an approval must not compromise a desired environmental outcome or conflict with a planning scheme unless justified gives primacy to environmental outcomes, including outcomes in the local area as well as statewide or higher level outcomes; see *Webster v Caboolture Shire Council* [2008] QPEC 82

9.5

It will be an offence to commence development without approval in circumstances where approval is required; and it will be no excuse that the development is in any event within the permitted zoning. As Hasluck J said in *Swan Bay Holdings P/L v City of Cockburn* [2010] WASC 81, it would be misguided to allow unauthorized developments to proceed with scarcely any censure simply because they were thought to be compatible with the relevant zoning, as this would reduce requirements for development consent to the level of a mere formality.

9.19

For an example of a development (extension of a winery and restaurant) that was refused permission because of incompatibility with the Mornington Peninsula 'Green Wedge' Zone see *Fosters Group Ltd v Mornington Peninsula Shire Council* [2010] VCAT 104

9.26

An objector will not lose a right to appeal by reason only of a minor or technical mistake in the process of lodging a submission; see *Harding v Brisbane CC* [2008] QPEC 75. However, where a failure to comply with process results in an incompetent appeal unless the court allows an extension of time, then the consequences of allowing such an extension on both applicant and objector must be weighed in the balance; see *Kangaroo Point Residents Association v Brisbane City Council* [2009] QPEC 33

9.46

(1)

Ministerial powers to approve major projects under Part 3A are subject to the provisions of State Environmental Planning Policies (EPAA s.75R). The power to approve a project under s.75J must therefore be subject to the implied limitation that the legislature did not intend to allow the minister to approve unlawful conduct; that is to approve the carrying out of a project that could not lawfully be carried out because it was prohibited by a SEPP; see *Hill Top Residents Action Group Inc v Minister for Planning* [2009] NSWLEC 185

(2)

EPAA s.75G allowed the minister to appoint a panel of experts to assess any aspects of a proposed major project. It has been held that the intention of the legislature in conferring this power was that the panel should consist of technical experts; so that where one member of the panel was not a technical expert then this was not relevantly a 'panel' of experts; see *Hill Top Residents Action Group Inc v Minister for Planning* [2009] NSWLEC 185. The Court held however that this error did not affect the validity of the minister's approval; there was no intention expressed by the Act that this should be the effect. What it did mean however was that the rights of appeal under ss.75K and 75L of the Act, which would otherwise have been excluded if the project had been the subject of a report by a panel of experts, had effectively never been taken away. **Note:** s.75G has now been repealed; and the relevant provisions of ss.75K and 75L now refer to review by the Planning Assessment Commission not a panel of experts.

(3) The Part 3A process is subject to the legitimate criticism that neither the Minister nor the Department of Planning are primarily 'enforcement' agencies and that therefore monitoring and enforcement of the conditions of development consents issued by the Minister will be subject to a rigorous monitoring regime. In practice the Department may rely on complaints from the general public to point to breaches of development consents. A good example is *Minister for Planning v Moolarben Coal Mines Pty Ltd* [2010] NSWLEC 147 where, appraised of a breach involving clearance of native vegetation that included an endangered ecological community, the Minister did ultimately commence proceedings against the offender under ss.75D and 125 of the Act.

10.58

In considering whether development that involves additions or alterations to existing or approved development is itself 'designated development' Clause 35 of Pt.2 Sch.3 of the EPAA Regulation 2000 directs that development will not be designated if, in the opinion of the consent authority, the additions or alterations will not significantly increase the environmental impact of the total development. Clause 36 of Pt.2 Sch.3 mandates that certain factors must be taken into consideration in reaching this conclusion. In *Boral Resources (Country) P/L v Clarence Valley Council* [2009] NSWLEC 81 the court held that the formation of an opinion under clause 35 was a precondition to the exercise of power to grant development consent; and that failure to impose relevant conditions of consent, in the absence of any other evidence to the contrary, meant that the necessary conclusions could not have been formed based on the factors referred to in Clause 36.

A one-off deposition of material at a nominated location that does not involve any form of processing of material is not 'designated development' within the meaning of EPAA Regulation 2000 sch.3 Pt. 1 cl.19 'extractive industries'. An 'industry' denotes commercial activities carried on by industrial processes; a concept that carries with it a notion of continuity of process not a 'one-off' application: *SJ Connelly CPP P/L v Ballina Shire Council* [2010] NSWLEC 128.

10.96

Applications for approval under the EPA are required for 'environmentally relevant activities' (ERA); defined in sch.4 as activities prescribed by regulation. Storage of petroleum in underground storage tanks is, for example, an ERA. An approval to carry on an ERA granted under the EPA is not relevantly however a 'development approval' referred to in the Integrated Planning Act. The only source for such an 'approval' is the EPA; see *Strasburger Enterprises (Properties) P/L v Gold Coast City Council* [2009] QPEC 103

10.100

Assessment of environment effects under the Environment Effects Act 1978 (Vic) is not to be restricted to solely physical effects, but may incorporate reference to economic and social effects. Although the Act does not define 'environment' there is no indication that it would exclude such considerations; and indeed reference to the provisions of the legislation and accompanying guidelines suggests that such considerations would be encapsulated within the statutory scheme; see *Friends of Mallacoota v Minister of Planning* [2010] VSC 222

