



Land and Environment Court New South Wales

Case Title: Oshlack v Rous Water

Medium Neutral Citation: [2011] NSWLEC 73

Hearing Date(s): 14 March 2011

Decision Date: 28 April 2011

Jurisdiction: Class 4

Before: Biscoe J

Decision: Preliminary questions answered as follows:
(a) Was the First Respondent, Rous Water, required to comply with the provisions of ss 111 and 112 of the Environmental Planning and Assessment Act 1979 with respect to the impacts on human health and the environment of adding fluorine to the water supply when determining to approve the construction and operation of the Clunes, Dorrroughby, Corndale and Knockrow fluoridation plants? Yes, except that insofar as any of those plants was the subject of the direction of 12 December 2007 to add fluorine to the Richmond Valley Water Supply the First Respondent was required to comply with s 111 but not s 112;
(b) Was the Second Respondent, Ballina Shire Council, required to comply with the provisions of ss 111 and 112 of the Environmental Planning and Assessment Act with respect to the impacts on human health and the environment of adding fluorine to the water supply when determining to approve the construction of the Marom Creek Fluoridation plant? Yes.

Catchwords: JUDICIAL REVIEW:- whether an activity by a water supply authority pursuant to an approval or direction under the Fluoridation of Public Waters Supplies Act 1957 to add fluorine to the water supply under its control

is subject to ss 111 and 112 of the Environmental Planning and Assessment Act 1979.

Legislation Cited: Broadcasting and Television Act 1942 (Cth) ss 89, 132
Code of Practice for the Fluoridation of Public Water Supplies
Constitution s 109
Dangerous Goods Act 1975
Environmental Planning and Assessment Act 1979 ss 111, 112, 113, 114
Environmental Planning and Assessment Regulation 2000 cl 228
Fluoridation of Public Water Supplies Act 1957 ss 3, 6, 6A, 6B, 11
Fluoridation of Water Supplies Regulation 2007 cl 5, 6, 7, 8
National Parks and Wildlife Act 1974
Occupational Health and Safety Act 2000
Protection of the Environment Operations Act 1997
Roads Act 1993 s 88

Cases Cited: Coalcliff Community Association Inc v Minister for Urban Affairs and Planning [1999] NSWCA 317, 106 LGERA 243
Commercial Radio Coffs Harbour Ltd v Fuller [1986] HCA 42, 161 CLR 47
Ferdinands v Commissioner for Public Employment [2006] HCA 5, 225 CLR 130
Parks and Playgrounds Movement Inc v Newcastle City Council [2010] NSWLEC 231
Prineas v Forestry Commission of NSW (1983) 49 LGRA 402

Category: Separate questions

Parties: Al Oshlack (Applicant)
Rous Water (First Respondent)
Ballina Shire Council (Second Respondent)
Lismore City Council (Third Respondent)

Representation

- Counsel: Mr J Johnson (Applicant)
Mr N J Williams SC (Respondents)

- Solicitors: N/A (Applicant)
Blake Dawson (Respondents)

File number(s): 40570 of 2010

JUDGMENT

Introduction

- 1 The addition of fluorine to public water supplies in New South Wales is regulated by the *Fluoridation of Public Water Supplies Act 1957* (**Fluoridation Act**). Under that Act, the Secretary of the Department of Health may grant approval to (s 6), or may direct (s 6A), a water supply authority to add fluorine to a public water supply under its control. A “water supply authority” is defined in s 3 to include “any person or body, corporate or unincorporate, who or which supplies water to the public”. The respondents, Rous Water, Ballina Shire Council and Lismore City Council, are “water supply authorities” as defined. “Rous Water” is the business name of Rous County Council. Lismore City Council has filed a submitting appearance.

- 2 The issue before the Court is whether an activity by a water supply authority pursuant to an approval or direction under the Fluoridation Act to add fluorine to the water supply under its control is subject to ss 111 and 112 of the *Environmental Planning and Assessment Act 1979* (**EPA Act**).

- 3 The issue is raised by the following two preliminary questions in the proceedings:
 - (a) Was the first respondent, Rous Water, required to comply with the provisions of ss 111 and 112 of the EPA Act with respect to the impacts on human health and the environment of adding fluorine to the water supply when determining to approve the construction and operation of the Clunes, Dorrroughby, Corndale and Knockrow fluoridation plants?
 - (b) Was the second respondent, Ballina Shire Council, required to comply with the provisions of ss 111 and 112 of the EPA

Act with respect to the impacts on human health and the environment of adding fluorine to the water supply when determining to approve the construction of the Marom Creek Fluoridation plant?

4 If s 111 of the EPA Act applied, the respondents, before carrying out the activity were required to:

- (a) “examine and take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of that activity”;
- (b) consider whether the activity “is likely” to have a “significant effect” on threatened species and their habitats; and
- (c) consider the effect of the activity on “any other protected fauna or protected native plants within the meaning of the *National Parks and Wildlife Act 1974*”.

5 If s 112 of the EPA Act applied, there was a jurisdictional fact, which the Court would determine at the final hearing, whether the activity of adding fluorine to the water supply is likely to significantly affect the environment or threatened species, populations or ecological communities, or their habitats. If so, s 112 imposed the following requirements on the respondents before they carried out the activity:

- (a) if the activity “is likely to significantly affect the environment”, an environmental impact statement had to be “examined and considered”; and
- (b) if the activity “is likely to significantly affect threatened species” or their habitats, a species impact statement (or an environmental impact statement that includes a species impact statement) had to be prepared.

