new south wales

Woolworths Ltd v Pallas Newco Pty Ltd & Anor - Significant new case on jurisdictional fact

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On 19 November 2004 the NSW Court of Appeal handed down its decision in *Woolworths Ltd v Pallas Newco Pty Ltd & Anor* [2004] NSWCA 422 ("**Woolworths**"). The decision clarifies the application of the somewhat confusing doctrine of jurisdictional fact.

The appeal was initially heard by a bench of 3 but was later re-listed because there were conflicting decisions about the issue of whether the characterisation of a development is a jurisdictional fact. A bench of 5 was appointed to hear the appeal and in doing so, to review the decision of the Court of Appeal in *Londish v Knox Grammar School* (1997) 87 LGRA 1 ("**Londish**"), which upheld a long line of authority that characterisation is not a matter in which courts can intervene.

The term *"jurisdictional fact"* describes a concept in administrative law where the exercise of an administrative or judicial power is conditional upon the satisfaction of certain factual preconditions.

The most frequently cited definition of the term comes from the leading case on the doctrine, *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135; 106 LGERA 419; 169 ALR 400 at [28] ("**Enfield**") in the judgment of Gleeson CJ, Gummow, Kirby and Hayne JJ:

> *"The term jurisdictional fact (which may be a complex of elements) is often used to identify that criterion, satisfaction of which enlivens the power of the decision-maker to exercise a discretion. Used here, it identifies a criterion, satisfaction of which mandates a particular outcome."*

The decision of the Court of Appeal in *Woolworths* provides an excellent and comprehensive discussion of the authorities on jurisdictional fact. It confirms that the approach of the High Court in *Enfield* to the doctrine of jurisdictional fact is the leading authority to be followed and that *Londish* must be departed from.

The Court of Appeal upheld the decision of Talbot J at first instance that the characterisation of the use nominated in a development application as permissible with consent under the terms of an environmental planning instrument is a jurisdictional fact which must be determined by the court *de novo*. Furthermore, the Court held that the privative clause in section 101 of the *Environmental Planning and Assessment Act* 1979 (NSW) (which places a 3 month limitation period on appeals on grounds of jurisdictional error) does not protect from review consents to prohibited development carried out in contravention of section 76B, which prevents prohibited development from being carried out.