



# The Expert Report

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**MALLIK  
REES  
LAWYERS**

**141 Vincent Street  
Cessnock NSW 2325  
DX 21504 CESSNOCK**

**Ph (02) 49901266**

**Fax: (02) 49907844**

**www.mallikrees.com.au**

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### In this Issue:

- SEPP (STATE & REGIONAL DEVELOPMENT) 2011
- ENVIRONMENTAL PLANNING & ASSESSMENT ACT 2011 (PT 3A REPEAL)
- FUNERAL FACILITY—COMMERCIAL PREMISES OR INDUSTRY?
- CHARACTERISATION OF DEVELOPMENT AS ANIMAL ESTABLISHMENT
- RELEVANT WEIGHT TO BE GIVEN TO LEP
- ESTABLISHMENT FOR COMMERCIAL DEVELOPMENT
- SEPP 64—ADVERTISING & SIGNAGE
- COURT OF APPEAL DECISION—S101 ENVIRONMENTAL PLANNING & ASSESSMENT ACT
- COURT OF APPEAL DECISION—COSTS IN CLASS 3 MATTERS



Welcome to the December installment of **The Expert Report**, a newsletter advising clients on recent decisions of the Land and Environment Court and on changes to Local Government, Planning and Environmental Law. We hope that the information contained in this newsletter and in future newsletters will be informative.

The same expertise and client focus that enabled our Environmental Law team to win the 2005 Australian Law Awards in Environmental Law is available in our other fields of practice including Conveyancing, Commercial Law, Leasing, Industrial Law, Liquor and Hospitality Law, Administrative Law, Probate and Wills, Trusts and Criminal Law.

Our Local Government and Planning clients can be assured of specialist knowledge and expertise when they consult our Local Government and Planning Law team.



### Office and Court Christmas Break

Our office will be closed from 3pm Friday 23 December 2011 and will reopen at 9am on Monday 9 January 2012.

The Judges fixed vacation begins on 16 December 2011 and resumes on 30 January 2012.

Matters may be listed for s34 conferences, mediations and hearings before Commissioners throughout the fixed vacation except for public holidays.

The final Registrar directions hearing list will be 22 December 2011 and will resume on 9 January 2012.

Rob Mallik and his staff wish you and your families a happy and safe Christmas and New Year. We look forward to working with you in 2012.

### **INTRODUCTION OF STATE ENVIRONMENTAL PLANNING POLICY (STATE & REGIONAL DEVELOPMENT) 2011**

The draft of proposed SEPP (State and Regional Development) 2011 was publicly exhibited from 18 August 2011 to 2 September 2011. The proposed SEPP (State and Regional Development) 2011 is due to commence on the commencement of Schedule 1.1 to the Part 3A Repeal Act.

The proposed SEPP (State and Regional Development) 2011 amends a number of other SEPP's in part which includes:

- State Environmental Planning Policy (Infrastructure) 2007
- State Environmental Planning Policy (Major Development) 2005.

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- The Hon. Michael Francis Moore has been appointed as an Acting Judge of the Court for the period commencing 3 October 2011 to 16 December 2011.

- Mr Anthony Logan McAvoy has been appointed as an Acting Commissioner of the Court from 21 September 2011. Mr McAvoy has expertise in Aboriginal Land Rights.

### OUR SPECIAL CHRISTMAS OFFER!

If you, a family member or friend are buying or selling property from now until 29 February 2012 you can take advantage of our very competitive Conveyancing fees and at the same time receive a free Will\*.

Just mention this newsletter at your first appointment.

This is a saving of \$198 (GST incl) per couple!

\*does not apply to complex Wills. Conditions apply

## Environmental Planning & Assessment Amendment Act 2011 (Part 3A Repeal)

We briefly advised you in our last newsletter that the Environmental Planning and Assessment Amendment (Part 3A Appeal) Act 2011 was assented to on 27 June 2011.

The primary effect of this new legislation is that Part 3A of the Environmental Planning and Assessment Act 1979 will be removed and will be replaced with provisions designed to confine the types of development for which the Minister responsible for the Environmental Planning and Assessment Act is the consent authority.

