

CASE FOR THE RESPONDENT

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O N A P P E A L

FROM THE SUPREME COURT OF NEW SOUTH WALES
IN ITS EQUITABLE JURISDICTION

Suit No. 2083 of 1971

B E T W E E N :

ASSOCIATED MINERALS CONSOLIDATED
LIMITED

and

10 WYONG ALLUVIALS PTY. LIMITED Appellants

- and -

WYONG SHIRE COUNCIL Respondent

CASE FOR THE RESPONDENT

I. SYNOPSIS

RECORD

20 1. This case relates to an area of land within the Shire of Wyong known as the North Entrance Peninsula. The Peninsula lies between the Pacific Ocean and Tuggerah Lake. The greater part of the Peninsula is still covered by trees, in some places very thickly. The Peninsula contains a rain forest and a very substantial angophora forest each of which were described by the trial Judge (who viewed the area during the hearing) as being "of considerable beauty". Each forest grows on sand and this lends to the area value for scientific and other purposes.

P.264 1.28

RECORD

2. The land within the Peninsula is Crown Land and within such area approximately 1750 acres is the subject of various mining leases which have been granted, at various times, to one or other of the Appellants. The Appellants desire to mine the area for the extraction of rutile and zircon. This mining process involves the complete removal of vegetation, the removal and stock piling of top soil, the excavation of the sub-soil (predominantly sand) down to the level of the lake, the passing of the sand through a floating dredge and the extraction from the sand of the two heavy minerals sought. 10

3. Since 3rd May 1968 there has been in force within the Shire of Wyong a planning scheme ordinance which purports to regulate the use of land for various purposes. The Respondent plaintiff claims that, upon its proper construction and in the events which have occurred, the ordinance prohibits the mining of the relevant area except after prior consent given by it as responsible authority. The Appellant defendants deny that the consent of the Plaintiff is required and the first major question in the case is whether the Appellants require the consent of the Respondent in order to use the land for sand mining activity. 20

4. By cl.44 of the ordinance provision is made for the Respondent, as responsible authority, to make tree preservation orders. The Respondent has purported to make two such orders prohibiting the destruction of trees except with its consent. It is common ground that the mining activity being carried out by the Appellants and proposed to be carried out by the Appellants involves the destruction of trees but the Appellants deny that the tree preservation orders, or either of them, are properly made and deny that the council has power to make such orders. The second major question is, therefore, whether any tree preservation orders were validly made by the Respondent acting within its powers. 30 40

5. Consideration of the issues thus emerging involves some reference to the relevant legislation being firstly the Local Government Act (N.S.W.) 1919 as amended and secondly ordinances made thereunder. Thereafter it has been thought convenient to refer to the standing of the Plaintiff to obtain injunctive relief, the history of activity on the land and the respective contentions of the parties.

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II - RELEVANT LEGISLATION

A. Local Government Act Part XIII A

6. Part XIII A of the Local Government Act, 1919, as amended provides for the preparation and prescription of planning schemes designed to control the use of land within a particular area or areas.

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7. Division 2 of the Part deals with the method of preparation of schemes. One method of preparation is pursuant to a direction to a council to prepare a scheme.

8. The Shire of Wyong Planning Scheme ordinance was prepared pursuant to such a direction (ex.A) advertised in the Government Gazette and a local newspaper (exs. B and R). At the date of that direction i.e. 6th January 1961 the relevant section was s.342D which read as follows :

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"342D. (1) The Minister may from time to time by notice in writing direct any council to prepare a scheme with respect to any land within its area or direct two or more councils to act together in preparing a scheme with respect to any land in their areas, and the council or councils concerned shall comply with the direction.

(2) A direction under subsection 1 of this section may -

RECORD

- (a) specify the particular purposes or objects for or with respect to which the scheme shall be prepared;
- (b) fix the period of time within which the scheme shall be prepared;

and the Scheme shall be prepared accordingly: Provided that the Minister may, from time to time, upon the application of the Council or Councils concerned, extend such period if it appears to him to be expedient so to do. 10

(3) Where a direction is given under subsection 1 of this section the Minister shall publish a notice of that fact in the Gazette and in a newspaper circulating in the locality in which the land to which the direction relates is situated.

Such notice shall contain a concise statement of the effect of the direction, together with information as to the place and times at which a plan defining the land to which the direction relates may be inspected." 20

9. Thereafter the council was bound to prepare a scheme pursuant to such direction as soon as practicable (s.342E) and to submit such scheme to the Minister for consideration prior to exhibition and objection by interested persons (s.342F).

10. The matters to be contained within a scheme were dealt with in s.342G which, at January 1961, read as follows : 30

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

(a) the situation, opening, widening, deviating, classifying and providing of roads;

10

(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.

20

30

In this paragraph "building" includes neither fences, gates, posts, masts, ornaments or other similar structures or erections required for the purposes of framing or grazing or of any dwelling house or garden occupied with a dwelling house nor green-houses or summer-houses required in connection with any such garden, nor temporary tenants 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;

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(c) the minimum standards of construction of roads of different classes and

RECORD

- drains, culverts and bridges in or upon roads;
- (d) the provision of water, gas, electricity and other public services;
 - (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; 20
 - (h) the reservation of sites for water reservoirs;
 - (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, greenbelts, green wedges and other open spaces; 30
 - (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;

- (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;
- 10 (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;
- 20 (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;
- 30 (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;
- (t) securing co-operation between the council or councils concerned and the Government, or any person or body of persons;

RECORD

- (u) the acquisition of land for any purpose of the scheme;
- (v) the apportionment between councils 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;
- (w) the recovery of betterment in accordance with Division 10 of this Part; 10
- (x) any matter necessary or convenient for carrying out the scheme.

(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. 20

(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 objections or purposes. 30

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

(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. 40

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

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Certain minor amendments, not presently material, were made to s.342G in 1963. Otherwise the section retained its quoted form until 3rd May, 1968.

10 11. Division 3 of the Part, which deals with approval of planning schemes prepared by councils, was substantially amended in 1963 consequential upon the establishment of the State Planning Authority of New South Wales by legislation (the State Planning Authority Act 1963) of that year. Division 3, as thus amended, provided for consideration by the Authority of schemes submitted to it by councils and of any objections thereto and for report by the Authority to the Minister thereon. By s.342J (2) the Minister was then empowered to decide either to proceed with the scheme with alterations or not to proceed with the scheme.

20 12. Division 3 B deals with the prescription of schemes and provides by s.342KD that the Governor on the recommendation of the Minister that the scheme, or the scheme as altered, be prescribed may make an ordinance prescribing the scheme or the scheme as altered as the case may be. Such a scheme is referred to as a "prescribed scheme".

30 13. Division 6 of the Part deals with the enforcement of prescribed schemes and by s.342N confers upon the responsible Authority specified in a prescribed scheme "all the powers, authorities, duties and functions conferred and imposed on the responsible authority by the "prescribed scheme". Section 342O(c) empowers the responsible authority to carry into effect the provision of the prescribed scheme, inter alia, by taking such action as may be necessary to enforce the performance of any duty imposed by the prescribed scheme upon any person.

