Supreme Court of New South Wales – Court of Appeal

MINISTER ADMINISTERING THE CROWN LANDS ACT v ILLAWARRA LOCAL ABORIGINAL LAND COUNCIL [2009] NSWCA 289 (11 September 2009)

Last Updated: 14 September 2009

NEW SOUTH WALES COURT OF APPEALCITATION: MINISTER ADMINISTERING THE CROWN LANDS ACT v ILLAWARRA LOCAL ABORIGINAL LAND COUNCIL [2009] NSWCA 289FILE NUMBER(S): 40272/08HEARING DATE(S): 15 May 2009JUDGMENT DATE: 11 September 2009PARTIES: Minister Administering the Crown Lands Act – AppellantIllawarra Local Aboriginal Land Council - RespondentJUDGMENT OF: Hodgson JA McColl JA Basten JA LOWER COURT JURISDICTION: Land & Environment CourtLOWER COURT FILE NUMBER(S): LEC 30751/06LOWER COURT JUDICIAL OFFICER: Sheahan JLOWER COURT DATE OF DECISION: 6 June 2008LOWER COURT MEDIUM NEUTRAL CITATION: [Illawarra Local Aboriginal Land Council v Minister Administering the Crown Lands Act] [2008] NSWLEC 188COUNSEL: C E Adamson SC/C Mantziaris – AppellantJ E Griffiths SC/G E Wright - RespondentSOLICITORS: Crown Solicitor's Office – AppellantChalk & Fitzgerald Lawyers - RespondentCATCHWORDS: ABORIGINALS – land rights under legislation – claim to Crown land – establishment of national park – needed or likely to be needed for public purpose of nature conservation – appropriate level of government to demonstrate need or

likely need – whether resolution of dispute at Cabinet level necessary – [Aboriginal Land Rights Act 1983] (NSW) s 36(1)ADMINISTRATIVE LAW – procedural fairness – foreseeable inferences drawn from tendered evidence to support case other than that of tendering party – whether such inferences available in absence of warning to tendering partyAPPEALS – statutory appeal from Land and Environment Court – appeal against erroneous decision on a question of law – denial of procedural fairness – whether capable of grounding appeal EVIDENCE – Aboriginal land claim – permissible use of evidence of events and conduct post-dating claim – whether such events and conduct irrelevant considerationsSTATUTORY INTERPRETATION – remedial legislation – principle of beneficial construction – whether adopted impermissibly in treatment of gaps in evidenceWORDS & PHRASES – 'needed or likely to be needed' – 'appropriate level of government' – 'beneficial construction'LEGISLATION CITED: [Aboriginal Land Rights Act 1983] (NSW), s 36[Government and Related Employees Appeal Tribunal Act 1980] (NSW), s 54[Interpretation Act 1987] (NSW), s 14, 33[Land and Environment Court Act 1979] (NSW), ss 38, 57[National Parks and Wildlife Act 1974] (NSW), s 33CATEGORY: Principal judgmentCASES CITED: [Akora Holdings Pty Ltd v Ljubicic] [2008] NSWCA 339[Batemans Bay Local Aboriginal Land Council v Minister Administering the Crown Lands Act] [2007] NSWLEC 800[Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd] [1994] FCA 1074; 49 FCR 576[Director-General, Department of Ageing, Disability and Home Care v Lambert] [2009] NSWCA 102[FAI Insurances Ltd v Winneke] [1982] HCA 26; 151 CLR 342[Haider v JP Morgan Holdings Aust Ltd] [2007] NSWCA 158[Housing Commission v Falconer] (1981) 1 NSWLR 547[Italiano v Carbone] [2005] NSWCA 177[Jerrinja Local Aboriginal Land Council v Minister Administering the Crown Lands Act] [2007] NSWLEC 577; 156 LGERA 65[Malvaso v The Queen] [1989] HCA 58; 168 CLR 227[McCathie v Federal Commissioner of Taxation] [1944] HCA 9; 69 CLR 1[Minister for Aboriginal Affairs v Peko-Wallsend Limited] [1986] HCA 40; (1986) 162 CLR 24[Minister Administering the Crown Lands Act v Bathurst Local Aboriginal Land Council] [2009] NSWCA 138[Minister Administering the Crown Lands Act v Deerubbin Local Aboriginal Land Council] (1998) 43

NSWLR 249 (“[Castlereagh Nature Reserve Land Claim]”)[Minister Administering the Crown Lands Act v Deerubbin Local Aboriginal Land Council (No 2)] [2001] NSWCA 28; 50 NSWLR 665 (“[Maroota Land Claim]”)[Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council] [2008] HCA 48; 82 ALJR 1505[Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council] [2009] NSWCA 151[Minister for the Army v Parbury Henty & Company Pty Ltd] [1945] HCA 52; 70 CLR 459[Minister for Immigration and Multicultural Affairs v Eshetu] [1999] HCA 21; 197 CLR 611[Muin v Refugee Review Tribunal] [2002] HCA 30; 76 ALJR 966[Neal v The Queen] [1982] HCA 55; 149 CLR 305[Parker v Director of Public Prosecutions] (1992) 28 NSWLR 282[Qantas Airways Ltd v Gubbins] (1992) 28 NSWLR 26[Re Minister for Immigration and Multicultural Affairs; Ex parte Miah] [2001] HCA 22; 206 CLR 57[Saville v Health Care Complaints Commission] [2006] NSWCA 298[State Transit Authority of New South Wales v Chemler] [2007] NSWCA 249[South Western Sydney Area Health Service v Edmonds] [2007] NSWCA 16[Sue v Hill] [1999] HCA 30; 199 CLR 462[SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs] [2006] HCA 63; 231 ALR 592; 81 ALJR 515[Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority] [2009] NSWCA 178TEXTS CITED:
DECISION: (1) Appeal allowed.[
][
](2) The decision of Sheahan J of the Land and Environment Court dated 6 June 2008 allowing the applicant’s appeal and the final orders made by the Court on 4 September 2008 set aside.[
][
](3) Respondent to pay the appellant’s costs of the appeal, and to have a certificate under the Suitors’ Fund Act 1951 if otherwise eligible.[
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](4) Matter remitted to the Land and Environment Court for decision in accordance with these reasons.JUDGMENT: **IN THE SUPREME COURTOF NEW SOUTH WALESCOURT OF APPEAL**

CA 40272/08

LEC 30751/06

HODGSON JA

McCOLL JA

BASTEN JA

11 September 2009

MINISTER ADMINISTERING THE CROWN LANDS ACT v ILLAWARRA LOCAL ABORIGINAL LAND COUNCIL

Headnote

On 17 January 1986 Budderoo National Park was established south of Sydney and inland of Kiama. Its establishment fulfilled part of a proposal by the National Parks and Wildlife Service to provide a corridor linking existing parks along the Illawarra escarpment, using available Crown land. One of the constraints on the area of the Park as reserved in 1986 had been concern voiced by the Department of Mineral Resources that there might be economically viable coal reserves underlying parts of the escarpment.On 3 March 1986 a land claim under the *Aboriginal Land Rights Act 1983* (NSW) was lodged over two portions of land to the north of the newly established park. On 22 June 2006 the Minister rejected the claim, primarily on the basis that they were needed or likely to be needed for the essential public purpose of nature conservation. Small sections of the claimed land were rejected because they comprised freehold land, public roads or were lawfully occupied for mining purposes. The respondent appealed to the Land and Environment Court against the refusal by the Minister. The area of freehold land having been conceded by the respondent, Sheahan J overturned the decision of the Minister in respect of the remainder of the claimed land, other than land reserved for public roads. The Minister appealed to this Court from the judgment of

Sheahan J. The issues for determination on appeal were:

(i) whether the need or likely need must be identified to have been at "an appropriate level of government";

(ii) whether the trial judge correctly identified the use that could be made of evidence as to matters which arose after the lodgement of the claim;

(iii) whether, in making use of evidence of post-claim events, the trial judge had denied procedural fairness to the Minister, and

(iv) whether the trial judge elevated a finding of delay in determination of the claim into a principle that allowed any gaps in the evidence to be filled favourably to the Land Council.**The Court held, allowing the appeal:**In relation to (i)(per Hodgson JA, McColl JA agreeing):

1. The trial judge did not address the correct question, namely whether the land was, as a matter of fact, likely to be needed by the executive government for an essential purpose. Rather, his Honour addressed a question distorted by an irrelevant consideration of whether any trajectory towards the existence of such need was itself at the appropriate government level: [39].

Minister Administering the Crown Lands Act v Deerubbin Local Aboriginal Land Council (No 2) [2001] NSWCA 28; (2000) 50 NSWLR 665, considered.

Minister for Aboriginal Affairs v Peko-Wallsend Limited [1986] HCA 40; (1986) 162 CLR 24; *Saville v Health Care Complaints Commission* [2006] NSWCA 298, referred to.(per Basten JA, dissenting):

2. The political commitment demonstrative of a need or likely need may be required to be discerned at Cabinet level, if the relevant decision is to be made at such level of government. The evidence was capable of supporting a conclusion that, absent the resolution of conflicting departmental positions as to the claimed land by Cabinet, the necessary political commitment did not exist as at the date of the claim: [94] – [100],

[106] – [107].

