

LOCAL GOVERNMENT LAW JOURNAL

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ARTICLES

A decade of licit sex in the city – Penny Crofts

It has been a decade since the *Disorderly Houses Amendment Act 1995* (NSW) was passed, which abolished the common law offence of keeping a brothel. Under this legislation, councils were to regulate brothels using their planning powers. However, the New South Wales government has offered very little guidance to councils as to how to best use their powers. The limited advice councils have been given has also been plagued by ambiguities. On the one hand, the legislation was passed with the intention of treating brothels as legitimate commercial premises. On the other hand, the historical perception of brothels as inherently immoral and offensive has been present in governmental guidance. This article analyses the impact of the New South Wales government's equivocal position on the sex industry through an examination of Land and Environment Court cases. It is argued that the Land and Environment Court is torn between two conflicting approaches, responding to brothels as commercial premises or perceiving brothels as inherently offensive. While the court initially responded to brothels as commercial premises, the characterisation of brothels as offensive has become increasingly apparent. This article argues that the New South Wales government needs to release clear guidelines regarding the regulation of the sex industry.

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The “jurisdictional fact doctrine” in New South Wales local government and environmental planning law – Ian Ellis-Jones

Errors made with respect to jurisdictional matters, including errors made with respect to so-called “jurisdictional facts”, are reviewable for “jurisdictional error”. A jurisdictional fact is some fact or fact situation which must exist in fact as a condition precedent or essential prerequisite for the primary decision-maker to exercise its jurisdiction. Over the past 15 years New South Wales superior courts have increasingly applied the so-called “jurisdictional fact doctrine” in local government and environmental planning law cases. This article discusses a number of important judicial authorities and seeks to identify what the key elements or indicators of the presence of a jurisdictional fact situation in a particular statutory formulation are. They include: the interrelated elements of “objectivity” and “essentiality”; the purpose of the formulation in the overall legislative scheme; the inconvenience, if any, that may arise from the fact situation being held to be jurisdictional; whether the fact situation occurs or arises as a matter for consideration or as a matter to be ultimately adjudicated upon by the tribunal of fact; whether the fact situation occurs or arises in the actual formulation of the grant of substantive power to the tribunal of fact to make the ultimate decision on the merits; and whether the fact situation occurs or arises in a formulation requiring the formation by the tribunal of fact of a specified mental state. Ultimately, it is an issue of statutory construction and legislative intention, with the reviewing court having the final say, at least on those matters.

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Local government powers over contaminated land in New South Wales – Part 2 – John Desmond

Local councils are required to take account of land contamination in any rezoning, change of use or development approvals. They also have responsibility for the provision of information on contamination, which is important to vendors and purchasers of land. The first part of this article reviewed the policy and legislative background governing contaminated land in New South Wales, with particular reference to the application of local council powers and the liability structure surrounding the way in which they are exercised. This second part considers the costs and benefits of the information used and provided by local councils, and suggests the development of information standards on a state wide basis. It is contended that the reforms suggested would be cost-neutral but lead to better planning outcomes and a fairer allocation of the costs of contamination. 36

Neo-liberalism and development certifier privatisation in New South Wales – James Kerr

This article critically examines the privatisation of construction certification in New South Wales. Recourse to neo-liberal principles in the sphere of land use planning is problematised. It is argued that the New South Wales government overreached in its implementation of Australian National Competition Policies relating to construction certification. Excessive deregulation has lowered the quality of construction in New South Wales and exposed consumers to a range of problems. It is shown that the core objects of the *Environmental Planning and Assessment Act 1979* (NSW) have been offended. The current situation is assessed and the suggestion is made that a more considered approach may be found in the *Building Professionals Bill 2005*, which recentralises key aspects of government oversight. 53

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