

New South Wales
Court of Appeal

CITATION:	Caroona Coal Act This decision has
HEARING DATE(S):	9 November 2010
JUDGMENT DATE:	15 December 2010
JUDGMENT OF:	Giles JA at 1; Hod
DECISION:	Appeal dismissed v [The Uniform Civi a judgment or orde system. Setting asi and 36.18. Parties :
CATCHWORDS:	ADMINISTRATIV statutory pre-condi justifying renewal decision-maker wa transfer between tr statutory process – new authority befo the – public interes
LEGISLATION CITED:	Coal Mining Act 1 Land and Environr Land and Environr Mining Act 1992 Mining Regulation

Uniform Civil Proc

CASES CITED:

Caroona Coal Acti
(2010) 172 LGERA
Caroona Coal Acti
Currey v Sutherlan
Franklins Limited
Kostas v HIA Insu
Manly Council v F
Oshlack v Richmo

PARTIES:

Caroona Coal Acti
Coal Mines Austr
Minister for Miner

FILE NUMBER(S):

CA 2010/28363

COUNSEL:

A: Mr B McClinto
1R: Mr T Bathurst
2R: Mr R Beech-Jo

SOLICITORS:

A: Environmental
1R: Minter Ellison
2R: Crown Solicit

LOWER COURT JURISDICTION:

Land & Environme

LOWER COURT FILE NUMBER(S):

LEC 20009/80003

LOWER COURT JUDICIAL OFFICER:

Preston CJ

LOWER COURT DATE OF DECISION:

6 January 2010

LOWER COURT MEDIUM NEUTRAL CITATION:

Caroona Coal Acti
Resources (No 2) [

**IN THE SUPREME COURT
OF NEW SOUTH WALES
COURT OF APPEAL**

CA 2010/2836

**GILES JA
HODGSON J
TOBIAS JA**

Wednesday 14

CAROONA COAL ACTION GROUP INC v

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1 GILES JA: I agree with Tobias JA.

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2 HODGSON JA: I agree with the order proposed by Tobias JA and with his

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3 In my opinion, the scheme of Division 2 of Part 7 of the *Mining Act* 1992 ma
transfer operating between the holder and the transferee, but by the statutory p

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4 The first step is an application made by the holder under s 120, lodged with 1
document accompanying the application, or even in existence: the agreement o
the consent of the proposed transferee (required by s 120(2)(b)). I note that eve
application in this case), accompanied by the consent of the transferee, would

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5 The transfer may then be approved by the Minister under s 121(1)(a). A tran
transferee becomes the holder of the authority. As pointed out by the primary j

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6 In this case, the application was for transfer of part of the authority, so s 123
the part transferred (s 123(1)(a)), a new authority was taken to have been gran
setting out the terms of the new authority, signed by the Minister and the trans

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7 It is plain from the circumstances that the Exploration Licence dated 12 Apr
document. It is true that the recitals to that document were not entirely apt, and

Ju

April 2006 (rather than up to 22 February 2011, the date of expiry of the authc considerations are substantially outweighed by the circumstances manifesting to the part of the authority being transferred. The Exploration Licence did in f of the authority was not correctly stated did not in my opinion invalidate it (an

8 As stated by Tobias JA, the appellant seized on the words “Before part of an referred to in s 123(2)(b) had to be signed before a transfer could take place. I evidence as to the sequence of events on 12 April 2006. I would in any event r the effect that a transfer is not effective until the requisite document is signed.

9 **TOBIAS JA:** On 6 January 2010 Preston CJ of the Land and Environment C challenging the validity of the renewal by the second respondent, the Minister part transfer by the Director-General (the Director-General) of the Department Australia Pty Ltd (CMA): *Caroona Coal Action Group Inc v Coal Mines Aust.*

10 The jurisdiction of the Land and Environment Court to hear and dispose of 1979 (the Court Act) and referred to as “Class 8” of its jurisdiction. The appel Act. The appeal is confined to an order or decision of the Land and Environme

THE NATURE OF THE APPELLANT’S CHALLENGE

11 In its Amended Points of Claim filed on 28 September 2009 the appellant c number of grounds of which only two are presently relevant. Those allegations respect to the issue of renewal of A216 and in paragraphs 29 to 31 with respect terms;

- “9. On 22 February 2006, the Minister for Mineral Resources 2011, but did not satisfy himself that special circumstan half the number of units over which the licence was in f the Mining Act 1992.
- 9A. In the premises, the purported renewal of Coal Authoris
- ...
- 29. Further and in the alternative, section 123 of the Mining proposed transferor must sign a document setting out th the proposed transferee must sign a document setting ou
- 30. Coal Authorisation 216 is an authority within the meani
- 31. The first and second respondents did not sign a documen document setting out the terms of the proposed new autl

THE BACKGROUND FACTS

12 The appellant is an incorporated association formed to contest exploration in the Carroona district of Western Australia. Its members are landholders in the Carroona district whose properties are owned by members of the wider community. CMA is a subsidiary of BHP Billiton Plc.

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13 EL6505 covers an area of approximately 344km² on the Liverpool Plains, and the area covered was formerly part of that covered by A216 issued in 1980 under the former Act.

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14 The area of A216 as originally granted was 19,750 km². As a result of a number of renewals, the area covered is now 8,556 km².

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15 On 21 August 1992 the *Coal Mining Act 1973* was repealed and replaced by the *Coal Mining Act 1992*. A216, being an authorisation granted under the *Coal Mining Act 1973* and in force at the time of the repeal, is taken to be an exploration licence granted under the Act. An exploration licence is defined in the Act as an authorisation granted under the Act.

