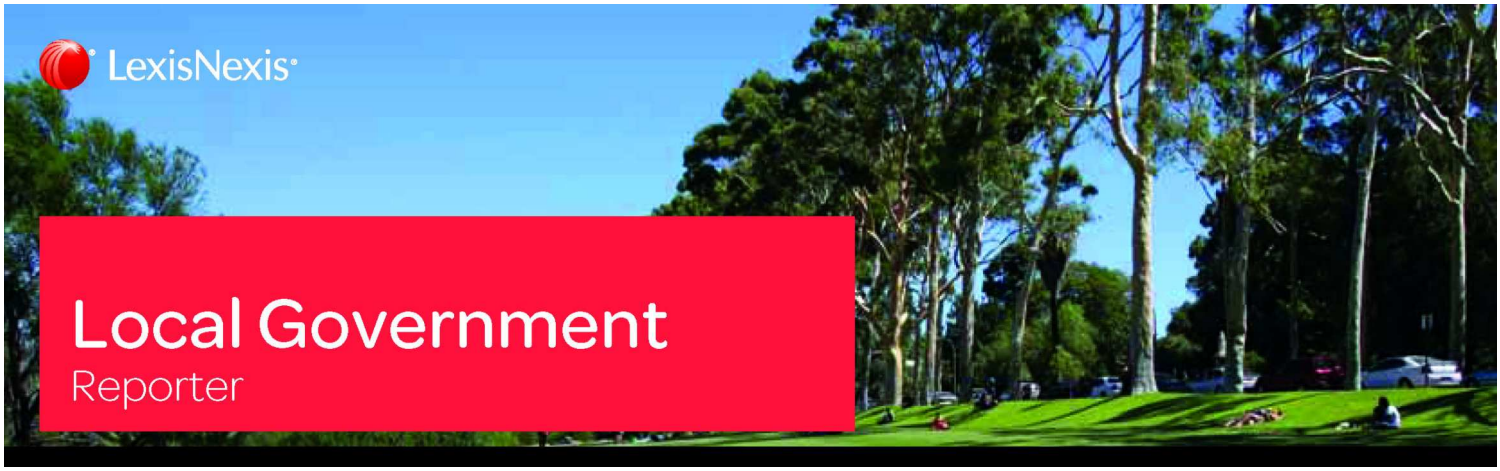

LexisNexis

Local Government Reporter

2012 . Vol 10 No 7

Contents

Commissioning Editor
Mark Hamilton *Lawyer*

Consulting Editor
Peter Rowell *Special Counsel, Ashurst, Brisbane*

Editorial Panel
Neil Douglas *Partner, McLeods Barristers & Solicitors, Perth*
Michael Kelledy *Partner, Wallmans Lawyers, Adelaide*
Commissioner Jan Murrell *NSW Land and Environment Court, Sydney*
Dean Newell *Partner, DibbsBarker, Sydney*

Information contained in this newsletter is current as at June 2012

LexisNexis Butterworths

Commissioner Murrell's contribution to planning: an analysis of her decisions

Mark Hamilton *LOCAL GOVERNMENT REPORTER*[1]

Commissioner Murrell, now retired, was a Commissioner of the Land and Environment Court (the court) from 1998 until early 2012. From 2004–11 (inclusive), the commissioner handed down some 362 judgments. The purpose of this article is to assess what those judgments reveal about town planning merit determinations. It will concentrate on the years 2004–11 because those decisions are available to the public online.[2] The one decision handed down in 2012 has not been included in this analysis.

Judgment type

Although 10 different types of matters occupy the commissioner's judgments from 2004–11, applications pertaining to development consents or their modification account for 87%[3] of those judgments.[4] The other 13%[5] is accounted for by:

- appeals against s 121B orders (brought under the provisions of the Environmental Planning and Assessment Act 1979 (EPA Act));
- rating appeals under the Valuation of Land Act 1916;
- costs (before there were assigned exclusively to registrars and judges of the court);
- applications under the Trees (Dispute Between Neighbours) Act 2006;
- appeals against councils' failure to issue building certificates;[6]
- an appeal under s 290 of the Protection of the Environment Operations Act 1997 (POEO Act) against a noise notice;
- an appeal under s 98A of the EPA Act pertaining to a security bond lodged with council; and
- an appeal under s 96 of the POEO Act against a prevention notice.

This article only intends to deal with development applications and modification applications.

Development applications

A total of 263 decisions relating to appeals against council decisions pertaining to development application(s) (DA) were handed down by Commissioner Murrell in the period of 2004–11, representing some 72% of the decisions handed down. These appeals were brought as both actual and deemed refusals. An actual refusal is where a council has determined the application by refusing to grant consent. A deemed refusal is where a council has not determined an application within a specified statutory time period giving the applicant a right of appeal notwithstanding that the application has not been determined by council.[7] In my experience, deemed refusals are similar in number to actual refusals brought to the court.

What is development consent being sought for?

The 263 decisions involved 33 different uses, the most prevalent relating to residential uses (144 or 55%). Other prominent uses are subdivision (40 or 15%) and childcare (20 or 8%). Arguably, the most interesting use was for a pet crematorium to cremate domestic animals.[8]

Respondent council

During the period in question, Commissioner Murrell determined appeals pertaining to development applications involving 62 different respondent councils. Of the 263 decisions, 23 (9%) involved appearances by Ku-ring-gai Council, 18 (7%) involved Waverley Council, 15 (6%) involved Woollahra Council, 14 (5.5%) involved City of Sydney and Manly Councils. These five councils were respondents in 32% of all the development application appeals. Some 21 councils only featured once, including councils in exotic places such as Ballina, Byron Bay and Tweed Heads, and more regional areas such as Armidale, Inverell and Wagga Wagga.

Consent orders

A total of 31 appeals involving development applications were resolved by the making of consent orders, representing about 12% of all decisions. A council will agree to enter consent orders upholding an appeal if it is satisfied that all the issues in the proceedings have been

satisfactorily addressed either through design changes or imposition of suitable conditions. The court must ensure that the application warrants approval (including assessment against s 79C of the EPA Act, and consideration of objections), as Commissioner Murrell points out:

> The court in its assessment of the application, despite the matter being consent orders, must be satisfied that all the necessary processes and procedures have been appropriately carried out, and also must be satisfied on the merits of the application. As with many matters that come before this court, they often come under greater scrutiny than other applications.[9]

SEPP 1

A SEPP 1 objection was lodged with 45 of the applications seeking development approval, representing 17% of all DA applications. Of those, 34 (76%) were allowed and 11 (24%) were not allowed. A SEPP 1 objection is an objection lodged with an application for development consent pursuant to State Environmental Planning Policy No 1 — Development Standards — in circumstances where development could be carried out but for non-compliance with a development standard.[10]

Issues

Throughout the 263 appeals relating to development appeals, there were over 100 issues at the heart of the commissioner's merit consideration. The top 10 are as follows with the number of times each appears in brackets:

1. streetscape (65);
2. parking (40);
3. bulk and Scale (38);
4. privacy (36);
5. landscaping (33);
6. noise (31);
7. impact on heritage item (29) (equal seventh);
8. traffic (29) (equal 7th);
9. character (28); and
10. height (27).

More often than not, a matter will have more than one issue. Some issues often go hand in hand, eg, traffic and parking. Some issues impact on others, such as height, bulk and scale on streetscape. Some matters generally attract the same issues, eg, childcare centres (noise, parking, traffic and privacy) and telecommunication towers (health impact and visual impacts).

