Land and Environment Court of New South Wales

New South Wales Aboriginal Land Council & Another v Minister Administering the Crown Lands Act [2008] NSWLEC 241 (29 August 2008)

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NEW SOUTH WALES LAND AND ENVIRONMENT COURTCITATION: New South Wales Aboriginal Land Council & Another v Minister Administering the Crown Lands Act [2008] NSWLEC 241PARTIES: APPLICANTSNew South Wales Aboriginal Land Council and Metropolitan Local Aboriginal Land CouncilRESPONDENTMInister Administering the Crown Lands ActFILE NUMBER(S): 31513315143151531516 of 2005CATCHWORDS: Aboriginal :- land claims; conclusive certificates; validity thereof; whether land was needed or likely to be needed for residential lands or essential public purpose of nature conservation; whether lands were lawfully used or occupiedLEGISLATION CITED: Aboriginal Land Rights Act 1983Crown Land Act 1989 Housing Act 1985Interpretation Act 1987Land Acquisition (Just Terms Compensation) Act 1991 Landcom Corporation Act 2001National Parks and Wildlife Act 1974 CASES CITED: Carltona Limited v Commissioners of Works [1943] 2 All ER 560Centro Properties Limited v Hurstville City Council and Another [2004] NSWLEC 401; (2004) 135 LGERA 257Craig v State of South Australia [1995] HCA 58; (1995) 184 CLR 163Daruk Local Aboriginal Land Council v Minister Administering the Crown Lands Act (1993)

30 NSWLR 140 Daruk Local Aboriginal Land Council v Minister Administering the Crown Lands Act [No. 2] [The Londonderry Claim] (1995) 89 LGERA 194 Darkingung LALC v Minister for Natural Resources (No.2) (1987) 61 LGRA 219 Dorrigo Plateau Local Aboriginal Land Council v Ministering Administering the Crown Land Act (2007) 155 LGERA 307Griffith Local Aboriginal Land Council v Minister Administering the Crown Lands Act [2008] NSWLEC 108 Housing Commission of New South Wales v Falconer and Others [1981] 1 NSWLR 547 Jerrinja Local Aboriginal Land Council v Minister Administering the Crown Lands Act (2007) 156 LGERA 65Minister Administering the Crown Lands (Consolidation) Act v Tweed Byron Local Aboriginal Land Council (1992) 75 LGRA 133 Minister Administering the Crown Lands Act v Deerubbin Local Aboriginal Land Council (1998) 43 NSWLR 249 Minister Administering the Crown Lands Act v NSW Aboriginal Land Council (1993) 31 NSWLR 106 Minister Administering the Crown Lands Act v Deerubbin Local Aboriginal Land Council [No.2] [2001] NSWCA 28; (2001) 50 NSWLR 665 Minister for Aboriginal Affairs and Another v Peko-Wallsend Limited and Others [1986] HCA 40; (1985-1986) 162 CLR 24Minister for Immigration and Multicultural Affairs v Yusuf [2001] HCA 30; (2001) 206 CLR 323Minister for Natural Resources v New South Wales Aboriginal Land Council and Another (1987) 9 NSWLR 154New South Wales Aboriginal Land Council v The Minister Administering the Crown Lands Act (2007) NSWLEC 481New South Wales Aboriginal Land Council v Minister Administering the Crown Lands (Consolidation) Act and the Western Lands Act (1988) 14 NSWLR 685 New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (The Department of Education Claim) (1992) 76 LGRA 192NSW Aboriginal Land Council v Minister Administering the Crown Lands Act (No 2) [2008] NSWLEC 13 NSW Aboriginal Land Council v Minister Administering Crown Lands Act [2007] NSWCA 281; (2007) 157 LGERA 18 NSW Aboriginal Land Council v Minister Administering the Crown Lands Act [2008] NSWLEC 35 O'Reilly and Others v The Commissioners of the State Bank of Victoria and Others (1983) 153 CLR 1Plaintiff S157/2002 v The Commonwealth of Australia (2003) 211 CLR 476Re Patterson; ex parte Taylor [2001] HCA 51; (2001) 207 CLR 391 Wanaruah Local Aboriginal Land Council v Minister Administering the Crown Lands Act [2001] NSWLEC 20Woolworths Ltd v Pallas Newco Pty Ltd and Another [2004] NSWCA 422; (2004) 61 NSWLR 707Worimi