40 14. Division 7 of the Part relates to "interim development". This term was defined, as at January 1961, by s. 342T as follows :

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"Interim development means development of land to which a scheme applies between the date upon which a resolution of the council or two or more councils acting together to prepare a scheme has taken effect or the date upon which notice of the fact that the Minister has directed the council or two or more councils to act together 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". 10

15. The word "development" was defined by s.342T as including, in relation to any land, "the carrying out of any work and any use of the land or building or work thereon for a purpose which is different from the purpose for which the land or building or work was last being used". 20

16. As the legislation stood in 1961 the interim development provisions automatically applied on the publication in the Gazette of notice of a direction by the Minister that a council prepare a scheme (by virtue of the definition of "interim development" in s. 342T).

17. The consequence of this fact was set out in s.342U providing as follows :

"342U. (1) Interim development shall not be carried out - 30

a) except as may be permitted by ordinance; or

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.

(2) Ordinances may be made suspending either generally or in any particular case or class of cases the operation of any 40

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 interim development permitted under this Division".

10 18. In 1962 Division 7 was substantially amended so as to provide for the making of interim development orders: see the Local Government (Town and Country Planning) Amendment Act, 1962. That Act, by s.5(1)(1) substituted a new s.342U so as to provide for the making of interim development orders and the regulation of land use thereunder. However s.7(1) of that Act specifically provided that notwithstanding, inter alia, the amendments made by s.5 of that Act "the provisions of Division 7 of Part XIII A of the Principal Act and of any ordinance made under that Part with respect to the granting or refusal of any approval, consent or permission to carry out interim development which are in force in relation to any land within an area immediately before the commencement of this Act shall continue in force in relation to that land until and except to the extent to which they may be suspended by an interim development order in accordance with sub-section 3 of this section or lapse upon the coming into operation of the scheme, whichever is the sooner". Sub-section (2) provided for the continuation of consents granted under Division 7 or an ordinance subject to revocation in a particular case by an interim development order. Sub-section (3) provided for the making of an interim development order whereby the continued operation of the pre-1962 control might be suspended.

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B. General interim development ordinance - Ordinance 105

40 19. On 9th November, 1945 ordinance No.105 entitled "Town and Country Planning - General Interim development" ordinance was proclaimed.

RECORD

20. Clause 3 of that ordinance contained the following definitions :

"Interim development authority means the Council of the area in which the land proposed to be developed is situated and includes the Minister in any case where he is authorized by or under the Act to permit interim development; and "development", "interim development" and "interim development application" have the meanings ascribed to them respectively in Division 7 of Part XIIIA of the Act"

10

"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".

"Quarry" has the meaning ascribed to it in the Mines Inspection Act 1901-1945".

21. The definitions incorporated by reference are as follows :

20

Mines Inspection Act 1901-1945 s.4 :

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

30

"Quarry" includes any place, open cut, or excavation wherein or whereby any operation is carried on above ground for or in connection with the purpose of obtaining any metal or mineral other than coal or shale and any place adjoining thereto on which any product of the quarry is stacked, stored or crushed".

40

Coal Mines Regulation Act 1912-1953 s.3 :

"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, but does not include any open cut working".

10 22. Part II of the ordinance deals with development permitted thereby. Clause 4 provides that interim development of certain classes may be carried out. These classes include class V being development of any description specified in Schedule I to the ordinance. Schedule I contains a list of ten categories of development including category 7 as follows :

20 "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, except -

a) the erection of buildings (not being plant or other structures or erections required for the mining, working, treatment or disposal of minerals), and the reconstruction, alteration or extension so as materially to affect the design or external appearance thereof, of buildings;

30 b) The formation or alteration of any means of access to a road."

23. Clause 5 of the ordinance empowers the Governor to direct that the exemption granted by clause 4 shall not apply but not so as to prevent the specific development enumerated in Schedule II. In relation to category 7 the specific development so enumerated is as follows :

40 "a) Extension, alteration and maintenance of plant or other structures or erections required for the winning,

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working, treatment or disposal of minerals.

- b) Maintenance of any other buildings used for those purposes.
- c) Winning and working of minerals by underground working
- d) Deposit of waste materials or refuse in connection with the winning or working of minerals in any part of a mine which was used for that purpose at the commencement of this Ordinance, whether or not the superficial area of the deposit is thereby extended." 10

24. Part III of the Ordinance relates to development which may be permitted by the interim development authority. By cl.6 it is provided that development which is not permitted by the Ordinance shall not be carried out except with the permission of the interim development authority. The Ordinance then goes on to deal with the procedure for making application for consent and matters relating to determination of such application. 20

C. Wyong Planning Scheme Ordinance

25. The Wyong Planning Scheme Ordinance was prescribed by publication in the Government Gazette No.57 of 3rd May 1968.

26. The Appellants, by para. 2 of the Statement of Defence put in issue the prescription of the Shire of Wyong Planning Scheme Ordinance and, in particular, the prior compliance with the requirements of Division 2 Part XIIIA of the Local Government Act. However : 30

P.26 1.12

- a) The ordinance was admitted (Ex.c) without objection
- b) No evidence was adduced to suggest any failure to comply with the statutory requirements.

c) Section 42 of the Interpretation Act 1897-1969 provides :

42 (I) It shall be presumed, in the absence of evidence to the contrary, that all conditions and preliminary steps precedent to the making, whether before or after the commencement of the Interpretation (Amendment) Act, 1969, of an instrument made under an Act have been complied with and performed.

(II) In this section, "instrument" means instrument -

- a) that is made by the Governor; or
- b) that is made by any other person or body and is required by the Act under which it is made to be approved or confirmed by the Governor,

being an instrument that is required by this Act or the Act under which it is made to be published in the Gazette".

Section 342KD provides for a planning scheme ordinance to be prescribed by the Governor by publication in the Gazette. Consequently the presumption imported by s.42 applies: see State Planning Authority of New South Wales v. Shaw 21 L.G.R.A. 192 affirmed by Court of Appeal 8th December, 1972.

27. By cl.1(2) of the ordinance it is said that the planning scheme prepared by the Respondent pursuant to the direction issued by the Minister under s.342D of the Act, which direction was published in Government Gazette No.1 of 6th January 1961, is embodied in the ordinance.

28. In Cl.3 the following definitions are applied, unless inconsistent with the context or subject matter -

RECORD

"Appointed day" means "the day upon which this ordinance takes effect".

"Council" means "the Council of the Shire of Wyong"

"Existing work" means "a work constructed or carried out before the appointed day...."

"Existing use" means "a use of a building, work or land for the purpose for which it was used immediately before the appointed day....."