Other prominent issues include impact on a heritage conservation area, overlooking, overdevelopment, overshadowing, setback, solar access and visual impacts. Given the frequency at which the same issues are raised in planning appeals, it is no surprise that the court has developed planning principles to guide the assessment of those issues. The court defines a planning principle as:

- [a] statement of a desirable outcome from;
- a chain of reasoning aimed at reaching; or
- a list of appropriate matters to be considered in making a planning decision.[11]

Planning principles not only assist decision-makers, they promote consistency in decision-making which is important considering "the acceptance and respect with which merit decisions are held depends on their consistency".[12] The court has provided a link to the 42 current planning principles on its website.[13]

Interestingly, the court has not published a planning principle pertaining to streetscape. Streetscape can be defined as "the character of a locality (whether it is a street or precinct) defined by the spacial arrangements and visual appearance of built and landscape features when viewed from the street".[14] Perhaps there is not a planning principle for streetscape because there are so many factors that affect streetscape such as bulk and scale, height, setback and landscaping, making it not possible to draft a planning principle to guide in the assessment of appropriate streetscape.

Appeal outcome

Of the 263 decisions relating to development applications 182 (69%) were upheld, 15 (6%) were upheld in part, and 66 (25%) were dismissed. Of the 182 appeals that were upheld, 31 (17%) were by way of consent orders and 34 (19%) were by way of successful use of a SEPP 1 objection. In my opinion, there are at least two factors (there may be more) which help to explain why 69% of all development appeals determined by Commissioner Murrell were upheld and 6% upheld in part. First, if a lot of appeals are being brought to the court as deemed refusals, it may be that council does not have any grave merit concerns with the proposal and perhaps these are the matters which end up in consent orders. The second factor may be the facilitative way that Commissioner Murrell conducts development appeals, provided there is an applicant who is willing to listen to the concerns of the court and court-appointed experts and amend their development proposal. This collaboration, which is directed at achieving a suitable and harmonious development, must invariably lead to better planning outcomes. That is not to say the purpose is to eliminate all impacts of development, which is impossible, as pointed out by the commissioner:

> I do understand peoples concerns of being impacted by development and it is true to say that all development has some impact. The question is whether that impact is unreasonable.[15]

There are numerous occasions when Commissioner Murrell has heard an appeal and remarked that the appeal would be upheld on the provision of amended plans which reflect the decision of the court, made assisted by the evidence presented in court in light of the concerns of council and neighbours. For example, in *CSA Architects Pty Ltd v Waverley Council*[16] it was stated that "an amended plan to show these matters [as discussed during the hearing] needs to be provided to the court before the final orders are issued and I will issue final orders in chambers".[17] The appeal was to be upheld on receipt of that amended plan.[18]

Modification applications

The 57 decisions pertaining to modification applications handed down by Commissioner Murrell in the period of interest represent 16% of her total decisions. A total of 33 (58%) concerned modifications to residential uses (comparable to the 55% residential use in development application appeals), six (11%) to subdivision, and three (5%) to mixed use and the same to childcare.

There were 26 different respondent councils in modification applications before Commissioner Murrell. The top seven councils were City of Sydney (nine or 16%), Ku-ring-gai (seven or 12%), Waverley (five or 9%), Mosman (four or 7%), Camden, Pittwater and Woollahra (three or 5% each). These top seven councils appeared in 34 (60%) of all modification appeals.

Thirty different issues were raised in modification appeals, the top three being:

- streetscape (14);
- privacy (9); and
- impact on heritage item (8).

Other common issues include bulk and scale, overshadowing, public interest and visual impacts. Streetscape was the top issue in both development appeals and modification applications.

Of the 57 decisions relating to modification applications:

- thirty-five (61%) were upheld (nine (26%) by consent);
- seven (12%) were upheld in part;
- fourteen (25%) were dismissed; and
- one (2%) was dismissed in part.[19]

Interestingly the ratio of appeals upheld (including in part) versus dismissed (including in part) are very similar for development appeals (75%; 25%) and modification appeals (73%; 27%).

Section 56A appeals

A s 56A appeal gives a party to proceedings the right of appeal on a question of law and is heard by a judge of the court.[20] It is not concerned with the merits of a proposal.

During the commissioner's commission (1998–2012), there were seven s 56A appeals against her decisions: five were dismissed[21] and two were upheld.[22] The first of the two successful s 56A appeals was brought by council against the commissioner's decision to grant development consent to the applicant.[23] The council alleged, and the applicants conceded, that the commissioner had denied the council procedural fairness, constituting an error of law, by including a condition in the approval requiring "vehicular egress … without giving the respondent an opportunity to":

(a) call evidence;
(b) cross-examine the applicant's experts; and
(c) be heard.[24]

The pertinent issue in the case was to whom was the matter to remitted to be re-heard and re-determined? The council contended that upon the matter being upheld, the matter should not be remitted back to Commissioner Murrell,[25] as it considered that there was "a reasonable apprehension that the commissioner might not bring an impartial and unprejudiced mind to the redetermination of the appeals".[26] Pearlman CJ disagreed and indicated that she, as the chief judge responsible for the allocation of cases, would be remitting the matter back to Commissioner Murrell for re-determination.[27]

On appeal, the Court of Appeal held that Pearlman CJ had erred in law by not remitting the matter back to a commissioner other than Commissioner Murrell. Tobias JA (Handley JA and Ipp JA agreeing) held that:

> It might fairly be said to impose the impugned condition without notice, evidence or argument and contrary to the respondents' disclaimer, involved pre-judgment of quite a high order necessitating remitter to a bench differently constituted. In my opinion, the primary judge erred in law in declining to so order.[28]

The appeal was upheld and the original development application was to be remitted to a commissioner other than Commissioner Murrell for re-hearing and re-determination.[29]

The other successful s 56A appeal against a decision of Commissioner Murrell was brought by council against the commissioner's upholding of a development consent described as the "occupation of existing warehouse building for general warehouse use".[30] The appeal before the commissioner turned on existing use rights; the lawful existing use for the warehouse was "for the warehousing/storage and distribution of alcoholic goods".[31] The council before Commissioner Murrell opined that

the proposed development constituted a change of use which was not facilitated under the existing use provisions of the EPA Act and Regulations; warehouse and distribution centres having become prohibited with a change of zoning. Commissioner Murrell upheld the appeal and granted consent, stating:

> I am satisfied that the description of the use in the 2002 consent can be enlarged or expanded by deleting the type of goods that may be stored and distributed, that is alcoholic goods, and that this does not constitute a "change of use". But rather an enlargement or expansion because of the increased range of goods that may potentially be stored for warehouse and distribution purposes from the existing premises on the subject site.[32]

On appeal before Lloyd J in the s 56A appeal, the council submitted that the approval granted by Commissioner Murrell constituted a "change of use" which is not facilitated under the EPA Act and Regulations hence constituting an error of law.[33] Justice Lloyd agreed with the council, stating that the lawful consent applicable to the property limited its use to warehousing/storage and distribution of "alcoholic goods". It was a change of use to expand that use to "general warehouse" use which was not permissible by law and constituted an error of law.[34] The decision of Commissioner Murrell was set aside.

In a career that included the handing down of over 400 judgments (a conservative estimate based on the fact that some 362 judgments were handed down between 2004–11), it is an envious position indeed to say that only two decisions were found to be infected with an error of law.

