

IN THE PRIVY COUNCIL

No. 20 of 1973

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES IN ITS
EQUITABLE JURISDICTION IN SUIT NO. 2083 of 1971

BETWEEN :

ASSOCIATED MINERALS CONSOLIDATED
LIMITED and WYONG ALLUVIALS PTY.
LIMITED

Appellants
(Defendants)

- and -

WYONG SHIRE COUNCIL

Respondent
(Plaintiff)

CASE FOR THE APPELLANTS

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A. INTRODUCTORY (PARAGRAPHS 1 - 2)

- 1. This is an appeal from a decree of the Supreme Court of New South Wales in its Equitable Jurisdiction (Hope, J.) made on 18th May, 1972. Final leave to appeal to Her Majesty in Council from the said decree was granted by the said Supreme Court on 15th December, 1972. The said decree was made in proceedings commenced in the said Supreme Court by statement of claim dated 23rd December, 1971. p.342
- 2. By the said decree the said Supreme Court in substance - p.350
 - (a) declared that the use of certain land (hereinafter called "the subject land") for the purpose of the mining of p.2

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certain minerals or for certain ancillary purposes, without the prior consent of the Respondent, was in breach of the Shire of Wyong Planning Scheme and, illegal;

- (b) ordered that the Appellants be restrained from using the subject land for any such purpose without prior consent under the Shire of Wyong Planning Scheme.

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B. APPELLANTS' TITLE TO USE THE SUBJECT LAND
(PARAGRAPHS 3 - 5)

3. At all material times the subject land was owned in fee by the Crown in right of the State of New South Wales and was "Crown land" within the meaning of the Mining Act, 1906. The subject land comprises four adjoining parcels known as M.L.'s (or portions) 42, 48, 51 and 44.

4. At the date of commencement of the said proceedings and at all material times thereafter - 20

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- (a) the second Appellant was the lessee from the Crown of M.L. 42 under a Special Mining Lease (No.175) which had been granted by the Governor pursuant to Section 40 of the Mining Act, 1906, on 3rd May, 1961, and transferred to the second Appellant on 14th January, 1963, and the term of which was deemed to be current by virtue of the provisions of Section 107A 30 of the Mining Act, 1906;

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- (b) the second Appellant was the lessee from the Crown of M.L. 48 under a Special Mining Lease (No.176) which had been granted by the Governor pursuant to Section 40 of the Mining Act, 1906, on 14th June, 1961, and transferred to the second Appellant on 14th January, 1963 and the term of which was deemed to be current by virtue of the provisions of Section 107A of the Mining Act, 1906;

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10 (c) the second Appellant was the lessee from the Crown of M.L. 51 under a Special Mining Lease (No.202) which had been granted by the Governor pursuant to Section 40 of the Mining Act, 1906, on 29th August, 1962, and transferred to the second Appellant on the 24th April, 1964, and the term of which was deemed to be current by virtue of the provisions of Section 107A of the Mining Act, 1906;

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20 (d) the first Appellant was the lessee from the Crown of M.L. 44 under a Special Mining Lease (No. 369) which had been granted by the Governor to the first Appellant pursuant to Section 40 of the Mining Act, 1906, on 22nd February 1967, and the term of which was current up to 22nd February 1972 and thereafter was deemed to be current by virtue of the provisions of Section 107A of the Mining Act, 1906.

p. 431

30 5. Each of the Special Mining Leases referred to in Paragraph 4 above demised the land comprised therein for the purpose of mining therein for zircon, rutile, ilmenite and monazite, and for purposes connected with such mining being "mining purposes" within the Mining Act, 1906, and for no other purpose.

By Section 3(1) of the Mining Act, 1906, it was provided that in that Act unless the context or subject matter otherwise indicates -

40 "'mining purpose' includes cutting and constructing any tunnel, water-race, drain, dam or reservoir, or constructing any railway or tramway, or laying any pipes for the purpose of mining, erecting buildings and machinery to be used for any process whatsoever in connection with the extracting of gold or minerals, pumping or raising water to or from land mined or worked or intended to be worked

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for the extraction of gold or minerals therefrom, treatment of tailings or abandoned land, and any other work which the Governor may by proclamation declare to be a mining purpose."

C. THE RESPONDENT'S CLAIM TO RELIEF
(PARAGRAPHS 6 - 10)

6. The subject land is situated within the local government area known as the Shire of Wyong. The Respondent is the Council of the said Shire constituted as such under the Local Government Act, 1919. 10

7. In these proceedings the Respondent sought to enforce against the Appellants the provisions of an Ordinance purportedly made under the Local Government Act, 1919, called The Shire of Wyong Planning Scheme Ordinance (hereinafter called "the Planning Scheme").