"Mine" means "any place, open cut, shaft, tunnel, pit, drive, level or other excavation, drift, gutter, lead, vein, lode or reef wherein, whercon, 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 product of the mine is stacked, stored, crushed or otherwise treated but does not include a quarry". 10 20

29. By cl.4 the ordinance is made applicable to all land within the Shire of Wyong.

30. By cl.5 the Respondent is made the responsible authority and is charged with the functions of carrying into effect and enforcing the provisions of the ordinance.

31. Part III of the ordinance relates to zoned land. Clause 11 states the purposes for which the buildings or works may be erected, carried out or used by reference to a zoning table. 30
The subject lands fall into three categories (See para.6 of Statement of Claim and exhibit T.)

P.3 1.5

The three categories are as follows :

- i) Non-urban A (p.11 of Ord.) in which the use of land for mining purpose (an innominate purpose) is permissible only with the consent of the responsible authority.

ii) Residential "A" (p.13 of Ord.)
within which the use of land for
mining purposes is absolutely prohibited.

iii) Open space - recreation (p.17 of Ord.)
within which the use of land for mining
ilmenite, monazite, rutile, zircon
and similar minerals is permissible
only with the consent of the responsible
authority.

10 32. Clause 12 of the ordinance prohibits the use
of a building or work, without the consent of the
responsible authority, for a purpose shown in
column IV of the zoning table and prohibits the
erection or use of a building or work for any
purpose shown in Column V of the zoning table.

20 33. By cl.13 it is provided that land included
in a zone shall not be used without the consent
of the responsible authority for any purpose for
which a building in the same zone may be erected
or used only with the consent of the responsible
authority and that land in a zone shall not be
used for any purpose for which a building in the
same zone may not be erected or used. The result
is to embody restrictions on the use of land
identical with the restrictions imposed in
relation to buildings by cll.11 and 12 and the
zoning table.

30 34. Part IV of the ordinance, which deals with
existing buildings, existing works and existing
use of land, contains two relevant clauses,
c11.14 and 18 as follows :

40 "14. Notwithstanding the provisions of Part
III and Part IV, but subject to the provisions
of Part II of this Ordinance an existing
building or an existing work may be
maintained and may be used for its existing
use and an existing use of land may be
continued notwithstanding that such existing
use is for a purpose for which buildings or
works may not be erected or used or for
which land may not be used under Part III
or Part IV of this Ordinance in respect
of the zone in which such existing building
or existing work or land is situated.

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18. The foregoing provisions of this Part shall not apply to an existing building or work or to an existing use of a building, work or land which was erected or carried out or commenced after 6th January 1961 in contravention of the provisions of the Town and Country Planning (General Interim Development) Ordinance or of any permission or modification thereof granted under Division 7 of Part XIII A of the Act or under that Ordinance". 10

35. Part V of the ordinance deals with consents and it provides in cl.19 for an application for consent to be made in writing to the responsible authority by the owner or his representative appointed in writing and accompanied by certain plans and particulars.

36. Clauses 20 and 21 set out matters which the responsible authority shall take into consideration in considering applications made to it and cl.25 provides that the responsible authority may grant an application either unconditionally or subject to conditions or may refuse to grant such application. Reasons must be given and provision is made for a consent to become void if the development is not substantially commenced within two years from the date of consent. 20

37. Part VI contains various special provisions and in particular cll.44 and 46 as follows : 30

"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. 40

(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.

(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.

20 (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.

(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.

30 (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 46. The responsible authority, before determining any application made to it for its consent to the use of land within Zone No.6(a) for the purposes of a mine shall consult with the Authority and shall not grant its consent to such application except with the concurrence of the Authority and, in the case of such concurrence

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being given, shall attach to its consent such conditions as the Authority may require to be imposed."

38. By cl.48 a saving provision is inserted as follows :

"48. Nothing in this ordinance shall be construed as restricting or prohibiting or enabling the responsible authority to restrict or prohibit -

- a) The carrying out of development of any description specified in Schedule 6 of this ordinance 10

39. Schedule 6 includes para.6 as follows :

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

- a) The erection of buildings (not being plant or other structures or erections required for the mining, working, treatment or disposal of minerals) and the reconstruction, alteration or extension of buildings, so as materially to affect the design or external appearance thereof; 20
- b) The formation or alteration of any means of access to a road".

III - Standing and interest of the plaintiff

40. Section 587 of the Local Government Act reads :

"587. In any case in which the Attorney-General might take proceedings on the relation or on behalf or for the benefit of the council for or with respect to enforcing or securing the observance of any provision made by or under this Act, the council shall be deemed to represent sufficiently the interests of the public 30

and may take proceedings in its own name."

RECORD

10 41. It is now well settled that an injunction may be granted, at the suit of the Attorney-General, to secure obedience to legislation: see Attorney-General v. Bastow (1957) 1 Q.B. 514, Attorney-General v. Smith (1958) 2 Q.B. 173, Attorney-General v. Harris (1961) 1 Q.B. 74, Attorney-General v. Warringah Shire Council (1972) NSWLR 526, Attorney-General v. North Shore Gas Company Limited (1930) 10 L.G.R. (N.S.W.) 30, Attorney-General v. Sharp (1931) 1 Ch. 121, Attorney-General v. Premier Line Limited (1932) Ch. 303.

42. It follows that, in this case, there would be jurisdiction to grant an injunction at the suit of the Attorney-General on the relation of the council.

20 43. Such a suit would be to compel compliance with the Wyong Planning Scheme Ordinance, this being an ordinance made under the Local Government Act.

44. It follows that s.587 confers jurisdiction on the Court to grant relief at the suit of the council proceeding in its own name so as to compel, in the public interest, compliance with the ordinance: see for example Rockdale Municipal Council v. Kogarah Municipal Council (1927) 39 C.L.R. 203, Cooney v. Ku-ring-gai Municipal Council (1962) 114 C.L.R. 582.

IV - History of Activity on Land

30 45. Prior to 6th January, 1961

ML 44 - Associated Mineral Consolidated
less (578 acres)

(i) Mid-1956 to early November 1956 - App.120 holes drilled to determine presence of minerals in relation to negotiations by company to purchase interest of Nicolle, Kennedy and English in relation to Authority to Prospect held by Nicolle for 12 months from 7th December, 1955

P.16 1.2-25
P.62 1.44
P.64 1.6 -
P.65 1.10

RECORD

p.492

Red holes on plan

(ii) July 1958 - App. 14 holes drilled in relation to negotiation with Mines Department for excission of 80 acres in north eastern corner of lease area

p.65 1.10-
P.66 1.20

ML.51 - Wyong Alluvials lessee (537 acres)
ML.48 - Wyong Alluvials lessee (450 acres)
ML.42 - Wyong Alluvials lessee (237 acres)

FP.89,90,
91 11.15-
25

(i) September 1957 38 holes drilled prior to purchase of Authorities to Prospect from Jennings

10

P.92 1.12 -
P.93 1.50

(ii) December 1957 check drillings by Nolan on behalf of unrelated company Coff's Harbour Rutile in relation to possible purchase by that company of an interest in the area

46. Between 6th January 1961 and 3rd May 1968

ML.51 - Wyong Alluvials lessee

P.66 1.22-
P.67 1.18

(i) December 1963 - March 1964 Drilling along line (purple in plan at p.492) for valuation purposes prior to merger of defendant companies. 20

P.275
1.1-16

(ii) After July 1964 - exploratory drilling (yellow line on plan record p.492): not shown to be before 3rd May, 1968 (see judgment)

ML.48 - Wyong Alluvials lessee

P.81 1.32-
P.83 1.37

(i) September 1964 - December 1966 Drilling to determine dredge path and design of dredge - abandoned on merger with Associated Minerals.