11.40

In late 2009, the *NSW Sea Level Rise Policy Statement* adopted sea level rise benchmarks of up to 40 cm by 2050 and 90 cm by 2100. This corresponds to a projected erosion and recession distance of 45-90 metres landwards. The Federal Government's report *Climate Change Risks to Australia's Coast* however predicts that sea-level rise relative to 1990 could be between 75 - 190 cms, with 1.1 m being adopted as a plausible sea-level rise. Partly in response to this, and the pressures exerted by the Vaughan litigation (see **14.28**), the Coastal Protection Act 1979 (NSW) has been amended by the *Coastal Protection and Other Legislation Amendment Bill (2)* to introduce *inter alia* the following provisions:

- landowners in specific locations will now be able to place sand or sandbags on the beach under strict conditions in order to reduce the impact of coastal erosion on their properties. If the bags cause erosion they are to be removed. Draft Minister's Requirements for these works have been released for consultation.
- consent authorities assessing development applications for long term coastal protection works such as seawalls must be satisfied that appropriate arrangements are in place to restore beaches if they are eroded by the works.
- councils may levy a coastal protection service charge on land where the current or past landowners have voluntarily constructed coastal protection works. This charge covers council's costs of maintaining the works and restoring the beach if the works cause erosion.
- A NSW Coastal Panel has been established to provide expert advice to the Minister and councils on coastal management issues. It is proposed that the Panel will also be the consent authority for long term coastal protection works where the council does not have a coastal zone management plan in place.
- Enhancing statutory exemptions from liability for councils and State agencies when their coastal management activities are carried out in good faith.

The Bill will be supported by a series of statutory and non-statutory guidelines. Once the amendments are operational the Minister will then be directing councils in areas with properties at high risk of beach erosion to prepare a Coastal Erosion Emergency Action Plan and Coastal Zone Management Plan within a specified period.

12.24

s.38CA of the GBRMPA provides that a person is guilty of an offence if the person intentionally or negligently uses or enters a zone for the purpose of fishing where that fishing activity is not permitted under the relevant zoning plan. A commercial fisherman who has neither properly functioning instruments of navigation nor the skill to use them was properly convicted under this provision. His conduct exhibited such a degree of negligence and such a high risk that it properly fell within the standards set by s.5.5 of the Commonwealth Criminal Code for conduct constituting negligence and merited punishment for the offence; *White v Patterson* [2009] QCA 320

12.74

The existence of a 'structural adjustment payment' in *ICM Agriculture P/L v Commonwealth* [2009] HCA 51 did not prevent Heydon J, in dissent, concluding that the payment was not sufficient to constitute 'just terms' acquisition of a property right in water. See further on this case **update 6.33**

12.86

NVA s.44 ascribes legal responsibility for unlawful clearing to the landowner, unless it is established that the clearing was carried out by another person whom the landowner did not cause or permit to carry out the clearing. To cause clearing does not involve the same sort of control that would be necessary to establish vicarious liability for the acts of an independent contractor. Where clearing by a third party arises as a natural consequence of the conduct of the landowner, then the landowner has caused the clearing; *Department of Environment and Climate Change v Olmwood P/L* [2010] NSWLEC 15

12.87

In *Director-General, Department of Environment and Climate Change v Walker Corporation Pty Limited (No 2)* [2010] NSWLEC 73, the defendant, through its contractor, was found guilty of clearing native vegetation contrary to s 12(1) of the *Native Vegetation Act 2003* (NSW). Justice Pepper interpreted 'vegetation' as including both dead and alive vegetation: "...a definition of the term "vegetation" which includes both dead and living vegetation achieves greater harmony with an expansive statutory conceptualisation of 'native vegetation' which includes the entire plant community from groundcover up."

The onus to establish the defence that clearing was only 'regrowth' under s 19 of the Act was held to lie with the defendant, on the balance of probabilities. The approach under the previous, now repealed, legislation, outlined in *Department of Land and Water Conservation v Bailey* (2003) 136 LGERA 242, under which the prosecutor bore the onus of negating beyond reasonable doubt the 'regrowth' exemption, does not therefore apply under the NVA. The onus under the NVA lies on the defendant to prove on the balance of probabilities that the exemption applies; the prosecutor can also seek to negative that defence on the balance of probabilities, but that does not shift the onus to the prosecutor: *Department of Environment and Climate Change v Olmwood P/L* [2010] NSWLEC 15

12.104

A defence to cutting down a tree in breach of a tree preservation order may be that the tree was dangerous. The onus is on the defendant to establish that this state was established in relation to the whole tree, not just a part of it; and before cutting down the tree. 'Dangerous' means, unless otherwise defined 'full of danger or risk; causing danger; perilous; hazardous; unsafe'; see *Gosford City Council v Forrester* [2010] NSWLEC 49

12.112

Minor changes have been proposed to the Biobanking Assessment Methodology. These may be viewed at <http://www.environment.nsw.gov.au/biobanking/methodologyupdate.htm>