8. The Planning Scheme was purportedly prescribed under Part XIIIA of the Local Government Act, 1919, to take effect on 3rd May, 1968. 20

9. The Respondent's claim to the relief referred to in paragraph 2 above was based on clauses 12 and 13 of the Planning Scheme, by which it is provided, so far as presently material, that subject to the provisions of Part IV and to any other special provisions of the Planning Scheme, land included in a zone shall not be used without the consent of the responsible authority for any purpose shown opposite that zone in column IV of the Table to clause 11. The purposes shown in column IV of the said Table opposite the respective zones in which the subject land fell included the purposes for which the Appellants were using and desired to continue to use it namely the mining of minerals and purposes ancillary thereto. These purposes are hereinafter referred to as "the said purposes". By clause 5 of the Planning Scheme it is provided that the 30 40

Respondent is the responsible authority and is charged with the function of carrying into effect and enforcing the provisions of the Planning Scheme.

10. The Respondent also claimed alternative relief based on clause 44 of the Planning Scheme by which it is provided that in certain circumstances the responsible authority may make a tree preservation order which may prohibit, inter alia, the destruction of any trees specified in such order, except with the consent of the responsible authority. The Respondent sought declaratory and injunctive relief against the Appellants with respect to, inter alia, the destruction of trees on the subject land in reliance upon purported tree preservation orders made by the Respondent on 22nd July, 1971 and 9th December, 1971. By reason of his decision to grant relief to the Respondent based on clauses 12 and 13 of the Planning Scheme, Hope J. did not consider it necessary to reach any conclusion as to the alternative relief sought.

D. ISSUES IN THIS APPEAL (PARAGRAPH 11)

11. The questions which arise for determination in this appeal are as follows :

- (1) Whether Part XIII A of the Local Government Act, 1919, authorises the inclusion in a Planning Scheme Ordinance of any provision whereby the holder of a Mining Lease issued pursuant to the Mining Act, 1906, and the Regulations thereunder, is, or can be, prevented from exercising the rights conferred and fulfilling the obligations imposed on him by the Lease or by the said Act and Regulations.
- (2) If Part XIII A of the Local Government Act, 1919, does authorise the inclusion in a Planning Scheme Ordinance of such a provision, whether

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the Planning Scheme is an effective exercise of that authority

- (3) Whether, in all the circumstances of the case, the use by the Appellants or either of them of the subject land for the said purposes is the continuation of an "existing use" within the meaning of clause 14 of the Planning Scheme and is permitted by the Planning Scheme 10
- (4) Whether the use by the Appellants or either of them of the subject land for the said purposes is "the carrying out by the owner or lessee of a mine of... development required for the purposes of the mine" within the meaning of clause 6 of Schedule 6 of the Planning Scheme and is permitted by the Planning Scheme, by virtue of clause 48 thereof
- (5) Whether Part XIII A of the Local Government Act, 1919, authorises the inclusion in a Planning Scheme Ordinance of any provision delegating to the Council of a Shire the functions relating to the making of tree preservation orders included in clause 44 of the Planning Scheme. 20
- (6) Whether either of the resolutions of the Respondent of 22nd July, 1971 and 9th December, 1971, was a valid exercise of the powers purportedly conferred on the Council by clause 44 of the Planning Scheme, or if it was, whether it materially affected the Appellants 30
- (7) Whether the Respondent is precluded from obtaining the relief sought or granted in these proceedings by reason of its laches acquiescence and delay.

E. APPELLANTS' SUBMISSIONS ON THE FIRST ISSUE
(PARAGRAPHS 12 - 15)

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10 12. It is well established as a principle of construction that "when the legislature has given its attention to a separate subject and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly" (Baker v. Edger, 1898 A.C. 748 at 754).

13. By the Mining Act, 1906, the New South Wales Parliament gave its attention to and made special provision for the separate subject of the use of land in New South Wales for mining and purposes ancillary thereto. The Act, in making such special provision -

- 20 (a) conferred rights to use certain land in a particular manner in certain circumstances (e.g. Sections 15, 16, 49A, 54, 65, 83B and 195);
- (b) empowered the Governor, the Minister or a Warden, to confer rights to use certain land in a particular manner in certain circumstances (e.g. Sections 17, 23, 28, 38, 39D, 40, 40A, 41, 42, 43, 50, 55, 57, 58, 59A, 60, 61, 62A, 70, 70A, 70B, 70C, 70F, 83B, 86, 99, 101, 102, 108, 110 and 111);
- 30 (c) imposed obligations to use certain land in a particular manner in certain circumstances (e.g. Section 67);
- (d) empowered the Governor, the Minister or a Warden, to impose obligations to use certain land in a particular manner in certain circumstances (e.g. Section 37, 38, 40, 59, 62, 62A, 70, 70B,C, 70F, 86 and 108);
- 40 (e) empowered the Governor to make Regulations conferring rights and imposing obligations to use certain

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land in a particular manner in certain circumstances (e.g. Sections 184 (v), 184 (xiv), and 184 (xix)).