Concluding remarks

From the forgoing discussion, it is apparent that if an application was brought before Commissioner Murrell from 2004–11, it was most likely to have been an appeal pertaining to a development application for a residential use, with a 32% chance of being against Ku-ring-gai, Waverley, Woollahra, City of Sydney or Manly Council. Issues would likely include at least one pertaining to streetscape, bulk and scale, parking, privacy or landscaping. If the application was accompanied by a SEPP 1 objection, there is a 76% chance the SEPP 1 objection would have been allowed and, if the orders sought were by consent, they would have been made. Overall, it would have had a 75% change of being upheld (at least in part). If it went to a s 56A appeal, there is a 29% chance of it being overturned.

Commissioner Murrell's contribution to planning is great. It is a contribution that so many will be (and are) envious of and so many will attempt to emulate.

Mark Hamilton,
Lawyer,
Commissioning Editor,
Local Government Reporter.

Footnotes

1. The views in this article are those of the author. The analysis was undertaken by the author. All errors and omissions are solely those of the author.
2. Available from New South Wales case law at www.caselaw.nsw.gov.au, and Austlii at www.austlii.edu.au. Decisions prior to 2004 are available in hard copy from the Land and Environment Court (see notice at www.lawlink.nsw.gov.au).
3. All statistics quoted in the body of this article have been rounded to make the paper more digestable.
4. That is, 87.43% or 320 decisions.
5. That is, 12.57% or 46 decisions. The 362 judgments handed down, contain some 366 decisions, as some judgments contain more than one decision. For example, *McClelland v Wollongong City Council* [2011] NSWLEC 1138; BC201103805 (application under s 97 of the EPA Act seeking development consent and s 149F of the EPA Act appeal against council's refusal to issue a building certificate), *Abby's Real Estate Pty Lt v Ku-ring-gai Council* [2010] NSWLEC 1208; BC201007933 (s 96 of the EPA Act modification appeal, appeal against s 121B order (s 121ZK of the EPA Act) and s 149F of the EPA Act appeal against refusal to issue building certificate). Some decisions occupy more than one judgment such as when a preliminary finding is made ahead of the final hearing and pronouncement of orders.
6. Environmental Planning and Assessment Act 1979, s 149F.
7. See Environmental Planning and Assessment Act 1979 s 82 and Environmental Planning and Assessment Regulations 2000 cl 113.
8. *Kearney v Parramatta City Council* [2006] NSWLEC 786;; BC200611066. The appeal was upheld in part subject to a 12-month trial period.
9. *Jarberg Investments Pty Ltd v Great Lakes Council* [2006] NSWLEC 261; BC200603448 at [34].
10. For a discussion of SEPP 1, see *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827; BC200711382 per Preston J.
11. See, Land and Environment Court at www.lawlink.nsw.gov.au.
12. J Roseth, "Establishing planning principles: What are planning principles?" (2006) 4(10) *LGR* 144.
13. See above, note 11. See also, N Eastman, "Planning principle: height and bulk of proposed developments. *Local Government Reporter* (2007) 6(1) at 13; Jeff Reilly, Solar access in subdivision layouts: planning principle" (2007) 5(7) *LGR* 99,

and J Reilly, "When proposed alterations will be considered a new building: planning principle" (2007) 5(8) *LGR* 117.

14. State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004, cl 3.
15. *Catalina Developments Pty Lt v Woollahra Municipal Council* [2004] NSWLEC 545; BC200406867 at [12].
16. *CSA Architects Pty Ltd v Waverley Council* [2005] NSWLEC 311; BC200505614.
17. Above, note at [30].
18. bove, at [33]. For another example, see, *Big Beat (Australia) Pty Ltd v Sydney City Council* [2005] NSWLEC 306; BC200504027. For an example of a case involving a series of amendments before the hearing, see, *Masling v Ku-ring-gai Council* [2004] NSWLEC 394; BC200405468.
19. *Gabb v Ku-ring-gai Council* [2009] NSWLEC 1255; BC200907667.
20. Land and Environment Court Act 1979, s 56A.
21. *Dasey v North Sydney Council* [1999] NSWLEC 234; BC9906431 (Pearlman J); *Pittwater Council v Mount* [2000] NSWLEC 256; BC200008153 per Bignold J; *Shao v Hornsby Shire Council* (2001) 116 LGERA 462; [2001] NSWLEC 254; BC200107117 per Cowdroy J; *JPR Legal Pty Ltd v Marrickville Council* [2009] NSWLEC 156; BC200908352 per Pain J; and *Gerondal v Eurobodalla Shire Council* [2011] NSWLEC 77; BC201103013 per Craig J.
22. *Basemount Pty Ltd and Gasfind Pty Ltd v Baulkham Hills Shire Council* [2002] NSWLEC 172; BC200205967 per Pearlman J; and *Botany Bay City Council v Parrangool Pty Ltd* [2009] NSWLEC 198; BC200911254 per Lloyd J.
23. *Basemount Pty Ltd and Gasfind Pty Ltd v Baulkham Hills Shire Council*, above, at [1].
24. Above, at [7].
25. Above, at [14].
26. Above, at [19].
27. Above, at [23] and [26].
28. *Baulkham Hills Shire Council v Basemount Pty Ltd* (2003) 126 LGERA 339; [2003] NSWCA 189; BC200303944 at [24].
29. Above, note at [27].
30. *Botany Bay City Council v Parrangool Pty Ltd*, above, at [1].
31. Above, at [3].
32. *Parrangool Pty Ltd v Botany Bay City Council* [2009] NSWLEC 1189; BC200905285 at [48].
33. *Botany Bay City Council v Parrangool Pty Ltd*, above, at [5].
34. Above, at [17]–[18].

Fighting against the current: why a river cannot acquire land under the Just Terms Act

Jenny Radford *MADDOCKS*

The applicant in the recent NSW Land and Environment Court decision of *Van Tonder v Hodgkinson* (*Van Tonder*)[1] claimed that a change in course of the Bell River amounted to a compulsory acquisition of private land by the New South Wales Crown. While the proceedings rely on a series of novel arguments, the decision draws attention to the unusual, and sometimes counter intuitive, nature of compulsory acquisition in New South Wales.

The right to compensation on "just terms" is one of the best known protections in the Australian Constitution. It is less well known that this protection does not extend to the actions of the states nor that the New South Wales Constitution does not contain such a right. It is sometimes mistakenly assumed that equivalent protection is provided in the New South Wales Land Acquisition (Just Terms Compensation) Act 1991 (Just Terms Act) — as the title might infer. In *Van Tonder*, however, the court observes that the right to compensation on just terms (as provided by the Just Terms Act) is limited to acquisitions specifically undertaken in accordance with that Act. The protection does not extend to other government actions (sometimes known as "takings"), which could amount to an acquisition of land, such as prohibitions on clearing, or other restrictions on use.

What happened?

Mr Van Tonder purchased a rural block of land from Wellington Shire Council in early 2011. The deposited plan included with the contract for sale showed the Bell River running along the boundary of the land. After Mr Van Tonder completed the purchase, a second survey of the land showed that the Bell River had changed course and now ran through the middle of the block, effectively cutting it in two and making one side inaccessible.

The arguments raised

Mr Van Tonder, self-represented, raised a number of causes of actions (under 14 different statutes) around what he terms a basic "commonsense approach". Namely, this approach was that the Crown should transfer to him a strip of land adjacent to his land parcel in exchange for the area of land now taken by the Bell River.