ML.42 - Wyong Alluvials lessee

P.66 1.22-
P.67 1.18

(i) December 1963 - March 1964 Drilling along line (purple in plan at p.492) for valuation purposes prior to merger of defendant companies. 30

P.81 1.32-
P.83 1.37

(ii) September 1964 - December 1966. Drilling to determine dredge path and design of dredge - abandoned on merger with Associated Minerals.

	47. <u>After 3rd May, 1968</u>	<u>RECORD</u>
	(i) Further drilling on each of leases - no evidence of knowledge by plaintiff of drilling operations. See judgment.	P.330 1.26 P.317 1.3
	(ii) June 1969 - Assembly of plant 10/10 on ML.42 (eastern side of road) commenced	P.322 1.25
	(iii) July 1969 - Plant 10/10 commenced to mine ML.42 and then moved to approved areas S.L.A. 1614 and 1625 to south	P.322 1.22- P.323 1.13
10	(iv) End of 1969 or early 1970. Plant 10/10 returned to ML.42	P.323 1.13
	(v) July 1971 - Assembly of plant 20 commenced on ML.44 (western side of road)	P.326 1.13
	(vi) 22nd July 1971 - Council resolution purporting to impose tree preservation order	Ex.D - P.355
	(vii) December 1971 - Assembly of plant 20 completed	P.326 1.20

IV - Plaintiff's case for relief

Part III (c11.11-13) of Ordinance

20	48. The manner in which the ordinance affects the subject land is set out in para.31 above. Pursuant to the ordinance the use of the land for the mining of rutile, zircon and related minerals is (depending upon the particular zone involved) either absolutely prohibited or prohibited without the consent of the Respondent as responsible authority.	
30	49. The Appellants admit, on their pleadings, that no consent has ever been granted by the Respondent, in favour of any person, permitting the use of the subject land or any part of it for mining or associated purposes	P.3 11.10-20
	50. The result, therefore, and subject to the defences raised (referred to in paras. 60 to 67	

RECORD

P.5 11.6-22
PP.7 & 8

below) is that mining by the Defendants of the subject lands constitutes a breach of the provisions of the ordinance. There was, at the date of hearing, a continuing breach in relation to dredge 10/10 and a threatened breach in relation to dredge 20. Consequently, in accordance with the practice of the Courts referred to in para.41 above it is prima facie proper to grant the relief, including injunctive relief, sought in prayers 1, 3 and 5 of the Statement of Claim. 10

Part VI (cl.44 of Ordinance)

51. Clause 44 of the ordinance empowers the Respondent, as responsible authority, to make tree preservation orders. By such an order the Respondent may prohibit the destruction without its consent of such tree or group of trees as may be specified therein.

52. This power the Respondent exercised, relevantly to the subject lands, on two occasions.20

Ex.D,P.355

53. On 22nd July 1971 it resolved to "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 ML.44 and ML.51".

Ex.E,P.356

54. On 9th December 1971 the Respondent further resolved "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 ringbarking, cutting down, topping, lopping, removing, injury or wilful destruction of any tree within the Shire of Wyong except with the consent of the Council" 30

55. The former resolution affected part only of the subject lands, the latter the whole Shire including the subject lands. Whilst, therefore, the Respondent submits that the former resolution was a proper and effective exercise of power under cl.44 to prohibit without its consent the 40

destruction of any tree on ML.44 and ML.51 it is sufficient to primarily rely upon the second and more far reaching resolution.

56. The Appellants submitted below that cl.44 of the ordinance was invalid. In this regard the Respondent respectfully submits :

- a) That trees are commonly objects of natural beauty
- 10 b) That groups of trees are commonly major contributants to places of natural beauty
- c) That the clause is therefore one designed to ensure or assist "the preservation of places or objections . . . of natural beauty".
- d) That the clause is therefore a provision authorized by s.342G (3)(p) of the Local Government Act: see para.10 above.
- 20 e) That, alternatively, the destruction of trees on land is a matter relating to the use of land and the clause is therefore a provision 'for regulating and controlling the use of land' and authorized by s.34G(2) of the Act: see para.10 above.
- f) That no question of delegation of a legislative power is involved. The clause confers upon the Respondent a power to prohibit in the particular case or in such general cases as it thinks fit. The exercise of this power is an act of administrative discretion
- 30 g) Alternatively this is not a case of delegation by a delegate. Whilst the Governor, by his ordinance, indicated the nature and ambit of the power to be exercised the actual grant of power is contained in s.342N of the Act: see para.13 above. By that section the Parliament has conferred upon the Respondent power to discharge those powers and functions which may be indicated by the scheme. The Respondent exercises power as the delegate of Parliament itself.

RECORD

- h) That cl.44 is a valid provision of the Ordinance.

57. The Appellants further contended that neither of the resolutions of the Respondent was, assuming the validity of the clause, authorized by cl.44. In relation thereto the Respondent respectfully submits:

- a) As to the first resolution - that the resolution is not rendered ineffective by reason of the failure of the council to specifically prohibit various acts. The powers of specification conferred by cl.44 (2) and (3) are discretionary powers. It is not essential that these sub-clauses be used - the power granted by sub-clause (1), standing alone, is sufficient. For example sub-clause (1) requires specification of the subject tree or group of trees - this specification being clearly essential to a proper exercise of the power. But sub-clause (3) gives an amplified discretionary power e.g. to make an order referable to the Shire generally. This power the Council may or may not use without affecting its power under sub-clause (1). Similarly an order under sub-clause (1) must make clear that the specified trees are to be 'preserved' but this would not mean a prohibition on the topping, lopping or injuring of a tree. If the Council wishes to prohibit those acts then it may, in its discretion, do so under sub-clause (2). If it does not choose to do so then this fact cannot affect its power under sub-clause (1). The only essential pre-requisite for a valid resolution are that a particular tree or group of trees be specified (or that there be a description within sub-clause (3)) and that the resolution manifest an intention to impose a duty of preservation.
- b) As to the second resolution, the Appellants submitted that the council was unable to describe the subject tree or trees by reference to the boundaries of the Shire.

10 If sub-clause (1) stood alone this would be so, since trees so described would not be 'any tree or group of trees'. However sub-clause (3) specifically permits description 'generally by reference to the Shire or any division thereof'. This must be a reference to description by reference to the boundaries of the Shire or of a division e.g. a riding of the Shire. A description by reference to the whole Shire falls within this category.