By Regulations made under the Mining Act 1906, the Governor inter alia prescribed forms of leases to be granted under the said Act (Reg.110, Schedules 43A to 43E), made provision for the number of men to be employed in respect of inter alia every mining lease of Crown lands (Reg.111) and imposed a penalty not exceeding \$20 for a breach of certain of the said Regulations including, it is submitted, Regulation 111. 10

Rights conferred by the Act and Regulations upon the holders of tenements granted by the Crown under the Act may have a wider force and operation than merely as between the Crown and the holder. This is illustrated by those provisions of the Act authorising the grant by the Crown of authorities to use land in private ownership to persons other than the owners (see Part IV and particularly Sections 60 to 65 and 70 to 70F, discussed by Windeyer J. in Wade v. N.S.W. Rutile Mining Co. Pty. Limited, 121 C.L.R. 177 at 193-199) 20

14. The relevant provisions of the Local Government Act, 1919, namely, Part XIIIA, which was inserted in the Act in 1945, (although since amended), in so far as they deal with the use of land in New South Wales, deal with that subject in a completely general way and contain no specific reference either to the Mining Act, 1906, or to the use of land in New South Wales for mining and purposes ancillary thereto, and do not manifest a sufficiently clear intention to interfere with the special provisions of the Mining Act, 1906. Except in accordance with authority clearly given by the Local Government Act, 1919, the Planning Scheme could not validly contain any provision repugnant to the Mining Act, 1906 (see e.g. Powell v. May, 1946 K.B. 330). 30 40

15. It is submitted that Part XIIIA of the Local Government Act, 1919, does not authorise the inclusion in a Planning Scheme Ordinance of any provision whereby the holder of a Mining Lease issued pursuant to the Mining Act, 1906, and the Regulations thereunder, is or can be validly prevented from exercising the rights conferred and fulfilling the obligations imposed on him by the Lease or by the said Act and Regulations.

10 F. APPELLANTS' SUBMISSIONS ON THE SECOND ISSUE
(PARAGRAPH 16)

16. If it be suggested that, contrary to the Appellants' submissions on the first issue, Section 342G (4) of the Local Government Act, 1919, does authorise the inclusion in a Planning Scheme Ordinance of a provision suspending the operation of relevant provisions of the Mining Act, the Appellants submit that any authority so conferred by Section 342G (4) was not validly exercised in the Planning Scheme. The Appellants submit -

- (a) that the extraordinary delegated power given by Section 342G (4) must be exercised, if at all, strictly in accordance with the terms of that sub-section;
- (b) that Section 342G (4) contemplates as a condition of the exercise of the power therein conferred, that the "suspension" shall be express, and that the provisions the operation of which is suspended shall be expressly identified;
- (c) that the mere making in a Planning Scheme Ordinance of a provision the operation of which is or may be in certain circumstances inconsistent with certain provisions of the Mining Act, 1906, is not equivalent to the suspension of the operation of those provisions to the extent of the inconsistency

G. APPELLANTS' SUBMISSIONS ON THE THIRD ISSUE
(PARAGRAPHS 17 - 26)

17. The provisions of the Planning Scheme most material to this submission are as follows :

"3. In this Ordinance, unless inconsistent with the context or subject matter -

...

'appointed day' means the day upon which this Ordinance takes effect

...

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'existing use' means a use of...land for the purpose for which it was used immediately before the appointed day...

PART IV

14. Notwithstanding the provisions of Part III and Part VI...of this Ordinance...an existing use of land may be continued notwithstanding that such existing use is for a purpose...for which land may not be used under Part III or Part VI of this Ordinance, in respect of the zone in which such...land is situated

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...

18. The foregoing provisions of this Part shall not apply to...an existing use of...land which....commenced after 6th January, 1961 in contravention of the provisions of the Town and Country Planning (General Interim Development) Ordinance..."

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18. The provisions of the Town and Country Planning (General Interim Development) Ordinance most material to this submission are as follows:

"3. In this Ordinance, unless the contrary intention appears -

...

'Mine' has the meaning ascribed to it in the Mines Inspection Act, 1901-1945, and the Coal Mines Regulation Act, 1912-1941, but does not include a quarry.

...

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4. (1) ... interim development of the following classes may be carried out, that is to say -

....

Class V - Development of any description specified in Schedule I to this Ordinance.

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6. (1) Development which is not permitted by this Ordinance shall not be carried out except with the permission of the Interim Development Authority

SCHEDULE I

Development of Class V permitted under Clause 4 of this Ordinance

...

7. The carrying out by the owner or lessee of a mine, on the mine, of any development required for the purposes of the mine..."

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19. The meaning ascribed to "Mine" in the Mines Inspection Act, 1901-1945, is as follows :

"'Mine' means and includes any place, open cut, shaft, tunnel, drive, level, or other excavation, drift, gutter, lead, vein,

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lode, or reef wherein or whereby any operation is carried on for or in connection with the purpose of obtaining any metal or mineral other than coal or shale, by any mode or method, and any place adjoining thereto on which any product of the mine is stacked, stored, crushed, or otherwise treated, and also includes any quarry."

The meaning scribed to "Mine" in the Coal Mines Regulation Act, 1912-1941, is as follows : 10

"'Mine' includes every shaft in the course of being sunk, and every level and inclined plane in the course of being driven, and all the shafts, levels, planes, works, tramways and sidings both below ground and above ground in and adjacent to and belonging to the mine".