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16 On 24 April 1993 A216 was renewed for a further term until 24 April 1998 and the area covered was reduced to about 3,329 km². It was renewed because of the potential of that area for coal exploration.

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17 On 20 March 1998 the Director-General, on the advice of the Department's Geologist, sought for a total of 3,252.64 km². On 24 June 1998 the Minister approved that application, which was unsuccessfully challenged before the primary judge but there is no appeal from that decision. The primary judge referred to one aspect of the Ministerial Briefing pursuant to which the area was reduced.

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o **THE RENEWAL OF A216 IN 2006**

18 The following facts relating to the renewal of A216 in 2006 are taken from the primary judge recited the relevant facts as follows:

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▪ “22 On 3 February 2003, a Departmental Minute from Geology Australia, signed by the Department's Geologist, Principal Geologist, stated that A216 had been renewed and reduced in size for successive periods. The area covered is now approximately '294' km² within the Gunnedah Basin and the township of Gunnedah and one to the south. The area covered was subsequently, in the renewal of A216, the area of A216 was reduced to 294 km².

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23 The Minute noted that the Department had undertaken a program of geological mapping of the Carroona area and provided the basis for the creation of a geological map of the Gunnedah Coalfield by companies looking to gain access to the coalfield.

▪

24 The Minute noted that in the next five years, Coal and Petroleum Australia was to undertake computer 3D modelling, field mapping and further exploration.

Minute concluded that:

- 'It is recommended that A216 be renewed. Authorisation is required to continue the mining industry in the area.
- The Department holds the Authorisation and their allocation to the mining industry.
- 25 The Geological Survey Minute was the basis of and was the Director-General on behalf of the Department apply for renewal of A216. Geological Survey Minute:
 - 'There has been recent interest in the area to ensure short to medium term supply of minerals. The licence should be renewed for a 5 year period (Table 1.1 of this area.'
- 26 On 17 March 2003, the Director-General approved the renewal of A216 on behalf of the Department applied for renewal of A216. The area of 2,940 km². This would seem to continue the typographical error in the documents, should be 2,940 km².
- 27 On 17 April 2003, notice was given of the receipt of the application for renewal of A216.
- 28 The application for renewal of A216 was held in abeyance pending the award of an exploration licence over the Carroona area.
- 29 On 1 August 2005, the Minister issued the Carroona Expression of Interest ('EOI'). In the Introduction, the document states:
 - 'The Minister for Mineral Resources has issued an exploration licence in respect of the Carroona area. An Expression of Interest is for an area of mineral resources of export quality thermally stable. The area comprises part of Authorisation A216. The Mining Industries. The successful application was for a 5 year period, pursuant to the Mining Act 1972. A number of companies have approached the Minister for Mineral Resources has decided to issue an Expression of Interest for the area.
 - Interested parties are required to submit an Expression of Interest for an exploration and development licence for the area.
 - ...
 - The Minister will select a company/candidate for an initial period of five years.

subsequent renewal period will be
is not bound to accept any of the

- 30 Four companies submitted an EOI, including BHP Billiton CMA.
- 31 On 20 January 2006, the Department's Minerals Development the Minister announce CMA as the successful EOI applicant Ministerial Submission referred to A216 and the process exploration licence over the Carroona coal exploration area.
 - 'The subject Carroona coal exploration licence is currently held by the Department and it is the intention that the successful EOI applicant will receive a part transfer of Authorisation 216 to the area.
 - Awarding of the exploration licence to the successful applicant.
- 32 On 25 January 2006, the Director-General signed and issued the terms of the briefing note are important and warrant setting out.
 - **'Renewal of an Exploration Licence Issue:**
 - Renewal of Authorisation No 216 (A216) on behalf of the Crown.
 - **Background:**
 - Authorisation No 216 (A216) was granted in May 1980, and was renewed for a further 5 years in May 2005. The original area of A216 covered some 100,000 hectares of allocations to mining companies in the Carroona area.
 - A valid application for the renewal of A216 was received in May 2005 and is on file in abeyance pending the calling for tenders to be done so that the title could be renewed. A copy of section 114 of the *Mining Act 1978* and part of A216 could then be transferred to the successful applicant.
 - A copy of section 114 of the *Mining Act 1978* is attached to the briefing note.
 - **Comment:**
 - DPI holds authorisations and exploration licences for the allocation to the mining industry of areas to mining companies looking to gain coal rights in the Carroona area. The department has undertaken extensive consultation with the mining industry over the renewal of A216 for 5 years. This will allow

Once the renewal of A216 is approved

All statutory requirements have been met.

Recommendations:

1. In accordance with section 114(1)(a) of the Act, effective from 1 March 2006, for the attached Instrument of Renewal to be issued.
2. The Director-General NSW DPI, to sign the Instrument and return it to the Maitland Minister.

33 The 'Additional Information 1' referred to was an extract from the Instrument of Renewal.

34 On 17 February 2006, the Minister wrote to BHP Billiton recommending the awarding of the exploration licence over the Carroona area and the exploration licence for that area.

35 On 22 February 2006, the Minister initialled and dated the Instrument of Renewal as of 25 January 2006 recommending renewal of A216. On that date, the Instrument had been enclosed with the Ministerial Briefing. The Instrument was dated 25 February 2011. The area of A216 was stated to be '294 km²'.

36 On 3 March 2006, notice of the renewal of A216 was published in the Gazette as '2940' km². The renewal was stated to be "effective on 28 February 2011".

19 The gazettal of the renewal was required by s 136 of the Act which relevantly provides:

"As soon as practicable after:

(a) ...