The following amendments to the Environmental Planning and Assessment Act 1979 will be made as a result of this new legislation:

- Division 4.1 will be inserted under Part 4 to establish the new assessment path for State Significant development.
- Part 5.1 will be inserted after Part 5 to establish the new assessment pathway for State Significant infrastructure.
- Schedule 4A will be inserted after Schedule 4 which will outline the classes of regional development to which the Joint Regional Planning Panel will be the consent authority.
- Schedule 6A will be inserted after Schedule 6 which establishes transitional arrangements for applications pending consent and already approved under the unamended Part 3A.

It is important to note that the Part 3A Repeal Act changes the membership, role and function of the Planning Assessment Commission and Joint Regional Planning Panels.

The Repeal Act also makes changes to appeal rights.

### Funeral Facility - Commercial Premises or Industry?

This was an appeal to the Court pursuant to s97(1) of the *Environmental Planning and Assessment Act* 1979 and concerned an application for development consent to modify an existing commercial building on land for use as a funeral facility.

The development comprises of an administrations area including reception, offices and meeting rooms, a chapel with 104 seats, function area, crematorium and associated parking.

The Court allowed pursuant to s38(2) of the *Land and Environment Court Act* 1979 for the owner of a Memorial Gardens to participate in the hearing, on a limited basis, in order to raise the issue of permissibility.

The Applicant and the Respondent agreed that the development consent is characterized as a "commercial premises" under the LEP and is permissible with consent, there is no agreement about the acceptability of a funeral facility with a cremator on the site.

On the third day of the hearing the Applicant, by notice of motion, amended its facts and contentions in reply and no longer submitted that the crematorium was an independent component of the commercial premises but an ancillary component of the development.

In determining whether the development was a "commercial premises" or an "industry", the Court ultimately held that the development was permissible as "commercial premises" and found that the characterization of the development as an "industry" would be a strained construction.

Whilst the Court accepted the permissibility of the development they dismissed the appeal and the development consent to modify an existing commercial building for use as a funeral facility was refused as the Court found that the development was unacceptable on a merit assessment under the s79C considerations of the *Environmental Planning and Assessment Act* 1979.

## Characterization of development as “animal establishment”

The Land and Environment Court recently considered an appeal where the applicant operated a private dog and cat shelter. The shelter cares for dogs and cats which are surrendered, abandoned or rescued until an appropriate new owner and home can be found for them. On 10 November 2008 the applicant lodged a development application with the Council seeking development consent for a proposed use described as “residential rural and temporary foster care of domestic dogs and cats until rehomed”. The application also proposed the erection of various sheds, shelters, enclosures and fences for the dogs and cats.

The Council granted development consent to the applicant on 16 June 2009 for the purpose of “Animal Establishment” and subject to conditions, one being that they were restricted to the temporary foster care for domestic cats and up to 6 domestic dogs at one time.

The Council was concerned that the application was housing more than 6 domestic dogs and on 15 February 2011 they issued an order on the applicant pursuant to s121B of the *Environmental Planning and Assessment Act 1979*, to cease using the premises in contravention of the conditions of consent. The applicant appealed the order.

The applicant claims that the development it is carrying out is “agriculture” and under the LEP is permissible without development consent. At the hearing a different reason as to the development consents invalidity was raised in that the Council purported to grant development consent to carry out development for the purpose of “animal establishment”, the purpose of “animal establishment” is not a purpose specified under the heading “only with development consent” in the LEP. The Council did not grant development consent to carry out development for the purpose of “commercial dog breeding and kenneling” that purpose being specified in the LEP.

The Court held that the development consent was outside power and accordingly should be held invalid. The development consent and conditions clearly established that the Council did not purport to grant development consent to carry out development for the purpose of commercial dog breeding and kenneling, but rather for the different and broader purpose of animal establishment which includes the keeping and care of cats as well as dogs. The purpose of “animal establishment” is not, however, a purpose specified under the heading “Only with development consent” in the LEP. The Court held that the development was agriculture which was permitted without consent.

Accordingly, the Court held that if the development consent was therefore outside Council's power and invalid, then the s121B order was also invalid.