12.198

In *Gordon Plath of the Department of Environment and Climate Change v Fish; Gordon Plath of the Department of Environment and Climate Change v Orogen Pty Ltd* [2010] NSWLEC 144, the defendants were convicted under s.118D of the National Parks and Wildlife Act 1974 (NSW) in that, as consultants assisting in the preparation of an application for development consent, they failed to advise the developer that damaging koala habitat was unlawful under the NPW Act. The developer subsequently cleared the vegetation based on the advice of the defendants. Both defendants pleaded guilty and were convicted. Justice Pain imposed fines totalling \$15,000 (\$5000 Fish; \$10,000 Oregon) plus prosecutor's costs amounting to \$105,000 which the defendants agreed to equally share. Both defendants were also ordered, pursuant to s. 205(1)(c) of the NPW Act, to conduct mapping in specific parts of the koala habitat and to publicise the offence.

13.92

In *Young v Corporation of City of Whyalla* [2009] SASC 314, a vessel was held to be 'rubbish' for the purposes of s.235 of the Local Government Act 1999 (SA). The offence of 'depositing rubbish' had been made out by the action of the appellant in mooring the vessel in such a position that it would inevitably come to rest on rocks in a public place upon the receding of the tide.

13.93

A place cannot be lawfully used for a particular purpose if it does not have lawful authority required for that use. A site cannot therefore be 'lawfully' used as a waste facility if it does not have requisite development consent; *The Hills Shire Council v Suciu* [2009] NSWLEC 145

13.120

The Commonwealth Administrative Appeals Tribunal has heard an appeal about a permit granted to NSW under s 19 of the *Environment Protection (Sea Dumping) Act 1981* (Cth) to enable the scuttling and placement of the decommissioned frigate *HMAS Adelaide* as an artificial reef off Avoca Beach near Terrigal in New South Wales. The No Ship Action Group Inc. sought review of the decision to grant the permit. The case against the artificial reef proposal was based principally upon concerns relating to potential harmful effects from red lead-based paint in the ship and copper based anti-fouling on the hull. The Tribunal determined to allow the scuttling of the ship to proceed, but to vary the decision by imposing additional conditions to avoid possible harmful impacts on human health and the marine environment; *No Ship Action Group Inc and Minister for Sustainability, Environment, Water, Population and Communities and State of New South Wales (Joined Party)* [2010] AATA 702.

14.17

One consequence of the failed CPRS, and with it the proposed Emissions Trading Scheme, has been the introduction of legislation to amend the Renewable Energy Target (RET) scheme under the Renewable Energy (Electricity) Act 2000 (Cth). The Government has set a target to supply 20 per cent of Australia's energy needs through renewable sources by 2020. In order to achieve this, the scheme creates an obligation for liable entities to surrender a quantity of Renewable Energy Certificates (RECs) annually or pay a shortfall (penalty) charge of \$65/MWh. A liable entity's obligation to purchase a REC is determined on an annual basis according to the "renewable power percentage" set by the Government and the amount of electricity which the liable entity purchases. In order to satisfy the demand for RECs, the scheme includes a mechanism for eligible generators to create RECs through either small-scale or large-scale generation of renewable energy.

It has been feared however that the inclusion and subsidising of small-scale technologies, such as solar water heaters, in the original RET scheme, has had a negative impact on investment in large-scale renewable energy projects.

The Commonwealth Parliament has now reacted by passing legislation to separate the RET into the Large-scale Renewable Energy Target and the Small-scale Renewable Energy Scheme. Large-scale RECs can be created by accredited power stations. Small-scale RECs can be created by solar water heaters and small generation units and sold through a 'clearing house' established under the Act. When there is a shortage of supply in the clearing house, the Regulator will be empowered to create small-scale RECs. The scheme will not be operative until regulations have been made consequent upon the passage of the legislation. Draft regulations may be viewed at <http://www.climatechange.gov.au/government/submissions.aspx>

14.28

(1) The NSW Court of Appeal decision in *Western Districts Developments P/L v Baulkham Hills Shire Council* [2009] NSWCA 283, noted in **update 3.16**, has implications for common law actions in negligence concerning approval of sub-divisions in coastal zones that are potentially subject to impacts from climate change, where consent authorities are directed by legislation to be satisfied about certain matters before giving consent.

(2) Partly in response to the controversies raised by the *Vaughan* case, the NSW Parliament has introduced reforms to the Coastal Protection Act 1979 (NSW) that allow landowners to protect their properties from coastal erosion, under strict conditions. For an outline of these reforms see **11.40** of this Update.

14.20

The Building Energy Efficiency Disclosure Act 2010 (Cth) requires owners and tenants of large commercial office buildings to declare the energy efficiency of those buildings before selling or leasing the building. The owner or tenant of a building subject to this scheme must register a building energy efficiency certificate ("BEEC") before it offers to sell or lease or invites offers to purchase or lease the building. Prospective purchasers and lessees have a right to require the owner or tenant to provide them with a copy of the BEEC. Any advertisements for the sale or lease of the building must contain the energy efficiency rating of the building. The maximum penalty for not having a registered BEEC or not providing an energy efficiency rating in an advertisement is \$110,000.

This scheme complements the NGERs scheme (see **14.14**), which imposes obligations on owners, facility managers and tenants, depending on who is in a position to control energy consumption in respect of a particular building.