6 If s 112 did not apply, as the respondents contend, it will be unnecessary for the parties to call (as they otherwise will) expert scientific evidence as to a jurisdictional fact in s 112. Consequently, the duration of the final

hearing is likely to be much reduced and will only be concerned with residual issues. That is the rationale for the preliminary questions.

Approvals and direction

- 7 Rous Water has been granted two approvals and a direction under the Fluoridation Act to add fluorine to public waters supplies located within three geographical areas of its operation:
- (a) On 12 December 2007, Rous Water was granted approval, pursuant to s 6, to add fluorine to the “Lismore LGA water supply” (**Lismore Approval**);
 - (a) On 12 December 2007, Rous Water was directed, pursuant to s 6A, to add fluorine to the “Richmond Valley water supply” (**Richmond Valley Direction**); and
 - (b) On 20 August 2009, Rous Water was granted approval, pursuant to s 6, to add fluorine to the “Ballina LGA water supply” (**Ballina Approval**).
- 8 On 11 December 2009, Ballina Shire Council was granted approval pursuant to s 6 to add fluorine to the “Ballina – Marom Creek water supply” (**Ballina – Marom Creek Approval**).
- 9 Each of the approvals and the direction is subject to three almost identical conditions or terms except that the date differs in the third for commencing “the upward adjustment of fluorine”. The conditions or terms are, or are very similar to the following:
- 1. [The authority] may only add fluorine to the [geographical area] water supply in accordance with any provisions, directions or approvals made under the Fluoridation of Public Water Supplies Act 1957, the Code of Practice for the Fluoridation of Public Water Supplies made under that Act as amended from time to time, and

the Fluoridation of Public Water Supplies Regulations 2007 or any subsequent Regulation made in its place; and

2. [The authority] shall maintain the content of fluorine in the [geographical area] water supply at a target concentration level of 1.0 mg/L with an overall accuracy of +/-5% and within an operating range of not more than 1.5 mg/L and not less than 0.9 mg/L and generally in accordance with the relevant provisions of the Code of Practice for the Fluoridation of Public Water Supplies; and
3. [The authority] shall have commenced the upward adjustment of fluorine in the [geographical area] water supply by no later than [date], unless otherwise approved by the Chief Dental Officer of NSW Health or that Officer's approved representative.

10 The specified dates in condition or term 3 for commencing the upward adjustment of fluorine were as follows:

- (a) Lismore Approval – 31 December 2008;
- (b) Richmond Valley Direction – 31 December 2008;
- (c) Ballina Approval – 31 December 2010;
- (d) Ballina – Marom Creek Approval – 31 December 2010.

11 However, pursuant to condition or term 3, on 14 March 2011 (during the hearing of the preliminary questions) the Chief Dental Officer of NSW Health wrote to Rous Water extending to 30 June 2012 the commencement dates for the upward adjustment of fluorine at Lismore, Richmond Valley and Ballina.

Resolutions

12 On 21 April 2010, Rous Water resolved to approve the "construction and operation of the Clunes, Dorrroughby, Corndale and Knockrow fluoridation plants" having considered a "Review of Environmental Factors" and "Determining Authorities Report" incorporating "letter dated

16 February 2010” from its town planning consultants (**Rous Water’s Resolution**). The purpose of the fluoridation plants is to facilitate the addition of fluorine to the public waters supplies in accordance with the Lismore Approval, the Richmond Valley Direction and the Ballina Approval.

13 On 27 May 2010, Ballina Shire Council resolved to approve the “construction of the proposed fluoridation dosing plant at Marom Creek WTP, subject to the recommended conditions of the Determination Report” (**Ballina Shire Council’s Resolution**). The purpose of the fluoridation dosing plant is to facilitate the addition of fluoride to the public water supply in accordance with the Ballina – Marom Creek Approval.

14 To date, Rous Water and Ballina Shire Council have not commenced construction of any of the fluoridation plants and have not commenced the “upward adjustment of fluorine” in accordance with any of the approvals or the direction.

15 In summary, the position is as follows:

Respondent	Location	Date of resolution	Approval / Direction under Fluoridation Act	Commencement date in Approval or Direction	Extended Commencement Date
Rous Water	Lismore	21/4/10	Approval	31/12/08	30/6/12
	Richmond Valley	21/4/10	Direction	31/12/08	30/6/12
	Ballina	21/4/10	Approval	31/12/10	30/6/12
Ballina SC	Ballina – Marom Creek	27/5/10	Approval	31/12/10	

16 The evidence does not disclose which of the Clunes, Dorrroughby, Corndale and Knockrow fluoridation plants, which were the subject of Rous Water’s Resolution, was the subject of the Richmond Valley Direction and which were the subject of the Lismore Approval or the Ballina Approval: see [7] and [12] above. Nevertheless, the evidence is sufficient to enable the preliminary questions to be answered.