The Court also did not agree with Council's argument that the Applicant's business was characterized as being for the purpose of “commercial dog breeding and kenneling”.

### RELEVANT WEIGHT TO BE GIVEN TO LEP

The Land and Environment Court has recently considered an appeal under s97 of the EP&A Act against the refusal by the Council to a development application seeking consent for the fit out and use of an existing commercial premises for the purposes of a retail liquor outlet. As well as other issues such as public policy and site suitability the main issue that Pearson C had to determine was the weight to be given to the amendment to the LEP since the development application had been made, which had the effect of prohibiting the proposed development.

Pearson C held that the amendment to the LEP to prohibit development for the purpose of a liquor outlet in residential 2(a) zone was a matter that should be given significant, but not determinative weight. She further held that the proposed development must be considered on the basis that it is permissible in the shire, and in undertaking that assessment it is relevant that the amending plan did not amend the objectives of the LEP, or those applicable to the Residential zone.

The appeal was upheld.

### Staff Profile

#### Therese Mallik



Therese is an Associate of the firm and a solicitor with over 8 years experience in Probate, Conveyancing, Property and Commercial law.

Therese manages our probate, property and commercial law department and has extensive experience in all aspects of Probate, Conveyancing and Commercial property transactions and is well equipped to handle these types of matters for our commercial, local government and general clients.

Therese is also the only Solicitor who also holds a current Real Estate licence.

For an appointment with Therese please contact our office on 49901266.

## Is Council liable for stormwater damage?

This matter was recently heard in the Supreme Court of the NSW. The plaintiff owned land which it had planned to develop into a combination of residential and retail uses. The Council has conducted various drainage works, constructed roads and permitted various developments that caused untreated stormwater runoff to discharge directly onto the plaintiff's land. As a result the runoff pooled and remained on the land for long periods of time which caused changes to the habitat and ecology of part of the land. In 1999 the Wallum Froglet which is classed as a 'vulnerable species' was detected on the land and their number increased between 1999 and 2003. In 2004 the plaintiff contacted the Council alleging that their conduct amounted to nuisance and asking them to provide adequate drainage to stop the ponding. The plaintiff lodged a development application in 2005 to fill the land and construct a shopping centre and in 2008 the Land and Environment Court granted the development consent subject to certain conditions including the protection of the Wallum Froglet.

The plaintiff commenced proceedings in the Supreme Court seeking a mandatory injunction requiring the Council to implement a drainage scheme to abate the nuisance and also seeking damages for the maintaining and monitoring of the Wallum Froglet and compensation for the loss of the use of that part of the land for the development.

The issues for the Court to consider was whether the stormwater runoff and pooling on the land constituted an actionable nuisance and whether the plaintiff was entitled to recover damages for the maintaining and monitoring of the Wallum Froglet and the loss of that part of the land for the development.

The Court dismissed the claim for a mandatory injunction but awarded damages in the sum of \$600,000 plus 30% of any costs of treating the stormwater. The Court held:

1. The inundation of the land with untreated stormwater runoff caused very serious interference with the plaintiff's enjoyment of the land.
2. The Council knew or ought to have known of the nuisance and the real risk of reasonably foreseeable damage to the plaintiff it had an obligation to take positive action to eliminate the nuisance.
3. No later than May 2004 when the plaintiff complained of the nuisance the Council was aware of the increased flow of water onto the land which could cause damage to the land. This constituted an actionable nuisance from May 2004 onwards.
4. The mandatory injunction was unsuitable because it would have involved obligations to third parties and required the Court's supervision. The appropriate relief was damages on the basis that the plaintiff would install a drainage system itself.
5. The plaintiff could not recover damages for the exclusion of that part of the land which had the Wallum Froglets as their presence was not a consequence of the actionable nuisance and the prospect of the large number of Wallum Froglets colonizing the land was not reasonably foreseeable at the time of the Council's conduct.
6. At the time that the Council became aware that the plaintiff's enjoyment of the land was being unreasonably interfered with, it knew that there was a viable population of Wallum Froglets on the land and the risk that the plaintiff would be put to additional cost in treating the stormwater as to accommodate the Wallum Froglet was foreseeable.