Minister Administering the Crown Lands Act v Deerubbin Local Aboriginal Land Council (No 2) [2001] NSWCA 28; (2000) 50 NSWLR 665, applied.

FAI Insurances Ltd v Winneke [1982] HCA 26; 151 CLR 342; *Minister Administering the Crown Lands Act v Deerubbin Local Aboriginal Land Council* (1998) 43 NSWLR 249; *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council* [2009] NSWCA 151, referred to. In relation to (ii)(per Hodgson JA, McColl JA agreeing):

3. The trial judge erred in taking into account the irrelevant consideration of whether the land had been included in Budderoo National Park up to the date of the hearing: [39].

Housing Commission v Falconer (1981) 1 NSWLR 547, considered(per Basten JA, dissenting):

4. The distinction embodied within the Falconer principle is not between confirming or denying a foresight, but between evidence which could relate to a foresight and that which merely constituted a hindsight. It was open to the trial judge to infer from an absence of post-claim executive activity, the absence of a likely need at the date of claim: [80], [83] – [85].

McCathie v Federal Commissioner of Taxation [1944] HCA 9; 69 CLR 1; *Minister for the Army v Parbury Henty & Company Pty Ltd* [1945] HCA 52; 70 CLR 459; *Housing Commission v Falconer* (1981) 1 NSWLR 547, considered.In relation to (iii)(per Basten JA, Hodgson and McColl JJA not deciding):

5 Doubt exists as to whether an alleged denial of procedural fairness constitutes an erroneous decision of the court below on a question of law. In any event, where foreseeable inferences adverse to a party's case have been drawn from evidence tendered by that party, no denial of procedural fairness can be said to have occurred: [88] – [89].

Director-General, Department of Ageing, Disability and Home Care v Lambert [2009] NSWCA 102, referred to.

Re Minister for Immigration and Multicultural Affairs; Ex parte Miah [2001] HCA 22; 206 CLR 57; *Muin v Refugee Review Tribunal* [2002] HCA 30; 76 ALJR 966; *ZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; 231 ALR 592; 81 ALJR 515; *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* [1994] FCA 1074; 49 FCR 576, cited.In relation to (iv)(per Basten JA, Hodgson and McColl JJA not deciding):

6. In circumstances where the trial judge possessed a large degree of procedural freedom, where there is evidence supportive of the trial judge's particular finding, and no erroneous principle of practice or law has been stated, no error on a question of law will have been established: [113] – [114].

Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council [2008] HCA 48; 82 ALJR 1505; *Minister Administering the Crown Lands Act v Deerubbin Local Aboriginal Land Council (No 2)* [2001] NSWCA 28; (2000) 50 NSWLR 665; *Minister Administering the Crown Lands Act v Bathurst Local Aboriginal Land Council* [2009] NSWCA 138; *Batemans Bay Local Aboriginal Land Council v Minister Administering the Crown Lands Act* [2007] NSWLEC 800, referred to.

Sue v Hill [1999] HCA 30; 199 CLR 462; *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21; 197 CLR 611, cited.

IN THE SUPREME COURTOF NEW SOUTH WALESCOURT OF APPEAL

CA 40272/08

LEC 30751/06

HODGSON JA

McCOLL JA

BASTEN JA

11 September 2009

MINISTER ADMINISTERING THE CROWN LANDS ACT v ILLAWARRA LOCAL ABORIGINAL LAND COUNCIL

Judgment

1 HODGSON JA: On 6 June 2008, Sheahan J in the Land and Environment Court determined an appeal against the decision made by the appellant (the Minister) to refuse a claim made by the respondent (the Land Council) under the *Aboriginal Land Rights Act* 1983 (the *Act*) over two parcels of land in an area that has been called the Tongarra Gap or the Jamberoo Gap.

2 The primary judge upheld this appeal, holding that the Minister had not established that, as at the date the claim was lodged, the relevant parts of the claimed land were needed or likely to be needed for an essential public purpose, within s 36(1)(c) of the *Act*.

3 The Minister appeals from that decision, relying on the following grounds of appeal:

1 The Court below erred in law by inferring from an absence of executive activity in relation to the land after the date of claim that the claimed land was neither needed, nor likely to be needed, for the essential public purpose of nature conservation, when the absence of such activity was the result of there being an undetermined claim under the *Aboriginal Land Rights Act* 1983 (NSW).

2 The Court below erred in law in applying an inverse construction of *Housing Commission (NSW) v Falconer* [1981] 1 NSWLR 547, to sanction its use of the *absence* of executive activity in relation to the land after the claim to confirm a *lack* of 'foresight' that the land was neither needed nor likely to be needed for the purpose of nature conservation as at the date of the claim.

3 The Court below denied the appellant procedural fairness by failing to put to the appellant each of the following propositions:

(a) That the presence or absence of a declaration of a national park, or the relative presence or absence of nature conservation planning and decision-making in relation to the claimed land *itself* (as distinct from areas of land surrounding it) *after the date of claim*, would be material to the determination of the Court below; and

(b) That the Court would draw an inference, from the absence of a declaration of a national park over the claimed land after the date of claim, that the claimed land was Crown land not likely to be needed for the essential public purpose of nature conservation.

4 The Court below erred in failing to give the words in s.36(1)(c) of the *Aboriginal Land Rights Act* 1983 (NSW), "needed or likely to be needed for an essential public purpose" their full force and effect.

5 The Court below erred in using the appellant's delay in determining the respondent's claim to resolve any ambiguities or gaps in the evidence in

the respondent's favour, when the jurisdiction conferred on the Court below by s.36(7) of the *Aboriginal Land Rights Act* 1983 (NSW) neither required nor permitted it.

6 The Court below erred in law by using the principle of 'beneficial construction' to devise a rule of evidence that, by reason of the appellant's delay in determining the claim, any ambiguities or gaps in the evidence ought be resolved in the respondent's favour.

4 In my opinion, the crucial issue before the primary judge was whether the whole or part of the subject land was, at 3 March 1986, "likely to be needed, for an essential public purpose" within s 36(1)(c) of the *Act*, the relevant public purpose being nature conservation.

5 The basis on which the Minister claimed that the land was likely to be needed for this public purpose was that the land was likely to be needed for nature conservation in order to effect a corridor or link between Macquarie Pass National Park and Budderoo National Park along the Illawarra Escarpment, and through that means to link a series of national parks to the north and south of these parks.

6 The primary judge's decision on this aspect of the case was set out in pars [117] and [118] of his judgment at [2008] NSWLEC 188:

[117] Turning now to the question of whether the land was likely to be needed for the essential public purpose of nature conservation, the relevant question, at the date of claim, is was there a real (or not remote) chance or real possibility that the claimed land was needed for nature conservation? As already discussed, the evidence demonstrates that the NPWS had a desire, admittedly a strong desire, to control the claimed land for the purpose of nature conservation. This desire was supported by some

departments but opposed by others. The post claim evidence reveals continued objection by the DMR to inclusion of the area into National Parks because of underlying coal. The DMR toward the end of 2003 supported Tongarra Reserve becoming a SCA, despite its initial opposition, and this occurred in September 2004. Budderoo National Park has increased in size since the claim was lodged and still does not include the claimed land. As a whole the post claim evidence reveals the expansion of Budderoo National Park and SCAs when appropriate land became available, and does not support a "trajectory", at the appropriate Government level, to include the claimed land in Budderoo National Park or reserve it for nature conservation. The "trajectory" was that of the NPWS, which changed course because of DMR (and other) objections. There was not a real chance (or a not remote chance) or real possibility that the claimed land was likely to be "needed" for the stated essential public purpose at the date of claim.

[118] The Act requires the Minister to prove that, at the time of the claim, the land was needed, or likely to be needed, for an essential public purpose, in this case, for nature conservation. After considering all the arguments, I have concluded that the Minister has not discharged that onus.

7 The statement that the specified desire of the NPWS (that is, the National Parks and Wildlife Service) was supported by some departments but opposed by others was also referred to by the primary judge in par [116] of his judgment; and the reference to Budderoo National Park increasing in size had been referred to in par [115]. Those paragraphs are as follows:

[115] The boundaries of the Park were extended in 1994, 1998 and 2001 (see maps attached to the Affidavit of Peter Bowen sworn 27 July 2007). Yet, as of 2007, none of the claimed land forms part of the Budderoo National Park (see paras [9]–[11] above). The western part of the claimed

land, as of 29 September 2004, forms part of the Macquarie Pass SCA.

[116] Up to and including the date of claim the NPWS had the desire to include the claimed land for the essential public purpose of nature conservation. However, this desire, even with the concurrence of various other departments, was frustrated by DMR objections and issues with Kiama Council. This desire, although supported by other departments, does not satisfy 'needed' for the purpose of s 36(1)(c) of ALRA (see *Deerubbin Local Aboriginal Land Council v The Minister Administering the Crown Lands Act* [1999] NSWLEC 82 at [82]; *Maroota* at [61]–[64]).

8 The "issues with Kiama Council" had been referred to in par [53] of the judgment:

[53] A NPWS briefing note dated 26 March 1985 on the "proposed Budderoo National Park" (Ex M1, v1, tab 22) notes that the reservation of the land known as "Minnamurra Falls Reserve" is subject to a $40,000 compensation claim from Kiama Council, as well as "the need for augmentation of staffing and funds to provide effective management of the area." (folio 216)

These issues do not appear to have had any bearing on the question whether the subject land was "likely to be needed", and were not treated as such by the primary judge or by the respondent's arguments on appeal.