58. Finally, in relation to the tree preservation orders, it was submitted by the Appellants that notice of the proposed resolutions, with an opportunity to be heard thereon, should have been granted to the Appellants. In relation thereto the Respondent respectfully submits :

- a) That no such obligation is expressed in either the Act or the ordinance.
- 20 b) That no obligation to give notice arises in a case such as this where the prohibition is open to subsequent contest. The prohibition is imposed by a resolution capable of rescission or variation and, in relation to any use of sub-clause (2) at least, is subject to exception with the consent of the Council as responsible authority. Against any refusal to vary or rescind or any refusal to consent an appeal lay under
30 s.342N (2) of the Act which in 1971, read as follows -

40 "342N (2) Where a prescribed scheme provides expressly or impliedly that any act, matter or thing specified in the scheme shall be done only with the approval, consent or permission of the responsible authority or shall not be done except with the approval, consent or permission of the responsible authority, any person who is dissatisfied with the decision of the responsible authority upon an application for such approval, consent or permission or with any condition imposed by the responsible authority or any neglect or delay of the

RECORD

responsible authority to give within forty days after service of his application on the responsible authority a decision with respect thereto, may appeal to the Land and Valuation Court."

In consequence no irrevocable prejudice flowed from the making of an order - the reasonableness of which was always subject to challenge in the Land and Valuation Court.

c) That the power granted by sub-clause (3) of cl.44 indicates to the contrary of an intention to require an opportunity to be heard. Plainly it would be impossible for the council to give a notice, complying with the requirements of the authorities, or an opportunity to be heard to all affected owners where it contemplated making an order affecting the whole Shire or a substantial portion thereof. 10

59. For the above reasons it is respectfully submitted that the resolutions were each proper orders under cl.44 of the ordinance, lawfully binding on the Appellants. To the extent that the proposed mining operations involved destruction of trees, without the consent of the Respondent, on ML.44 or ML.51 such operations were a breach of the former order. To the extent that the proposed mining operations involved destruction of trees without the consent of the Respondent anywhere on the subject lands, such operations were a breach of the latter order. The continuing and threatened operations admittedly involved such destruction so that, subject to the defences raised, it was proper to grant the relief, including injunctive relief, sought in prayers 2, 4 and 5 of the Statement of Claim. The Privy Council is therefore respectfully requested by the Respondent to vary the order made by His Honour so as to include a declaration in or to the effect of prayer 2 of the Statement of Claim and an injunction in or to the effect of para.4 of the Statement of Claim. 20 30 40

P.6 1.25-
P.7 1.5;
P.12 1.1-
P.13 1.19

V - Defences raised by Appellants

RECORD

60. Six defences by way of confession and avoidance were raised by the Appellants in their Statement of Defence. They may be summarised as follows :-

- | | | | |
|----|------|---|-------------------------|
| | i) | Rights under Mining Act 1906 as amended (paras. 8-15) | P.13 1.20-
P.17 1.28 |
| 10 | ii) | Use is "development required for the purposes of the mine" within para.6 of Schedule Six of the ordinance (para.16) | P.17 1.29-
P.18 1.13 |
| | iii) | Use is a continuance of an "existing use" of land within cl.14 of the ordinance (para.17) | P.18 11.14-
24 |
| | iv) | Use is a maintenance of an "existing work" within cl.14 of the ordinance (para.18) | P.18 1.15-
P.19 1.6 |
| | v) | Laches acquiescence and delay (para.20) | P.19 11.19-
23 |
| 20 | (vi) | Discretion (para.21) | P.19 1.24-
P.20 1.2 |

61. The Respondent contests each of these defences, on either legal or factual grounds, and respectfully submits that the Appellants are not entitled to succeed on any of them. It is convenient to summarise the Respondent's submissions in relation thereto seriatim.

62. Mining Act

30 The Respondent concedes that the Appellants hold, or are deemed to hold, mining leases of the subject land pursuant to the Mining Act 1906 as amended but respectfully submits that this fact confers no privilege upon the Appellants entitling non-compliance with the ordinance and no defence in the suit, for the following reasons -

- i) There is nothing in either the Local Government Act or the Shire of Wyong

RECORD

Planning Scheme ordinance to exempt from compliance therewith holders of mining leases under the Mining Act.

- ii) Special attention has been paid to the definition of land made subject to the Planning provisions (Part XIII A) of the Local Government Act and of ordinances thereunder: see s.342B of the Act which defines 'land' broadly so as to include any estate or interest in land and all lands of the Crown. An estate as lessee under a mining lease is an estate or interest in land and so is included in the definition of land. Additionally 'land' has its ordinary sense and the use of Crown land for mining purposes is a use of 'land' within the meaning of the definition. 10
- iii) The Local Government Act contains specific provision (s.10) preserving from any effect thereunder a number of statutes. The enumerated statutes do not include the Mining Act. This indicates a legislative intention that rights and duties under statutes not enumerated should be subject to the regulatory provisions of the Local Government Act and ordinances made thereunder - at least in the absence of a clear conflict between the two. 30
- iv) There is no conflict between the provisions of the Mining Act conferring or permitting conferral of rights to mine, as against other potential miners, and the provisions of the Local Government Act protecting the public interest in a planning sense. The requirements are simply cumulative so that a would be miner must both have the necessary personal rights under the Mining Act and be acting pursuant to all necessary consents (notified impersonally to himself or another) under the Local Government Act or its ordinance. 40

- v) The Respondent respectfully adopts and relies upon the approach taken by the trial judge in his judgment on this issue; which approach was shared by Hardie J. (as he then was) in Coffs Harbour Shire Council v. Gudgen R.Z. Limited (1971) 25 L.G.R.A. 336.

RECORD

P.288 1.25-
P.291 1.20

63. Development for purposes of a mine

10 This defence raises the question whether the Appellants' activities are exempted from control by the ordinance because falling within cl.6 of Schedule Six of the ordinance. It is conceded that if the activities so fall then, by virtue of cl.48 of the ordinance, nothing in the ordinance could restrict or prohibit or enable the restriction or prohibition of those activities. However it is respectfully contended that the activities do not fall within cl.6 for
20 the following reasons :-

- i) The ordinance must be read as a whole. The ordinance displays a clear intention to control the establishment of mines - see :
- 30 a) zoning table (cl.11): zones Residential "A" (col.V), Residential "B" (col.V), Residential "C" (col.V), Residential (Village Area) (col.V), Business (General Business) (col.V), Industrial (General Industrial) (col.IV)
- b) Cl.20(b) re consideration of applications, inter alia, for use of land for the purposes of a mine
- c) Cl.46 requiring responsible authority to refer to State Planning Authority certain applications to use land for the purposes of a mine

RECORD

These provisions would be otiose if cl.6 be read as exempting from control under the ordinance all mining activity, whether original establishment or continuing development.