20. The meanings of the expressions "Development" and "Interim development" in Part XIIIA of the Local Government Act, 1919, as in force at the time of the making of the Town and Country Planning (General Interim Development) Ordinance referred to in paragraph 18 above, and therefore, by virtue of Section 18 of the Interpretation Act, 1897, in that Ordinance, are, so far as presently material, as follows : 20

"'Development' in relation to any land includes .. any use of the land... for a purpose which is different from the purpose for which the land... was last being used. 30

'Interim development' means development of land to which a scheme applies between ... the date upon which notice of the fact that the Minister has directed the Council ... to prepare a scheme was published in the Gazette, and the date of the coming into operation of the scheme, or the date upon which the Minister notifies in the Gazette that he has decided not to proceed with the scheme, as the case may be" 40

21. It is submitted that clause 18 of the Planning Scheme has no relevant application in the present case by reason that -

- (a) the Town and Country Planning Scheme (General Interim Development) Ordinance did not operate to prohibit any development (see paragraph 22 below), or alternatively
- 10 (b) any relevant development which occurred after 6th January 1961 fell within Clause 7 in Schedule I to the Town and Country Planning (General Interim Development) Ordinance and accordingly was not in contravention of the provisions of that Ordinance (see paragraph 23 below), or alternatively
- 20 (c) any relevant development which occurred after 6th January 1961 was not "Interim development" and was thus not prohibited by the Ordinance (see paragraphs 24 and 25 below).

22. It is submitted that Clause 6 (1) of the Town and Country Planning (General Interim Development) Ordinance (which is the only provision of that Ordinance which purports to prohibit development) is invalid. That Ordinance was made on 9th November 1945 in purported pursuance of Section 342U of the Local Government Act, 1919, (as then amended) which so far as presently material, provided as follows :

- 30 "342U (1) Interim development shall not be carried out -
- (a) except as may be permitted by Ordinance; or
 - 40 (b) except as may be permitted by the Council under the authority of an Ordinance and subject to such conditions, restrictions and provisions as may be contained in such Ordinance.

This Section authorised the making of an Ordinance permitting interim development and authorising the Council to permit interim development and containing conditions, restrictions and provisions relating to any such permission given by the Council, but did not authorise the inclusion in any such Ordinance of a prohibition of interim development: Any authority for the inclusion of a prohibition would have been superfluous because the relevant prohibition was contained in Section 342U itself. Therefore, Clause 6(1) was invalid being authorised neither by Section 342U nor by any other provision of the Local Government Act, 1919. 10

23. It is submitted that as at 6th January 1961, and at all material times thereafter the subject land or alternatively certain parts of it constituted a "mine" within the meaning of Clause 7 in Schedule I to the Town and Country Planning (General Interim Development) Ordinance, in that it was a "place...drift...lead, vein, (or) lode... ..wherein...any operation is carried on...in connection with the purpose of obtaining any... mineral...by any mode or method...". In the present context, "drift" connotes a mineral deposit on or near the surface caused by currents of water or air, and "lead", "vein" and "lode" connote a mineral deposit having an extended or ramifying course underground. The rutile and zircon deposits within the subject land are the detritus of currents of water and air over a very long period of time and do have an extended or ramifying course underground. They therefore constitute drifts and also leads, veins or lodes. The drilling operations which were being carried on both before and after 6th January 1961 on the subject land were operations carried on in connection with the purpose of obtaining rutile and zircon. The fact that there was no physical activity on the subject land on the very day of 6th January 1961 does not mean that on that day the subject land did not constitute or include a "mine". There had been no abandonment of the 20 30 40

p.267-275

existing intention to utilise the subject land for the recovery of rutile and zircon, and the pause in the carrying on of physical operations on the subject land itself did not cause the character of the subject land or the relevant parts thereof as a "mine" within the meaning of the Town and Country Planning (General Interim Development) Ordinance to be changed. It is submitted that the relevant permission conferred by clause 4 of the Town and Country Planning (General Interim Development) Ordinance applies even if (contrary to what is submitted to be established by the evidence) the subject land did not constitute or include a "mine" until after 6th January 1961.

24. Development of land is not "Interim development" within the meaning of the Town and Country Planning (General Interim Development) Ordinance unless the land is land "to which a scheme applies". Neither the Local Government Act 1919 nor the Ordinance contains any definition of the word "scheme". In Ampol Limited v. Rockdale Municipal Council ((1953) 19 L.G.R. 64) Sugerman J. of the New South Wales Land and Valuation Court made the following comments in relation to the meaning of the word "scheme" in the context of Part XIII A of the Act :

"I have not been referred to any statutory definition of the word 'scheme'. But having regard to Sections 342F and 342G a 'scheme' in the statutory sense may be described as an instrument or set of instruments (including in that term, 'maps, plans, specifications and other particulars' (Section 342F(2)(a)(i)) which in the prescribed manner (see Section 342G (1) and Ordinance 102) defines the land to which it applies, which specifies the responsible authority, charged with carrying into effect and enforcing its provisions (Section 342G (5)(a), and which contains what may properly be termed 'provisions' for or in relation to all or any of the matters mentioned in Section 342G(2), (3), (4) and (5)(b)."