While not raised in this case, there is a long history of common law around the "doctrine of accretion", concerning the gradual movement of a waterway defining the boundary of a land parcel. Insufficient facts were provided in the case to determine whether and how the doctrine might apply.

The court ultimately found that, to the extent that the applicant disclosed reasonable causes of action, it lacked jurisdiction under the Land and Environment Court Act 1979 to determine them.

Compulsory acquisition powers

The applicant's first and most interesting set of arguments can be grouped together as arguments relating to just terms compensation for a compulsory acquisition.

In this regard, the applicant's principal argument is that the council, under delegated responsibility from the Crown, conducted work upstream and downstream of the land which caused the river to change course. The applicant contended that this change in course effected a compulsory acquisition of the land within the meaning of s 40 of the Public Works Act 1912, or alternatively, within the meaning of s 375 of the Water Management Act 2000.

In determining that it had no jurisdiction, the court observed that under the Public Works Act 1912 "the Minister *may* acquire land (including an interest in land) by agreement or by compulsory process *in accordance with* the Land Acquisition (Just Terms Compensation) Act 1991" for certain public works.[2] (Emphasis added)

The Water Management Act 2000, and indeed all acts which specifically permit an authority to acquire land, including the Local Government Act 1993, the Sydney Water Act 1994 and the Transport Administration Act 1988, work in a similar way and allow an authority to acquire land "in accordance with" the Just Terms Act. Following amendments to the Just Terms Act in 2009, it is now clear that the Act itself does not convey upon authorities a power to acquire land.[3]

The procedures of the Just Terms Act are process driven and technical, and culminate in the publication of an acquisition notice in the NSW Government Gazette. It is this notice which effects the actual acquisition and vests the land in the acquiring authority.

Perhaps not surprisingly, the court in *Van Tonder* did not find that the Bell River's haphazard change in course had complied with the procedures of the Just Terms Act. The river, it seems, had failed to negotiate with Mr Van Tonder, had failed to issue a proposed acquisition notice (PAN) (s 11), and perhaps most unforgivably, had failed to publish a notice in the NSW Government Gazette acquiring the land within 90 (but less than 120) days of serving the PAN (s 19).

In short, the river (or more accurately the Crown) had not acquired the land "in accordance with" the Just Terms Act. While the Minister may hold a discretionary power to undertake an acquisition under the Public Works Act 1912 and in accordance with the Just Terms Act, the court does not have the power to step into the Minister's role and initiate such an acquisition. Biscoe J observed:

> As I understood him, the applicant said in oral submissions that he was under the impression that this court had the same power as the Minister to decide to compulsorily acquire land. In my opinion, the court has no such power.[4]

While not discussed in this case, the court's powers in this regard would likely be restricted to judicial review remedies.

Jurisdiction of the NSW Land and Environment Court

The jurisdiction of the NSW Land and Environment Court relevantly extends to hearing appeals for compensation (or procedural irregularity) under the Just Terms Act[5] or in some cases to an over-reach of the acquisition powers conveyed under certain Acts. Where, as in the present case, an acquisition does not take place "in accordance with" the Just Terms Act, Biscoe J found it was "clear" that the court had no jurisdiction. Biscoe J observed:

> It is unnecessary for me to decide whether a change in the course that a river takes is capable of amounting, in such circumstances, to "compulsory acquisition".
> That is because in this case the Minister has not acquired land or an interest in land by agreement or by compulsory process "in accordance with" the Just Terms Act. Sections 19(e) and 24 of the Land and Environment Court Act are clear in indicating that the court's jurisdiction is relevantly dependent upon compulsory acquisition of land 'in accordance with' the Just Terms Act. Accordingly, the court has no jurisdiction. Nothing in the Public Works Act or the Just Terms Act enlivens the court's jurisdiction.[6]

In this case, the court did not have the power to consider whether the council's actions, as a question of fact, amounted to an acquisition of private property.

It is important to note as an aside that the Just Terms Act contains provisions for owner initiated hardship acquisitions. However, these provisions are of limited application and apply only to land which an authority has designated for acquisition or reserved exclusively for a public purpose. This had not occurred.

"Just terms" constitutional protection

The case highlights a gap in the protection of private property rights in New South Wales.

Where an acquisition occurs under a legislative acquisition power in accordance with the Just Terms Act, an affected land owner has the right to appeal against a procedural irregularity, or the compensation offered, to the Land and Environment Court. In contrast, an act by the Parliament of NSW, or a New South Wales authority or council, which *amounts* to a taking of land, or deprives an owner of their interest in land, but which is not a formal acquisition of property rights under the Just Terms Act, has proven almost impossible to appeal on the basis of "just terms". This has been the case even where no compensation is paid, in stark contrast to the stringent protections of the Just Terms Act.

The gap was explored in the well-publicised 2010 High Court decision of *Spencer v The Commonwealth* (*Spencer*).[7] In that case, a farmer, Peter Spencer, argued that prohibitions on clearing land under the New South Wales Native Vegetation Act 2003 amounted to an acquisition of private property otherwise than an on "just terms". The difficulty Mr Spencer encountered in making this argument (the subject of ongoing Federal Court proceedings) has similarities to the jurisdictional issues faced by the applicant in *Van Tonder*.

The Federal Constitution's "just terms" protection of s 51(xxxi) applies only with respect to the powers of the Federal Parliament. It states:

> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:
> …
> (xxxi) the acquisition of property on just terms from any state or person for any purpose in respect of which the Parliament has power to make laws …[8]

This section has been used in proceedings as wide ranging as an appeal against the Federal Government's Northern Territory Emergency Response and British American Tobacco's current challenge to the Federal Government's plain packaging legislation.

However, the section does not apply to the acquisition of property by a state or by a local government authority. The New South Wales constitution does not contain an equivalent protection. In 1988, a national referendum was held to extend the protection to state actions, but, parceled with three other issues including freedom of religion, the amendment was unsuccessful.

Alternative arguments

Mr Van Tonder also unsuccessfully raised a number of additional causes of action including under the Encroachment of Buildings Act 1922, the Conveyancing Act 1919, the Real Property Act 1900, the Roads Act 1993, the Crown Lands Act 1989, the Environmental Planning and Assessment Act 1979, the Trade Practices Act 1974 and the Sale of Goods Act 1923. The court dismissed each of these claims either for lack of jurisdiction or for failure to disclose a reasonable cause of action. Some of these issues may have met with more success if raised in the appropriate jurisdictions of the supreme or district courts.

Where to from here?

The case serves to highlight the scarcity of opportunities for land owners seeking to claim "just terms" compensation for a state taking outside of the process and the protections of the Just Terms Act. In May this year, the Department of Finance and Services announced that it is undertaking a review of the Just Terms Act in relation to private property rights as part of the state's strategic regional land use policy. The review provides a timely opportunity to consider the issues and anomalies raised by *Van Tonder* and *Spencer*. Further information on the review process is available from the following NSW Government website, http://haveyoursay.nsw.gov.au/justterms.

Jenny Radford,
Lawyer,
Maddocks,
Email: jenny.radford@maddocks.com.au,
Website: www.maddocks.com.au.

