The admission from Delta is important in this case. It is an acknowledgment that unless there is express authorisation under an environment protection licence to discharge pollutants, any such discharge is unlawful, *even where the company is required to monitor the discharge of those pollutants*. This has implications for many other licences in NSW that may have similar conditions.

Concluding comments

Among other things, this case highlights significant gaps and deficiencies in the administration of pollution laws in NSW.

The OEH is responsible for administering the POEO Act, and investigating, and prosecuting where appropriate, breaches of that Act. Yet no enforcement action was taken by OEH, even when Delta's own monitoring results submitted to the OEH demonstrated ongoing pollution. When it is left up to a volunteer community group like BMCS to take on a state-owned corporation for breaches of pollution laws, one has to ask, what is the role of the government regulator in this case?

To Delta's credit, it has now acknowledged the pollution, and agreed to apply to the OEH to have conditions imposed on its licence. But again, the question needs to be asked, is there something wrong with the NSW licensing system, when it is up to the *polluter* to ask the *regulator* to stop it from polluting?

SOUTH AUSTRALIA

***Davies v Minister for Urban Development and Planning and Anor* [2011] SASC 87** **by Nicole Harris**

The plaintiffs (the Davies) in these proceedings sought various declarations, including that an amendment of the Development Plan of the Rural City of Murray Bridge made on 20 July 2000 was invalid. The amendment had extended the boundaries of the 'flood zone' over the Davies' land (and over land leased by thousands of other people).

The amendment had been made in accordance with s 29(2) of the *Development Act 1993* (SA), which provides that the Minister may amend a Development Plan in order to make a change of form (not of substance) in the plan. The Davies argued that the amendment was substantive and should have been made in accordance with 'usual process' including the preparation of a Plan Amendment Report (now known as Development Plan Amendments) and public consultation.

The court examined the history and nature of declaratory relief and matters relevant to the exercise of its discretion, including the passage of time since the amendment (almost 11 years), the prejudice to the Davies resulting from the amendment and the prejudice to the thousands of lessees that would be affected if the amendment was declared to be invalid.

The court concluded that the effect of the amendment was limited to substituting a number of maps in the Development Plan and to adjust the mapping references accordingly. On that basis, the court found that the amendment had been validly made pursuant to s 29(2). The court granted summary judgment in favour of the Minister and the Development Assessment Commission (DAC) on the basis that it was satisfied that there was no reasonable basis for the Davies' claim.

VICTORIA

***Reachy Pty Ltd v Greater Geelong* CC [2011] VCAT 1202 (27 June 2011)** **by Barnaby McIlrath**

The Victorian Civil and Administrative Tribunal (VCAT) set aside a refusal by the Greater Geelong City Council of a proposed 82 lot subdivision on the grounds of odour concerns from a nearby abattoir.

The decision is worth noting because of its technical analysis of where the relevant buffer distance should be measured

from. The applicant and the Environment Protection Authority Victoria (EPA) were at odds on this issue.

The parties agreed that the abbatoir's waste water treatment plant (WWTP) was the relevant source of odour emissions from which the buffer should be measured, as opposed to the stock holding yards and other operations. If the centre of the WWTP was selected, 32 of the proposed lots would be within the 500m buffer distance called for by the EPA's Guideline AQ 2/86 on Buffer Distances from Industrial Residual Air Emissions.

The buffer had in fact been measured from a 'sludge filter press' located near the north-west corner of the WWTP. The effect of this was that all of the proposed lots were then outside of the buffer.

The VCAT was critical of the rezoning of land for residential purposes within 500m of an abattoir. It made comments regarding the need to make provision for appropriate buffers during the strategic planning process, as policy guidance becomes difficult to apply after land has been rezoned for residential purposes.

***Community Villages Australia Pty Ltd v Mornington Peninsula SC* [2011] VCAT 1667 (31 August 2011)**

In *Lynbrook Village Developments Pty Ltd v Casey CC* [2011] VCAT 1380, the VCAT recently considered the statutory relationship between s 52(4) of the *Aboriginal Heritage Act* 2006 (AHA) and cl 62 of Schedule 1 of the *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act).

In *Lynbrook Village* an application under s 79 of the *Planning and Environment Act 1987* was found to be premature because the 60 day period before the Application could be made had not begun to run due to the operation of s 52(4) of the AHA. There, the responsible authority had not yet received a copy of the approved cultural heritage management plan (CHMP) and could not lawfully approve the development. The tribunal considered whether it had jurisdiction under cl 62 to disregard the non-compliance and to determine the Application.

In *Lynbrook Village*, the VCAT ruled that it could not rely on cl 62 of Schedule 1 to the VCAT Act to override noncompliance with s 52(4) of the AHA so as to confer jurisdiction to entertain an appeal under s 79 of the *Planning and Environment Act 1987*.

In *Community Villages*, the facts were distinguished from those in *Lynbrook Village* because the council had received a copy of an approved cultural heritage management plan before the application was made. However, the prescribed 60 day period for making a decision on the permit application had not elapsed. Only 34 days had passed after the deemed commencement period, which does not start until the CHMP has been approved. The application for review was therefore premature. The VCAT considered whether jurisdiction could be conferred under cl 62 by disregarding the failure to comply with the s 79 requirements.

The tribunal disagreed with the approach in *Lynbrook Village*. The tribunal ruled that cl 62 of Schedule 1 to the VCAT act is not contrary to s 52(4) of the AHA and the tribunal has jurisdiction to disregard a non-compliance with a planning enactment, including the passing of a deemed period under s 52(4) before an application may be made under s 79. The VCAT ruled that it was for it to determine whether it is in the interests of justice to disregard the non-compliance and to determine the application.

A Planning Panel has recommended approval of SITA Australia's proposal for a soil treatment facility at its Lyndhurst Landfill. But in a partial victory for residents groups it was approved on the proviso that the permit expire after the landfill closes to the receipt of waste.

The Panel report for Amendment C125 to the Greater Dandenong Planning Scheme can be downloaded at: http://planningschemes.dpcd.vic.gov.au/shared/ats.nsf/webviewdisplay?openform