- ii) The obvious intent of the ordinance was to permit, unfettered by planning control, the expansion of existing mine workings (which would otherwise have required consent as the alteration or enlargement of an existing work (cl.15)), whilst at the same time subjecting to control the establishment of new mines. 10
- iii) The word 'mine' in cl.6 of the Schedule should be given its defined meaning: see cl.3 of the Ordinance, namely a "place . . . wherein, whereon or whereby any operation is carried on for or in connection with the purpose of obtaining any metal or mineral". The definition (in contrast with other definitions in cl.3) uses only the present tense, speaking as at the date of prescription namely 3rd May, 1968. Thus the question is whether, at that date, the place was one wherein or whereon such operations were carried out. 20
- iv) As the Schedule operates as an exception to the control provisions of the ordinance the onus rested upon the Appellants to prove facts bringing the Schedule into relevance. 30
- v) The evidence discloses no operations whatever on the subject lands as at 3rd May, 1968. The then most recent activity had apparently been the drilling activity between September and December 1966 on ML.48 and ML.42: see para.46 above. It could not be said as a matter of fact that any part of the leased area was a place therein or whereon any mining activity (even of a preliminary nature) was then being carried out. 40

10 vi) Alternatively if the drilling activity between 6th January 1961 and 3rd May 1968 constituted the leased area, or any part of it, as a place therein or whereon any mining operation was carried on as at 3rd May 1968 such activity was unlawful, for non-compliance with the provisions of Ordinance 105, so that no right could be obtained. In this regard the Respondent respectfully adopts and relies upon the approach set out in the judgment below.

RECORD

P.298 1.9-
P.302

20 vii) The definition of 'mine' contained in cl.3 of the ordinance requires that any 'place' falling within such definition be an excavation; firstly as a matter of literal construction and secondly by reason of the ejusdem general rule. There was no evidence of any existing excavation at 3rd May, 1968.

64. Continuance of an existing use of land

30 The Appellants claim that the mining activities carried out, and proposed to be carried out, by them amount to a continuation of an existing use of land and that, as such, they are exempted by cl.14 from control under Part III (the zoning part) or Part VI (the part containing cl.44) of the ordinance. The Respondent contests that a defence of existing use of land has been made out, for the following reasons :-

- 40 i) The onus of establishing an 'existing use' right rests with the Appellants
- ii) The definition of 'existing use' contained in cl.3 indicates that the term refers to a use of land 'for the purpose for which it was used immediately before the appointed day' i.e. 3rd May, 1968.
- iii) In determining whether land was used for a particular purpose at a particular

RECORD

time regard must be had to the nature of the alleged use. Whilst day by day use may not always be necessary such use as is commonly associated with the claimed activity is necessary.

- iv) The actual operations which occurred on the subject land prior to 3rd May 1968 are set out in para.46 above. In fact no operations whatever had, on the evidence, taken place between December 1966 and May 1968 despite the fact that mining (or even prospecting) operations would normally occur day by day, subject perhaps to extraordinary weather conditions or industrial disputes, during ordinary working hours. Whatever use there had been had terminated prior to 3rd May 1968 so that it was not existing at that day. 10 20
- v) In any event the drilling operations which had occurred prior to 3rd May 1968 were so different in purpose, procedure, intensity and effects from the mining operations carried on and threatened to be carried on that they cannot, as a matter of fact, be said to be the same use.
- vi) Alternatively and additionally the Appellants admit that no consent was ever granted by the Plaintiff under the Town and Country Planning - General Interim Development Ordinance (O.105) for the use of the subject land or any part of it for mining operations. If, therefore, contrary to the last submission, it be proper to categorize the drilling operations between 6th January 1961 and 3rd May 1968 as being the same 'use' as the mining activities carried on and threatened to be carried on such operations were themselves in contravention of O.105. As such, by force of cl.18 of the ordinance, they could confer no 30 40

existing use right. The Appellants could only escape this conclusion if there had been an existing use under O.105 at 6th January, 1961. However the finding of the trial judge was the contrary.

RECORD

P.292
11.12-30

- 10 vii) Alternatively and additionally, and assuming that an 'existing use' right to mine was held at 3rd May 1968 such right was lost prior to the commencement of the operations carried on, and threatened to be carried on. The right preserved by cl.14 is a right to continue an existing use. Continuity involves such use as is commonly associated with the active carrying on of a particular use. In the case of mining operations this will normally involve day by day operations. In fact no day by day activity occurred (and then only on a comparatively small portion of the land) until the return of dredge 10/10 to ML.42 at the end of 1969 or early in 1970. No attempt at other day by day activity was made until the assembly of dredge 20 on ML.44 commencing in July 1971 - three years after the prescription of the ordinance.
- 20
- 30 viii) Alternatively and additionally to the foregoing any use which existed at the date of prescription of the scheme and which thereafter continued was confined to those particular areas within which drilling had occurred i.e. the drill hole sites themselves. No right extended generally throughout the subject land or the proposed dredge paths thereon.
- 40 ix) In relation to this defence the Respondent respectfully adopts and relies upon the approach taken by the trial judge as expressed in the judgment under appeal

P.291 1.21-
P.302

65. Maintenance of an existing work

The Appellants pleaded that the proposed activities were a maintenance of an existing work and so exempted from control by cl.14 of the ordinance. The Respondent contests this claim for the following reasons :

- i) The term 'existing work' is defined by cl.3 of the ordinance as a 'work . . . constructed or carried out before the appointed day'. 10
- ii) Whilst the term 'work' is not defined the word is used throughout the ordinance in reference to some observable physical feature - capable of being 'constructed', 'carried out', 'altered', 'used' and 'maintained' (see cll.7-9, 11, 14-15, 19(b), 20, 21(a)(b)(e)).
- iii) There was, in that sense, no work whatever on the subject land at 3rd May, 1968. There was nothing to be 'maintained' under cl.14. 20
- iv) The matters set out in para.64 above, in relation to the claim of continuance of an existing use of land are relied upon by the Respondent in relation to this defence.

66. Laches, acquiescence and delay

The Appellants argued below that relief should be denied the Respondent on account of its alleged laches, acquiescence and delay. 30
In relation thereto the Respondent submits :

- i) The equitable defence of laches, acquiescence and delay is not available against the Attorney General suing in the public interest.
- ii) In this suit the Respondent occupies the same position as the Attorney

General in such a suit so that the defence is, equally, inapplicable against it.

10 iii) The defence includes acquiescence. This involves an implication of consent - which implication is impossible in the case of a statutory prohibition or where there has been no compliance with a statutory procedure for obtaining consent.

iv) Alternatively, if the defence be available, the defence is a discretionary one and the Court will not exercise that discretion so as to preclude the Attorney General, or a party suing in his place, from asserting a non-compliance with statute.