9 The reference in par [117] to the support of some departments would appear to include a finding, which was amply supported by evidence, that the Minister for Planning and Environment did at the relevant date support the desire of NPWS. The reference to the opposition of other departments would appear to refer to the opposition of the Minister for Mineral

Resources: the evidence does not suggest opposition from any other department at the material time.

10 In those circumstances, in my opinion the essential question for determination by the primary judge was whether, having regard to the desire of NWPS, the support of the Minister for Planning and Environment, the opposition of the Minister for Mineral Resources, the non-opposition from other departments, and all other relevant circumstances, was it objectively likely as at 3 March 1986 that the subject land would be needed for the essential public purpose of nature conservation.

11 It appears from par [117] of the primary judge's judgment that he addressed this question having regard to the circumstance that Budderoo National Park had increased in size since the claim was lodged and still did not include the claimed land, and to his view that the evidence did not support a trajectory at the appropriate government level to include the land in Budderoo National Park or to reserve it for nature conservation. In my opinion, the critical issue on this appeal is whether this manifests an erroneous decision or decisions on a question of law, in that the primary judge addressed wrong questions and/or took into account matters irrelevant to the question raised for his decision.

12 In order to consider this issue, it is necessary to set out some relevant history.

13 An early indication that both parcels of the claimed land were proposed for inclusion in Budderoo National Park is given by a letter dated 19 December 1980 from the National Parks and Wildlife Service (NPWS) to the Nowra Land Board office, advising that NPWS proposed to reserve the area shown by red edging on an attached diagram, this area including all of

the claimed land (Blue 115-117). The follow-up letter from NPWS dated 24 July 1981 (Blue 121-122) noted that objections had been notified by the Department of Mineral Resources (DMR), but consents had been obtained from all other authorities. By letter dated 18 August 1981, the Officer-in-Charge of the Land Board Office at Nowra advised that "this Department" had no objection to the proposed Budderoo National Park boundaries (Blue 125-130).

14 Meanwhile, a letter dated 10 August 1981 from NPWS to DMR (Blue 123-124) urged reconsideration of that Department's objections, noting that NPWS would be prepared to limit reservation of the Park to the surface and soil below to a depth of 15.24 metres.

15 On 20 January 1984, the Minister for Mineral Resources wrote to the Minister for Planning and Environment advising that, on completion of proposed drilling most probably by June 1984, DMR would be in a position to review its objection to that part of the proposed Park that did not contain economic reserves of coal (Blue 202). That drilling had apparently still not commenced by May 1985; but by that time DMR was prepared to withdraw its objections to part of the proposed Park (Blue 220). This was confirmed by a letter dated 26 August 1985 from the Minister for Mineral Resources and Energy to the Minister for Planning and Environment (Blue 222), in which it was agreed that the remainder of the area would need to be managed in accordance with National Park guidelines.

16 A NPWS memo to the Minister for Planning and Environment dated 28 November 1985 (Blue 228-229) recommended approval in principle to the establishment of the Budderoo National Park including the claimed area, and recommended that an area not including the claimed area be reserved as the Budderoo National Park. On 29 November 1985, the Minister for Planning and Environment signed this memorandum, and also signed letters to the Premier, the Minister for Mineral Resources and others

proposing the immediate reservation of the smaller area (Blue 231-240).

17 On 17 January 1986, the Premier announced the establishment of Budderoo National Park extending over the smaller area. This was described in the relevant NPWS briefing document as "an initial core area" (Blue 226, 241).

18 The subject claim was made on or shortly before 3 March 1986.

19 The drilling tests foreshadowed by DMR commenced in February 1987 (Blue 535).

20 By letter dated 28 May 1987 to the Crown Lands Office, referring to the subject claim, DMR advised that it had no objections to a grant to the Land Council of an area, being part of the western parcel of the claim, subject to a depth restriction of 15 metres from the surface (Blue 545).

21 A letter dated 15 February 1989 from the Minister for the Environment to a constituent (Blue 1000) asserted that NPWS would be maintaining its interest in the area in the original proposed boundaries of Budderoo National Park but excluded because of objections (inferentially, from DMR), with a view to examining other ways of assuring the protection of this land.

22 By a letter dated 24 April 1991 (Blue 539), the Department of Lands enquired of DMR if the position set out in DMR's letter of 28 May 1987 was still current; and by letter dated 16 August 1991 (Blue 550-551), DMR replied that there was now no objection raised to the eastern part of

the claim provided a depth restriction of 15 metres applied, but that objections were raised to the granting of a claim over the western area.

23 A letter dated 26 August 1999 from NPWS to the Manager of Aboriginal Land Claims Investigations (Blue 1018) enclosed information asserting that since the subject claim NPWS had continued towards achieving the goal of a continuous corridor of protected areas in public ownership and that the land claimed was needed to provide the linking corridor (Blue 1019), and giving further arguments and history (Blue 1019-1038).

24 A briefing note dated 11 November 2002 from NPWS to the Minister for the Environment (Blue 433-435) referred to two gaps in the relevant continuous corridor, one of which was identified as the Jamberoo Gap; and it noted that an Aboriginal land claim lodged over parts of the Crown land in this Gap was awaiting determination. It asserted that one of the actions required to establish a substantial corridor link in this Gap was the transfer of available Crown land into the reserve system. It was also noted that the DMR was less likely to object to the establishment of State Conservation Areas than to the establishment of National Parks. (I note that this additional possibility was introduced by amending legislation in 2001: *National Parks and Wildlife Amendment Act* 2001.)

25 By letter dated 26 February 2003 from the Department of Land and Water Conservation to NPWS (Blue 1008), it was advised that an area including the eastern part of the land claim was available for transfer to the National Park Estate (this apparently, so far as DMR was concerned, being consistent with the attitude of the DMR expressed in its letter of 16 August 1991). However, by further letter of 14 March 2003 to NPWS (Blue 1007), the Department of Land and Water Conservation advised that it had recently been clarified that part of the land was subject to an Aboriginal land claim, and that as a consequence no action should be taken to add this land to Budderoo National Park until the claim had been finalised.

26 An email dated 1 September 2003 from DMR to NPWS advised that DMR now supported the transfer of the Tongarra Reserve (which included the western part of the claim) to a State Conservation Area (Blue 445), and requested a letter seeking DMR concurrence to this; and such a letter was sent on 10 September 2003 (Blue 458-459). A letter dated 23 December 2003 from NPWS to the Department of Lands sought to progress this transfer (Blue 448), and the Department of Lands replied on 13 January 2004 (Blue 451) asserting there was no objection.

27 A letter dated 19 February 2004 from NPWS to the Department of Lands (Blue 452) referred to a 2003 election undertaking by the Premier to expand Budderoo National Park by 150 hectares to link with Macquarie Pass National Park (thus closing the Jamberoo Gap) (in making which undertaking it appears that the existence of the subject land claim had been overlooked: Blue 454R); asserted that NPWS wished to proceed with gazettal of this; noted that the subject land claim was yet to be determined; and noted past objections from mining interests.

28 A letter dated 15 March 2004 from Department of Lands to the Department of Environment and Conservation (Blue 1004-1006) referred to its letter of 14 March 2003, and advised that no action should be taken to add the subject land to Budderoo National Park until the land claim was determined.

29 Advice from NPWS to the Minister for Environment dated 22 June 2004 (Blue 453-454) referred to parcels of land at Budderoo that were subject to land claims and thus could not be reserved yet as part of Budderoo National Park.

30 On 29 September 2004, Tongarra Reserve (including the western part of the claim) was made a State Conservation Area (Blue 460-464), this apparently not being considered as precluded by the existence of the land claim.

31 It was put by the Minister to the primary judge that this history supported the existence of a "trajectory", as at the time the land claim was made, such that the claimed land was likely to be needed for nature conservation. As recognised by the primary judge, very relevant to this submission was the decision of the Court of Appeal in *Minister Administering the Crown Lands Act v Deerubbin Local Aboriginal Land Council (No 2)* [2001] NSWCA 28; (2000) 50 NSWLR 665 (*Maroota* case).

32 In the *Maroota* case, it was held:

(1) "likely" in s 36(1)(c) of the *Act* conveyed the notion of a substantial, that is a real and not remote chance (at [57]);
(2) it was not enough that the public purpose within s 36(1)(c) be desirable or highly desirable – it had to be essential (at [55]);
(3) the question of need was referrable to what was required by the Government (at [62]); and
(4) facts subsequent to the relevant date could be used, not to prove hindsight, but to confirm a foresight (at [69]; [71]) (*Housing Commission v Falconer* (1981) 1 NSWLR 547 and 558).

33 The contention of the Minister was that the subsequent history confirmed what was foreseeable at the date of the land claim, namely that it was unlikely that DMR objections would prevail over the strong reasons supporting the establishment of a continuous chain of areas reserved for nature conservation, particularly in the area of the escarpment covered by Budderoo National Park and Macquarie Pass National Park and the intervening Gap, and the strong desire of NPWS supported by the Minister for Environment that this happen. It was put that this was particularly so in circumstances where the purpose of nature conservation could be achieved

without precluding mining at a depth below 15 metres, as proposed by NPWS in 1981 and progressively accepted by DMR in 1987 (as regards part of the western part of the claim) and in 1991 (as regards the eastern part of the claim). I would add that another relevant matter is that, as early as 26 August 1985, the Minister for Mineral Resources agreed that even the area over which it had objections "would need to be managed in accordance with National Park guidelines" (Blue 222).