Footnotes

1. *Van Tonder v Hodgkinson* [2012] NSWLEC 86; BC201204057.
2. Above at [11].
3. Section 7 provides that the Act does not empower an authority to acquire land unless it already has such a power under another Act.
4. *Van Tonder v Hodgkinson*, above, at [13].
5. Sections 19(e) and 24 of the Land and Environment Court Act 1979.
6. *Van Tonder v Hodgkinson*, above, at [15]–[16].
7. *Spencer v The Commonwealth* (2010) 241 CLR 118; 269 ALR 233; [2010] HCA 28; BC20100630.
8. Commonwealth of Australia Constitution Act (The Constitution), s 51(xxxi).

Enforcement orders — "strict compliance with statutory conditions"

James Fan *PIKES & VEREKERS LAWYERS*

In the recent decision of *Bobolas v Waverley Council*,[1] the Court of Appeal declared an enforcement order invalid on the basis that it was uncertain. The Court of Appeal's decision, lead by McColl JA (with whom Macfarlan JA and Tobias AJA agreed), held that the order was invalid as it contained terms expressed in futurity.

In a long running series of disputes involving accumulation of rubbish at residential premises in Bondi, Elena, Liana and Mary Bobolas (together, the appellants) were each issued with a purported order under s 124 of the Local Government Act 1993 (the LG Act) by Waverley Council (the council), which required them to remove the rubbish accumulated.

Other issues dealt with in the Court of Appeal's decision such as guardianship and costs of pro bono representation are not discussed in this article.

Background

In January 2009, council's officers attended the premises and formed the opinion that waste accumulated there was causing or likely to cause a threat to public health.

On 5 March 2009, the council purported to issue the order under s 124 of the LG Act (under the terms of No 22A) which stated:

> **Terms of the proposed order**
> (a) Remove the accumulation of rubbish from all parts of subject premises …
> **Reasons for the order**
> The order *will be* given …
> **Period for compliance with the order**
> As the storage of waste and refuse constitutes a health risk the order *will* require that you comply with its terms within twenty-eight (28) days from the date of this order.
> (Emphasis added in italics)

When the council's officers attended the premises again in April 2009, they formed the opinion that the order had not been complied with.

The council sought orders in the Land and Environment Court to enforce the s 124 order.[2] Particularly, it sought orders under s 678(10) of the LG Act to allow the council's officers to enter and remain on the premises to carry out the removal of rubbish.

Justice Pain of the Land and Environment Court rejected much of the appellants' defence which raised issues such as the existence and constitution of the council under the LG Act and the powers of the council to carry out the orders under the LG Act. Particularly, her Honour referred to s 697 of the LG Act, under which proof of the incorporation of council is not required. Her Honour also rejected evidence that went to the conduct of the functions of the council in relation to the earlier orders.

After judgment had been delivered by Pain J, leave was granted to amend the defence to include the following:

> Each of the purported Orders relied upon by the Applicant in these proceedings dated 5 March 2009 are not valid orders under Section 678 of the Local Government Act 1993 for the reason that the words "Terms of *proposed* order" appear before the actions described in each, and the words "The order *will* be given" appear before the "reasons" stated such that the documents do not (or might be reasonably understood not to) state a present order to do anything so as to satisfy s 124 of the Act and do not (or might reasonably be understood not to) give any reasons for the order made as required by s 136, and accordingly the court has no jurisdiction to grant the relief sought.[3] (Emphasis added)

As recorded in the transcript of the hearing of the amended defence, her Honour stated, "I think any of the recipients of this order would be under no illusion that they were to comply with the order, that there were potential offences that might arise if they failed to comply with the order …".[4]

The Court of Appeal's decision

McColl JA compared the strict requirement of council orders to that of a search warrant in the sense that it would permit entry to premises whether or not the owner or occupier gave consent. Her Honour noted that such orders "authorise the invasion of interests which the common law has always valued highly and which, through the writ of trespass, it went to great lengths to protect".[5] There is therefore a need to "insist on strict compliance with the statutory conditions …".[6]

Referring to authorities on the issuing of search warrants, her Honour noted that there is a balancing test of a person's private interest, against the public interest.

Those principles dealing with search warrants were found to be of "analogical application to interpreting the [LG Act] and the validity of orders purportedly issued".[7]

Her Honour referred to the case of *Foster v Sutherland Shire Council*,[8] in which Cowdroy J had held that an order, albeit not one authorising entry to premises, was required to be expressed in such terms as to convey its purpose clearly to the recipient. Although the subject matter before Cowdroy J was on the issue of s 121B orders under the Environmental Planning and Assessment Act 1979, her Honour found, at [44], the same rationale applied to orders under the LG Act.

Her Honour referred to the fact that s 124 of the LG Act speaks in present terms. Therefore, "an order issued pursuant to its terms had to convey clearly to the recipient that that person was being ordered at that time to do or refrain from undertaking the identified action by reason of the receipt of the order".[9]

As the order purportedly issued contained certain terms in the future tense, it was held, at [48], that it did not convey any requirement for immediate implementation or compliance. This was confirmed by use of words and phrases such as "Terms of the proposed order", "Reasons for the order", "the order will be given …" and "… the order will require that you comply …".

It was held that this deficiency went to the heart of the order and the recipient of the order could not "be certain as to whether it required present compliance or, rather, whether it was some sort of warning notice in anticipation of an order requiring removal of rubbish being issued at a later date".[10]

Despite the fact that the council had carried out the works the subject matter of the order, the Court of Appeal set aside the orders made by Pain J and declared the order issued by the council to be invalid.

Conclusions

The undeniable lesson, if not a timely reminder, is that local government practitioners and compliance officers need to exercise care and diligence in drafting and executing orders under s 124 of the LG Act, as well as those under s 121B of the Environmental Planning and Assessment Act 1979. Such orders are a vital and powerful tool in enforcement and ensuring compliance with relevant laws and instruments, most often they involve issues of wider public amenity and interests.

However, as pointed out by the Court of Appeal, these public interests must be balanced with the protection of private interests, and any deficiency or uncertainty in an order will sway that balance in favour of the private interests.

James Fan,
Lawyer,
Pikes & Verekers Lawyers,
Email: jfan@pvlaw.com.au,
Website: www.pvlaw.com.au.

Footnotes

1. *Bobolas v Waverley Council* [2012] NSWCA 126; BC201202857.
2. See *Waverley Council v Bobolas (No 2)* [2009] NSWLEC 211; BC200911717.
3. *Bobolas v Waverley Council*, above, at [21].
4. Above at [22].
5. Above at [41].
6. Above note.
7. Above at [41]–[43].
8. *Foster v Sutherland Shire Council* (2001) 115 LGERA 130; [2001] NSWLEC 89; BC200103346.
9. *Bobolas v Waverley Council*, above, at [47].
10. Above at [49].

Wind farms — the South Australian context

Victoria Shute *WALLMANS LAWYERS*

The individual planning regimes of each state and territory govern the development of new wind farms in different ways. Following the enactment of VC82[1] in Victoria, and the release of the *Draft NSW Planning Guidelines: Wind Farms*[2] (which will likely be finalised and enacted in the near future), both of which purport to restrict the construction of wind turbines in proximity to dwellings, South Australia is arguably the only jurisdiction within which wind farms are actively encouraged. This article examines the South Australian experience and how the law concerning wind farm developments in this state may evolve in the future.

A brief history of wind farms in South Australia

Wind farm development in South Australia has been influenced by various legislative incentives encouraging the development of wind farms.