20 v) In any event the Respondent denies that, upon the facts as established, any defence of laches, acquiescence and delay is available. In relation to the matters relied upon by the Appellant the Respondent says :

30 a) The correspondence with the Department of Mines relating to the grant of leases is of no significance: the Respondent was entitled to assume that any lessee would comply with the existing law at the date of working any lease which might be granted. There was nothing in the correspondence to suggest otherwise.

40 b) The rating of the subject lands as a 'mine' was obviously correct having regard to the definition of 'mine' in the Local Government Act and flowed automatically from the grant of the leases. The Respondent had no choice whether to rate or not: see ss.132 and 139 of the Act. The act of rating

RECORD

contained no implication that an application for consent was unnecessary.

P.316 1.27-
P.317 1.11

- c) There was no evidence that the Respondent knew of any prospecting or drilling operations, that actual mining operations would follow or that the Appellants would not firstly apply for consent: see judgment

10

P.317 1.14-
P.326 1.12

- d) As a result of certain meetings and correspondence, summarized in the judgment, the Respondent became aware of the Appellants' proposals to mine the subject lands. Whilst the Respondent did not specifically point out to the Appellants the need to obtain consent this is of no significance because :

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P.322 1.20
P.119 1.10

- The Appellants must be presumed to know the law and their obligations under it.

- The Appellants did in fact know of the existence of the ordinance

- The Appellants accepted the necessity for consent in relation to the areas south of ML.39 i.e. S.L.A. 1614 and 1625 and applied for consent in relation thereto, in May 1969

30

P.119 11.
31-40

- Nothing was said on behalf of the Respondent to suggest that a similar consent was unnecessary in relation to the subject lands or by the Appellants to suggest that any different course would be taken by them in relation to the subject lands.

40

- Not prejudice as a result of any delay is proven. Delay cannot be imported to the Respondent in relation to any period prior to the date of commencement of actual mining in a particular area or with a particular dredge. Until that time was reached there was nothing to indicate, in relation to that area or dredge, that mining would occur without consent. In respect of dredge 10/10 the only prejudice claimed was the expenditure in constructing the dredge. This expense was incurred prior to that time being reached. After that date, and during any delay which occurred, the Appellants used the dredge for mining purposes. Far from that delay operating to their prejudice it advantaged them by enabling them to earn a return on the cost of construction of the dredge. In the case of dredge 20 there was no delay after the date upon which it became apparent that the Appellants proposed to mine without consent. The dredge itself was constructed with knowledge of the Respondent's opposition to mining west of Wilfred Barrett Drive.

- Even if some inference might be drawn by reason of the failure of the Respondent to actively oppose the operations of dredge 10/10 east of Wilfred Barrett Drive prior to the institution of the suit no such inference may be drawn in relation to dredge 20 or the area west of the road. Nothing occurred prior to December 1971 to indicate that the Appellants would fail to seek consent prior to commencing

operations with that dredge or in that area or that the Respondent would not require an application for consent. On the contrary the Respondent had, by its June 1971 resolution, clearly indicated its opposition to mining operations on ML.44 and ML.50 west of Wilfred Barrett Drive.

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- e) In relation to this defence the Respondent relies upon the matters set out in para.67 below relating to the defence of exercise of discretion.

67. Exercise of Court's Discretion

Finally the Appellants contend that, if all their other defences failed, the Court should in the exercise of its discretion dismiss the suit. In relation to this contention the Respondent respectfully submits :

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- i) That in a suit instituted by the Attorney-General to enforce the law the Court will only deny relief on discretionary grounds in very exceptional circumstances.
- ii) That the same approach is appropriate in a suit instituted by a council under s.587 of the Local Government Act.
- iii) That there are here no exceptional circumstances. All expense incurred by the Appellants, in relation to mining operations was incurred with knowledge of the ordinance requirements.
- iv) The exercise of discretion necessitates consideration of all the local circumstances including the dominance and attractiveness of the area sought to be mined and its likely importance

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in relation to the use and planning of the Wyong district. These matters can only be fully appreciated by a judge with knowledge of the area and local conditions and patterns of use and development. The Privy Council will, in the Respondent's respectful submission, decline to interfere with the judgment of a local judge, experienced in this field, who has had the benefit of a full inspection of the area except where it could be shown very clearly that the judge had proceeded on some incorrect principle or that the evidence supplied no justification for the course taken by him.

10

v) In this case the trial judge fully understood and gave proper weight to all the matters advanced by the Appellants, on the issue of discretion, but considered them insufficient to justify him in dismissing the suit.

20

vi) There was abundant material to support the trial judge's decision on discretion including the following :

a) The fact that the Appellants had a right of appeal to the Land and Valuation Court (a specialized tribunal presided over by a Supreme Court judge) against any refusal by the Respondent to consent to the mining operations (except in relation to the part of the subject lands zoned Residential). Upon such appeal the Court could make such order as it thought proper including imposition of conditions desirable in the public interest. (Since the date of judgment s.342N of the Act has been amended so as to direct such appeals to a new multi-member tribunal, the Local Government

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RECORD

Appeals Tribunal. The jurisdiction of the Tribunal permits it to exercise all the powers of the Council in relation to any application and to make such decision as the Council should have made).

- b) The power of the Minister for Local Government to suspend from ordinance control any area of land if he sees fit. If, as a matter of government or ministerial policy, it was thought proper in the public interest to permit an area to be mined then the Minister could, by a gazette notification under s.342Y of the Act, secure this result regardless of the opinion of the Respondent or of any appeal tribunal. The power under s.342Y, which has been used very frequently, still remains. 10 20
- c) The period of time which had elapsed since, in relation to the various leased areas, the Respondent had indicated it had no objection to the grant of a lease. The ordinance recognizes (by cl.25 (3))the desirability of terminating stale consents. Under that clause a consent lapses after two years unless there is a renewal by the Council or substantial commencement of the development. In this case the decisions not to oppose the grant of leases were made ten or twelve years previously. They were not decisions on formal applications to use the land for mining enabling consideration of the actual area to be mined or of conditions which might be appended. There was never any resolution renewing that position and there 30 40

RECORD

was (if the Respondent's submission on the earlier defences be accepted) no substantial commencement. As a matter of discretion the decisions not to oppose the grant of leases can hardly be given weight in considering an ordinance whereunder, if the decisions had been grants of formal consents, the consents would have lapsed. This is particularly so in a case where circumstances have changed materially during that period: see the evidence of the Shire President (Mr. Chalmers) relating to :

- The present position that the subject lands are "the only major portion of the area that is not subdivided and "the only major area along the lake shores of Tuggerah Lake that will not be eventually developed". P.243 1.3
- The present use of the subject lands for recreation purposes P.243 1.12
- The importance of the tourist industry to the area and its growth over recent years P.243 1.18-
P.244 1.14
- The change in membership of council since the previous decisions P.245 1.25
- The recent public interest in the question of mining on the peninsula P.246 11.
11-29
- The recent preparation, by eminent consultants retained by the Appellants, of an environmental report relating to the proposed mining: see McKellar, which report the Appellants refused to produce to the Council and objected to tender to the Court. P.131 11.
5-30
P.247 1.22-
P.248 1.11
P.142 11.
18-28

RECORD

P.193 1.30-
P.194 1.3

Evidence was given by Mr. S. Clark a resource ecologist who has made a study of the re-establishment of vegetation after mining as to the importance of such a study prior to mining operations.