The Proceedings

- 17 The applicant challenges the validity of the Resolutions and seeks declarations and injunctions including an injunction restraining the respondents from undertaking any activities or work in reliance on the approvals or direction.
- 18 The applicant's main complaint is that in making the resolutions as a step in carrying out the activity of fluoridating public water supplies under their control, the respondents were bound to comply with ss 111 and 112 of the EPA Act. The respondents contend that they were not and are not under an obligation to comply with ss 111 and 112.

The Fluoridation Statutory Regime

- 19 The fluoridation statutory regime comprises the Fluoridation Act, the Fluoridation of Water Supplies Regulation (**Fluoridation Regulation**) and the gazetted Code of Practice for the Fluoridation of Public Water Supplies (**Fluoridation Code**). The Fluoridation Code is incorporated by reference in the Fluoridation Regulation. Both are incorporated by reference in conditions or terms of the approvals and direction: [9] above.
- 20 The Fluoridation Act relevantly provides:
 - 6 (1) **Notwithstanding anything contained in any other Act**, a water supply authority may, subject to the provisions of this section and the regulations, add fluorine to any public water supply under its control.
 - (1A) **Notwithstanding anything contained in any other Act**, a water supply authority shall, subject to this Act and the regulations, add fluorine to any public water supply under its control, if directed to do so by the Secretary.
 - (2) A water supply authority shall not add fluorine to any public water supply except with the approval of or at the direction of the Secretary.
 - (3) A person, not being a water supply authority, shall not add fluorine to any public water supply.
 - ...
 - (6) Any person, not being a water supply authority, who contravenes or fails to comply with any of the provisions of

this section or any water supply authority contravening or failing to comply with any of the provisions of this section or any of the conditions attached to an approval granted to it under the provisions of this section, shall be guilty of an offence against this Act.

6A Directions

(1) The Secretary may, by notification published in the Gazette, direct a water supply authority to add fluorine to a public water supply.

...

(3) A direction is subject to:

- (a) a term requiring the water supply authority to maintain the content of fluorine in the public water supply at a concentration of not more than the maximum nor less than the minimum concentration (calculated as parts per million) specified in the direction,
- (b) a term prohibiting the water supply authority from adding to the public water supply fluorine in a form other than that specified in the direction, and
- (c) such other terms as may be determined by the Secretary and specified in the direction.

...

(5) Any water supply authority contravening a direction or any terms attached to the direction is guilty of an offence against this Act.

6B Discontinuance of fluoridation

- (1) A water supply authority to which an approval has been granted or a direction has been given shall not discontinue fluoridating the public water supply concerned, unless the approval or direction is revoked by the Secretary.
- (2) A water supply authority contravening this section is guilty of an offence against this Act.

(emphasis added)

21 The Fluoridation Act predates the EPA Act but ss 6(1A) and 6A were introduced after the EPA Act.

22 Section 11(1) provides that regulations may be made with respect to:

- (a) the protection of persons employed in adding fluorine to any public water supply from inhaling fumes or dust containing fluorine,
- (b) the qualifications of persons employed in operating plant or equipment used for adding fluorine to any public water supply,

- (c) the disposal or destruction of containers from which fluorine has been removed for addition to any public water supply,
- (d) requiring a water supply authority to whom an approval under this Act has been granted or direction given to make analyses and the prescribed tests of samples of water taken at such points as the Secretary determines from the public water supply in respect of which such approval was granted or direction given and to forward to the Secretary samples of water so taken from such public water supply,
- (e) prescribing the method of making such analyses and tests and the times or intervals at which such analyses and tests shall be made,
- (f) the records to be kept for the purposes of this Act by a water supply authority to whom an approval under this Act has been granted or direction given...

23 Section 11(3) provides that the regulations may incorporate by reference any codes in force and prescribed or published by any authority or body.

24 The Fluoridation Regulation contains provisions with respect to:

- (a) the accuracy of machinery used to carry out fluoride dosing; cl 5;
- (b) alterations to water supply capacity, water supply works and fluoridating apparatus: cl 6;
- (c) analyses of water samples; cl 7; and
- (d) qualifications of fluoridation equipment operators: cl 8.

25 The Fluoridation Regulation incorporates by reference the Fluoridation Code. The Fluoridation Code at [2] states that it “includes generally technical material”, which has not been specified in the Fluoridation Act or Regulation; its aim is “to achieve best practice in the establishment and operation of fluoridation plants in New South Wales, in order to meet the technical, occupational health and safety, and environmental requirements of the relevant legislation”; it applies to all new and existing plants; and “it is the responsibility of the fluoridating water supply authorities to ensure that they comply with” the Code.

- 26 The Fluoridation Code at [5.1.7] under the heading “Design Controls for Fluoridation Facilities” states that the water supply authority “shall ensure the fluoridation plant complies with all legislative requirements”. It continues: “The Fluoridation Act, Regulation and Code of Practice does not contain all legislative requirements that a Water Supply Authority may have to comply with in the design, construction and operation of a fluoridation plant (for example, building codes). The responsibility for identification of and, compliance with, relevant legislative requirements lies with the Water Supply Authority”. The Fluoridation Code at [6.1.1] and [7.1.1] under the headings “Occupational Health and Safety” and “Environmental Safety” states that the water supply authority must comply with the provisions of the *Occupational Health and Safety Act 2000*, the *Dangerous Goods Act 1975*, and the *Protection of the Environment Operations Act 1997* and that: “In the area of protection of the environment these Acts and Regulations will take precedence over the Fluoridation Act, Fluoridation Regulation and Code of Practice”.
- 27 Other sections of the Fluoridation Code are headed: Control of fluoridating agent: at [8]; Measurement of fluoride in the treated water: at [9]; Plant operation and process control: at [10]; Reporting requirements: at [11]; Operator training and qualification: at [12]; Records keeping and availability: at [13]; and Quality assurance and auditing: at [14].