34 In my opinion par [117] of the judgment does disclose errors of law in dealing with this contention.

35 First, it shows that the primary judge considered that any "trajectory" that might support a finding that the land was likely to be needed had to be "at the appropriate government level". In my opinion, this is a misapplication of what was said in *Maroota*. The question of whether land was *needed* must be decided with reference to what the Government requires, and that of course means a requirement at the level of executive Government. However, where the question is whether the land is *likely to be needed*, it is a question as to whether it is likely that there will in the future be a Government requirement; and if this is addressed by considering whether there is a trajectory at the relevant time, this need not then be a trajectory existing *at* the appropriate Government level, but only a trajectory *towards* a requirement at the appropriate Government level.

36 Second, par [117] particularly read with par [115] indicates that the primary judge considered it was relevant that the claimed land still had not been included in Budderoo National Park. The submission of the Minister was that, because the land claim precluded inclusion, this consideration could not be relevant; but we were not referred to any statutory provision which had that effect, and I am not aware of any such statutory provision.

37 However, in my opinion, it appears from the history I have given that, at least from March 2003, the existence of the land claim was recognised and given effect to as a practical obstacle to inclusion of the land in Budderoo National Park (although this was apparently overlooked in the 2003 election undertaking); so that non-inclusion of the land in Budderoo National Park between March 2003 to the hearing (December 2007) could not be relevant, except conceivably in a tenuous and highly indirect way

not suggested in the primary judge's reasons (that delay by the Minister in determining the claim between March 2003 and December 2007 somehow bore on the question whether, as at March 1986, the land was likely to be needed for nature conservation).

38 As regards the period from March 1986 to March 2003, the position is less clear: it is not apparent that the land claim was an operative factor in the non-inclusion of the land during that period. However, apart from the land claim, the only matter standing in the way of inclusion of the lands in Budderoo National Park (both when it was originally established and thereafter) was opposition from DMR; so it was the likelihood (as at the date of the claim) of the persistence and success of this opposition, on which some light could be shed by what happened in relation to DMR opposition after the claim, that was relevant, and not the bare fact of subsequent non-inclusion of the land. So in my opinion, while reference to non-inclusion of the land in Budderoo National Park from March 1986 to March 2003 would not itself have manifested error, in its context and in combination with the other matters I have mentioned, it does do so.

39 In my opinion, having regard to these considerations, the primary judge did not decide the correct question, namely whether the land was, as a matter of fact, likely to be needed for an essential purpose; but rather he addressed a question distorted by irrelevant considerations, namely whether any trajectory towards the existence of such need was itself at the appropriate government level, and whether the land had been included in Budderoo National Park up to the date of the hearing.

40 I recognise that, in relation to judicial review sought on the ground of taking into account irrelevant considerations, it has been said "that, where a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined, except insofar as there may be found in the subject matter, scope and purpose of the statute some implied limitation on the factors which the decision-maker may legitimately have regard": *Minister for Aboriginal Affairs v Peko-Wallsend Limited* [1986] HCA 40; (1986) 162 CLR 24 at 40, per Mason J. And in *Saville v Health Care Complaints Commission* [2006] NSWCA 298, in a case where judicial review was being considered, because the Court proceeded on the basis that there was

no appeal to the Court of Appeal, Basten JA (with whom Handley JA and Tobias JA relevantly agreed) said this at [57]-[58]:

[57] Finally, the practitioner seeks to complain that the Tribunal took into account a number of irrelevant considerations. It is not necessary to identify each of the considerations in this category either. Legal error is demonstrated only where a matter is taken into account which the law prohibits: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24 at 40 (Mason J). Each of the matters identified was similar to that which said "there was a need for supervision of the plaintiff in his general medical practice". Whether, as a matter of evaluative judgment, there was such a need is a question of inference and fact, and not a question of law. If there was such a need, it was patently relevant. So much is demonstrated by the practitioner's own complaint that the absence of such a need was a relevant consideration in the sense of a mandatory consideration, albeit one said not to have been taken into account.

[58] Most matters taken into account in judicial or quasi-judicial proceedings, and even in administrative decision-making, are permissible considerations. Some may be elevated to the status of mandatory considerations, so that to ignore them would demonstrate legal error, but one would rarely expect a specialist tribunal, especially when assisted by experienced counsel, to fail to take such matters into account. It will also be rare that such a tribunal, assisted by experienced counsel, will be misled into giving weight to matters which lie so far beyond the purpose of its functions as to be legally irrelevant. The practitioner has demonstrated no such error in the present case.

41 The appeal to this Court in this case is against a decision with respect to a question of law; and what is being challenged is not the exercise of a discretion but a determination whether or not a state of affairs satisfies a statutory description. In relation to such challenges, I accept that a finding that a judge has taken into account irrelevant considerations may in some circumstances not involve an erroneous decision on a question of law, but may merely be an error in reasoning on a question of fact. However, in the present case the primary judge's reliance on irrelevant considerations does, in my opinion, show that he was misapplying the statutory description and

thus was making an error of law.

42 The next question is whether the errors I have identified were material to the primary judge's decision. In my opinion, they were: there is a reasonable possibility that, but for those errors, the decision could have been different.

43 This means that in my opinion the primary judge's decision should be set aside; and the question arises whether this Court should decide the matter itself or remit the matter to the Land and Environment Court. In my opinion, the latter course is preferable. That Court is a specialist court for matters such as this; and although this Court has all the material that was available to the primary judge (and there was no oral evidence), we have not had the benefit of detailed submissions directed to the correct conclusion of fact to be drawn, on the basis of the legal rulings I have made.

44 In my opinion, the following orders should be made:
(1) Appeal allowed.
(2) The decision of Sheahan J of the Land and Environment Court dated 6 June 2008 allowing the applicant's appeal and the final orders made by the Court on 4 September 2008 set aside.
(3) Respondent to pay the appellant's costs of the appeal, and to have a certificate under the *Suitors' Fund Act* 1951 if otherwise eligible.
(4) Matter remitted to the Land and Environment Court for decision in accordance with these reasons.

45 McCOLL JA: I agree with Hodgson JA.

46 BASTEN JA: On 17 January 1986 the Premier, Mr Neville Wran, announced the establishment of Budderoo National Park near the headwaters of the Kangaroo River and the Minnamurra River. The park was situated on the Illawarra Escarpment, south of Sydney and inland from Kiama.

47 The reserved land was part of an area between Macquarie Pass National Park, Morton National Park and Barren Grounds Nature Reserve which had been the subject of consideration by the National Parks and Wildlife Service ("the NPWS") for some years. It was not in doubt that the establishment of Budderoo National Park fulfilled only part of a broader proposal promoted by the NPWS, the underlying policy of which was to provide a corridor linking existing parks along the Illawarra Escarpment, using available Crown land.

48 One of the constraints on the area of the Park as reserved in 1986 had been concerns voiced by the Department of Mineral Resources that there might be economically viable reserves of coal underlying parts of the escarpment.

49 On 3 March 1986 the respondent Land Council lodged a claim under the *Aboriginal Land Rights Act 1983* (NSW) over two portions of land to the north of the new park and following the line of part of the escarpment. Small sections of the claimed land were rejected because they comprised freehold land, public roads or were lawfully occupied for mining purposes. The bulk of the lands were rejected because they were needed or likely to be needed for the essential public purpose of nature conservation.

50 The decision to reject the claim was not made for some 20 years after the claim was lodged. On 22 June 2006 notice of rejection was provided to the respondent by the Minister for Lands.

51 On 25 August 2006 the Land Council lodged an appeal with the Land and Environment Court against the decision of the Minister to refuse the claim. By the time the matter came on for hearing in December 2007 the area of freehold land had been conceded by the Land Council and it was ultimately successful with respect to areas which remained in dispute,

other than land reserved for public roads. Judgment was delivered by Sheahan J on 6 June 2008: see *Illawarra Local Aboriginal Land Council v Minister Administering the Crown Lands Act* [2008] NSWLEC 188; 161 LGERA 294.

52 An appeal has been brought from that judgment to this Court, limited to his Honour's rejection of the Minister's contention that the land was needed or likely to be needed for the essential public purpose of nature conservation.

Jurisdiction of this Court

53 Although the Illawarra Local Aboriginal Land Council was the applicant in the Land and Environment Court, the burden lay on the Minister to satisfy that Court that the lands were not claimable Crown lands: *Land Rights Act*, s 36(7). The definition of claimable Crown lands and the relevant exception provided in s 36(1) read as follows:

"**36 Claims to Crown lands**
(1) In this section, except in so far as the context or subject-matter otherwise indicates or requires:

claimable Crown lands means lands vested in Her Majesty that, when a claim is made for the lands under this Division:

...

(c) are not needed, nor likely to be needed, for an essential public purpose ...."