14.28

Prospects for using laws of nuisance in climate litigation have been dealt a blow by the refusal of the 4th U.S. Circuit Court of Appeals panel to entertain the notion, upheld in the lower court, that emissions from power plants constituted a public nuisance. The court stressed essentially that such matters raised issues of policy that courts were not competent to determine: *State of North Carolina v Tennessee Valley Authority*

14.30

VCAT continues to endorse a policy of requiring preparation of a coastal hazard vulnerability assessment, in appropriate cases, even for small scale development, where the costs might be quite prohibitive. State policy makes it quite clear that the wider risks and consequences for the community involved in such proposals are the primary consideration justifying the imposition of such a condition; see *Owen v Casey City Council* [2009] VCAT 1946

14.31

Uncertainty about the effects of climate change on the availability of water supply has convinced VCAT to refuse permission to extract groundwater for agricultural irrigation: *Alanvale Pty Ltd v Southern Rural Water & Ors* [2010] VCAT 480 (21 April 2010). Applying the precautionary principle in the context of climate variability and available water resources, the Tribunal concluded that the licence application fell outside the sustainability objectives of the Water Act 1989 (Vic)

15.3

In *Truth About Motorways P/L v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at [611] Gaudron J said that it well established that the writ of prohibition may issue to a person who has neither a direct nor special interest in the subject-matter of the proceedings. Relying on this statement the Court in *Cheltenham Park Residents Association Inc v Minister for Urban Development and Planning* [2010] SASC 93 accorded standing to a residents association having regard inter alia to its representative status, the purpose for which it was formed and the interests of its members.

15.23

In *Cheltenham Park Residents Association Inc v Minister for Urban Development and Planning* [2010] SASC 93 the Court accorded common law standing to a residents association having regard inter alia to its representative status, the purpose for which it was formed and the interests of its members; a similar test to that adopted in cases that rely on statutory criteria such as 'person aggrieved' or 'interested'..

16.3

Criminal and civil remedies may be pursued independently of each other, subject to any (unlikely) contrary intention evinced by statute. For example, a decision by a regulatory authority to prosecute for a breach of legislation does not preclude an application for enforcement by way of civil remedies, for example remediation; see *Page v Manningham City Council* [2010] VSC 267

16.23

The power to enter land to determine whether a contravention is being committed, granted under the Native Vegetation Act 2003 (NSW) s.35, is 'spent' once that determination has been made. But until the determination is made whether there is a contravention or not, then this power may be exercised any number of times, so long as it for the stated purpose; *Walker Corporation P/L v Director-General, DECCW (No.2)* [2009] NSWLEC 177

16.29

The denial of a right to corporations to resist production of information on the basis of self-incrimination, set out in *Caltex*, has been extended to another common law right, the privilege against exposure to penalties. In *Graymarshall P/L v Director-General DECCW* [2010] NSWLEC 54, which concerned an order under s.36 of the Native Vegetation Act 2003 (NSW) to produce information, the court held that a corporation could not resist such an order on the basis of such

a right. The general rule of statutory construction that a provision will be presumed not to abrogate common law rights in the absence of clear legislative intent was, said the judge, now considered to be of 'minimal weight'; at least where the objective purpose and intent of the legislation justified such a departure.

16.47

A director's conduct in employing a contractor to clear land in breach of native vegetation clearance controls was attributable to the corporation by reference to one or more of three alternative rules of attribution:

- (a) The director was the 'mind and will' of the company in respect of the clearance
- (b) The company is vicariously liable for the conduct of the director. Clearing was within his implied or apparent authority.
- (c) The director's conduct is covered by the special rule of attribution, namely he was one of two directors of a company that owned the land on which the offence occurred, at least as the clearing furthered the company's interests or was not against them; see *Director-General DECC v Jack and Bill Issa P/L (No.5)* [2009] NSWLEC 232

16.56

Merely diverting from normal operational procedure for example is unlikely to relieve the employer of its vicarious responsibilities for the actions of its employees: *Environment Protection Authority v New South Wales (DECCW)* [2010] NSWLEC 67.

16.62

- (1) Determining whether a 'mistake' is one of fact or law is 'notoriously difficult; *Australian Fisheries Management Authority v Su* (2009) 176 FCR 95 at [23].

In *Environment Protection Authority v Unomedical Pty Limited (No 3)* [2010] NSWLEC 198 [262], Pepper J identified from the authorities the following propositions:

- (a) a positive belief in a state of facts which, if they existed, would make the act innocent and take the act outside the operation of the statute;
 - (b) the act must be based on a reasonable belief;
 - (c) the mistake must not be one of law;
 - (d) a mixed mistake of fact and law will generally be a mistake of law;
 - (e) the defendant has the evidentiary burden of raising the defence;
 - (f) the prosecutor must then negative the defence beyond reasonable doubt;
 - (g) a lack of knowledge or mere ignorance is insufficient to establish the defence;
 - (h) there must be more than a general understanding that everything is in order;
 - (i) the mistaken belief must be sufficiently specific to relate to elements of the offence in question;
 - (j) an absence of fault or an absence of negligence is not an element of the defence; and
 - (k) the ground of exculpation is a narrow one
- (2) Officially induced error

In *Environment Protection Authority v Unomedical Pty Limited (No 3)* [2010] NSWLEC 198 [285] Pepper J set out the necessary elements of this defence, as gleaned from overseas authorities, as follows:

- (a) an error of law or of mixed fact or law was made;
- (b) the defendant who committed the act giving rise to the commission of the offence considered the legal consequences of his or her actions prior to committing the act;
- (c) advice was sought by the defendant and was obtained from an appropriate official;
- (d) the advice was reasonable;
- (e) the advice was erroneous; and
- (f) the defendant relied on the advice in committing the act.