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In Ex Parte Tooth & Co. Limited, re Parramatta City Council ((1955) 20 L.G.R. 60, at 74) the Full Court of the New South Wales Supreme Court expressed its complete accord with the decision and reasons of Sugerman J. in Ampol Limited v. Rockdale Municipal Council (supra).

pp.4, 25-26

There was no scheme in existence which applied to the subject land on 9th January 1961, being the date of the receipt by the Respondent of the Minister's direction to prepare a scheme. There was such a scheme in existence on 24th April 1968, being the date on which the Ordinance containing the Planning Scheme was proclaimed. There is no evidence that any such Scheme came into existence at any particular point of time before 24th April 1968, and accordingly, no evidence that any development in relation to the subject land which occurred before 24th April 1968 was "Interim development" and thus within the prohibition expressed in Clause 6 (1) of the Town and Country Planning (General Interim Development) Ordinance. 10 20

25. Furthermore, development of land is not "Interim development" within the meaning of the Town and Country Planning (General Interim Development) Ordinance, unless it occurred (in the circumstances of the present case) after "the date upon which notice of the fact that the Minister has directed the Council...to prepare a Scheme was published in the Gazette". Notice of the fact that an event has occurred cannot be effectively published until the event has occurred. The event of the Minister directing the Council to prepare a Scheme in the present case did not occur until 9th January 1961 the admitted date of receipt by the Respondent of the Minister's direction, and the only relevant notice of which was published in the Gazette on 6th January 1961. 30

pp.4, 25-26

26. If Clause 18 of the Planning Scheme has no relevant operation in the present case, the effect of Clause 14 of the Planning Scheme is that the Planning Scheme does not prohibit the 40

10 use of land for the purpose for which it was used immediately before 3rd May, 1968. Although no wholesale extraction of minerals occurred until after 3rd May 1968, namely, in or about June 1969, the purpose to which the use of the subject land or alternatively certain parts of it was being applied immediately before 3rd May 1968, was clearly mining. Physical operations on the subject land consisted of drilling bore holes in order to ascertain the nature and location of the mineral deposits for the purpose of subsequently extracting them. This is a use for the purpose of mining. In Shire of Perth v. O'Keefe (1964) 110 C.L.R. 529, at 534-5, Kitto, J. with whose reasons Owen, J. agreed, said of the expression "purpose" in a similar context :

20 "But at the outset it is necessary to observe that the 'existing use' by-laws take two steps which should be kept distinct from one another. First it is required that a purpose be identified as the end for which it can be seen that the premises are being used at the date of gazettal "of the bye-laws. Then the provision is made that the land may continue to be used for that purpose; not that the precise manner of use for that purpose may alone continue, but that use generally for that purpose may continue. The application of the by-law in a particular case has therefore not to be approached 30 through a meticulous examination of the details of processes or activities, or through a precise cataloguing of individual items of goods dealt in, but by asking what, according to ordinary terminology, is the appropriate designation of the purpose being served by the use of the premises at the material date". (Applied by the Supreme Court of New South Wales in Woollahra Municipal Council v. Hinton, 85 W.N. (1) 735 at 737, and Thompson v. Cash Clearances Pty. Limited, 87 W.N. (1) 211 at 213).

40 The fact that there was no physical activity on the subject land on the very day of 3rd May 1968

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does not mean that on that day the subject land was not being used for the purpose of mining. There had been no abandonment of the intention to continue to apply the subject land to that purpose, evidenced by the earlier physical operations (see Schwertzerhof v. Wilkins, 1898 1 Q.B. 640, and Rosenblum v. Brisbane City Council, 98 C.L.R. 35). Nor was there any relevant break in continuity of use after 3rd May 1968. In any event, for the purposes of Clause 15, once use of the subject land for the purpose of mining is established immediately before 3rd May 1968, the use of the subject land for that purpose at any time thereafter, whether or not there be continuity of such use after 3rd May 1968, is permitted by the Planning Scheme (Banool Developments Pty. Limited v. Woollahra Municipal Council, 1972, 2 N.S.W.L.R. 353; J. Scott Pty. Limited v. Botany Municipal Council, 1972, 2 N.S.W.L.R. 388).

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H. APPELLANTS' SUBMISSIONS ON THE FOURTH ISSUE
(PARAGRAPHS 27 - 28)

27. The provisions of the Planning Scheme most material to this submission are as follows :

"3. In this Ordinance, unless inconsistent with the context or subject matter --

'Mine' means any place, open cut, shaft, tunnel, pit, drive, level, or other excavation, drift, gutter, lead, vein, lode, or reef wherein, whereon, or whereby, any operation is carried on for or in connection with the purpose of obtaining any metal or mineral by any mode or method and any place adjoining on which any produce of the mine is stacked, stored, crushed, or otherwise treated, but does not include a quarry.

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...

48. Nothing in this Ordinance shall be construed as restricting or prohibiting

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or enabling the responsible authority
to restrict or prohibit --

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(a) the carrying out of development of
any description specified in
Schedule VI to this Ordinance...

.....

SCHEDULE VI

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6. The carrying out by the owner
or the lessee of a mine, of any
development required for the
purpose of the mine,..."