(b) ...

(c) an authority is granted, renewed, transferred or cancelled, the Director-General is to cause notice of that fact to be published in the Gazette."

20 The renewal of A216 until "28 February 2011" was an error as the maximum term is 10 years. The appellant challenged the validity of the renewal on the basis that the renewal was not gazetted. That was rejected by his Honour and there is no appeal from that decision.

THE RELEVANT STATUTORY PROVISIONS RELATING TO

21 Part 7 of the Act sets out provisions relating to the renewal, transfer and cancellation of authorities. The relevant provisions are contained in Division 1 of Part 7 and were as follows:

"113 Applications

(1) The holder of an authority may, from time to time,

(2) ...

- **114 Power of Minister in relation to applications**
- (1) After considering an application for the renewal of an authority, the Minister may:
 - (a) may renew the authority, or
 - (b) may refuse the application.
- (2) ...
- (3) The period for which an authority is renewed shall be:
 - (a) 5 years in the case of an exploration licence ...
 - (b) ...
- (4) On renewing an authority, the Minister may vary the terms of the authority.
- (5) The area of land over which an authority is renewed shall not be enlarged, but not so as to include any land that was not included in the original authority.
- (6) The number of units over which an exploration licence was in force when the application for renewal was made shall not exceed the number of units that exist that justify the renewal of the licence or the authority.
- (7) ...

- **115 ...**

- **116 ...**

- **117 Authority to have effect until application dealt with**
- (1) If an application for the renewal of an authority is made and the authority ceases to have effect, the authority continues to have effect until the application is finally disposed of.
- (2) ...

- **118 Date from which renewal of authority has effect etc**
- (1) The renewal of an authority takes effect on the date of the renewal.
- (2) ...

- **119 ...”**

- **THE PARTIAL TRANSFER OF A216**

22 Again, there is no challenge to the primary judge’s findings of fact with respect to the appeal it will be necessary to elaborate upon certain of the documents referred to in the unchallenged facts relevant to the partial transfer of A216 in the following terms:

- **“The partial transfer of A216**
- 37 On 7 March 2006, BHP Billiton emailed the Department
March 2006, the Department replied with a modified ve
- 38 On 17 March 2006, the Director of CMA wrote a letter t
stated:
 - ‘Coal Mines Australia Limited, a wh
Authorisation No. 216 to it as the
as defined in the Caroon Express
- 39 On 31 March 2006, the Department’s Minerals Develop
Director-General approve and submit Form 12 (applicat
registration of the transfer of an authority) to enable the
the Background section, the Director-General submissio
 - ‘Coal Mines Australia Limited, a me
applicant for the Caroon Coal E
would be awarded an Exploratio
Authorisation 216 which is held l
Crown.
- This process requires:
 - Form 12 Application for Approval of
of the Transfer of an Authority (a
General).
- Once signed, forms will be forward
requirements and registration of I
- 40 On 5 April 2006, the Director-General (per Peta Johanne
(Act 1973) from Director-General NSW Department of
Caroon Project Exploration Licence No 6505 (Act 199
 - ‘I refer to the application for part tra
 - Enclosed is a copy of the proposed ne
original of this document is to be
Minister for Mineral Resources. (C
prepared to accept this offer, or if
- 41 The proposed new authority enclosed with the letter was
and CMA.
- 42 On 6 April 2006, a Departmental email from Mr Garth F
document with conditions was to be ready ‘for the hand
April ~ 9.30am at Gunnedah).’
- 43 On 6 and 7 April 2006, various changes were made to th

- 44 On 10 April 2006, the Director-General signed and lodged a Transfer of an Authority and a completed Form 13: Application for Transfer of an Authority as being received at 9.30am on 10 April 2006.
- 45 On 11 April 2006, Ms Peta Johannessen, of the Northern Territory Government, met with the Minister concerning approval and registration of the application for transfer of an authority setting out in full:
 - **‘APPROVAL AND REGISTRATION ISSUE:**
 - Application for approval and registration of an authority for the transfer of an authority to the NSW Department of Primary Industries for the BHP Billiton Group.
 - **BACKGROUND:**
 - Exploration Licence 6505 (part transferred to the west of Quirindi and covers an area of 1000 hectares) owned by Coal Mines Australia Limited, a member of the BHP Billiton Group.
 - Coal Mines Australia Limited, a member of the BHP Billiton Group, applied for the Caroon Coal Exploration Licence and was awarded an Exploration Licence on 10 April 2006.
 - **PRESENT POSITION:**
 - All requirements have been met.
 - The application for transfer of an authority is currently being processed by The Manager, Coal and Petroleum Titles, Darwin.
 - **RECOMMENDATIONS:**
 - 1. Pursuant to the provisions of Section 122(3) of the Mining Act, the transfer of that part of Authority on Behalf of the Crown to Coal Mines Australia Limited for a new lease include the conditions set out in the application.
 - 2. The new exploration document is satisfactory.
 - 3. Pursuant to Section 122(3) of the Mining Act, the transfer of an authority (062 855 270) as the holder of Exploration Licence 6505.
- 46 On 12 April 2006, the Department’s Manager, Coal and Petroleum Titles, Darwin, and the Director-General, signed and lodged a Transfer of an Authority and a completed Form 13: Application for Transfer of an Authority as being received at 9.30am on 10 April 2006. The Director-General, circled the word ‘approved’ on the submission of the application for transfer of an authority on behalf of the Minister’s delegate, it operates under the Mining Act and secondly, as the Director-General under s 122(3) of the Mining Act.
- 47 The submission also has a handwritten asterisk placed at the end of the application for transfer of an authority ‘signed by Minister at handover ceremony in Sydney’.