The Court however pointed out that [305] "While it is correct to say, as Unomedical did, that *Ostrowski* does not preclude the operation of the defence in Australia, a close examination of the reasons of that decision cannot give Unomedical the comfort it desires..... I do not accept that the defence of officially induced error of law is a defence available to Unomedical at common law in Australia"

16.63

On 'practicable means' to minimize air pollution see *Environment Protection Authority v Unomedical Pty Limited (No 3)* [2010] NSWLEC 198 at [209]: "it follows that the nature of the risk, the cause of the risk, the state of the scientific and engineering knowledge and learning at the relevant time and the means by which the air pollution could have been prevented or minimised, all form part of the assessment of whether Unomedical took "such practicable means" as may be necessary to prevent or minimise air pollution ... Contrary to the submission put by the EPA, in my view, when combined what underlies these factors is an inherent element of reasonableness. That is not to say that the touchstone of reasonableness is a necessary element to which regard must be had of and by itself in construing the provision - if it were it would have been expressly referred to in the body of the section - but rather, that when examined in their totality, these factors necessitate the implementation of a specific measure that is reasonable in all the circumstances."

16.77

(1) Although a court may well look favourably upon negotiated settlements, making orders that reflect terms that have been agreed between the parties, nevertheless the court also has a duty not simply to accept and adopt the position put forward by the parties but to determine the appropriate penalty as warranted by the circumstances, in the light of the nature of the unlawful conduct and its consequences, and the need for deterrence. In *Minister for Environment, Heritage and the Arts v Rocky Lamattina and Sons P/L* [2009] FCA 753 the pecuniary penalty imposed by the Court for breach of provisions of the EPBCA (\$220,000) was double that that had been agreed between the parties.

(2)

There may be a greater need for specific deterrence where the defendant has knowledge of the responsibilities and consequences of non-compliance; *Cessnock City Council v Quintaz P/L*; *Cessnock City Council v McCudden* [2010] NSWLEC 3. In this case the offences arose out of a reasonable suspicion that asbestos contaminated material was present on the site. The defendant company and director operated a waste disposal business that, amongst other things, dealt with demolition and asbestos waste. The defendants failed to comply with a clean-up notice and withheld information sought by Council. The corporation was fined \$112,500 plus costs of \$45,700; the director \$21,000 plus costs of \$26,700

16.79

In *Betland v Environment Protection Authority* [2010] NSWLEC 183 a custodial sentence of four months, imposed on an offender in a local court for using a prescribed substance, namely a poison, to attempt to harm a bird without consent, was set aside by the Land and Environment Court as being excessive in the circumstances. S.5 of the Crimes (Sentencing Procedure) Act 1999 (NSW) requires a court not to sentence an offender to imprisonment unless it is satisfied that no other penalty is appropriate, having regard to all the possible alternatives. In this case the Court considered that a fine was an appropriate alternative penalty. Pepper J undertakes at [59] a useful survey of cases in which imprisonment has been considered and applied in environmental cases, both in Australia and overseas.

16.80

A public authority that has responsibility for environment protection, and in particular in a sensitive alpine area, should be expected to be setting an example; and these particular attributes of the defendant should be considered in setting a penalty that reflects specific deterrence for an offence of pollution: *Environment Protection Authority v New South Wales (DECCW)* [2010] NSWLEC 67.

16.82

The totality principle does not strictly apply where the offences are separate and against different defendants (for example a corporation and its director) where the two offences both arise from one incident, and where the director is the sole director of the corporation, then the court ought to adjust the monetary penalties to reflect the close connection of the two offences; *Cessnock City Council v Quintaz P/L*; *Cessnock City Council v McCudden* [2010] NSWLEC 3.

16.84

(1) After footnote 297 insert “including to what extent the defendant could have foreseen the offence committed by an employee: *Environment Protection Authority v New South Wales (DECCW)* [2010] NSWLEC 67.”