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28. For the reasons expressed in another connection
in paragraph 23 above, it is submitted that as at
3rd May, 1968, and at all material times thereafter,
the subject land, or alternatively certain parts
of it, constituted a "mine" within the meaning
of clause 6 in Schedule VI to the Planning Scheme.
It is submitted that the relevant exemption in
Clause 48 applies even if (contrary to which is
submitted to be established by the evidence) the
subject lands did not constitute or include a
"mine" until after 3rd May 1968.

I. APPELLANTS' SUBMISSION ON THE FIFTH ISSUE
(PARAGRAPHS 29 - 32)

29. The provisions of the Local Government Act,
1919, most material to this submission are as
follows :

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"342G. (1) A Scheme shall in the prescribed
manner define the land to which it applies.

(2) A scheme may contain provisions
for regulating and controlling the use of
land and the purposes for which land may
be used.

(3) Without prejudice to the generality
of subsection two of this section a scheme
may contain provisions for or in relation

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to all or any of the following matters,
that is to say --

- (a) the situation, opening, widening, deviating, classifying, and providing of roads;
- (b) the restriction of ribbon development of land fronting adjoining or adjacent to a road by regulating all or any of the following matters, that is to say, the construction, forming or laying out of any means of access to or from the road, the erecting or making on the land of any building or permanent excavation which is within a specified distance from the road, or restricting or prohibiting the erection of any building intended for use for any purpose which is likely to cause increased vehicular traffic along the road, or traffic congestion on the road. 10 20

In this paragraph "building" includes neither fences, gates, posts, masts, ornaments or other similar structures or erections required for the purposes of farming or grazing or of any dwelling house or garden occupied with a dwelling house nor greenhouses or summerhouses required in connection with any such garden, nor temporary tents or scaffolding required for any purpose, but save as aforesaid includes any structure or erection of whatsoever material and in whatsoever manner constructed and any part of a building; 30

- (c) the minimum standards of construction of roads of different classes and of drains, culverts and bridges in or upon roads;
- (d) the provision of water, gas, electricity and other public services; 40

- (e) the reservation of sites for places of religious worship, the residences of ministers of religion and buildings for religious purposes;
- (f) the reservation of sites for educational and hospital establishments and community centres for promotion of physical, mental, moral and cultural welfare;
- 10 (g) the reservation of sites for ambulance stations, fire brigade stations, police stations, court houses and buildings for the use of Government Departments and of statutory bodies representing the Crown and for residences for the officers of any such Department or statutory body;
- (h) the reservation of sites for water reservoirs;
- 20 (i) the regulation of building and of matters relating thereto;
- (j) the reservation or provision of land for afforestation purposes or for recreation grounds, ornamental gardens, children's playgrounds, green belts, green wedges, and other open spaces;
- (k) the planning of localities and the design and protection of buildings and structural elements so as to reduce the risk of fire and limit the spread of fire;
- 30 (l) the zoning of land and the prohibition in any zone of the erection, construction, carrying out or use of any structure or work upon the land or the use in any zone of any land for any specified purpose or for any purpose other than a specified purpose;

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- (m) the extinction or variation of private rights of way and other easements;
- (n) the removal, alteration, or demolition of obstructions or obstructive works;
- (o) the preservation or acquisition for public access use and enjoyment of the foreshores or banks of the ocean, harbours, rivers, lakes, lagoons, and the like, and the conservation of the natural beauty thereof; 10
- (p) the preservation of places or objects of historical or scientific interest or natural beauty or advantage;
- (q) the provision of amenities;
- (r) securing the safety of persons and property from hostile attack;
- (s) the location of public utility undertakings, shipping facilities, railways, tramways, canals, and sites for air ports, aerodromes, bridges, jetties, wharves and ferries, and works and matters ancillary thereto; 20
- (t) securing co-operation between the council or councils concerned and the Government, or any person or body of persons;
- (u) the acquisition of land for any purpose of the scheme;
- (v) the apportionment between the responsible authorities specified in the scheme of any costs, expenses and disbursements incurred in carrying into effect and enforcing a scheme, and the recovery from any council of its share or proportion of the same; 30
- (w) the recovery of betterment in accordance with Division 10 of this Part;

(x) any matter necessary or convenient for carrying out the scheme

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(4) A scheme may suspend either generally or in any particular case or class of cases the operation of any provision of this or any other Act, or of any rule, regulation, by-law, ordinance, proclamation, agreement, covenant or instrument by or under whatever authority made, to the extent to which that provision is inconsistent with any of the provisions of the scheme.

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(5) (a) A scheme shall contain provisions specifying the responsible authority or responsible authorities which shall be charged with the functions of carrying into effect and enforcing the provisions of the scheme or such of those provisions as relate to any particular portion or portions of the land included in the scheme, or such of those provisions as are directed to particular objects or purposes

Any responsible authority so specified shall be a council, or two or more councils acting together as prescribed, or the Authority.

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(b) A scheme may contain provision for the appointment of a special committee, constituted as prescribed, to assist the responsible authority in carrying into effect and enforcing the scheme.

Such committee may include as members persons who are not members of the body which is the responsible authority."

342D (1) the Governor...may make an Ordinance prescribing the scheme ...

.....