On 1 April 2011, the first scheme which encouraged wind farm developments in South Australia was released. This scheme was the Commonwealth Government's Mandatory Renewable Energy Target (MERT) which was enacted through the Renewable Energy (Electricity) Act 2000 (Commonwealth).[3]

This Act was created to achieve a MERT of 2% of energy in Australia being sourced from renewable sources by 2010. At the time of its introduction, the Act obligated electricity retailers in Australia to source power from renewable energy sources and created a system of tradeable Renewable Energy Certificates, which were required to be surrendered on an annual basis to demonstrate compliance with the MERT.

On 28 June 2007, South Australia enacted the South Australian Climate Change and Greenhouse Emissions Reduction Act 2007 (SA). This Act prescribes a state greenhouse gas emissions reduction target, obliges the minister administering the Act to establish policies, programs and other initiatives to address climate change and establishes the Premier's Climate Change Council to provide advice to the minister in this regard. Currently, the South Australian greenhouse gas emissions reduction target is prescribed as a reduction of at least 60% in emissions to an amount that is equal to or less than 40% of 1990 levels by 31 December 2050.

In 2010, a number of amendments to the Renewable Energy (Electricity) Act 2000 were made to increase the MERT (now known as the Renewable Energy Target (RET)) to achieve a new target of 20% of Australia's energy production being derived from renewable sources by 2020.[4]

Reflecting the influence of incentive schemes upon wind farm development in this state, prior to 2005, South Australia had only one operating wind farm. This was located in Coober Pedy, an opal-mining town which is over 800 km north of Adelaide.[5] This wind farm is still in operation and consists of a single turbine generator which supplements the town's diesel power generator.[6]

Currently, South Australia has 14 significant wind farm developments and the greatest wind energy capacity in Australia — being 51% of Australia's total wind energy capacity.[7] Over 20% of South Australia's energy demand is generated by wind[8] and the total power generation capacity of wind farms in South Australia is 1150 megawatts,[9] compared to nine wind farms with a total capacity of 428 megawatts in Victoria[10] and six operative wind farms with a 150 megawatt capacity in New South Wales.[11]

Wind farm development in South Australia

One of the striking differences between South Australia, Victoria and New South Wales is the way in which the planning system has been utilised to facilitate and encourage wind farm developments in recent times. In fact, recent planning reform has occurred with the express intention of overcoming case law authority[12] from the state's Environment, Resources and Development Court (ERD Court) which, in 2011, overturned a development authorisation issued in respect of a wind farm development.[13]

Before explaining the specific planning law reforms affecting wind farm developments in South Australia, it is important to summarise the planning system of the state.

South Australia's planning regime

Land use planning and development in South Australia is governed by the Development Act 1993 (the Development Act). Under this Act, each area of the state is covered by its own, individual, development plan.[14] Each council area has its own development plan and there are three development plans for land within South Australia which is outside of council areas.[15]

The Development Act provides for the creation of a state planning strategy[16] and development plans are amended in a manner which is consistent with the strategy.[17]

An amendment to a development plan may be prepared by a council or the minister administering the Development Act.[18] Where a council prepares a development plan amendment (DPA), it must ultimately be approved by the minister.[19]

According to s 28 of the Development Act, where the minister "is of the opinion that it is necessary in the interests of the orderly and proper development of an area of the state" that a DPA should come into operation prior to its approval, the minister may, at the same time or at any time after the DPA is released for public consultation, and without the need for consultation with a council, declare the DPA on interim operation by way of a notice in the government gazette.

Development applications in this state are assessed against the version of the development plan in force at the date that the application is made. Ministerial DPA's are often therefore, declared to commence on interim operation, usually to prevent lead to a rush of inappropriate development occurring prior to a DPA being approved and consolidated into the relevant development plan, thus defeating the purpose of the DPA.

The Development Act defines acts and activities which constitute "development"[20] and requires that development be approved in accordance with the Act prior to being undertaken.[21] Individual forms of development may be assigned a public notification category by a development plan, or by the Development Regulations 2008.[22] The Development Act prescribes four separate public notification categories, of which only three — Categories 1, 2 and 3 — are operative.[23]

Wind farm development applications are usually assessed by councils. However, it is possible for the Development Assessment Commission[24] (the state-wide assessment authority) to be appointed by the minister as the "relevant authority" to assess a wind farm development, particularly in situations where a wind farm development is of regional significance, or the relevant council has a potential conflict of interest in the development application.[25]

Category 1 development applications are assessed and determined without any public notification occurring.[26]

Notice of Category 2 development applications must be provided to the owners or occupiers of adjacent land[27] to the site of the proposed development.[28] Persons who receive a notice of a Category 2 development application may make a representation on the proposed development during the statutory notification period.[29] Persons who make a representation may request that they be heard on their representation prior to the determination of the development application,[30] but they do not have rights to appeal this decision to the ERD Court.

Category 3 development applications must be notified to the owners or occupiers of land adjacent to the development site, any other owner or occupier of land who would be "directly affected to a significant degree by the development if it were to proceed" and the public generally.[31] Persons who make a representation on a Category 3 development application during the public notification period have a right to be heard on their representation prior to the determination of the development application.[32] Further, Category 3 representors have a right to appeal the decision made in respect of the development application in the ERD Court.[33]

South Australian wind farm case law

In South Australia, there have been just three challenges against planning decisions made in respect of wind farm development applications.[34] Each of these cases has consisted of appeals lodged against decisions of councils to approve Category 3 wind farm development applications by third party representors. Of these three case law authorities, one decision overturned the approval granted by the local council, ie, *Paltridge v District Council of Grant* (*Paltridge*).[35]

This case concerned a proposal for a wind farm comprising 46 wind turbines, each with a tower height of 80 metres, and associated access tracks, monitoring equipment and infrastructure to be constructed over 15 privately-owned allotments of land comprising an area of approximately 10.7 square kilometres.

The proposal was categorised as a Category 3 development application by the District Council of Grant. The appellants lodged representations on the development application, objecting to it. The proposal was approved by the council, and the representors commenced an appeal in the ERD Court.

Although the appellants' case consisted of several grounds of appeal,[36] the court upheld the appeal on the basis that the proposal would cause an unacceptable detrimental impact on the existing character and visual amenity of the locality.

In reaching this finding, the ERD Court held that the council's development plan put a "high value" on the "scenic qualities" of the landscape of the relevant locality, and that it sought to "avoid or minimise" adverse visual impacts and alterations to that landscape.[37] The court found that the proposal, if constructed, would be incongruous to the existing flat, pleasant, rural landscape.[38]

Wind farm planning law reform

Subsequent to *Paltridge*, on 19 October 2011, the Statewide Wind Farms Development Plan Amendment was released by the Minister for Planning for public consultation. This DPA was declared to be on interim operation on the same day.[39]

The DPA was specifically drafted to overcome the judgment of *Paltridge*,[40] and to ensure that the state's emission reduction targets would continue to be met. It includes the following changes:

- the introduction of objectives and principles of development control into Development Plans across the State to specifically address the visual amenity impacts of wind farms, including principles which seek to achieve a minimum *1 m* setback from the base of wind turbines to dwellings not associated with a wind farm; and
- wind farm developments located in "sparsely populated" zones (ie, rural or coastal zones), where the base of any wind turbine is located more than 2 km from the boundary of certain zones intended primarily for residential development (including residential zones, settlement zones and rural living zones) are now Category 2 developments, which means there are no third party rights available against approvals of these developments.[41]

The public submission period for this DPA ended on 13 December 2011 and a series of public meetings were convened by the Development Policy Advisory Committee, which advises the minister on DPA's before their final determination, occurred throughout January and February 2012. A final decision on the DPA is expected in the near future.