- 48 On 12 April 2006, the exploration licence EL6505 was executed by the Minister. Pursuant to the deed between the Minister and CMA setting out the terms of the transfer, the Minister executed the licence at the hand of the CMA.
- 49 On 5 May 2006, notice of the transfer of part of A216 was published in the Gazette. The notice stated that the area part transferred had been transferred in part to CMA and the transfer was approved by the Minister.
- Pursuant to Section 123 of the Mineral and Petroleum Resources Act, the Minister is required to publish in the Gazette a notice of the transfer of an authority. The notice must contain the following information:
 - (1) Authorisation No. 216 has been cancelled.
 - (2) Exploration Licence No. 6505 has been granted to CMA for a period until 28 February 2007.
- The notice dated that the area part transferred was the same as the area part transferred in 2006.

◦ **THE RELEVANT STATUTORY PROVISIONS RELATING TO**
 23 Division 2 of Part 7 of the Act deals with transfer of authorities. Its relevant provisions are as follows:

- **“120 Applications**
 - (1) The holder of an authority may apply for approval of the transfer of the authority.
 - (2) An application for approval of the transfer of an authority must be accompanied by the following:
 - (a) must be accompanied by the appropriate fee.
 - (b) must be accompanied by the consent of the holder of the authority.
 - (c) must be accompanied by the particulars of the transfer.
 - (d) must be lodged with the Director-General.
- **121 Power of Minister in relation to applications**
 - (1) After considering an application for approval of the transfer of an authority, the Minister:
 - (a) may approve the transfer in accordance with the conditions specified in the application.
 - (b) may refuse the application.
 - (2) Without limiting the generality of subsection (1), the Minister may refuse the application if the transfer would result in an offence against this Act or the regulations.
 - (3) In approving the transfer of an authority, the Minister may impose conditions that the authority be amended or that further conditions be imposed.
- **122 Registration of transfers**
 - (1) The transferor or transferee of an authority for which an application for approval of the transfer has been made must register the transfer.
 - (2) An application for registration of a transfer:
 - (a) must be lodged with the Director-General, and
 - (b) must be accompanied by the appropriate fee.
 - (3) On receipt of such an application, the Director-General may refuse registration of the transfer if the transfer is prohibited by section 121.

- (4) On registration of a transfer, the transferee be amended conditions or further conditions ref

▪

▪ **123 Partial transfers**

- (1) If part of an authority is transferred under thi
- (a) the authority (in this section referred to transferred, and
- (b) an authority over the part transferred (in transferee for the period ending on the the Minister in granting approval of the
- (c) if the Minister considers that it is neces authority is subject may be amended in
- (2) Before part of an authority is transferred:
- (a) the Minister and the proposed transfero original authority, and
- (b) the Minister and the proposed transfere

▪

▪ **124 ...”**

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○ **ELABORATION OF [44] AND [48] OF THE PRIMARY JUDGE’**

24 At [44] of his reasons, his Honour referred to the completion and execution some relevance given the manner in which the appellant argued the appeal, it i

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25 Form 12 was as follows:

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26 Form 13 was as follows:

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27 At [48] the primary judge referred to EL6505 executed by CMA and the M

form of a deed and was headed “**MINING ACT 1992**” under which appeared document continued in the following terms:

- “WHEREAS
- (a) in conformity with the Act application was made for an
- (b) all conditions and things required to be done and performed NOW THIS DEED WITNESSETH that in c
Deed the Minister in pursuance of the provisions of the
parcel of land described in the Exploration Area annexe
TO HOLD the said land together with any appurtenances th
▪ (a) such rights and interests as may be lawfully subsisting th
▪ (b) such conditions, provisos and stipulations as are contain
for the initial period of **Five (5) years** for the purpose as

28 The appellant relied on that part of the Deed which I have set out in the pre Director-General clearly intended to effect a partial transfer of A216 to CMA, CMA pursuant to Part 3 of the Act which deals with exploration licences and, may apply for an exploration licence while s 22 empowers the Minister, after c applicant or to refuse the application.

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29 It was submitted that paragraph (a) of the Recitals to the Deed referred to a paragraph (b) of the Recitals contemplated the granting of such a licence. Furt

- “the Minister in pursuance of the provisions of the Act DOI

o

o purported to constitute the grant of an exploration licence pursuant to s
30 Originally the appellant sought to argue that EL6505, being an exploration Part 3 of the Act had not been complied with. However, as his Honour noted a Minister nor CMA contended that EL6505 was the grant of an exploration lice transfer of part of A216 under Part 7 of the Act and that its validity stood or fe addressing the appellant’s first category of challenge.

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31 In its written submissions on the appeal CMA sought to support the primary the part transfer of A216 was invalid, nevertheless it could be supported as an notice of contention and as CMA declined to raise it as such, its submissions o

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o **THE ISSUES ON THE APPEAL**

32 Subject to one matter to which I will refer later in these reasons, the appella was that in purporting to renew A216 the Minister was in breach of s 114(6) o circumstances existed that justified the renewal of that authority over the numl did not apply to the renewal.

o

33 The second ground challenged the validity of the partial transfer of A216 exploration licence pursuant to Part 3 of the Act in that it did not purport to be CMA. In other words, there could not be a valid partial transfer without there being a breach of s 160(1) of the Act which was in the following terms:

- “**160 Interest in authority to be created by instrument in**
- (1) A legal or equitable interest in an authority or

34 It was submitted that neither the Deed nor any other document constituted a breach of s 160(1) of the Act. It was also submitted that the licence was disposed of to CMA.