- d) The fact that three out of the four relevant leases had expired at the date of hearing and that the Crown, as owner of the land, had not decided whether it was prepared to renew those leases. 10
- e) The beauty of the subject lands as described in the judgement :

....."the greater part of the area is still covered by trees, and in some places it is very thickly covered. The peninsula is formed of sand, and the value of the area for scientific and other purposes is based in part on the fact that the flora is growing on sand. In particular, there is a rain forest, and a very substantial angophora forest, each of considerable beauty and each growing on sand". 20

The beauty of the area, and the improbability of its restoration were taken into account on the matter of discretion as set out in the judgment : 30

P.264 11.21-
30

"As it seems to me, a most material circumstance in relation to any discretionary defence upon which the Defendants seek to rely is the public interest in the preservation of the angophora forest, the rain forest, and indeed the general appearance of the land in the subject mining leases. Without a doubt the forests on these lands add greatly to the beauty of this 40

area, and the evidence also establishes that apart from their aesthetic value, they are of great public value for educational and scientific purposes. They cannot be replaced, and the attempts at restoration which on any view of the matter would take a very long time to come to any kind of fruition, will in all probability be quite unsatisfactory".

RECORD

P.338 1.20-
P.339 1.8

There was ample evidence to support these conclusions. Mr. McKenzie an experienced landscape architect, for example, referred to the peninsula area as being "without a doubt quite unique amongst coastal areas generally". He thought that it had a special quality by reason of the size of the area and the forest within it, the way in which it had been formed by the elements and the environment within it. He also referred to the prevalence of wildflowers and its visual importance in relation to the Tuggerah Lakes area. In this regard he said: "I see it as being important firstly as being at this point a rare example of a large tract of really high quality natural land in contrast with the balance of the Tuggerah area largely taken over already by other activities, other developments and so on. The contrast between the two is quite significant and very spectacular. The other is that a lot of the existing outlook qualities of the Tuggerah area, particularly from the lake environment itself, are strongly influenced by the quality of this North Peninsula area and particularly the higher dune portions called angophora foest adding again to the height of that, form literally a

P.230 1.9-
1.24

RECORD

quite substantial backdrop of sandhill site and vegetation forest, vegetation to the lake outlooks". Mr. McKenzie was not cross-examined and no contrary evidence was offered.

- f) The scientific and educational value of the subject lands.

Evidence on these matters was given by three witnesses. Mr. Clark stated that only five or six areas of rain forest remained on the New South Wales coast, that there was no rain forest closer to Sydney than the subject land and that, as the southernmost rain forest, the area had particular significance by reason of its retention of tropical vegetation. Mrs. F. Turton, a senior tutor in geography at the University of Sydney gave evidence of the use made by her of the peninsula, and the immediately surrounding area, for field work by her students and of the fact that no nearby alternative was available. Mr. A. Strom, conservation and environmental advisor to the New South Wales Department of Education and the former chief guardian of fauna of New South Wales spoke of the scientific importance of the area, the use made of it by secondary school students and the extreme difficulty of finding any alternative field areas.

P.189 1.28-
P.190 1.5

P.207 1.35-
P.209 1.12

P.233 1.25-
P.235 1.4

- g) The impossibility of restoring the existing land form.

Both Mr. McKenzie and Mr. Clark gave evidence of the impossibility of restoring the present

contours of the land. Mr. McKenzie pointed out that machinery simply could not re-establish the existing profile, and Mr. Clark gave evidence of his experience in studying mined areas, of a lowering of the level of the land and greater uniformity. He said "The areas before mining are more heterogenous areas. You have lots of dunes and swells and the complexity of the vegetation latter is related to this topography. Generally, I think, in the interest of stabilization companies are contouring after mining to a low uniform profile which prevents the return of the diversity of vegetation".

RECORD

P.229 11.
24-42

P.188 11.
20-42

h) The impossibility, within a reasonable time scale, of re-establishing trees on the subject land and the certainty that the rain forest would be permanently lost. In reaching his conclusion that attempts at restoration would in all probability be quite unsatisfactory, the trial judge had the advantage of an extensive view of other areas mined and "restored" by the Appellants as well as consideration of various photographs tendered in evidence. Mr. McKenzie stated that he, with his experience, could not reproduce the existing ground floor cover, pointed out the difficulties which occurred because of disturbance of the existing soil patterns, expressed considerable doubt as to the Appellants' ability to restore the vegetation and pointed out the very great cost.

P.225 1.50-
P.229 1.18

RECORD

P.187 11.32-42
P.191 1.31-
P.192 1.33

P.192 1.39-
P.193 1.3

Mr. Clark, who had studied the re-generation of particular species after mining indicated: that angophoras do not regenerate, that the melaleucas would probably not regenerate because of recontouring of the swamp area and disturbance of the water table and the difficulties in re-establishing the rain forest. 10

- i) The tremendous population growth of the Wyong Shire, with consequential increased pressure on its open space and recreational areas, and the diminishing economic importance of mining to the Shire and its population.

P.258 11.19-40

Mr. J. Steinke, a regional economist indicated that in the five years between 1966 and 1971 the population of the Shire had increased by approximately 33% and that the Shire had the highest rate of growth of any local government area in New South Wales outside the Sydney-Wollongong area. He referred to the proposal of the State Planning Authority to expand the shires of Gosford and Wyong by the year 2000 to accommodate half a million people and expressed the opinion that the recreation industry had been in the past the dominant source of growth of the Shire and that this was likely to continue in the future. 20 30

P.260 1.40-
P.261 1.22

Mr. Steinke also analyzed the distribution of employment within the Shire, pointing out the diminishing importance of mining as a source of employment and pointing out that "the normal expansion of employment annually 40

would be about four times the total employment in sand mining" within the Shire.

RECORD
P.260 11.
34-39

VI - Submission

68. The Respondent therefore respectfully submits:

- 10
- i) That it, as plaintiff in the suit, was entitled to all of the relief sought.
 - ii) That each of the defences advanced by the Appellants was properly rejected below and should again be rejected.
 - iii) That the order below should be varied by granting relief in terms of prayers 2 and 4 of the Statement of Claim but otherwise dismissing the appeal with costs.
 - iv) That, alternatively, the appeal should be dismissed with costs.

MURRAY WILCOX

Counsel for the Respondent

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

Suit No. 2083 of 1971

B E T W E E N :

ASSOCIATED MINERALS
CONSOLIDATED LIMITED

and

WYONG ALLUVIALS PTY.
LIMITED

Appellants

- and -

WYONG SHIRE COUNCIL

Respondent

CASE FOR THE RESPONDENT

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