The EPA Act and Regulation

- 28 Sections 111 and 112 in Part 5 of the EPA Act relevantly provide:
- 111 Duty to consider environmental impact**
- (1) For the purpose of attaining the objects of this Act relating to the protection and enhancement of the environment, a determining authority in its **consideration** of an activity shall, **notwithstanding** any other provisions of this Act or **the provisions of any other Act** or of any instrument made under this or any other Act, examine and take into account to the fullest extent possible all matters affecting or likely to affect the environment by reason of that activity.
 - (2) Without limiting subsection (1), a determining authority shall consider the effect of an activity on:

- (a) any conservation agreement entered into under the *National Parks and Wildlife Act 1974* and applying to the whole or part of the land to which the activity relates, and
 - (b) any plan of management adopted under that Act for the conservation area to which the agreement relates, and
 - (c) any joint management agreement entered into under the *Threatened Species Conservation Act 1995*, and
 - (d) any biobanking agreement entered into under Part 7A of the *Threatened Species Conservation Act 1995* that applies to the whole or part of the land to which the activity relates.
- (3) Without limiting subsection (1), a determining authority shall consider the effect of an activity on any wilderness area (within the meaning of the *Wilderness Act 1987*) in the locality in which the activity is intended to be carried on.
- (4) Without limiting subsection (1), a determining authority must consider the effect of an activity on:
- (a) critical habitat, and
 - (b) in the case of threatened species, populations and ecological communities, and their habitats, whether there is likely to be a significant effect on those species, populations or ecological communities, or those habitats, and
 - (c) any other protected fauna or protected native plants within the meaning of the *National Parks and Wildlife Act 1974*.

112 Decision of determining authority in relation to certain activities

- (1) A determining authority shall not carry out an activity, or grant an approval in relation to an activity, being an activity that is a prescribed activity, an activity of a prescribed kind or an activity that is likely to significantly affect the environment (including critical habitat) or threatened species, populations or ecological communities, or their habitats, unless:
- (a) the determining authority has obtained or been furnished with and has examined and considered an environmental impact statement in respect of the activity:
 - (i) prepared in the prescribed form and manner by or on behalf of the proponent, and
 - (ii) except where the proponent is the determining authority, submitted to the determining authority in the prescribed manner,
 - (b) notice referred to in section 113 (1) has been duly given by the determining authority (or, where a nominated determining authority has been nominated in relation to the activity, by the nominated determining authority), the period specified in the notice has expired and the determining authority has examined and **considered** any representations made to it or any other determining authority in accordance with section 113 (2),

- (c) the determining authority has complied with section 113 (3)

...

- (1B) Without limiting subsection (1), a determining authority must not carry out an activity, or grant an approval in relation to an activity, being an activity that is in respect of land that is, or is a part of, critical habitat or is likely to significantly affect threatened species, populations or ecological communities, or their habitats, unless a species impact statement, or an environmental impact statement that includes a species impact statement, has been prepared (in each case) in accordance with Division 2 of Part 6 of the *Threatened Species Conservation Act 1995*.

...

- (2) The determining authority or nominated determining authority, as the case requires, shall, as soon as practicable after an environmental impact statement is obtained by or furnished to it, as referred to in subsection (1), but before giving notice under section 113 (1), furnish to the Director-General a copy of the statement.

...

- (4) Before carrying out an activity referred to in subsection (1) or in determining whether to grant an approval in relation to such an activity, a determining authority which is **satisfied** that the activity will detrimentally affect the environment (including critical habitat) or threatened species, populations or ecological communities, or their habitats:
 - (a) may, except where it is the proponent of the activity:
 - (i) impose such conditions or require such modifications as will in its opinion eliminate or reduce the detrimental effect of the activity on the environment (including critical habitat) or threatened species, populations or ecological communities, or their habitats, or
 - (ii) disapprove of the activity, or
 - (b) may, where it is the proponent of the activity:
 - (i) modify the proposed activity so as to eliminate or reduce the detrimental effect of the activity on the environment (including critical habitat) or threatened species, populations or ecological communities, or their habitats, or
 - (ii) **refrain from undertaking the activity.**
- (5) Where a determining authority, not being the proponent of an activity, imposes conditions as referred to in subsection (4)(a)(i) or disapproves of an activity as referred to in subsection (4)(a)(ii), the determining authority shall, by notice in writing to the proponent, indicate the reasons for the imposition of the conditions or for disapproving of the activity.

- (6) **The provisions of subsection (4) have effect notwithstanding** any other provisions of this Act (other than Part 3A) or **the provisions of any other Act** or of any instrument made under this or any other Act.