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o THE PRIMARY JUDGE’S DECISION

o (a) The challenge to the renewal of A216

35 At [52] the primary judge set out s 114(6) which, for convenience, I repeat:

- “The number of units over which an exploration licence may be granted shall not exceed the number of units in force when the application for the renewal was made, unless the Minister is satisfied that there are special circumstances justifying the renewal of the licence over a larger number of units.”

36 It was common ground that this provision applied to the present case. The appellant submitted that the Minister was satisfied prior to the renewal of A216 on 22 February 2006 that there existed special circumstances. Consequently there was no validly existing authority available to be partially transferred to the appellant. The Minister had turned his mind to what might constitute “*special circumstances*”

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37 I interpolate here that the appellant conceded on the appeal that the information provided in his reasons (and reproduced at [18] above) was capable of constituting “*special circumstances*”. The appellant submitted that there was no evidence that the Minister was satisfied that those special circumstances existed.

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38 CMA and the Minister submitted that the onus was on the appellant to establish that the transfer was for the purposes of s 114(6) and that that onus had not been discharged. At [60] the primary judge stated:

- “The question then becomes: has the [appellant] established that the transfer was for the purposes of the 1998 renewal or 2006 renewal of A216? In my opinion, the answer is no.”

39 At [64] of his reasons, his Honour stated:

- “In relation to the 2006 renewal, it is important to recall that at the time, and in part in order to facilitate, the transfer of part of the 2006 renewal was based not only on the information provided in the Deed but also on the fact that the transfer of part of A216.”

40 At [65] the primary judge, after referring to other matters of which the Minister and the Director-General on 25 January 2006 was forwarded to him under cover of a letter, stated that he may have been briefed orally. According to his Honour, he was informed by the Minister that:

- “(a) A216 was in force until 24 April 2003;

- (b) a valid application for renewal of A216 was received on
- (c) the area of A216 has been reduced since the original gra
- (d) the process of renewal of A216 was held in abeyance pe
which forms part of A216. This was done so that the au
tenderer and part of A216 could be transferred to the su
- (e) the Department holds authorisations and exploration lice
allocation to the mining industry;
- (f) there has been increased interest in the Gunnedah Coalfi
- (g) the Department has undertaken an extensive exploration
- (h) Coal Advice has recommended renewal of A216 for five
resource;
- (i) once the renewal of A216 is approved the Carroona coal c
- (j) the recommendation of the Ministerial Briefing was that
attached Instrument of Renewal which stated the area o
- (k) Section 114 of the Mining Act is a relevant statutory pro
Information 1. The full text of s 114 was quoted in Add
- (l) ‘all statutory requirements have been met’.

41 After referring to the fact that on 17 February 2006 the Minister informed C
the relevant exploration licence and that on 22 February 2006 he initialled the
of Renewal of A216, the primary judge made the following findings:

- “68 In these circumstances, the inference should be drawn t
circumstances existed that justified the renewal of the li
made. The special circumstances stated in the Ministeri
A216 to CMA as the successful EOI applicant and retai
resources prior to their allocation to the mining industry
terms were quoted in the attachment. Although unlike tl
sufficient that the Minister’s attention was drawn to: the
over which A216 was to be renewed was the same size
made; and particular information about A216, which the
114(6) of the Mining Act.
- 69 The onus rests on the [appellant] as the challenger of the
required mental state of satisfaction under s 114(6). The
evidencing the decision-making process if that material
the required mental state of satisfaction. However, havin
proper to draw the inference that the Minister did not fo
regard to all of the documentary evidence, I also do not
the Minister was misled by the statement in the Ministe
do not consider that this statement meant that the Minis

- 70 Apart from relying on the documentary evidence, there a that the Minister did not form the required mental state to eliciting the relevant evidence. Other powers of the C a direction under Part 4 r 4.3 of the Land and Environm Minister’s reasons for the decision. These judicial mech [2009] NSWCA 154; (2009) 166 LGERA 436 at [99] at has, therefore, been unable to displace the inference tha form the mental state of satisfaction required under s 11
- 71 For these reasons, I reject the [appellant’s] challenge tha Act.”

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◦ **(b) The challenge to the partial transfer of A216**

42 At [96] the primary judge noted that the appellant claimed that EL6505 wa or instrument of transfer effecting the transfer of part of A216 from the Direct EL6505 expired after A216’s expiry date in breach of s 123(1)(b) of the Act. I the appeal.

◦

43 At trial the appellant submitted that in order to transfer an authority under t transfer from the transferor to the transferee. It would appear that this submiss provision. However, it was accepted on the appeal that that provision did form

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44 The appellant thus submitted that the Deed, in form and content, was the gr either in form or substance, a transfer or disposition because, amongst other th party to it and its recitals as well as its operative provisions were framed in ter authority. This being so, it was submitted that there was never any transfer of j was void.

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45 CMA and the Minister submitted that the appellant had misconstrued the st there was no statutory requirement for a document or instrument of transfer be documents referred to in s 123(2) served a different purpose than a document (

◦

46 It was submitted, and accepted at least for the purposes of the appeal, that s conceded by the appellant, that s 123(2)(b) was complied with because EL650 123(1)(b) and had been signed by the Minister and the proposed transferee, CM complied with so as to effect the transfer of part of A216.

◦

47 At [101] the primary judge agreed with the submissions of CMA and the M in Division 2 of Part 7 of the Act for a document or instrument of transfer betw

whole or in part.