54 An appeal under the *Land Rights Act* from a decision of the Minister to reject a claim invoked the Class 3 jurisdiction of the Land and

Environment Court. An appeal from that Court's judgment was brought pursuant to s 57 of the *Land and Environment Court Act 1979* (NSW) ("the LEC Act"), which relevantly provides:

"**57 Class 1, 2 and 3 proceedings—appeals**
(1) A party to proceedings in Class 1, 2, 3 of the Court's jurisdiction may appeal to the Supreme Court against an order or decision (including an interlocutory order or decision) of the Court on a question of law.

(2) On the hearing of an appeal under subsection (1), the Supreme Court shall:

(a) remit the matter to the Court for determination by the Court in accordance with the decision of the Supreme Court, or

(b) make such other order in relation to the appeal as seems fit."

55 Except in the case of an interlocutory order or decision, remittal will only be appropriate where this Court has identified error on the part of the Land and Environment Court. Where no relevant error has been identified, the usual course must be to dismiss the appeal.

56 An important question for present purposes is to identify the nature of the error upon which the Minister may rely in the current appeal. As I sought to explain in *Minister Administering the Crown Lands Act v Bathurst Local Aboriginal Land Council* [2009] NSWCA 138 at [194]-[204], it is necessary to identify a decision on a question of law, determined by the Land and Environment Court, which will then constitute the subject matter of the appeal: see [195]. Where the Court below has expressly identified the questions of law relevant to the determination of the case and has correctly identified the principles to be applied, the challenge faced by an appellant will be considerable. Where, as in the present case, the Minister bore the onus of proof in the Land and

Environment Court, it may be difficult to demonstrate that a factual finding is erroneous because unsupported by any evidence, unless it can be demonstrated that no other finding was reasonably open on the evidence which was accepted by the trial judge. Similarly, where the conclusion is a matter of evaluative judgment, it will be necessary for the Minister to demonstrate that, on the facts found, there was only one conclusion reasonably open. Otherwise, the primary focus of the Minister must be upon the statements of legal principle adopted in the Court below.

57 In the present case, Sheahan J set out the principles derived from authority in relation to the terms in issue:

(a) essential public purpose;

(b) needed, and

(c) and likely to be needed.

58 The Minister did not seek to cast doubt upon the principles identified by the Land and Environment Court with respect to these concepts. Rather, he claimed that the Court had applied a wrong legal test in identifying the use which could be made of evidence as to matters which arose after the making of the claim. Secondly, the Minister challenged the imposition of a gloss on the statutory language, namely that the need must be identified at "an appropriate level of government". Thirdly, the Minister submitted that if it were open to the Court to take into account the post-claim failure to take action in relation to the use of the land for nature conservation, there had been a denial of procedural fairness to him. Fourthly, and perhaps related to the first issue, the Minister argued that the Court had elevated a finding of delay in relation to the determination of the claim into a principle which allowed any gaps in the evidence to be filled favourably to the Land Council.

59 Each of the matters, other than the third, is capable of constituting a challenge to a decision on a question of law. As explained by Hodgson JA in *Director-General, Department of Ageing, Disability and Home Care v Lambert* [2009] NSWCA 102 at [28], in relation to a similarly worded right of appeal under s 54 of the *Government and Related Employees Appeal Tribunal Act 1980* (NSW):

"It is not necessary that the question of law be explicitly stated and decided by the Tribunal. It is sufficient if a decision of the Tribunal is such that a resolution of a question of law is manifested by it: see *Scicluna v NSW Land and Housing Corporation* [2008] NSWCA 277 at [3]- [4], and *Douglas v NSW Land and Housing Corporation* [2008] NSWCA 315 at [17]- [18]."

60 Whether it is open to treat the third matter in such a way is less clear. As suggested in *Lambert* at [75] there may be doubt as to whether a failure to accord procedural fairness can properly be characterized as an erroneous decision on a question of law, other than in particular circumstances, for the purposes of appeal provisions in similar form to s 57(1) of the LEC Act. Nevertheless, it is not necessary to resolve this question in the present case, because this ground fails for other reasons.

61 The Minister placed his primary argument on the misuse of the evidence of post-claim activity or inactivity. It is convenient, therefore, to commence with that issue. However, it is first necessary to identify both the relevant legal principles and the factual background.

Legal principles

(a) construction of s 36(1)(c)

62 Two bases for exclusion from the definition of "claimable Crown lands" considered in recent times have been the requirement that the lands are "not lawfully used or occupied" – discussed in *Bathurst Local Aboriginal Land Council* and the cases referred to therein – and that they not comprise lands which "in the opinion of the Crown Lands Minister, are needed or likely to be needed as residential lands": see *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council* [2009] NSWCA 151, referring to earlier decisions in *Minister Administering the Crown Lands Act v Deerubbin Local Aboriginal Land Council* (1998) 43 NSWLR 249 ("*Castlereagh Nature Reserve Land Claim"*) and *Deerubbin Local Aboriginal Land Council [No 2]* [2001] NSWCA 28; 50 NSWLR 665 ("*Maroota Land Claim*"). The present case is closer to the latter category, although it is not framed as an exclusion based upon the opinion of a Crown Lands Minister; rather it is framed in objective terms. Nevertheless, the language of need or likely need invites the question, 'needed by whom?'

63 In *Castlereagh Nature Reserve Land Claim*, at 252D, Meagher JA identified the relevant question raised by this provision as "a question of the view held by the government on the day the claim was made". To similar effect, Handley and Powell JJA identified the question as "whether the particular land was needed, that is, required or wanted, by the Executive Government for" the identified essential public purpose: p 254D-E. As explained in *Maroota Land Claim*, at [62] by Spigelman CJ (Powell and Heydon JJA agreeing), the justification for that approach is that the power to create national parks is vested in the Governor acting on the advice of his or her Ministers: see *National Parks and Wildlife Act 1974* (NSW), s 33(2) (a provision since repealed, but in force in 1986) and *Interpretation Act 1987* (NSW), s 14. That case involved issues similar to the present case, as did the *Castlereagh Nature Reserve Land Claim*. That is, they revealed more than one interest within the government in relation to the land at the date of the claim, all but one of which dropped away later leaving nature conservation as the remaining "essential public purpose". No decision having been made at the date of the claim as to any particular use to which the land might be appropriated, it was difficult for the Minister to establish that it was, at the date of the claim, "needed" for a

particular purpose. As noted by Spigelman CJ in *Maroota Land Claim* at [50]:

"The distinction between what was 'needed' and what was 'likely to be needed' turned, in the appellant's submission, on whether or not a decision concerning the use of the land had in fact been made. This is an acceptable distinction."

64 It might be arguable that where there were three competing uses for the land, each of which might properly be described as an "essential public purpose", the priority ultimately to be accorded to one over another, as revealed by subsequent events, would not preclude a finding that the land had been needed at the date of claim for an essential public purpose, even though one specific purpose might not then have been chosen. Alternatively, it might be said that the land was "likely to be" needed for any one of the purposes, assuming them to be mutually inconsistent, which would in turn satisfy the statutory exclusion from the definition of "claimable Crown lands". While these may be possible outcomes, other factors may militate against them. Thus, not all public purposes will constitute "essential" public purposes. As Spigelman CJ noted in *Maroota Land Claim* at [55], accepting a meaning of "likely" as involving a real or not remote chance:

"The reference to 'essentiality' of the public purpose sets a high standard. The restriction implied in the use of the word 'essential' is a significant one. It is not enough that the public purpose to be served is 'desirable' or even that it is 'highly desirable'."

65 What may constitute an essential public purpose in some circumstances, may not in others. For example, there is no doubt that the conservation values of particular land may fall on a scale between low and very high or outstanding. Reliance upon (say) three public purposes under consideration at the date of claim, two of which are subsequently allowed

to lapse, may give rise to an inference that the third has become an "essential public purpose" in relation to that land only with hindsight, or even opportunistically.

(b) reliance on post-claim material

66 The last suggestion raises the question as to the correct approach to reliance upon post-claim events. The Minister did not dispute that evidence of events occurring after the claim was made could be relied upon to determine whether the land was needed or likely to be needed for the specified purpose, at the date of the claim. Indeed, the Minister tendered a significant volume of material directed to that which he identified as a proper reliance on such events. On the assumption that there had been no decision taken within the executive government to use the land as part of a national park or State conservation area, as at the date of claim, the critical test was whether the land was likely to be needed for such a purpose. That involved a degree of speculation as to the future, for which purpose it may be permissible to take account of events which had not then occurred.

67 One area in which such questions have arisen involves the valuation of property at a particular date, whether it be the date of a person's death or the date on which the property is compulsorily acquired. *McCathie v Federal Commissioner of Taxation* [1944] HCA 9; 69 CLR 1 concerned the valuation of shares on the date of death of the shareholder. Williams J emphasised that the question was not the market value of the shares but their "real value", which required the valuer to speculate as to the temporary nature of factors (in that case a war) which may have tended to depress the value of the business. In relation to the date of death, being 7 August 1940, his Honour stated at 16-17:

"The accounts for the year ended 15th July 1941 would be admissible, in my opinion, on the question whether the structural alterations had affected

the trade in the years ended 15th July 1938 and 1939, whether these alterations would in the future lead to improved business, and whether the grave international situation was going to interfere with the trade of a retail store. These were matters existing and to be taken into account at the date of death, and the court should not be forced to speculate as to their future when the facts are known and can speak for themselves."