Future directions in wind farm development in South Australia

South Australia's current state government has committed itself to facilitating an increase in wind farm power capacity and has differentiated itself from other states[42] by enacting planning policy which reduces minimum setbacks between wind farms and dwellings. It has also lessened the ability of the public to challenge wind farm approvals. This situation may, however, change in the near future.

This policy is influenced not only by the profitability of wind farm power generation in South Australia,[43] but also the state's political context. South Australia's Labor Party government has been in power for 10 years, and has presided over and encouraged the growth of wind farms.[44]

The next Commonwealth election is due to occur in 2013. While the issue of the carbon tax will undoubtedly be an election issue. It remains to be seen whether both major political parties will continue to support renewable energy projects,[45] particularly the development of wind farms and whether the Commonwealth's RETs will be reduced after the election.

If RETs are reduced, or if other measures are introduced which would result in wind farm power generation becoming more expensive, this could result in reduced wind farm numbers in South Australia in the future. [46]

In the state political context, the role of party politics cannot be forgotten. South Australia's Labor Party government has been in power since 5 March 2002 and has presided over the growth of wind energy in this state.

Recent law reform undertaken in Victoria and proposed in New South Wales have occurred with newly-formed Liberal Party governments which have ousted long-serving Labor Party governments and have expressed a desire to distance themselves from policies of previous governments which encouraged the development of the wind farm industry, particularly in proximity to townships and dwellings.

The next South Australian government elections are due in 2014. In January 2012, the state's Liberal opposition announced its wind farm policy which largely accords with the Victorian position. If elected, the Liberal Party has announced that it intends to:

- restrict construction of wind turbines within 5 km of townships; and
- reinstate appeal rights to representors objecting to wind farm developments.[47]

Whether the Liberal Party will form a government in South Australia in 2014 remains to be seen. In the meantime, Australia is in a unique position regarding wind farm planning law reform with individual states having polar-opposite policies on wind farms. South Australia will (for at least the next two years) continue to be at the forefront of planning law reforms encouraging wind farms.

Given that South Australia will (at least for the next few years), continue to facilitate and encourage new wind farm developments, it is the writer's opinion that future law reform concerning wind farms, particularly whether they should be controlled and discouraged where in close proximity to dwellings or not, will be influenced by the South Australian experience.

Victoria Shute,
Senior Associate,
Wallmans Lawyers,
Email: victoria.shute@wallmans.com.au,
Website: www.wallmans.com.au.

Footnotes

1. See, www.dpcd.vic.gov.au.
2. See, www.planning.nsw.gov.au.
3. Accessible at ComLaw, www.comlaw.gov.au.
4. Department of Climate Change and Energy Efficiency, *RET Scheme Legislation*, Australian Government, Canberra, 2011, accessed 7 September 2011, www.climatechange.gov.au.
5. See, www.cooberpedy.net.
6. Above note.
7. Government of South Australia, *Wind energy in South Australia*, Government of South Australian, South Australia, 2011, accessed 20 June 2011, www.sa.gov.au.
8. Australian Energy Market Operator, *2011 SA Supply and Demand Outlook*, Australian Energy Market Operator, 2011, accessed 20 June 2011, www.aemo.com.au.
9. D Clarke, "Wind power and wind farms in Australia: Wind in the Bush", Wind in the Bush, Australia, 2012, accessed 20 June 2012, wwwramblingsdc.net.
10. See, www.sustainability.vic.gov.au.
11. New South Wales Trade & Investment, *Wind power*, NSW Government, New South Wales, accessed 20 June 2012, www.trade.nsw.gov.au.
12. Department of Planning and Local Government, *Statewide Wind Farms Development Plan Amendment*, Government of South Australia, South Australia, 2011, accessed 20 June 2012, www.sa.gov.au, p 197.
13. *Paltridge v District Council of Grant* [2011] SAERDC 23.
14. Development Act 1993 (SA), s 23.
15. These development plans are:

    - Land not within a council area Coastal Waters Development Plan;
    - Land not within a council area Eyre, Far North, Riverland and Whyalla Development Plan; and
    - Land not within a council area Flinders Development Plan.

Development Plans can be accessed at www.sa.gov.au.

16. Section 23. Currently the planning strategy consists of the 30-year plan for greater Adelaide, and a series of regional plans.
17. Sections 25 and 26 of the Development Act 1993, which provide processes by which a development plan can be amended require reports on a development plan amendment's consistency with the planning strategy to be prepared and considered prior to ministerial approval. Development plan amendments which do not accord with the planning strategy may be altered by the minister, or refused.
18. Development Act 1993, s 24(1).
19. Above, at s 25(15).
20. Above, at s 4.
21. Above, at s 32.
22. See Development Act 1993 s 38(2), and Development Regulations 2008 reg 32 and Sch 9.
23. Development Act 1993, s 38 (2)(b). According to this provision, the Development Regulations may assign a particular form of development to the fourth public notification category, Category 2A, however no such regulations currently exist.
24. The DAC is a planning assessment body appointed by the state government pursuant to the Development Act and assesses development applications in accordance with s 34 of the Act and Sch 10 of the Development Regulations 2008 as well as "Major Developments" under s 49 of the Act. See www.dac.sa.gov.au.
25. Development Act 1993, s 34.
26. Above, note at s 38(3).
27. The term "adjacent land" is defined in s 4 of the Development Act.
28. Development Act 1993, s 38(4).
29. Above, note at s 38(7).
30. Above, at s 38(10).
31. Above, at s 38(5).
32. Abve, at s 38(10).
33. Above, at s 38(14).
34. See *Quinn v Regional Council of Goyder* [2010] SAERDC 63, *Paltridge v District Council of Grant* [2011] SAERDC 23 and *Lamb v Regional Council of Goyder* [2011] SAERDC 38.
35. See *Paltridge*, above.
36. Above, note at [140].
37. Above at [82]–[110].
38. Above, at [108].
39. According to s 28 of the Development Act 1993, if the minister is of the opinion that it is necessary in the interests of the orderly and proper development of an area of the state, the minister may, by notice in the gazette, declare a DPA on interim operation on the same day that it is released for public consultation.
40. See *Paltridge*, above.
41. See above, note 12.
42. Particularly New South Wales and Victoria. See, P Akerman, "Wind farm work in doldrums" 2012 *The Australian*; J Leggatt, "Councils challenge wind ban" 2012 *Weekly Times* (Bendigo); P Akerman, "Turbines blown away as winds of change sweep through Victorian clean energy industry" 2011 *The* Australian; and N Schultz-Byard, "O'Farrell's Comments Fan Flames of Wind Farm Debate" 2011 ABC *Online*.
43. See above, note 12.
44. See, eg, South Australia's strategic plan "Environment" on www.saplan.org.au, and Climate Change and Greenhouse Emissions Reduction Act 2007 (SA).

45. See, eg, Liberal Party of Australia, "Renewable Energy", Liberal Party of Australia, Canberra, accessed 20 June 2012, available at www.liberal.org.au.
46. See, eg, Clean Energy Council, *Assessment of the impact of policies on renewable enrgy development in Victoria*, Clean Energy Council, Australia, 2010, www.cleanenergycouncil.org.au.
47. See South Australian Liberal leader, Isobel Redmond, "Liberals commit to wind farm reform" (Media Release, 6 January 2012), available at www.isobelredmond.com.au, as reported in D Wills, "Liberals to ban wind farms within 2km of homes" 2012 *The Advertiser*.