...
(emphasis added)

- 29 “Determining authority” is defined in s 110 to include a public authority and, in relation to an activity, the public authority by or on whose behalf the activity is or is to be carried out or whose approval is required in order to enable the activity to be carried out.
- 30 Section 113 requires the determining authority to publicise the environmental impact statement, receive public submissions and provide copies of the submissions to the Director-General of the Department of Environment, Climate Change and Water. Except where the Minister has requested that a review be held by the Planning Assessment Commission, the Director-General may examine or cause to be examined the environmental impact statement and any submissions; and is to forward to the authority a report containing the findings of the examination together with any recommendations. The report is to be made public.
- 31 Section 114 provides that where the Minister has requested that a review be conducted by the Planning Assessment Commission, the Minister is to consider the Commission’s findings and recommendations and forward a copy to the authority. The Minister may advise the authority whether, in the Minister’s opinion, (among other matters) there are no environmental grounds which would preclude the carrying out of the activity to which the findings and recommendations relate in accordance with the proponent’s proposal.
- 32 Clause 228 of the Environmental Planning and Assessment Regulation prescribes factors that must be taken into account concerning the impact of an activity on the environment.

Submissions

- 33 The respondents submit that the fluoridation statutory regime is self-contained in the sense that it contains comprehensive provisions dealing with consideration of proposals to fluoridate public water supplies and the safe carrying out of fluoridation. This is the context in which the introductory words to s 6(1) and (1A) “notwithstanding anything contained in any other Act” must be construed. Once an authority has been granted an approval or directed to add fluorine, it has an unfettered right or duty to do so. The general terms of ss 111 and 112 of the EPA Act should be read subject to the specific terms of s 6(1) and (1A) of the Fluoridation Act, thus avoiding conflict: *Parks and Playgrounds Movement Inc v Newcastle City Council* [2010] NSWLEC 231 at [102] – [108]. Alternatively, if these provisions conflict, then ss 111 and 112 must yield to s 6(1) and (1A): *Parks and Playgrounds* at [111] - [112].
- 34 The applicant submits that the fluoridation statutory regime is not self-contained. It covers the field only in the narrow sense that it provides a detailed regime for how the act of adding fluorine to water is to be carried out. An obligation to consider the impact on the environment under ss 111 and 112 of the EPA Act does not encroach on that subject matter and would depart from the legislative intention expressed through the words of the regulating regime for fluoridation: *Commercial Radio Coffs Harbour Ltd v Fuller* [1986] HCA 42, 161 CLR 47. The decision in *Parks and Playgrounds* is distinguishable. There is no inconsistency between having a right or duty to fluoridate water and being under an obligation to have regard to the environmental impacts of doing so, including from constructing and operating the associated infrastructure. The two statutes should be read together so that each, within its own sphere, can continue to operate. Compliance with ss 111 and (if applicable) s 112 would provide the water supply authority with information as to how (in the case of a direction) and whether and how (in the case of an approval) to

implement a fluoridation plant, having regard to the impact on the environment.

Discussion

- 35 There is a tension between s 6(1) and (1A) of the Fluoridation Act and ss 111(1) and 112(4) and (6) of the EPA Act. Is a duty or discretion to fluoridate a water supply conferred by a direction or approval under ss 6(1) and (1A) of the Fluoridation Act, which in terms apply “notwithstanding anything contained in any other Act”, fettered by the provisions of ss 111(1) and 112(4) and (6) of the EPA Act, which in terms apply “notwithstanding the provisions of ... any other Act”? The construction issue is more complex than if the “notwithstanding” provision appeared in only one of those statutes.
- 36 In my opinion, the specific provisions of ss 6(1) and (1A) of the Fluoridation Act should first be construed without the introductory words “Notwithstanding anything contained in any other Act”. Then, if the general provisions of ss 111 and 112 of the EPA Act contradict the operation of ss 6(1) and (1A) so construed, ss 111 and 112 must yield: *Parks and Playgrounds* at [102] and [106].
- 37 At issue in *Parks and Playgrounds* was the interplay between s 88 of the *Roads Act* 1993 and ss 111 and 112 of the EPA Act. Section 88 provided that a roads authority “may, despite any other Act or law to the contrary, remove or lop any tree or other vegetation that is on or overhanging a public road if, in its opinion, it is necessary to do so for the purpose of carrying out road work or removing a traffic hazard”. Having regard to the urgency purpose of s 88, its text and established canons of constructions, I decided that the specific provisions of s 88 were not subject to the general provisions of ss 111 and 112 in Part 5 and of Part 4 of the earlier EPA Act. Thus, the roads authority could in its discretion remove trees if, in its opinion, it was necessary to do so for the purposes of removing a traffic

hazard, without having to comply with the requirements of ss 111 and 112.

After reviewing relevant principles of statutory construction, I said:

97 In my opinion, the purpose and text of s 88 and established canons of construction weigh in favour of the conclusion that it is intended to exhaustively describe the only planning condition for the exercise of power to which it refers and therefore is not subject to the said planning constraints of Parts 4 or 5 of the EPA Act. According to those canons, priority may be attributed to a statute dealing with the specific (s 88 Roads Act) over one dealing with the general (Parts 4 and 5 EPA Act) and to a statute that is later in time (s 88 Roads Act) over one that is earlier (Parts 4 and 5 EPA Act): see [81] - [85] above.