68 Similarly, in *Minister for the Army v Parbury Henty & Company Pty Ltd* [1945] HCA 52; 70 CLR 459 at 514-515, Williams J held that an owner of property compulsorily acquired could recover the costs of moving its business to other premises. Where those costs had become known, the Court was entitled to take the known costs into account, rather than speculate, as would have been necessary at the date of acquisition.

69 In *Housing Commission of New South Wales v Falconer* [1981] 1 NSWLR 547 this Court accepted a similar approach in respect of compensation payable upon resumption of land, which included an allowance for actual and future costs resulting from the resumption. After referring to authorities including those identified above, Hope JA stated the principle that "evidence of future events is admissible not to prove a hindsight, but to confirm a foresight": at p 558B. That statement appears to have been given aphoristic status, although it has a somewhat Delphic quality taken out of context. The next sentence in the judgment noted that an application of the principle, sourced to *Parbury Henty*, was that the amount of compensation "being a matter of assessment, can, like damages, be calculated in the light of any subsequent facts". Similar statements by Glass JA at 563F and 564B-C should also be understood in their context.

Use of post-claim material

70 In the course of identifying the relevant legal principles, the trial judge in the present case stated at [32]:

"Post claim evidence may be logically probative in determining whether the land was needed or likely to be needed for an essential public purpose. This evidence may be used subject to the *Falconer* principle, in that such evidence may not be used to '*prove a hindsight, but to confirm a foresight*' ...."

71 A statement to similar effect may be found in the section of his Honour's judgment identifying the evidence which arose after the date of the claim: at [70].

72 Apparently invoking the concept of foresight, the Minister sought to identify a "trajectory" which had been achieved at the date of claim, arguing that the post-claim material could then be relied upon for the following purposes, at [97]:

"[a] [to confirm] that the DMR objections (relating to coal mining) to the inclusion of the claimed land in Budderoo National Park were only temporary, pending the conduct of some drilling investigations; and

(b) [to demonstrate] that subsequent land acquisition programs by the NPWS in the area confirm the original intention that Budderoo National Park link up with Macquarie Pass National Park along the line of the escarpment."

73 His Honour rejected the existence of any clear "trajectory" at the level of "political will", holding that at the time of lodgement of the claim there was no more than a desire on the part of NPWS to include the larger area within the new park: at [112]. That conclusion was open; there was no error of law in rejecting the metaphor of a "trajectory". It added nothing to the concept of need or likely need and was apt to mislead.

74 The proposed use of the future events was to demonstrate that what might have been characterized as an investigation into a potential public purpose (coal extraction) was no more than that and the completion of the investigation was sufficient to exclude the proposed use of the land for coal mining. In that regard, his Honour stated at [117]:

"The post claim evidence reveals continued objection by the DMR to inclusion of the area into National Parks because of underlying coal. The DMR toward the end of 2003 supported Tongarra Reserve becoming a [State Conservation Area], despite its initial opposition, and this occurred in September 2004."

75 Although this involved no express finding as to whether the objection based on potential coal resources was temporary or otherwise, it appears to be an implicit rejection of the characterization as "temporary" by the Minister. In identifying the post-claim evidence, his Honour had noted that on 4 October 2002 the Department of Mineral Resources ("Mineral Resources" or "DMR") had advised NPWS that the Tongarra Reserve should not become a State Conservation Area: at [77]. Mineral Resources gave no reason for its objection in that letter, nor was one apparent from the evidence. Nevertheless, it provided a basis upon which the trial judge was entitled to reject the characterization of any coal mining interests as merely "temporary" as at March 1986.

76 In 2002, various areas which had been subject to mining leases were being considered for reservation under the *National Park Estate (Southern Region Reservations) Act 2000* (NSW). In fact, areas subject to land claims were not available for reservation under that legislation, but that fact appears to have been overlooked, at least for a period. As a result, the western area of the claimed lands was reserved as a State Conservation Area in September 2004. However, importantly for present purposes, that did not occur until after Mineral Resources had expressly withdrawn its objection in relation to "the Tongarra Reserve" in September 2003. An available inference was that the land would not have been reserved for

nature conservation purposes while Mineral Resources maintained its objection to such a course.

77 Before leaving the use which was sought to be made of this material by the Minister, two factors need to be noted. First, the question which is to be addressed, as at the date of claim, is one involving an inherent level of speculation. If present need is not established, a real and not remote chance of future need will be sufficient. Had there been a degree of commitment to the essential public purpose of nature conservation as at the date of claim, giving rise to a real chance that the land would be put to that use, the existence of an investigation into alternative uses might reduce the likelihood from high to medium, or even lower, without precluding a finding that there was a real chance that the land would needed for nature conservation. Alternatively, it might reduce the likelihood of the land being reserved for nature conservation to a remote chance. Arguably, to await the results of the investigation is to make the required assessment at a later (and impermissible) point in time.

78 Secondly, the use of future events to confirm a real chance must be subject to reasonable time constraints. Were it otherwise, there would be an incentive for the Minister to delay deciding a land claim until the government's position with respect to the land had crystallized. A number of cases have now made reference to the unexplained, and thus apparently unjustifiable, delays incurred in processing land claims. Clearly a point is reached, far earlier than that demonstrated in the present case, at which time future events will no longer assist in confirming an existing state of affairs at the date of claim. In the present case, letters were despatched to all parties who might have a view about the purposes to which the land should properly be put within months of the claim being lodged. Any view which the executive government had in respect of the land should have crystallized promptly on receipt of the responses deemed relevant. The fact that Mineral Resources withdrew its objection to the land being set apart for conservation purposes some 16 years after the claim was lodged provided no assistance to the Minister's case.

79 The Minister's complaint on the appeal, however, was not that the post-claim evidence presented by him was not used to support his case, but that such evidence was used to support the Land Council's case.

80 The first point made by the Minister was that the trial judge "inverted" the "*Falconer* principle", so as to infer from an absence of post-claim executive activity, the absence of a likely need at the date of claim. This was described as employing hindsight to deny, rather than confirm, a foresight. This argument illustrates the risk which attaches to taking an aphorism out of context. The distinction which Hope JA was intending to draw in *Falconer* was not between confirming or denying a foresight, but between evidence which could relate to a foresight and that which merely constituted a hindsight. The point may be illustrated by reference to the example to which Hope JA referred, of the use of subsequent events to quantify loss: see at [69] above. The fact that foresight might anticipate a very significant loss does not mean that future events which discount the loss, rather than confirm its significance, are not admissible. Indeed, that was the point of the evidence in *Parbury Henty*: the cost of moving to cheaper premises was lower than expected, without adverse impact on the business of the property owner.

81 Further, underlying the Minister's submission was an assumption that the "*Falconer* principle" constituted a constraint on the legitimate approach to be taken by the Court below in determining the appeal. That assumption was not made good in the course of argument in this Court. At best from the point of view of the Minister, it would appear to be an evidential rule. However, the Court below was not bound by rules of evidence and could inform itself in such manner as it thought appropriate: the LEC Act, s 38, set out at [112] below. Ultimately, the only question of law which arose in this context was the requirement that any need or likely need for the land for an essential public purpose was to be assessed at the date of the claim. It might have been contended that nothing which happened thereafter was relevant to that question unless it directly

demonstrated that, at an earlier time, a particular view had been held by an appropriate person or persons in authority. However, the Minister did not adopt that approach at trial, having included in his "tender bundle" a large volume of material which came into existence only after the claim and, in many cases, years after the claim.

82 The second point raised by the Minister was that the absence of executive activity was in fact the result of the existence of the undetermined land claim. That complaint would have some merit, at least on the basis of illogicality, if it were made out. The complaint is one of misuse of post-claim evidence, rather than a failure to apply the "*Falconer* principle", however that is properly expressed. Immediately after referring to Mineral Resources' objection to the land being reserved as a State Conservation Area, which continued until the end of 2003, the trial judge said at [117]:

"Budderoo National Park has increased in size since the claim was lodged and still does not include the claimed land. As a whole the post claim evidence reveals the expansion of Budderoo National Park and SCAs when appropriate land became available, and does not support a '*trajectory*', at the appropriate Government level, to include the claimed land in Budderoo National Park or reserve it for nature conservation."

83 These broad statements do not reveal the underlying logic with any degree of precision. Accepting that post-claim evidence may reveal something about the intentions and purposes of the executive government at the date of claim, it must follow that evidence of long inactivity with respect to a proposed use of the land may give rise to an inference that there was not, at the date of claim, any real prospect that the land might be used for that purpose. That inference could not be drawn if there were a known explanation for the failure to act, namely that the existence of the land claim precluded such activity. However, it is far from clear that the factual premise for that complaint arose in the present case. On 27 February 2003, the Deputy Director General, Land and Water

Conservation, wrote to NPWS stating that land which included the whole of the eastern part of the claim area was "available for transfer to the National Park estate". A month later, the manager, Aboriginal Land Claim Investigations, wrote to NPWS advising that it had "recently been clarified" that part of the proposed addition remained under claim and that "[a]s a consequence no action should be taken to add the subject land to Budderoo National Park until such time as claim 2673 had finalised". In his written submissions in the Land and Environment Court, the Minister had somewhat blandly stated (par 49(d)):

"At some point in February to March 2003, it was discovered that 'Tongarra Reserve' was subject to ALC 2673, and so it was eventually understood that the land could not be gazetted as part of Budderoo NP until the land claim had been determined ...."