Backyard Blitz

New South Wales

Just terms compensation legislation and real property rights

The NSW Government is examining the Land Acquisition (Just Terms Compensation Act) 1991 as it applies to real property rights. The terms of reference are to:

- define and clarify what real property rights or interest in real property are;
- recommend a set of principles to guide the process for how acquisitions of real property should be dealt with by government;
- consider whether and how these principles should be reflected in current legislation; and
- recommend a process for considering these principles in future legislation.

The terms of reference do not include the issue of the level of compensation payable for acquisition of real property.

As advised in the previous issue of *LGR*, the NSW Government was calling for public submissions. Invitations for public submissions have closed and following consideration of the issues a consultation paper will be released for further public comment and feedback.

For more information visit the website www.nsw.gov.au/haveyoursay/justterms.

Special leave sought of the High Court

In issue 10.1 of LGR was featured an article based on the Court of Appeal decision in *Botany Bay City Council v Saab Corp Pty Ltd*.[1] Recently, the council sought leave of the High Court to appeal against the Court of Appeal's decision pertaining to the dismissal of claims against the personal respondents. In dismissing the application for leave, Hayne and Crennan JJ comment at [6]:

> No reason is shown to doubt the correctness of the conclusions reached by the Court of Appeal that the personal respondents had not carried out the development. This would not be a convenient vehicle for consideration of the points of general application which the applicant seeks to raise.

Environmental Planning and Assessment Amendment (Demolition Orders) Bill 2012

This Bill was read a second time on 24 May in the Legislative Assembly.

The Bill will amend the Environmental Planning and Assessment Act 1979 to enable a local council or other relevant consent authority to give an order to demolish or remove an unoccupied building if it is unsightly and significantly detracts from the quality of the amenity of the neighbourhood. This will expand the power of council who currently can only issue an order to the owners of such land to demolish unsightly buildings if those buildings become a danger to the public or "prejudicial to occupants or persons or property in the neighbourhood".

Councils call for local representation at Candidate Information Seminars

In the lead up to the 2012 local government elections, the Local Government and Shires Association of NSW is calling on the NSW Electoral Commission to allow council representative to speak at future Candidate Information Seminars.

According to some, the seminars are missing an experienced council perspective:

> The feedback I've been receiving about the seminars is that an excessive amount of regulatory information is packed into these three hour meetings, acting as a disincentive to people considering running for council.[2]

Some opine that it is vital for councilors be present at these seminars to "answer questions about the reality of council life, the qualities that make a good community leader, and the often complex internal workings of councils".[3]

NSW Budget 2012–13

As part of the state budget, the Building the State package delivers $561 million of new funding for infrastructure to accelerate housing construction as New South Wales housing supply is not keeping up with demand. The package includes the following incentives for more housing infrastructure:

- $481 million of infrastructure to boost housing supply through the Housing Acceleration Fund;
- an additional $30 million in interest concessions under the Local Infrastructure Renewal Scheme, which will allow local councils to build over $1 billion of local infrastructure; and
- an Urban Activation Precinct Program that includes $50 million of incentives for local councils to build essential infrastructure.

The Building the State package will provide the following homebuyer support:

- more than double the First Home Owner Grant to $15,000 from 1 October 2012 ($10,000 from 1 January 2014) for new properties of up to $650,000;
- provide a New Home Grant of $5000 to all non-first homebuyers of new properties of up to $650,000; and
- increase the upper threshold for stamp duty concessions for first homebuyers to $650,000, which reflects Sydney's median house price.

The Building the State package will deliver $13 million in additional funding to deliver a better development approval process by:

- clearing all transitional Pt 3A projects remaining in the system 12 months faster than scheduled;
- determining twice as many major development applications per year than previously; and
- processing up to 255 major development projects that have the potential to deliver an additional 100,000 jobs in New South Wales.

NSW Planning System Review

The first volume of the review paper ("Major Issues") with recommendations for a new planning system in New South Wales, having been provided to the Minister for Planning and Infrastructure, was due for release together with the government's response this month. However, at the time of print, it was not available to the public. An article will feature in the next issue of LGR outlining the review's findings and implications.

South Australia

Independent Commissioner Against Corruption Bill 2012

This Bill has been progressing through the South Australian Parliament and is expected to be enacted shortly. The primary objectives of the legislation are to:

(a) to establish the Independent Commissioner Against Corruption with functions designed to further:
  (i) the identification and investigation of corruption in public administration; and
  (ii) the prevention or minimisation of corruption, misconduct and maladministration in public administration, including through referral of potential issues, education and evaluation of practices, policies and procedures; and

(b) to establish the Office for Public Integrity to manage complaints about public administration with a view to:
  (i) the identification of corruption, misconduct and maladministration in public administration; and
  (ii) ensuring that complaints about public administration are dealt with by the most appropriate person or body; and

(c) to achieve an appropriate balance between the public interest in exposing corruption, misconduct and maladministration in public administration and the public interest in avoiding undue prejudice to a person's reputation (recognising that the balance may be weighted differently in relation to corruption in public administration as compared to misconduct or maladministration in public administration).

Commonwealth

Having commenced on 18 June, about 850 council representatives met in the nation's capital for the Australian Local Government Association's National General Assembly of Local Government (NGA). The representatives have supported a motion requesting the Gillard Government confirm its commitment to holding a referendum on the financial recognition of local government in the Australian Constitution. According to Mayor McCaffery, "the issue of constitutional recognition remains a priority for local government to ensure federal funding remains available to provide essential local community infrastructure and services".

For more detail, visit the association's website on www.alga.asn.au.

Footnotes

1. *Botany Bay City Council v Saab Corp Pty Ltd* (2011) 183 LGERA 228; [2011] NSWCA 308; BC201107691. See also, M Hamilton, "Conditions of consent: uncertainty, invalidity, and liability for breach" 2011 10(1) *LGR* 11.
2. President of the Shires Association of NSW, Cr Ray Donald.
3. President of the Local Government Association of NSW, Cr Keith Rhoades AFSM.

PUBLISHING EDITOR: Banita Jadroska, banita.jadroska@lexisnexis.com.au PUBLISHER: Joanne Beckett SUBSCRIPTION INCLUDES: 10 issues plus binder SYDNEY OFFICE: Locked Bag 2222, Chatswood Delivery Centre NSW 2067 Australia CUSTOMER RELATIONS: 1800 772 772 GENERAL ENQUIRIES: (02) 9422 2222 FACSIMILE: (02) 9422 2404 DX 29590 Chatswood www.lexisnexis.com.au
ISSN 1447-2163 Print Post Approved PP 255003/06255 This publication may be cited as (2012) 10(7) *LGovR*
This newsletter is intended to keep readers abreast of current developments in the field of local government law. It is not, however, to be used or relied upon as a substitute for professional advice. Before acting on any matter in the area, readers should discuss matters with their own professional advisers. This publication is copyright. Except as permitted under the *Copyright Act 1968* (Cth), no part of this publication may be reproduced by any process, electronic or otherwise, without the specific written permission of the copyright owner. Neither may information be stored electronically in any form whatsoever without such permission. Inquiries should be addressed to the publishers.
Printed in Australia © 2012 Reed International Books Australia Pty Limited trading as LexisNexis ABN: 70 001 002 357