98 The purpose of s 88 is to empower a roads authority to deal with a situation which, in its opinion, is dangerous or hazardous. By its nature, a dangerous or hazardous situation may need to be addressed quickly, even urgently. The ongoing hazard or danger to the public which results from holding that s 88 is subject to the delay involved in obtaining development consent if required under Part 4 of the EPA Act (including taking account of all the mandatory matters in s 79C) or in satisfying the requirements of ss 111 and 112 in Part 5, suggests a construction that s 88 is not subject to those requirements of Parts 4 and 5.

99 As for the text, the words in s 88 "despite any other Act or law to the contrary" suggest that s 88 exhaustively states the planning condition of power which it confers and is not subject to any other statutory planning requirements or restrictions.

...

102 The process of analysis for legislation containing such a phrase was set out in *In re Bland Brothers and the Council of the Borough of Inglewood (No 2)* [1920] VLR 522 where the Full Court construed a section of an Act commencing "Notwithstanding anything in this Act contained". It was held at 533:

As to the introductory words, the section should first be construed without them, and then, if there is anything in the other provisions of the Act inconsistent with the interpretation so arrived at, these other provisions must yield. This was in effect decided, as we understand, by all of the justices of England in *Sir Thomas Cecil's Case* [1597] 7 Rep, where it was said that the Act otherwise was to be no impediment to the interpretation of a section containing the words 'notwithstanding' etc.

...

106 Applying the process of analysis in *Bland* to s 88 of the Roads Act :

- (a) the first step is to construe s 88 without the words “despite any other Act or law to the contrary”;
- (b) the second step is to ask whether s 76A in Part 4 and ss 111 and 112 in Part 5 of the EPA Act contradict the operation of s 88 so construed;
- (c) the third step is to obey the directive contained in the word “despite” and ignore what would otherwise be a contradiction from the entitlement provided by s 88.

...

- 38 The principles discussed in *Parks and Playgrounds* are relevant but the decision is factually distinguishable. There the urgency purpose of s 88 of the *Roads Act*, which is absent in the present case, strongly influenced the decision. I also note that *Parks and Playgrounds* concerned a right but not an obligation to carry out an activity. The present case concerns not just a right to carry out an activity pursuant to an approval but an obligation to do so pursuant to a direction.
- 39 The construction of s 6 of the Fluoridation Act relevantly focuses on the distinction between a direction and an approval. There is a great difference in the nature of the obligation to fluoridate under s 6(1A) created by a direction and the nature of a discretionary right to fluoridate under s 6(1) created by an approval. The question of inconsistency with ss 111 and 112 of the EPA Act should be approached with a clear eye to the difference.
- 40 Term 3 of the Richmond Valley Direction required the upward adjustment of fluorine to commence by 31 December 2008, which was extended to 30 June 2012: see [9] – [11] above. Section 6A(5) of the Fluoridation Act provides that any water supply authority contravening any terms attached to a direction is guilty of an offence against that Act. The respondents submit that if compliance with ss 111 and 112 of the EPA Act causes an authority to breach a commencement date requirement of a direction, it would be guilty of an offence, which demonstrates that ss 111 and 112 are inconsistent with s 6A of the Fluoridation Act. I do not accept the submission.

- 41 In my opinion, s 6A(5) of the Fluoridation Act should be construed as not applying to a contravention where compliance is impossible without contravening another law (provided the other law is not inconsistent with the more specific provisions of the Fluoridation Act): *Commercial Radio Coffs Harbour Ltd v Fuller* [1986] HCA 42, 161 CLR 47 at 50.
- 42 In *Commercial Radio* a question arose as to inconsistency between Commonwealth and State laws. Under s 109 of the Constitution the State law was invalid to the extent of any inconsistency. The Commonwealth law, the *Broadcasting and Television Act* 1942, prohibited operation of a radio broadcasting transmitter without a licence, which could be granted on conditions. Section 89c required the holder of the licence to commence the service in pursuance of a licence on such date as was determined by the Tribunal. Section 132(1) made it an offence to fail to comply with any provision of the Act. The NSW State law, the EPA Act, provided for the preparation of environmental planning instruments which might prohibit the construction of buildings on land without the consent of the relevant authority. The concurrence of the Minister was required for the erection of a building of a height greater than 25 metres. Failure to comply with a planning instrument or with a condition subject to which consent was granted was an offence under the EPA Act. The applicant argued that if the NSW planning laws made it unlawful for the licence holder to do what has to be done in order to comply with the conditions of the licence and commence the licensed service on the specified date, then simultaneous obedience to the Commonwealth Act and the State planning laws is impossible, and they are inconsistent. The High Court held that there was no inconsistency within the meaning of s 109 of the Constitution.
- 43 As to the offence provision, Gibbs CJ and Brennan J said at [4]:
- ...The better construction is to read s 132(1) as not applying to a failure to comply with a condition or with the requirements of s 89c where compliance is impossible without contravening another law (provided, of course, that the other law is not inconsistent with the more specific provisions of the Act). In our opinion, s 132(1) stops short of authorizing a contravention of a State planning law.