84 Two comments may be made in respect of this material. First, neither the evidence nor the submission contradicts an inference that, from 1986 until 2003, a period of almost 17 years, it had not been appreciated that there was an obstruction to declaring a national park over the claimed land. Secondly, once the obstacle of an unresolved land claim had been identified, there was yet no hint that responsible officers appreciated the existence of a straightforward reason for rejecting the claim.

85 The highest point of the Minister's submission was the reference by the trial judge to the fact that the National Park "still does not include" the claimed land. If that statement could only be explained on the basis of a legally erroneous opinion that a national park could be declared over land subject to a land claim, the Minister may have established a relevant error of law. Assuming that the legal premise is correct, the inference does not follow, it having been squarely within the hands of the Minister to reject the claim so as to permit the inclusion of the area within the National Park. There is no reason to suppose that his Honour did not have such a basis in mind when referring to the present state of the land. As will be noted below, his Honour was conscious of the delay for more than 20 years in

determining the claim. (It was not contended that the use of the present tense in the words quoted was to be taken as referring to the period after the refusal of the land claim and pending disposition of the proceedings.)

Procedural unfairness

86 In the context of the first issue, it is convenient to note what has been raised as the third issue, namely lack of procedural fairness, with respect to the use to which the post-claim material was put. As noted above, it may be doubted whether a complaint of lack of procedural fairness is available with respect to an appeal against a decision on a question of law. However, the complaint fails for other reasons.

87 First, the lack of procedural fairness, as pleaded in the notice of appeal, was premised upon there having been a misapplication of the principles concerning the use to be made of post-claim events. Thus ground 3 alleged:

"The Court below denied the appellant procedural fairness by failing to put to the appellant each of the following propositions:

(a) that the presence or absence of a declaration of a national park, or the relative presence or absence of nature conservation planning and decision-making in relation to *the claimed land itself* (as distinct from areas of land surrounding it) *after the date of claim*, would be material to the determination of the Court below; and

(b) that the Court would draw an inference, from the absence of a declaration of a National Park over the claimed land after the date of claim, that the claimed land was Crown land not likely to be needed for the essential public purpose of nature conservation."

88 It is no doubt true that procedural fairness may require a warning from a decision-maker that he or she is inclined to take into account information not known to the applicant, or, if known to the applicant, to use it in a way which could not reasonably be anticipated absent express warning: see *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* [2001] HCA 22; 206 CLR 57 at [142] (McHugh J); *Muin v Refugee Review Tribunal* [2002] HCA 30; 76 ALJR 966 at [128]- [135] (McHugh); *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; 81 ALJR 515; *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* [1994] FCA 1074; 49 FCR 576 at 592 (Northrop, Miles and French JJ). Significantly, those statements related to administrative decision-making; although a similar principle applies in the exercise of judicial power, its operation must take account of the nature of the litigious process: see *Neal v The Queen* [1982] HCA 55; 149 CLR 305 at 308 (Gibbs CJ), 310 (Murphy J), 322 (Brennan J); *Malvaso v The Queen* [1989] HCA 58; 168 CLR 227 at 233 (Mason CJ, Brennan and Gaudron JJ); and *Parker v Director of Public Prosecutions* (1992) 28 NSWLR 282 at 296 (Kirby P). However, the Minister's complaint really turns on the correctness or otherwise of his construction of the "*Falconer* principle". He appears to have approached the matter in the Land and Environment Court on a particularly restricted basis as to the use which could be made of post-claim evidence, whilst tendering in his own case a considerable volume of such material. If a natural inference from such material was adverse to his case, he had every opportunity to address it. If he declined to do so on the basis that he thought it appropriate to place all his eggs in one basket, namely a restrictive legal interpretation of the "*Falconer* principle", he cannot complain if, that approach being rejected, he has failed to take an opportunity to address on the evidence more generally. Nothing the Court said in the course of the hearing misled him as to the approach which might be taken, nor was he otherwise deprived of an opportunity to address the Court as he thought fit.

89 Apart from any legal constraint, the inferences which might be drawn from the known facts were self-evident. The Minister's case was that, in March 1986, the land was needed or likely to be needed for a specific purpose. He acknowledged two constraints on giving effect to that

purpose, namely the continued exploration and investigation of the coal resources in the area and, from 3 March 1986, the existence of the land claim. The first constraint he dismissed as temporary; the removal of the second obstacle was entirely within his hands. After the initial inquiries and responses from potentially interested agencies had been collected, there was no evidence of any reason to delay further the determination of the claim. The self-evident inference was that the Minister and, through him the Executive Government, had no real intention of using the land for the identified purpose of nature conservation in March 1986. There may have been good reasons, both legal and factual, why such an inference could not or should not be drawn: it is unrealistic to suggest, however, that the Minister lacked the opportunity to make such submissions.

90 Secondly, the ground was without substance because counsel for the Minister in the Land and Environment Court expressly adverted to the post-claim evidence and the need "to factor in the fact that there was a land claim over this land and until the land claim was resolved no proposal for the National Park could go ahead": Tcpt, 18/12/07, p 70(30). For reasons already explained, that submission did not necessarily preclude reliance on executive inactivity after the claim, but it demonstrated awareness of the availability of an adverse inference. No procedural unfairness was demonstrated.

Misconstruction of *Land Rights Act*

91 The second issue raised on the appeal concerned the construction of s 36(1)(c). Reference has already been made to the provision and the earlier authorities in this Court. Each of the critical elements was identified by the trial judge at [24]-[30], referring to the same authorities as those referred to above. Complaint is not made about the express statements of principles contained in these paragraphs. Rather, the argument was that the Court's findings of fact on the evidence "result from the imposition of a gloss on the statutory wording of s 36(1)(c) that reflected the facts of the *Maroota* case": appellant's written submissions at par 40.

92 The gloss was said to have arisen through the search for a commitment "at the appropriate Government level" to include the claimed land in the National Park: at [117].

93 The appellant took exception to this statement at a number of levels. At the highest level, he assumed that his Honour had imposed a requirement that the relevant political will was to be demonstrated at the level of Cabinet, because, at the relevant time, power to create national parks was vested in the Governor, who, by convention, acted on the advice of Cabinet. The Minister submitted that the relevant level of Executive Government, a phrase used by the primary judge in the *Maroota Land Claim* and held not to have been erroneous in this Court, could not mean "the Executive Council, for this is a body which is not deliberative": submissions, par 45. He further submitted that the relevant level of Executive Government could not "as a matter of legal definition" mean the Cabinet, as that "decision-making organ is not formally recognised in the *Constitution Act 1902* (NSW) and functions as a matter of constitutional convention".

94 Neither constitutional theory nor practice demonstrate error on the part of the trial judge, even if he were to be taken as referring to either the Cabinet or the Executive Council as the relevant level of Government. Relying upon the statement of Wilson J in *FAI Insurances Ltd v Winneke* [1982] HCA 26; 151 CLR 342 at 396 that "the Governor in Council is not a deliberative body", is to do no more than acknowledge that effective decision-making is not taken at the formal stage of the process whereby the Executive Council gives advice to the Governor, on which he or she must, by convention, act. Furthermore, if effective decision-making is undertaken by the institution of Cabinet, there is no legal error in seeking a decision from Cabinet if that is the level at which, in terms of political reality, the relevant decision may be expected to be taken.

95 In the critical passage in the *Maroota Land Claim*, Spigelman CJ stated:

"61 ... His Honour identified the fact that the strong desire of the Service to have the area declared a national park had not been successful for two decades. Nothing in the period up to the change of government in 1995 suggested that the institutional imperative of the Service to create a new national park, in conjunction with the 'intrinsic ecological qualities and attributes of the land', created a real and not remote chance that a declaration would be made.

62 His Honour's references to the significance of consideration at the level of 'Executive Government' reflect the emphasis on the opinion of need held by the Government expressed in the [*Castlereagh Nature Reserve Land Claim*]: see Meagher JA's reference to 'government of the day' and Handley and Powell JJA's reference to 'required or wanted by the Executive Government' (at 252 and 254D). His Honour noted that the power to create national parks is vested in the Governor, and the Governor does so acting on the advice of Ministers. ... The trial judge said ... '... The policy of the Act is to leave such decisions to the policy of the Executive Government of the day.'

63 His Honour was entitled to act on the basis that expansion in the size and number of national parks in New South Wales is primarily a matter of political will and such was not manifest, to the appropriate degree, at the relevant time with respect to the Maroota proposal."

96 The difficulty faced by the Minister in the present case is that the trial judge used similar language, in quite similar circumstances, to that which was held to reveal no error on a question of law in the *Maroota Land Claim*. The Minister sought to avoid a similar conclusion in a number of ways.

97 First, he asserted that the statement taken from the *Maroota Land Claim* at [63] "contains no prescription as to the particular institutional form of the vehicle through which that political will is manifested". The submission continued:

"Nor does it allow any room for the inference that the trial judge would not have been entitled to act on a different basis."

98 These statements are correct, but beside the point. It is possible that the trial judge in the present case would have been entitled to act on a different basis; the fact that he did not provides no support for an error of law in acting on the same basis as that accepted as available in *Maroota*.