(2) The ability of an offender to pay the fine imposed may ‘trump’ considerations of both consistency and proportionality in sentencing: *Environment Protection Authority v Straits (Hillgrove) Gold P/L* [2010] NSWLEC 114

16.86

The degraded nature of the environment into which pollution was unlawfully released is not a mitigating factor in sentencing. Pollution can occur incrementally and each pollution incident degrades the environment even more; *Environment Protection Authority v Straits (Hillgrove) Gold P/L* [2010] NSWLEC 114

16.87

The NSW Court of Appeal has stressed that in strict liability cases it is particularly important that there should be an appropriate assessment of the culpability of the offender. It is axiomatic that the penalty should reflect not only the gravity of the offence but the circumstances of the offender. So in this case, where a fine and costs order would have forced the defendant to sell his home, this could be seen to be an excessive consequence of the strict liability of the defendant for an offence committed in subjectively innocent circumstances. The Court therefore reduced the penalty of \$22,500 imposed by the Land and Environment Court to \$3000; and ordered costs of \$4,110; see *Ngo v Fairfield City Council* [2009] NSWCCA 241

17.19

(1)

Litigation will not be considered to be in the 'public interest' merely because some members of the public have or display a particular interest in the case and express their support for a self-funded litigant. In *Teoh v Hunters Hill Council* [2009] NSWLEC 121 a neighbourhood planning dispute was held not to justify categorization as in the 'public interest'. And even where litigation may be classed as in the 'public interest' the self-interest of one of the parties in the outcome of the proceedings may also tend to weigh against a departure from the usual costs order; see *Ku-Ring-Gai Council v Minister for Planning (NSW) (No.2)* [2008] NSWLEC 276

(2)

In determining appropriate orders for costs, attention must be directed primarily at the character of the litigation not the subjective motivation of the litigants; *McClure v Mayor and Councilors of the City of Stirling* [2009] WASC 247

17.21

Indemnity costs are less likely to be awarded against a self-represented litigant who discontinues an unmeritorious case within a reasonable period of receiving legal advice that the case is without legal merit. Indeed there is a considerable policy advantage in ensuring that a punitive costs order is not made against a party who elects to discontinue an unmeritorious appeal; see *Macedon Ranges Shire Council v Thompson* [2009] VSCA 209.

17.23

The position as to determinations of costs in the LEC following the introduction of the Land and Environment Court Rules 2007 is that costs must follow the event unless it appears to the court that some other order should be made; rule 42(1) of the Uniform Civil Procedure Rules 2005 (UCPR). The Land and Environment Court Rules prevail over the UCPR only to the extent of any inconsistency between them; Civil procedure Act s.11; UPCR rule 1.7 and sch.2. To

displace the effect of UPCR rule 42(1) it must be shown there is something out of the ordinary in the case to justify the departure. The courts must be very careful to see that the concept of 'public interest' litigation does not become an umbrella for the exercise of discretion in relation to costs in an unprincipled, haphazard and unjudicial manner; *Hastings point Progress Association Inc v Tweed Shire Council* [2010] NSWCA 39. In this case Basten J refused to exercise a discretion for three reasons; the defendant was a commercial enterprise not a state government entity; the question raised involved a discrete point of interpretation that did not have broad ramifications for the community at large, nor even for environment protection; the matter was not without consequence for the private interests of members of the plaintiff association. Young JA said at [50]; "It must be remembered that once costs are incurred, they do not just vanish into the ether if a court declines to make an order that a party pay them. If a successful party does not obtain an order for costs, that party has to pay those costs itself. If a developer, that really means that the extra costs are passed on to purchasers of lots in the development...."

In *Caroona Coal Action Group Inc v Coal Mines Australia P/L (No.3)* [2010] NSWLEC 59, the Court determined, for reasons similar to *Hastings*, that the usual rules as to costs should apply, Preston CJ said there was a three step approach to costs in public interest litigation: first, was the litigation truly brought in the public interest; second, were there any countervailing circumstances, such as disentitling conduct by the applicant or matters contrary to the public interest; third, is there 'something more' that would entitle a party to relief from the usual costs order?

As to 'disentitling conduct' it was held in *Shoalhaven City Council v South Coast Concrete Crushing and Recycling P/L* [2010] NSWLEC 80 that the applicant should not be disentitled to a costs award merely because it had pursued litigation about the lawfulness of the respondent's activities even though it knew that planning approval had been sought from the Minister and could be granted.

17.23A (new paragraph) Protective Costs Orders

Just as the spectre of costs awards, should a plaintiff lose, effectively stifle litigation; so may a determination 'up front' that a plaintiff's costs will be waived or limited propel a plaintiff into making the decision to proceed with litigation. A 'protective costs order' is a court order by which litigants can obtain a ruling from the Court, before commencing litigation, about costs should they be unsuccessful. An indication whether costs would be waived or limited by the court obviously carries serious weight in deciding whether to go ahead with the litigation. Such an order may determine whether a litigant may have to pay the other side's costs if they lose; or whether those costs can be limited to a pre-determined amount. Such an order, enabled under the *Judicial Review Act 1991 (Qld)* s.49, was used in *Alliance to Save Hinchinbrook Inc v Cook* [2005] QSC 355, the court ruling that the applicant for relief would only have to pay its own costs, regardless of the outcome. The exercise of such a discretion will involve preliminary assessment by the court that the substantive proceeding is not frivolous, unreasonable or without reasonable basis. 'Costs capping' may be available in other jurisdictions under rules about management of proceedings or costs relating to civil litigation; for example in NSW the *Uniform Civil Procedure Rules 2005 (NSW)* rule 42.4; and the *Land and Environment Court Rules 2007 (NSW)* rule 4.2. Acting in accordance with the dictates of justice is the primary consideration for exercising such a discretion; *Civil Procedure Act 2005 (NSW)* ss.58 and 60. A protective costs order could also constitute a reasonable basis for capping an order for security for costs; see [17.25]. In *Blue Mountains Conservation Society Inc v Delta Electricity* [2009] NSWLEC 150 the exposure of the plaintiff to a costs order was capped at \$20,000 because the