◦

48 After referring to the provisions of s 120(1) and (2) and noting that the requirements of s 123. With respect to the steps alleged to have been taken regarding the requirements of s 123(1)(a),

- “105 In this case, on 12 April 2006, the Minister by his delegation of authority to the Director-General cancelled the authority of A216 in accordance with the application of the Director-General that the terms of the new authority be as set out in EL6505 as planned (see email of the Manager, Minerals Development and Planning) and the terms of the proposed new authority for the purposes of s 123(1)(a) (see letter from Director-General to CMA dated 5 April 2006). The Director-General did not need to comply with s 123(2)(a) of the Mining Act or cl 22 of the Mining Regulation 2003 (the Regulation) in relation to A216.”

49 At [106] his Honour noted that the next step in the statutory scheme after the cancellation of an authority is the registration of a new authority under s 122. Registration causes the transfer of an authority approved by the Minister to a new authority. His Honour then noted at [108] that the act of registration involves the transfer of an authority under the Mining Regulation 2003 (the Regulation).

◦

50 Given the provisions of s 123(1)(a), in the case of a transfer of part of an authority to the extent of the area of that part transferred and of the grant of the new authority, the requirements of s 123(1)(a) are satisfied.

◦

51 At [109] his Honour made the following observations:

- “It is to be noted that there is no requirement in s 122(1) or s 123(1)(a) to include a document or instrument of transfer between the original authority and the new authority. The requirements of s 122(1) and s 123(1)(a) of the Mining Act or cl 22 of the Mining Regulation for the transfer of an authority to a new authority are satisfied by the **references in s 122 to registration of ‘the transfer’ is approved by the Minister and not a document or instrument of transfer.**”

52 At [110] and [111] the primary judge reiterated the relevant steps taken up to the registration of the transfer on 12 April 2006. His Honour then noted that the new authority becomes effective on its registration by the Director-General under s 122(1) and the original authority becomes effective as provided for in s 123(1) and the new authority operates from the date of registration of the transfer to the expiry of the original authority: s 123(1)(b).

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53 At [112] his Honour summarised the position in the following terms:

- “In this case, therefore, on registration on 12 April 2006 by the Director-General:
- (a) CMA became the holder of the new authority of EL6505;
- (b) A216 was taken to have been cancelled as to the area of the original authority of A216 that was transferred to CMA;
- (c) EL6505 being the new authority over the part of A216 transferred to CMA, in accordance with the provisions of s 123(1)(a) of the Mining Act and cl 22 of the Mining Regulation 2003, from the date of expiry of the original authority of A216, in accordance with the provisions of s 123(1)(b) of the Mining Act and cl 22 of the Mining Regulation 2003.

54 His Honour therefore concluded (at [113]) that nowhere in the statutory scheme of instrument of transfer between a transferor and transferee to effect the transfer and would be effective if, carried out in accordance with Division 2 of Part 7 and registration of a document or instrument of transfer between the Director-

55 For the foregoing reasons his Honour rejected the appellant's claim that the Division 2 of Part 7 of the Act and was invalid by reason of the absence of a document for the partial transfer.

THE RESOLUTION OF THE ISSUES IN THE APPEAL

(a) The s 114(6) Issue

56 In its written submissions the appellant referred to the matters relied upon to draw the inference should be drawn that the Minister was satisfied under s 114(6) of the Act. The appellant submitted that in reaching that conclusion his Honour had gone beyond what he was not discharged its onus of proof that the Minister did not form the required state of mind. That inference, so it was submitted, provided any sound basis for concluding that the Minister was satisfied.

57 It is true, as the appellant submitted, that the primary judge went beyond what was warranted by the inference from the documentary evidence, that the Minister did form the required state of mind could only be challenged on an appeal confined to a decision on a question of law. See *Services Pty Ltd* [2010] HCA 32; (2010) 270 ALR 228 at [59] per French CJ;

58 However, the correct and only relevant question was that posed by the primary judge: whether the Minister failed to form the requisite mental state of satisfaction for the purpose of s 114(6). His Honour went further and made a positive finding of fact that was strictly unnecessary. See paragraphs 9 and 9A of the appellant's Amended Points of Claim (see [11] above).

59 In oral submissions the appellant alleged three errors of law with respect to the primary judge's finding. The first was that, on the basis that a finding of no evidence was a question of law (which clearly it is), the primary judge, on the basis of the documentary evidence, it would not be proper to draw the inference that the Minister was satisfied. The second was that his Honour failed to understand the appellant's submission, not open to him.

60 The second error of law was that his Honour indirectly, inappropriately and erroneously drew the inference from the last sentence of [70] of the primary judge's reasons, which I have extracted at [70].

61 The third error of law, based upon what his Honour said at [69] of his reasons, was that his Honour found that the state of mental satisfaction had been reached or a consideration taken into account. His Honour had turned his mind to the issue, may have justified a state of satisfaction. Reliance was placed upon the fact that the Minister had turned his mind to the issue, may have justified a state of satisfaction. Reliance was placed upon the fact that the Minister had turned his mind to the issue, may have justified a state of satisfaction. Reliance was placed upon the fact that the Minister had turned his mind to the issue, may have justified a state of satisfaction.

Council (1998) 100 LGERA 365 at 375; *Franklins Limited v Penrith City Cou* 81; (2001) 113 LGERA 321 at [40], [41] and [54].

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62 In my opinion none of these errors have been established. As to the second, of regularity. He did not use that expression and the expressions he did use are

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63 As to the third alleged error, his Honour did not say that it was sufficient as himself in his reasoning process to the fact that the section was attached to the reference was made by his Honour at [65] (see [40] above) and which he cons formed the relevant mental state of satisfaction.