99 Secondly, it was said that the trial judge applied "an erroneous criterion to the facts" in requiring "a manifestation of Executive will *greater than* what was established in the instant case, namely: the express desire or plan of the Minister for the Environment and the NPWS to include the claimed land in a national park which was accompanied by the express support or 'concurrence' in this plan of all but one of the other Minister's with carriage of relevant land use portfolios": submissions at par 48.

100 The assessment of likely inclusion of the claimed lands in the national park required the trial judge to assess the significance of objection taken by the Department of Mineral Resources. He was entitled to take into account the clear evidence that no declaration would be made without the support of the Department of Lands and that Lands was most unlikely to support reservation as a national park, or other restrictive conservation status, whilst any significant stakeholder objected.

101 The initial report collating the views of the various stakeholders was

prepared by the Lands Office, Nowra, on 17 October 1986 and summarised the objections in terms noted by his Honour at [73]:

"● The Council of the Municipality of Shellharbour is opposed to the claim as it will prejudice the development of an alternative route to Macquarie Pass, and is contrary to the objectives and recommendations for the escarpment management.

● The Illawarra Region of Councils [sic – as in original report] is opposed to the claim for the same reason as Shellharbour, and that the land should be retained for public purposes.

● The Department of Main Roads '*has requested postponement of the determination of the eastern section of the claim pending completion of the investigations into the Caloola Pass route down the escarpment*' *(folio 272)*.

● The DMR opposes the claim for the reasons outline[d] in par [71] above.

● The Electricity Commission '*opposes the claim because of*:
(a) The transmission line on the east of the claim adjacent to the Butter Track Pass.

(b) The Commission is considering the purchase of Tongarra Colliery and granting of the claim would seriously restrict mining activities (folio 273).

● The Public Works department has no interests in the land affected by the claim.

● The Forestry Commission is finalising its reply. No Reply is received from the Department of Environment and Planning, NPWS, or The National Trust of Australia."

102 It was also clear that reservation of land as a national park required an allocation of resources to NPWS in order to manage the lands: at [53]-

[54].

103 At [116] his Honour stated:

"Up to and including the date of claim the NPWS had the desire to include the claimed land for the essential public purpose of nature conservation. However, this desire, even with the concurrence of various other departments, was frustrated by DMR objections and issues with Kiama Council. This desire, although supported by other departments, does not satisfy 'needed' for the purpose of s 36(1)(c) ... ."

104 His Honour repeated that evaluation in the following paragraph in considering whether the land was "likely to be needed" for the specific purposes: at [117]. To that end, he was entitled, and probably required, to assess what evidence there may have been as to support for the proposal at a level of executive government which would allow resolution of the claims between departments whose interests were in conflict. His Honour formed the opinion that there was not a real chance or real possibility that the claimed land was likely to be needed for the stated essential public purpose at the date of claim. That was a factual evaluation which, in circumstances not dissimilar to the *Maroota Land Claim*, demonstrated no error of law.

105 The assumption underlying the Minister's challenge in this respect was that, in the absence of opposition from other departments, the proposals of NPWS, as promoted by the Minister for the Environment, must have had a real chance of prevailing. Linked to this proposition was the claim that the Government had in place "processes" which would allow the resolution of opinions amongst "stakeholders" without resort to Cabinet.

106 Such a view may have been open to the Court, but it was not the sole view reasonably open. A number of qualifications were also open on the evidence. First, having identified land capable of, and having qualities making it appropriate for, reservation for conservation purposes, proposals put forward by NPWS were unlikely to succeed if there were objection from other stakeholders promoting different public purposes. In the present case there was opposition at the relevant time from Mineral Resources. Secondly, it was by no means clear from the evidence that there was any formal process for resolution of conflicts between departments short of Cabinet. Thirdly, there was no evidence of the Minister for the Environment taking matters to Cabinet in order to resolve such a conflict. That course may have been taken on occasion, but some evidence would have been necessary in order to demonstrate the real possibility that the Minister would have prevailed if it had happened in the present case. Fourthly, the case presented by the Minister was that the land was likely to be needed for the Budderoo National Park. Inclusion of the land in a national park required reservation by the Governor; a reference to the Governor was a reference to the Governor acting on the advice of the Executive Council: *Interpretation Act 1987* (NSW), s 14. Within that legal framework, it was clearly open to the Court to conclude that no such step would be taken without the approval of Cabinet.

107 This ground must be rejected. The trial judge correctly expressed the legal principles to be applied, flowing from the language of s 36(1)(c), as construed by this Court. The Minister has failed to establish that, despite such statements, he actually applied different and incorrect principles, or drew inferences which were not reasonably open on the established facts.

Incorrect approach to evidence in case of delay

108 The final ground of appeal complained that the Court had applied a principle of "beneficial construction" in respect of land claims to resolve in favour of the Land Council any ambiguity or gaps in the evidence caused by the Minister's delay in determining the claim.

109 His Honour's reasoning in this respect commenced with the adoption of comments by Jagot J in an entirely different case that "no Land Council should have to wait for 20 years for its land claim to be determined": *Jerrinja Local Aboriginal Land Council v Minister Administering the Crown Lands Act* [2007] NSWLEC 577; 156 LGERA 65 at [124]. His Honour then referred to comments he had made in an earlier case noting that such delays can "cause serious evidentiary problems for all parties, and can thus frustrate the beneficial and remedial legislative intention of the [*Land Rights Act*] to return land to Aboriginal people": *Batemans Bay Local Aboriginal Land Council v Minister Administering the Crown Lands Act* [2007] NSWLEC 800 at [89]. His Honour concluded that he should accept the Land Council's submission that "any ambiguity arising from the difficulty of establishing relevant matters with the passage of time must be resolved in favour of the [Land Council]": at [128].

110 In this Court, the Minister took issue with the adoption of a principle of "beneficial construction" in relation to the operation of the *Land Rights Act*. This, he argued, had been rejected by the High Court in *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council* [2008] HCA 48; 82 ALJR 1505 and by this Court in the *Maroota Land Claim*. That submission should be placed in context. First, neither of the authorities referred to rejected the principle; in each, it was found not to provide assistance in construing a particular provision of the *Land Rights Act*. Thus, in the latter case, Spigelman CJ accepted that such a principle might support a construction of "likely" in s 36(1)(c) as meaning more likely than not, rather than the lower test of a real chance. His Honour found a countervailing indication in the fact that the provision applied to public purposes described as "essential": at [53]-[57]. Secondly, on one view the principle is merely an application of purposive construction, as mandated by the *Interpretation Act*, s 33: see *Minister Administering the Crown Lands Act v Bathurst Local Aboriginal Land Council* [2009] NSWCA 138 at [217].

111 More significantly, the Minister objected that delay in the decision-making process had been relied upon to construct a novel presumption to be applied in making findings of fact on the evidence. His Honour's view that such a course was open was said to constitute a decision on a question of law, erroneously determined.

112 There is force in the submission that this would be a novel principle, but the proposition that it constituted a decision on a question of law was not adequately explored in argument. The answer to that question required reference to s 38 of the LEC Act, which provides:

"**38 Procedure**
(1) Proceedings in Class 1, 2 or 3 of the Court's jurisdiction shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and of every other relevant enactment and as the proper consideration of the matters before the Court permit.

(2) In proceedings in Class 1, 2 or 3 of the Court's jurisdiction, the Court is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate and as the proper consideration of the matters before the Court permits."

113 The procedural freedom conferred on the Court by such a provision is not unlimited: it must apply the law governing the dispute before it and it must accord the parties procedural fairness: see *Sue v Hill* [1999] HCA 30; 199 CLR 462 at [42] (Gleeson CJ, Gummow and Hayne JJ); *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21; 197 CLR 611 at [49] (Gleeson CJ and McHugh J); *Qantas Airways Ltd v Gubbins* (1992) 28 NSWLR 26 at 29-30 (Gleeson CJ and Handley JA), 40-41 (Kirby P); *Italiano v Carbone* [2005] NSWCA 177 at [70]; *South Western Sydney Area Health Service v Edmonds* [2007] NSWCA 16; 4 DDCR 421 at [87]- [94]; *Haider v JP Morgan Holdings Aust Ltd* [2007] NSWCA 158;

4 DDCR 634 at [42]; *State Transit Authority of New South Wales v Chemler* [2007] NSWCA 249; 5 DDCR 286 at [65] and *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* [2009] NSWCA 178 at [75]. However, such a provision imposes significant constraints on appeals which are limited to circumstances where the court or tribunal in question has made an erroneous decision in point of law, or on a question of law: see *Akora Holdings Pty Ltd v Ljubicic* [2008] NSWCA 339 at [10].

114 If the trial judge had held that he could determine a case in a particular way in the absence of any evidence or other material supportive of the particular conclusion, that might have demonstrated a relevant error. However, in the present case his Honour's statement of principle was largely otiose because it operated against the Minister, who bore the onus of proof in any event, under s 36(7) of the *Land Rights Act*. If the Court were not affirmatively satisfied that the lands were not claimable Crown lands at the relevant date, it was required to make an order in favour of the Land Council. Furthermore, the applicant's submission, which the trial judge said he accepted, was expressly based on this premise. Accordingly, it is doubtful that the trial judge was intending to state any novel principle of practice or law. In the circumstances, no relevant error on a question of law has been established.

Conclusion

115 The various challenges raised by the Minister in respect of the decision in the Land and Environment Court having failed, the appeal should be dismissed with costs.

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