plaintiff had indicated that it could not proceed if its costs exposure exceeded this amount; and the court determined that it would be against the public interest if the case did not proceed. It was also relevant that the plaintiff's counsel was acting 'pro bono'; and that the respondent was a state government corporation that would not be caused undue financial hardship by the making of such an order. Any temptation for a party awarded such an order to run its case less than efficiently could be met by exercising the statutory power to vary such an order should special circumstances arise. The respondent then claimed security for costs in excess of \$20,000; *Blue Mountains Conservation Society Inc v Delta Electricity (No.2)* [2009] NSWLEC 193. This application was dismissed, on the basis that it would be clearly contradictory to the protective costs order already made to order security for an amount greater than had already been set by the order. Leave to appeal to the court of Appeal on this issue was summarily dismissed by the court; *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 264. It was stressed however in *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited and Minister for Mineral Resources* [2009] NSWLEC 165 that a maximum costs order would not be awarded unless necessary to facilitate access to justice for the applicant; and that the factors relevant to the exercise of this discretion, and their relative weight, need to be evaluated in the particular circumstances of each individual case.

18.7

In relation to costs in merits appeals and the application of the Land and Environment Court Rules 2007 (NSW) Pain J said in *Meriton Apartments P/L v Council of the City of Sydney (No.2)* [2010] NSWLEC 63 that so long as a party raises issues of merit that are at least 'arguable' then costs are unlikely to be awarded against an unsuccessful party.

18.9

The provisions of a local planning instrument, in this case a Development Plan, would not be open to judicial review on grounds seeking to challenge the Minister's view as to the best way to facilitate sustainable development and environmental protection. Such issues reflect matters of policy and evaluative judgments that are the province of local councils and the minister to determine. Similarly, making a decision about whether a place meets the statutory criteria for heritage status involves an evaluative approach; and whilst it would not be impossible that a court could adopt such an approach, assisted by expert evidence, it is more likely that parliament would intend, by establishing statutory consultative processes, to leave such a decision to the minister as a matter of social policy; *Ilic v City of Adelaide* [2010] SASC 139

18.12

Reasons for a decision may also be gleaned, in the context of court proceedings, from responses to interrogatories directed to the decision-maker; and, in NSW, by calling in aid rule 4.3 of the Land and Environment Court Rules 2007, under which a public authority may be required to furnish a written statement setting out reasons for a decision that include:

- (i) the public authority's findings on any material questions of fact, and
- (ii) the evidence on which any such findings were based, and
- (iii) the public authority's understanding of the applicable law, and
- (iv) the reasoning processes that led to the decision,

18.13

In *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited and Minister for Mineral Resources (No 4)* [2010] NSWLEC 91, the plaintiffs had argued that the public interest in the principle of open justice should defeat confidentiality orders sought by Coal Mines Australia to restrict public access to its Expression of Interest (EOI) in the Caroona mining exploration license. The Court concluded that because particular statements and data in the EOI were confidential, confidentiality orders should be made that would continue to restrict access to the entire EOI; but that a Redacted EOI should be produced that would allow public access to the EOI without the confidential material. Such an order would not offend the principle of open justice.

18.14

A basic rule that applies to privative clauses is that Parliament does not intend to cut down the jurisdiction of the courts save to the extent that the legislation in question expressly so states or necessarily implies. Accordingly, privative clauses will be strictly construed. For an example where a privative clause was interpreted as clearly excluding applications for orders relating to the assessment or approval of a project (the Tasmanian pulp mill project) see *Landon-Lane v Minister for Economic Development and Tourism* [2009] TASSC 50

A privative clause may not, however, operate where a jurisdictional error has been made by the decision-maker; see *Kirk v Industrial Relations Commission of NSW* [2010] 239 CLR 531 referred to in *Cheltenham Park Residents Association Inc v Minister for Urban Development and Planning* [2010] SASC 93. See also **update [18.15] (2)** below

18.15

(1)

In *Waratah Coal Inc v Minister for Environment Heritage and the Arts* [2008] 164 LGERA 187 the question arose whether the requirement under s.74B of the Environment Protection and Biodiversity Conservation Act 1999 (Cth), that the Minister respond to a referral under the Act within 20 business days, was an essential precondition (jurisdictional fact) to the validity of the exercise of power by the Minister, so that a response outside the statutory time limit would be invalid. Adopting the approach outlined in *Project Blue Sky* and other cases, the Federal Court found that there was nothing in the EPBCA that intended to invalidate the Minister's decision if the time-limit was not complied with; indeed sections 156(3) and 518 of the Act stated that a failure to comply with a time limit did not affect the validity of an act and applied to validate the response. The time limit had been included in the EPBCA to spur the minister into action not to limit the scope of his authority; indeed, were it otherwise then the purpose of 74B (decisions on referrals) would be substantially frustrated (at paragraphs 47 and 50)

(2)