## When is compensation payable for mine subsidence?

This is a recent decision handed down by the High Court. In this matter the Appellant owned a pipeline, part of which traversed land where coal mining takes place. It was predicted by experts that once mining started in that area that there would be mine subsidence. The Applicant, taking into account this advice, commenced preventative and mitigatory works to protect the pipeline. When the Appellant claimed the costs from the Respondent the Respondent refused to pay the compensation claiming that the Appellant could not make a claim unless the whole of the subsidence occurred prior to the Appellant completing the preventative and mitigatory works.

The section which was reviewed by the High Court was s12A(1)(b) of the *Mine Subsidence Compensation Act 1961* (NSW). The Appellant argued that the phrase "from a subsidence that has taken place" doesn't just refer to the specific subsidence that has occurred but includes subsidence anticipated to take place.

The High Court agreed with the Appellant stating that "The Act operates...to prevent or reduce damage before it is caused. Prevention may be cheaper than cure, and more efficient than cure."

This Bill is currently before Parliament and aims to amend the Local Government Act as follows:

- To extend maximum term for which a lease or licence may be granted over community land.
- To convert the status of Council and County Councils
- Provisions for Councillors who are suspended from Office by the Local Government Pecuniary Interest and Disciplinary Tribunal for misbehavior, does not vacate Office because of his or her absence from meetings during the period of suspension
- The voting system in a contested election is to be preferential if only one Councillor is to be elected, and proportional if 2 or more Councillors are to be elected.
- To reduce the period for which special arrangements exist for non-senior staff of Councils affected by the constitution, amalgamation or alteration of Council areas
- Disclosures of pecuniary interests and the duties of Councillors with respect to matters in which they have a pecuniary interest.

We will keep you updated in following Newsletters.

## **DEVELOPERS MUST DESCRIBE THEIR DEVELOPMENT WITH PRECISION**

This was a recent hearing before the Court of Appeal of an application for leave to appeal against a decision of the Land and Environment Court.

The applicant operates a tourist café and wishes to expand its activities by reorganizing the lower ground floor of its premises to incorporate a large room which will contain what has been described as a mixed media exhibition and will include an aboriginal cultural exhibit, a live koala exhibit and a vivarium, in which will be living snakes and lizards.

The applicant approached the Respondent Council for development consent which was initially a deemed refusal and subsequently an actual refusal. The applicant appealed to the Land and Environment Court and was unsuccessful before Senior Commissioner Moore and Justice Sheahan.

The zoning of the land has now changed so that the land is now zoned a “residential bushland conservation” zone and the applicant’s existing activities on its land, as well as its proposed changed activities, would now not be permitted.

The submission made by the applicant was that the development consent in the instant case was for the “establishment of a commercial development on the abovementioned land”. It then refers to the development application as shown in certain nominated plans. The applicant submitted that the development consent was for commercial development on the land and what is being proposed is commercial development.

The Court found that the major problem with this submission is that s91(4) (as it was at the relevant date) provides that the purpose is the purpose specified in the development application, the development application was never tendered before the Commissioner.

The Court of Appeal held that describing the purpose as commercial development is far too vague and nebulous. What the plans showed were the sale of souvenirs and food, principally for tourists; what is now sought is to include some tourist entertainment including a mini zoo.

The Court said that the real question is whether the proposed change of use is another commercial use in that the building is being used (a) for retail premises; or (b) for business premises, noting that (b) involves a service provided directly to the public on a regular basis. The Court did not accept the applicant’s submission that the selling of tickets constituted a retail business. Looking at whether the proposed premises were business premises, there is no occupation, profession or trade seemingly carried on, but even if there was, the proposed activity would not be a service provided directly to members of the public on a regular basis.

The only remaining question for the Court was whether this case was so likely to fail that it is one where leave to appeal should not be granted, the Court held that it probably does raise sufficient matters of public importance for the Court to grant leave to appeal. However, the appeal should be dismissed with costs.