◦

64 The authorities relied upon and to which reference has been made at [61] al necessary to establish affirmatively that a decision-maker held a particular stat is normally insufficient to merely point to material before the decision-maker r his or her decision or which, if taken into account, would satisfy the relevant p

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65 If the present appeal was one in which the Court could consider for itself w might be arguable that he did not. On that question, I have no view one way or question of law, if otherwise a relevant issue, the only question for this Court v Minister was satisfied that special circumstances existed within the meaning o demonstrated.

◦

66 The foregoing also disposes of the first alleged error of law asserted by the than was necessary, as I have already noted. The correct issue was whether the turned his mind to the provisions of s 114(6).

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67 As the appellant has failed to establish that there was no evidence capable c mental state of satisfaction, it must logically and inevitably follow that it has f state of satisfaction. In fact, the appellant did not really attempt to directly pro

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68 The appellant first submitted that the primary judge erred in law by relying had been attached to the Ministerial Briefing. This, so his Honour found, drew this was insufficient to enable a finding that the Minister directed his mind to s

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69 I have already dealt with this submission at [63] above in conjunction with finding that the Minister did have the necessary state of satisfaction. But the p said at [69]. There he noted the correct question for his determination and ackl proposition could be discharged by reference to the documentary material evic

Court to draw the inference that the Minister did not form the required mental
documentary evidence to draw the necessary inference. That was a conclusion

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70 I would also draw attention at this point to the primary judge's observation:
evidence, there were other judicial mechanisms that the appellant could have i
satisfaction. For example, interrogatories could have been directed to the Mini
sought under Part 4 r 4.3 of the Land and Environment Court Rules 2007 that
decision. However, the appellant did not invoke these mechanisms which, had
onus of establishing on what little evidence it had that the Minister did not for

71 The appellant nevertheless submitted that the statement in the Ministerial B
effect, telling him that he need not direct his mind to the requirements of s 114
114(6). In the last sentence of [69] of his reasons, the primary judge rejected th

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72 As was submitted on behalf of CMA, for the appellant to succeed as a matt
of s 114(6), it was necessary to demonstrate that the evidence could only comp
requirements of s 114(6) or, if he did, he did not hold the necessary mental sta
erred in law in failing to find that the Minister did not form the relevant menta
that the only finding available to his Honour was that the Minister did not con:

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73 In my view the primary judge made a positive finding for the reasons set ou
of his reasons was directed to the question his Honour correctly posed for him
on the balance of probabilities that the Minister did not form the relevant ment
error of law is involved in his approach or in his declining to find that the appe
the s 114(6) issue should be rejected.

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o **(b) The Partial Transfer Issue**

74 In its written submissions the appellant contended that the effect of the Dec
licence under s 22 of the Act and was not, and could not be construed as, an at
the Director-General as transferor was not a party to that document. It was furt
the terms of the proposed new authority in compliance with s 123(2)(b). Rathe
of a "*proposed new authority*".

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75 It was further submitted that once an authority is taken to have been granted
granted under s 22 is required to be in writing under s 28, so also must the new
requirement.

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76 The appellant's written submissions next contended that his Honour failed

that there was, in fact, a transfer of rights under A216 by the Director-General rights. There was no evidence of any express act or event of transfer.

o

77 It was submitted that none of the provisions of ss 120, 121, 122, 123(2) or "transfer" must be a distinct act or event and not merely a state of affairs arising of the transfer.

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78 In oral submissions the appellant reiterated its contention that the Deed did determination was whether there was an instrument of transfer as required by s 160(1) was conceded that the documentary material established that it was the clear intention of transfer of A216 pursuant to Division 2 of Part 7 of the Act. The contention, as given effect in the absence of a document of transfer that complied with s 160(1).

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79 During the course of argument it was put to the appellant that the document 2006 referred to at [38] of his Honour's reasons (and recorded at [22] above) was not in compliance with s 160(1). Furthermore, when taken together with the document set out at [45] of the Director-General's delegate on 12 April 2006 of the recommendation contained in Division 2 of Part 7 of the Act.

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80 In this respect it was conceded by the appellant that each of these documents was not in compliance with the meaning of s 160(1).

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81 Nevertheless the response of the appellant was that none of these documents was in compliance with the CMA. One had to comply with the statutory scheme and, in particular, s 160(1) licence. But, EL6505 was not created by a combination of Forms 12 and 13 as required by the Deed which was not an instrument of transfer as the Director-General's delegate on behalf of the Minister under Part 3 of the Act.

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82 The essence of the appellant's argument therefore, was that even if Division 2 of Part 7 required an instrument of transfer or disposition by which the transferor's interest in the transfer was insufficient to satisfy the statutory scheme.

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83 With respect to s 160(1) the CMA submitted first, that the documents to which s 160(1) was taken with the consent to the transfer signed on behalf of CMA, constituted in compliance with the relevant statutory provisions including the approval of the Minister, the Director-General's interest in the authority to CMA. Second, it was submitted that in accordance with Part 7 which, in effect, contains its own code as to how a transfer or part transfer is effected, there is a necessity for a transfer by an instrument in writing.

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84 In this context it is to be noted that s 160(1) requires that a legal or equitable interest in an authority, in other words, it is the instrument in writing which effects the relevant disposal. This leaves no room for the operation of s 160(1).

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85 Once the relevant statutory provisions of Division 2 of Part 7 are complied with, the transfer of an authority to a third party, it follows that the general provisions of s 160 have no application. This does not impose upon the Director-General an obligation to cause a record to be kept of the transfer of an authority under Division 2 of Part 7.