342N (1) The responsible authority specified in a prescribed scheme shall have and may

RECORD

exercise and discharge all the powers, authorities, duties and functions conferred and imposed on the responsible authority by the prescribed scheme ...

....

577.

(3)an Ordinance shall have the force of law".

30. The making of the Ordinance prescribing the Planning Scheme was clearly the exercise of legislative power of a delegated and not a plenary nature. Any provision of the Planning Scheme which itself purports to confer legislative power on another body is a sub-delegation of legislative power which is invalid unless specifically authorised by the Act (Blackpool Corporation v. Locker, 1948 1 K.B. 349; Allingham v. Minister of Agriculture, 1948 1 A.E.R. 780; Jackson Stansfield & Sons v. Butterworth, 1948 2 A.E.R. 558, at 565). For the purposes of this principle, legislative power is the power to alter the law and includes a power to interfere with existing vested legal rights (see per Scott L.J. in Blackpool Corporation v. Locker, supra, at 368), otherwise than merely by fulfilling a condition of the operation of existing legislation (see e.g., King - Emperor v. Benoari Lal Sarma, 1945 A.C.14, at 24-5).

31. The provisions of the Planning Scheme most material to this submission are as follows :

"44. (1) Where it appears to the responsible authority that it is expedient in the interests of amenity to make provision for the preservation of any tree or group of trees it may for that purpose make an order (hereinafter referred to as a tree preservation order) with respect to such tree or group of trees as may be specified in the order and may by like resolution rescind or vary any such order

(2) A tree preservation order may prohibit the ringbarking, cutting down, topping, lopping, removing, injuring or wilful destruction of any tree or trees specified in such order except with the consent of the responsible authority and any such consent may be given subject to such conditions as the responsible authority may think fit

10 (3) Any such order may relate to any tree or trees or to any specified class, type or description of trees on land described in such order and such land may be described particularly or generally by reference to the shire or any division thereof

20 (4) The responsible authority shall forthwith upon the making of a tree preservation order cause notice of the making of such order to be published in the Gazette and in a newspaper circulating in the area in which the land described in the order is situate

(5) Any person who contravenes or causes or permits to be contravened the provisions of a tree preservation order shall be guilty of an offence

30 (6) In any proceedings under this clause it shall be a sufficient defence to prove that the tree or trees ringbarked, cut down, topped, lopped, removed, injured or wilfully destroyed, was or were dying or dead or had become dangerous

(7) The powers conferred upon the responsible authority by this clause shall not extend to any trees within a State Forest or land reserved from sale as a Timber or Forest Reserve under the Forestry Act, 1916, as amended."

40 32. It is submitted that the power to make a tree preservation order purportedly conferred on the Respondent by clause 44 of the Planning Scheme is a legislative power in the relevant sense, that the Local Government Act, 1919,

contains no specific authority for the Governor to include such a power in a prescribed scheme, and that therefore clause 44 is invalid.

J. APPELLANTS' SUBMISSIONS ON THE SIXTH ISSUE -
PARAGRAPHS 33 - 37)

33. The Respondent relies on each of two resolutions as independent exercises of the power purportedly conferred by clause 44 of the Planning Scheme. The terms of the respective resolutions are as follows :

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p.355

(a) Resolution of 22nd July, 1971:

"That the Council immediately place a tree preservation order on the whole of the Red Gum Forest at the Entrance North, west of Wilfred Barrett Drive and contained within the boundaries of M.L. 44 and M.L. 51".

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(b) Resolution of 9th December, 1971:

"That Council, being of the opinion that it is expedient in the interests of amenity to make provision for the preservation of trees pursuant to Clause 44 of the Shire of Wyong Planning Scheme Ordinance, hereby prohibit the ring-barking, cutting down, topping, lopping, removing, injuring, or wilful destruction of any tree within the Shire of Wyong except with the consent of the Council."

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34. It is submitted that the resolution of 22nd July 1971 was not a valid exercise of the power purportedly conferred by clause 44 of the Planning Scheme in that -

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(a) it failed to specify what acts were to be prohibited in relation to the trees specified;

- (b) it was specifically directed at part of the subject land, and if valid, directly deprived the Appellants of valuable rights vested in them, without compensation. No opportunity was afforded to the Appellants to be heard in opposition to the making of the order;
- 10 (c) in its purported operation on the subject land it was inconsistent with the provisions of the Mining Act, 1906, and the Regulations made thereunder

35. It is submitted that the resolution of 9th December 1971 was not a valid exercise of the power purportedly conferred by Clause 44 of the Planning Scheme in that -

- (a) it did not relate to a "tree" or a "group of trees"
- 20 (b) clause 44 cannot in the context of the Planning Scheme as a whole, be construed so as to permit the Respondent to make an order which would have the effect of rendering unlawful any development whatever within any part of the Shire of Wyong which involves the ring-barking, cutting down, topping, lopping, removing, injuring, or wilful destruction of any tree
- 30 (c) in so far as it affected the subject land, if valid, it directly deprived the Appellants of valuable rights vested in them, without compensation. No opportunity was afforded to the Appellants to be heard in opposition to the making of the order.
- (d) in its purported operation on the subject land, it is inconsistent with the provisions of the Mining Act, 1906, and the Regulations made thereunder.