A privative clause contained in legislation will not preclude judicial review on the ground of jurisdictional error. This is because such a clause can only operate in the context of the jurisdiction conferred on the decision-maker by the statute in question. For confirmation of this principle see *Minister Administering Crown Lands Act v NSW Aboriginal Land Council* [2009]

NSWCA 352; *Cheltenham Park Residents Association Inc v Minister for Urban Development and Planning* [2010] SASC 93

18.18

A regular practice of notification may also involve a legitimate expectation that material will be updated; *Barton Securities Ltd v Warringah Council* [2009] NSWLEC 179

18.20

The right to a hearing in respect of decision-making will always be determined in the context of the statutory scheme that confers such rights. In this case, where the environmental effects of a boat-ramp were in issue, the applicants had been afforded an opportunity to comment on those effects. The court held that construction of the statutory processes in question indicated that the applicants had no further rights to demand a hearing in relation to the final decision. This conclusion was based largely on the discretionary nature of the statutory process; *Friends of Mallacoota v Minister of Planning* [2010] VSC 222

18.21

The failure of a Commissioner of the NSWLEC to advise parties to proceedings that he intended to exercise a statutory discretion in relation to modification of development consent was a denial of procedural fairness; *Cavasinni Constructions P/L v Fairfield City Council* [2010] NSWLEC 65

18.22

(1)

A conclusion of apprehended bias may be founded by an assumption by the decision-maker of an undertaking, whether contractually binding or not, to exercise a statutory discretion in a particular way. In *Gwandalan Summerland Point Action Group Inc v Minister for Planning* [2009] NSWLEC 140 it was held that, because of the minister's public commitment to a particular outcome, his freedom to determine an application on its merits had been limited, causing fair minded lay observers to reasonably apprehend that the minister may not have brought an impartial and unprejudiced mind to determination of an application for development consent.

(2)

The distinction between judicial decision-making and extra-curial decision-making (for example by a commissioner) is appropriately drawn. However, an association between a commissioner sitting on a merits hearing and one of the parties to the appeal may give rise to a reasonable apprehension of bias even where there is no connection between the association and one of the issues in dispute; see *Murlan Consulting P/L v Ku-Ring-Gai Municipal Council* [2009] NSWCA 300

18.23

Legislation may clearly state that substantial compliance with the procedural requirements may suffice, particularly if no adverse effects from the procedural irregularity are apparent; see for

example Sustainable Planning Act 2009 (Qld) ss 57, 119, 147, 194; and on the question whether evidence or lack of evidence of such impairment is a question of fact or law see *Lewani Springs Resort P/L v Gold Coast City Council* [2010] QCA 145

18.25

Where legislation provides that a decision-maker must be 'satisfied' about certain matters before making a decision, the onus lies on the applicant to prove that the decision-maker did not form the required mental state of satisfaction. Such an inference may be gleaned from relevant documentary material evidencing the decision-making process; from responses to interrogatories directed to the decision-maker; and, in NSW, by calling in aid rule 4.3 of the Land and Environment Court Rules 2007, under which a public authority may be required to furnish a written statement setting out reasons for a decision; see *Caroona Coal Action Group Inc v Coal Mines Australia P/L* [2010] NSWLEC 1

Whether such 'satisfaction' was reasonably open to the decision-maker on the facts may be challenged by judicial review; but not whether the facts underlying the formation of the relevant state of satisfaction actually existed; *Casa v City of Ryde Council* [2009] NSWLEC 212.

Questions as to whether evidence satisfies an indeterminate test such as 'significance' or 'substantiality' are generally questions of fact: *CPT Manager Ltd v Central Highlands Regional Council* [2010] QCA 183

18.28

Judicial standards for decision-making apply just as much to courts and tribunals hearing merits appeals as they do to any other decision-makers. For two cases where a Court hearing a merits appeal failed to properly consider relevant considerations in relation to heritage properties see *Vorrasi v Adelaide City Council* [2010] SASC 25 and *Lakshmanan v City of Norwood* [2010] SASCFC 15

18.29

(1)

A minister's decision may be vitiated for failure to have regard to mandatory and materially relevant considerations by reason of being based on misleading departmental advice; see *Williams v Minister for Planning* [2009] NSWLEC 5. This is because a misleading departmental communication may lead the minister to fail to take into account a materially relevant consideration; see *Sharples v Minister for Local Government* [2008] NSWLEC 328

(2)

A decision-maker hearing a merits appeal cannot simply put aside and substitute a standard set by a planning instrument for one the decision-maker considers more reasonable. This may lead the decision-maker to fail to comply with a statutory obligation to 'consider' the relevant planning instrument; *Botany Bay City Council v Premier Customs Services P/L* [2009] NSWCA 226.

(3) Presumption of Regularity

The presumption has been said not to apply to the substance of development consents; see *GPT RE Ltd v Belmorgan Property Development Pty Ltd* (2008) 72 NSWLR 647 at [78]-[84]).

18.34

For a case where the Minister was held entitled to rely on a careful consideration and review of issues presented in a departmental report, and did not have to give personal consideration to every submission, see *Cheltenham Park Residents Association Inc v Minister for Urban Development and Planning* [2009] SASC 303