## **SEPP 64—ADVERTISING & SIGNAGE**

We recently acted on behalf of a Respondent Council in an appeal in the Land and Environment Court before Pearson C under s 97(1) of the *Environmental Planning & Assessment Act* against the refusal by the Council to consent to the installation of 31 advertisements of an existing building.

This was a precedent setting case which considered in detail SEPP 64 – Advertising and Signage and in particular whether each proposed sign fell within the definition of “business identification sign”, “wall advertisement”, “building identification sign” or “roof advertisements” and if they were permissible if they could be approved on their merits.

Out of the 31 advertisements that the Applicant was seeking 21 signs were not approved by Pearson C, out of these 21 signs Pearson C did say that it would be appropriate for 5 of the signs to be altered so as to comply with the LEP, 8 signs were approved by Pearson C.

If you are having issues in relation to signs in your area contact our office and make an appointment to see us, after this case we are well equipped in being able to provide you with sound advice in relation to SEPP 64—Advertising and Signage and in particular what signs fall within the definition of “business identification sign”, “wall advertisement”, “building identification sign” or “roof advertisements”.

## **HOT OFF THE PRESS—COURT OF APPEAL DECISIONS**

### **TO GET THE PROTECTION OF S101 OF THE EP&A ACT THE ADVERTISEMENT MUST STRICTLY ACCORD WITH THE REGULATIONS**

This is a recent decision of the Court of Appeal. As a background to this matter in 2009 the First Respondent granted consent to the Third Respondent to use certain land for the construction of a school. Access to this school would be by a bridge that was to be constructed on a public reserve vested in the Council and did not require development consent, nevertheless an Environmental Impact Statement in respect of the bridge did accompany the application.

In July 2009 a notice of the grant of development consent was published in the Council News. In March 2010 the Appellant filed an application with the Land and Environment Court challenging the validity of the consent because the environmental impacts of the bridge had not been taken into account. The Land and Environment Court held that the Council had acted in breach of the *Environmental Planning and Assessment Act 1979* because they had not considered the impacts but held that no relief was available as the proceedings were not brought within three months of the publication of the notice of the Council's consent and therefore time barred to s101 of the Act.

The Appellant asked the Court of the Appeal to consider two issues:

1. Whether the primary judge erred in upholding the validity of the s101 notice and consequently the commencement of the limitation period; and
2. Whether the primary judge erred in finding that the consent to the development application was invalid.

The Court held:

1. Clause 124 of the *Environmental Planning and Assessment Regulation 2000* sets out the essential elements of a notice of the grant of the development consent for the purposes of s101 of the *Environmental Planning and Assessment Act 1979*. If the notice is not given in accordance with the regulations it cannot trigger the commencement of the limitation period in s101.
2. An environmental impact which was a likely consequence of the development needed to be considered, even though it resulted from activity which was not of itself the subject of the development application, for the purposes of s79C(1).

### **COSTS IN CLASS 3 PROCEEDINGS**

This was a recent decision of the Court of Appeal and came from an appeal to the Court from a decision of Sheehan J in relation to Class 3 proceedings, one of the issues that the Court was asked to determine on appeal was whether the Primary Judge erred in awarding costs of the proceedings.

Earlier in the year Pepper J in *Halley v Minister Administering the Environmental Planning and Assessment Act 1979 (No 3)* [2011] NSWLEC 94 held that the "general principle" previously relied upon in cases concerning compensation for compulsory acquisition, that is that the starting point for any determination of costs is that an applicant either should not have to bear his or her own costs or should not have to pay the resuming authority's costs, can no longer be maintained.

The Court of Appeal referred to this recent decision of Pepper J stating that Her Honour's assumption that r42.1 of the UCPR applies to proceedings in the Class 3 jurisdiction, was incorrect. The Court held that there is no presumption that costs follow the event in the Class 3 jurisdiction of the Land and Environment Court.

The Court reiterated the principles derived from previous cases and suggested that in the absence of any disentitling conduct of the land owner the land owner can usually expect costs to be awarded in his favour.

**If you know of anyone that would like to subscribe to the Expert Report please email**

**[marlie@mallikrees.com.au](mailto:marlie@mallikrees.com.au)**