- 44 Wilson, Deane and Dawson JJ, concurring in the result, said at [22]:
... despite the breadth of its language, we do not think that s 132(1) makes a criminal offence of a mere failure to institute the service on the date determined by the Tribunal...
- 45 The reasoning in *Commercial Radio* is also of some assistance on the general approach to the issue of inconsistency, although caution is required because
- (a) it was decided in a different context of inconsistency between Federal and State legislation under s 109 of the Constitution, whereas the present case concerns two pieces of legislation by the same State legislature with relevant provisions of the Fluoridisation Act being enacted both before and after the EPA Act; and
 - (b) the legislation in *Commercial Radio* dealt with a wholly different subject matter.
- 46 On the issue of inconsistency, Wilson, Deane and Dawson JJ said at [19]-[20]:
... our construction of the Commonwealth Act leads us to conclude that it does not purport to state exclusively or exhaustively the law with which the operation of a commercial broadcasting station must comply. The Act prohibits broadcasting without a licence. The prohibition is removed upon the grant of a licence, subject to certain conditions. Failure to comply with the conditions may result in a revocation or suspension of the licence thereby reinstating the prohibition. The licence confers on the grantee a permission to broadcast. There is nothing in the Act which suggests that it confers an absolute right or positive authority to broadcast so that the grantee, because he has a licence, is immune or exempt from compliance with State laws. On the contrary, in concentrating on the technical efficiency and quality of broadcasting services, the Act leaves room for the operation of laws, both State and Commonwealth, dealing with other matters relevant to the operation of such services. For example, the applicant was required to obtain, as it in fact did before the issue of the licence, the consent of the Department of Aviation to the erection of two radio antennas, subject to conditions relating to marking and lighting under reg 92 of the Air Navigation Regulations. Another example is the purchase or lease of the land, upon which the broadcasting station is to be built, in accordance with State property laws. So also is the obtaining of development consent

pursuant to the State Act for the building and use of the broadcasting station.

In *Airlines of NSW Pty Ltd v New South Wales*, the issue before the Court was whether the provisions of the State Transport (Co-ordination) Act 1931 (NSW), as amended, relating to the licensing of aircraft operating solely within New South Wales, were inconsistent with provisions of the Air Navigation Act 1920 (Cth), as amended. The combined effect of both statutes was to require an operator of an intrastate airline service which operated partly within "controlled airspace", as defined in the latter Act, to obtain licences under both Acts. The Court unanimously held that there was no inconsistency between the two statutes since each employed a licensing system to serve a different end. The Air Navigation Act was concerned with the safety, regularity and efficiency of the flight of aircraft in air transport operations, while the State Transport (Coordination) Act focused on the economic control of the transport for reward of passengers and cargo within the State. Windeyer J. concluded:

"The combined results constitute a generally uniform law governing air navigation throughout Australia, based upon a system of complementary and reciprocal enactments."

47 Their Honours added at [23]:

If a local council withholds its consent to a development application made under the State Act, the grantee of a licence under the Commonwealth Act may be unable to exercise the authority conferred by the licence. However, the fact that the combined operation of two laws, each of which deals with a different topic, may create a situation of deadlock does not give rise to inconsistency: see *Airlines of NSW Pty Ltd v New South Wales (No 2)* ... A resolution of the difficulty may be found in particular instances in the variation of a licence condition pursuant to s 85 of the Commonwealth Act, but even if this cannot be done, the result is at most one of inconvenience rather than inconsistency.

48 Relevantly, the most enduring canon of construction is that which requires the court "to endeavour, to the fullest extent permitted by the language, to read the two statutes so that each, within its own sphere, can continue to operate, such that no part of either is taken to be separated or inoperative, for Parliament has not said so": *Ferdinands v Commissioner for Public Employment* [2006] HCA 5, 225 CLR 130 at [108].

49 In my view, the fluoridation statutory regime is not exhaustive. It is only concerned with providing a system of approvals and directions for the addition of fluorine to public water supplies and with a detailed technical

regime of how that is to be carried out: see [19] – [27] above. The Fluoridation Code, which is incorporated by reference in the Fluoridation Regulation, reinforces this view. The Fluoridation Code states that the Fluoridation Act, Regulation and Code do not contain all legislative requirements with which an authority may have to comply. The Fluoridation Code notes that a water supply authority must comply with the *Occupational Health and Safety Act*, the *Dangerous Goods Act* and the *Protection of the Environment Operations Act* : see [25] – [26] above. The Fluoridation Code does not expressly mention the EPA Act, but is itself not exhaustive when mentioning other specific Acts.

- 50 The Fluoridation Act and Part 5 of the EPA Act generally serve different ends. As stated, the Fluoridation Act is concerned with approvals and directions for the addition of fluorine to public water supplies and provides a detailed technical regime of how that is to be carried out. The purpose of Part 5 of the EPA Act is to assist an authority to make an informed decision, by reference to environmental considerations, whether to carry out an activity and, if so, how to carry it out: cf *Prineas v Forestry Commission of NSW* (1983) 49 LGRA 402 at 417. The statutory ends interlock, however, where the addition of fluorine is required by a direction under s 6A of the Fluoridation Act.
- 51 It is relevant to construction that the fluoridation statutory regime is dealing with the specific whereas the EPA regime in ss 111 and 112 is dealing with the general, and that s 6(1A) of the Fluoridation Act was introduced after ss 111 and 112.
- 52 The question of inconsistency with s 6(1A) which obliges an authority to obey a fluoridation direction and the question of inconsistency with s 6(1) which empowers an authority to fluoridate if it has received an approval, raise different considerations.
- 53 I turn first to the question of inconsistency with s 6(1A) concerning a direction. Under s 112(4) and (6) of the EPA Act, if an authority is satisfied