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36. It is further submitted that even if the resolution of 22nd July 1971 was a valid exercise of the power purportedly conferred by clause 44 of the Planning Scheme, it was, by necessary implication, rescinded by the resolution of 9th December 1971 regardless of whether the latter resolution validly made a further tree preservation order.

37. It is further submitted that in so far as either resolution was at the time of the hearing of these proceedings a subsisting valid exercise of the power conferred by clause 44 of the Planning Scheme it did not operate to deprive the Appellants of the rights conferred on them by virtue of the respective Mining Leases of the subject land and the Mining Act, 1906, and the Regulations made thereunder. 10

K. APPELLANTS' SUBMISSIONS ON THE SEVENTH ISSUE (PARAGRAPHS 38 - 40)

38. Notwithstanding that the Respondent in the present proceedings is properly regarded as suing as representing the public interest, the Court may, in its discretion, refuse injunctive or other equitable relief on general equitable principles (see Brickworks Limited v. Warringah Corporation, 108 C.L.R. 568 at 579; Cooney v. Ku-ring-gai Corporation, 114 C.L.R. 582 at 605). 20

39. At all material times up to about July 1971, the Appellants and the Respondent acted and conducted themselves on the basis, mutually assumed between them to be correct, that the Appellants were entitled to use the subject land for the purposes of mining and ancillary purposes in accordance with the respective Mining Leases thereof held by the Appellants, without the consent of the Respondent. The belief of the Appellants in this mutual assumption was materially contributed to by acts and omissions of the Respondent over a lengthy period of time which amounted to representations by the Respondent to the Appellants that the Appellants were entitled without the consent of the 30 40

Respondent to use the subject land for the purpose of mining and ancillary purposes in accordance with the respective Mining Leases thereof held by the Appellants. In reliance on their said belief the Appellants spent very large sums of money on preparations necessary for extracting minerals from the subject land and did in fact carry out extensive dredging in association with the extraction of such minerals over a substantial part of the subject land continuously as from about June 1969. At all material times the Respondent was aware of the said belief of the Appellants and of the Appellants' intention to incur the said expenditure in reliance on the said belief and of the said dredging operations and acquiesced therein at all times up to about July 1971.

40. In the circumstances of the case it is submitted that the grant of injunctive relief against the Appellants is inequitable and that the grant of declaratory relief is inequitable and serves no useful purpose as between the parties and ought to have been refused.

L. CONCLUSIONS AND REASONS - PARAGRAPH (41)

41. It is therefore submitted that the decision of Hope J. is erroneous and ought to be reversed, and this appeal ought to be allowed and the decree of the Supreme Court of New South Wales set aside, and in lieu thereof the proceedings should be dismissed with costs for the following amongst other

R E A S O N S

- (a) BECAUSE Part XIIIA of the Local Government Act, 1919, does not authorise the inclusion in a Planning Scheme Ordinance of any provision whereby the holder of a Mining Lease issued pursuant to the Mining Act, 1906 and the Regulations made therein is or can be prevented from exercising the rights conferred and fulfilling the obligations imposed on him by the Lease or by the said Act and Regulations.

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- (b) BECAUSE even if Part XIIIA of the Local Government Act, 1919, does authorise the inclusion in a Planning Scheme Ordinance of such a provision, the Planning Scheme is not an effective exercise of that authority.
- (c) BECAUSE the use by the Appellants or either of them of the subject land for the said purposes is a continuation of an "existing use" within the meaning of clause 14 of the Planning Scheme and is permitted by the Planning Scheme. 10
- (d) BECAUSE the use by the Appellants or either of them of the subject land for the said purposes is "the carrying out by the owner or lessee of a mine of...development required for the purposes of the mine" within the meaning of clause 6 of Schedule VI to the Planning Scheme and is permitted by the Planning Scheme by virtue of clause 48 thereof. 20
- (e) BECAUSE Part XIIIA of the Local Government Act, 1919, does not authorise the inclusion in a Planning Scheme Ordinance of any provision delegating to the Council of a Shire the functions relating to the making of tree preservation orders included in clause 44 of the Planning Scheme.
- (f) BECAUSE neither of the resolutions of the Respondent of 22nd July 1971, and 9th December 1971 was a valid exercise of the powers purportedly conferred on the Respondent by clause 44 of the Planning Scheme, or if it was, materially affected the Appellants 30
- (g) BECAUSE the Respondent is precluded from obtaining the relief sought or granted in these proceedings by reason of its laches, acquiescence and delay.

WILLIAM DEANE
M.H. McLELLAND

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No. 20 of 1973

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE SUPREME COURT OF NEW
SOUTH WALES IN ITS EQUITABLE
JURISDICTION IN SUIT No. 2083
of 1971

B E T W E E N :

ASSOCIATED MINERALS
CONSOLIDATED LIMITED
and
WYONG ALLUVIALS PTY.
LIMITED

Appellants
(Defendants)

- and -

WYONG SHIRE COUNCIL

Respondent
(Plaintiff)

CASE FOR THE APPELLANTS

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