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86 It may be a moot question as to whether the holder of an authority has a legal or equitable interest in the authority including, relevantly, the right pursuant to s 29(1) to prospect on the authority specified in the exploration licence. These are statutory rather than contractual rights. A transaction that may involve the disposal of a legal or equitable interest in an authority is not a legal or equitable interest in the authority. The subsection provides that the Director-General may cancel an authority under s 161(2) provides that any person claiming a legal or equitable interest in an authority

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87 However, in the case of the transfer of the whole or part of an authority, s 160(1) applies. A comparison of s 159 with s 161 seems to indicate that the legislative scheme is that an authority transferred or cancelled under the Act on the one hand and an authority in respect of which a record is kept on the other.

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88 Furthermore, the cancellation of a part of an authority may be said to involve a transfer of that part of the authority required by s 159(1)(b) to be recorded. Yet clearly, such a cancellation is not a transfer of an authority under s 123(1)(a) which provides that where part of an authority is transferred under Division 2 of Part 7, the part so transferred. In other words, the statute operates to cancel that area to which the authority relates.

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89 Equally, the effect of s 123(1)(b) is that where there is a part transfer of an authority, there is, in effect, a deemed grant of that part of the authority with the consequence that a new authority is created under Division 4 of Part 3 of the Act. The creation of that new authority is effected by the transfer of an existing authority would be inconsistent with the statutory scheme.

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90 Accordingly, in my view where a transfer or part transfer of an authority is effected, it is not a transfer of an authority for the purposes of s 160. Furthermore, s 122 contains its own code with respect to the registration of a legal or equitable interest in an authority pursuant to s 160(1), it follows that those general provisions have no application to a transfer of an authority.

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91 Accordingly, a transfer or part transfer is a creature of the statute. Nowhere instrument in writing. On the contrary, the only documentation required is that

92 As I have already noted, it is common ground that s 123(2)(a) has no applic the proposed transferor. Section 123(2)(b) requires a document to be signed by new authority. The new authority in the present case was that contained in the of that licence. It was not suggested that the Deed as signed between the Minis EL6505. It therefore complied with s 123(2)(b).

93 Those parts of the recitals and the operative provisions of the Deed upon w transfer but, on the contrary, purported to constitute an original grant under Pa setting out the terms of the proposed new authority within the meaning of s 12 extracted by the primary judge at [45] of his Honour’s reasons (see [22] above which was forthcoming.

94 Paragraphs 1 and 2 of the recommendation refer to an attached document w ”handover ceremony” referred to at [47] of his Honour’s reasons.

95 In my opinion the primary judge was correct to reject the appellant’s submi Although his Honour did not refer to s 160(1), his conclusion at [113] that nov for a document or instrument of transfer between the transferor and the transfe correct. I would therefore reject the appellant’s challenge to his Honour’s find

THE TIMING POINT

96 In its written submissions on the appeal the appellant sought to rely on the transferee to sign a document setting out the terms of the proposed new author since it all took place on the one day but the order in which it occurred was no there was no evidence upon which he could have found, that the Deed was sig

97 This point was not elaborated upon in the appellant’s oral submissions in cl the point was still pressed. He ultimately responded that it was. However, it is transfer was invalid upon the basis that there was a non-compliance with the c

98 A consideration of the transcript of argument before the primary judge indi when referring to s 123(2)(b) said to senior counsel for the appellant:

- “As you rightly say, before part of an authority is transferre
673 [a reference to a document in the agreed bundle] fo
the proposed new authority.”

99 Senior counsel's response was to assert that although that was what the Deed being a reference to the recitals and the operative part of the Deed.

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100 Shortly prior to the statement of his Honour referred to above, senior counsel

▪ "attention hasn't been given to the opening words of subs (2) do these things."

101 The point was taken up by senior counsel for CMA in his submissions at the Approval document (and referred to in his Honour's reasons at [47]) as rec *approval*". Senior counsel for CMA responded that there was no pleading challenge was a potential problem with timing the onus lay on the appellant to demonstrate Minister and CMA signing the Deed.

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102 However, it is clear that the evidence did not address the sequence in which his Honour's recitation of what occurred on that date at [105] of his reasons constituted appear to have been submitted to his Honour by the appellant that in fact the submissions have indicated, it was common ground that there was no evidence as to the sequence

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103 In the foregoing circumstances, there being no evidence as to the sequence discharged the onus of establishing on the balance of probabilities that there had

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o COSTS

104 At [47] of its written submissions, the appellant submitted as follows:

▪ "In the event that the appeal is not allowed the appellant seeks the usual rule that costs follow the event should not apply *Oshlack v Richmond River Council* (1998) 193 CLR 72

105 No attempt was made to elaborate on this bare submission in oral argument substantive judgment, had reserved the question of costs. In a detailed and highly ordered the appellant to pay each of CMA's and the Minister's costs including *Group Inc v Coal Mines Australia Pty Ltd & Anor (No 3)* [2010] NSWLEC 59

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106 There may be some doubt as to whether the public interest costs principle proceedings have been instituted and prosecuted in the public interest. We were elaborate in oral argument on [47] of its written submissions.

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107 I can see no reason why the appellant should have the benefit of a departure primary judge did not consider that the usual rule should be relaxed with respect the same view with respect to the costs of the appeal.

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◦ **CONCLUSION**

108 The appellant has challenged the primary judge's findings that the renewal Honour dismissed the appellant's challenges to the validity of each of the renewals in law in so doing should be rejected.

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109 In the foregoing circumstances, I would propose that the appeal be dismissed.

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Amendments

16/12/201 -Numbering fault. - Paragraph(s) Coversheet, [8]
0 onwards

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