that the activity of fluoridating a water supply will detrimentally affect the environment, the authority may refrain from undertaking the activity or may modify the proposed activity so as to eliminate or reduce its detrimental effect on the environment, notwithstanding s 6(1A) of the Fluoridation Act which obliges the authority to obey a direction to undertake the activity. Clearly, those provisions of the two Acts are contradictory. The inconsistent general provisions of s 112(4) and (6) (as well as s 112(5) with which they are intertwined) must yield in my opinion to the specific and later provisions of s 6(1A) of the Fluoridation Act.

- 54 Section 112(1) prohibits an authority from carrying out a fluoridation activity under the Fluoridation Act that is likely to significantly affect the environment, threatened species etc unless (inter-alia) it has considered an environmental impact statement. Unlike s 111(1), s 112(1) is not subject to a “to the extent possible” qualification. In my opinion, s 112(1) contradicts the operation of s 6(1A) of the Fluoridation Act. It is then necessary to obey the directive contained in the s 6(1A) words “notwithstanding the provisions of any other act” and ignore what would otherwise be a contradiction provided by s 112(1). Unlike ss 111(1) and 112(4), s 112(1) is not governed by such a “notwithstanding” provision. The “notwithstanding” provision in s 112(6) is only applicable to s 112(4).
- 55 In my opinion, s 111 of the EPA Act is not inconsistent with s 6(1A) of the Fluoridation Act. The words in s 111 “in its consideration of an activity” are wide enough to include consideration of whether to carry out an activity and consideration of how to carry out an activity. A direction under s 6A of the Fluoridation Act obliges an authority to carry out a fluoridation activity regardless of the environmental impacts: s 6(1A). The authority cannot stay to consider whether it should carry out the fluoridation activity. However, it can, and necessarily has to, consider how to carry out the activity. For example, if that consideration showed that fluoridation would impact on the receiving environment, such as an endangered ecological community downstream of the fluoridation plant, that would raise the possibility of operational change so that fluoridated water does not reach

the endangered ecological community. Such an operational change would not breach the obligation to obey a s 6A direction. The requirement under s 111 is to examine to the “fullest extent possible” all matters affecting or likely to affect the environment by reason of the fluoridation activity. The qualifying word “possible” permits account to be taken of any term of the direction which requires fluoridation to commence by a certain time. If the time is short it may not be possible to do an examination as fully as if the time is long.

56 I turn to the question of inconsistency with s 6(1) concerning an approval. In my opinion, ss 111 and 112 of the EPA Act are not inconsistent with s 6(1) where the authority has only received an approval, as distinct from a direction, to carry out the activity of adding fluorine to the water supply. In that situation the authority is not obliged to carry out the activity but is empowered to do so. In the approval context, the fluoridation statutory regime leaves room, in my view, for the operation of ss 111 and 112 of the EPA Act. The combined effect of both statutes is to permit the authority to add fluorine and to comply with the requirements of ss 111 and 112 before doing so.

57 As an additional reason why there is no conflict between the Fluoridation Act and the EPA Act, the applicant submits that at the time of Rous Water’s Lismore Resolution and Ballina Resolution, respectively, the Lismore Approval and the Ballina Approval had lapsed because the time limit in condition 3 had expired: *Coalcliff Community Association Inc v Minister for Urban Affairs and Planning* [1999] NSWCA 317, 106 LGERA 243. I do not see how lapsing is relevant to the preliminary questions. In any event, it is answered so far as Rous Water is concerned by the extension of time that was granted: see [10], [11], [15] above. In *Coalcliff* the Court of Appeal held that a development consent lapsed where work had not commenced by the time stipulated in a condition of the consent. *Coalcliff* is distinguishable because in the present case condition 3 of each approval and direction empowered the Chief Dental Officer to extend the time, which he did.

Conclusion

58 Accordingly, I answer the preliminary questions as follows:

- (a) Was the first respondent, Rous Water, required to comply with the provisions of ss 111 and 112 of the EPA Act with respect to the impacts on human health and the environment of adding fluorine to the water supply when determining to approve the construction and operation of the Clunes, Dorrroughby, Corndale and Knockrow fluoridation plants?

Yes, except that insofar as any of those plants was the subject of the direction of 12 December 2007 to add fluorine to the Richmond Valley Water Supply the first respondent was required to comply with s 111 but not s 112 of the EPA Act.

- (b) Was the second respondent, Ballina Shire Council, required to comply with the provisions of ss 111 and 112 of the EPA Act with respect to the impacts on human health and the environment of adding fluorine to the water supply when determining to approve the construction of the Marom Creek Fluoridation plant?

Yes.

59 The costs of the preliminary questions will be costs in the cause. The exhibits may be returned.

THE 25 I CERTIFY THAT THIS AND
PRECEDING PAGES ARE
A TRUE COPY OF THE REASONS FOR
THE JUDGMENT OF THE HONOURABLE
JUSTICE P.M. BISCOE.

Date 28/9/11

Associate