Local Aboriginal Land Council v Minister Administering the Crown Lands Act and Another (1991) 72 LGRA 149TEXTS CITED: Aronson, Dyer, Groves, "Judicial Review of Administrative Action", (Third Ed. 2004)CORAM: Sheahan JDavis ACDATES OF HEARING: 25-28 March 2008JUDGMENT DATE: 29 August 2008LEGAL REPRESENTATIVESAPPLICANTDr J Griffiths SC with Dr S PritchardSOLICITORSChalk & FitzgeraldRESPONDENTMr V Hughston SC with Mr C LenehanSOLICITORSCrown Solicitors OfficeJUDGMENT: **New South Wales Aboriginal Land Council & Another v Minister Administering the Crown Lands Act [2008] NSWLEC 241INDEXA. INTRODUCTION Paragraphs** The Government and its Ministers 3-4 The Claims 5-6 These proceedings 7-10**B. NOTICE OF MOTION** 11**C. ISSUES TO BE DETERMINED** Conclusive certificates – the Notice of Motion 12 Substantive claim 12**D. THE CLAIMED LANDS** 13-14 ALC 6465 15-17 ALC 6323 and ALC 6324 18-20 ALC 6326 21**E. THE STATUTORY SCHEME IN MORE DETAIL** Generally 22-24 Section 36 – claims 25-36 Section 36(8) – Conclusive certificates 37-42**F. THE EVIDENCE** 1. The factual evidence Pre the first date of claim, 22 February 2000 *1977 Cabinet Minute* 43-45 *Berowra land and Landcom* 46-54 *The ESD study* 55-65 2. The factual evidence between the two dates of claim, 22 February 2000 and 19 May 2000 66-69 3. The factual evidence post the later date of claim, 19 May 2000 70-81 4. Determination of the Claims 82-86 5. The Intra-governmental arrangements for Crown Lands Home Sites 87-92 6. Mr O'Toole's evidence 93-967. Local evidence of use or occupation of some of the land (ALC 6465) 97-103**G. CONCLUSIVE CERTIFICATES – THE NOTICE OF MOTION** 1. Applicants' Submissions 104 2. Respondent's Submissions 105-111 3. Discussion(a) *Certificates generally* 112-116(b) *Residential Lands Certificates* 117-124(c) *Nature Conservation Certificates* 125-1314. Summary 132-1345. Conclusion 135-136**H. THE SUBSTANTIVE CLAIMS** 137-144**I. CONCLUSION AND ORDERS** 145-151**THE LAND AND ENVIRONMENT COURTOF NEW SOUTH WALESSheahan J29 August 200831513 to 31516 of 2005 New South Wales Aboriginal Land Council & Another v Minister Administering the Crown Lands ActJUDGMENTA. Introduction**1 **His Honour**: These matters concern appeals against the respondent Minister's refusal of four aboriginal land claims ("ALC") made by the two Applicant Land Councils in accordance with the regime

prescribed by the *Aboriginal Land Rights Act* 1983 (NSW) ("*ALRA*").2 The Minister named as respondent in these appeals is the current "*Crown Lands Minister*" referred to in the *ALRA*, and bears the onus of proving that the claimed land is not claimable under the *ALRA*. Such "*claimability*" of land under the *ALRA* must be assessed and determined as at the date the claim was lodged (see *ALRA* s.36(1) to which I will return). If the Minister fails to discharge that onus, the Court, on appeal, must order that the whole or part of the land claimed be transferred to the claimant Land Council, and can impose conditions on the order.**The Government and its Ministers**3 For the purposes of this complex matter I need to make clear that when I use the term "*the Minister*" in these reasons I will be referring to the Crown Lands Minister of the day (unless I specifically indicate otherwise). Each Act of Parliament and each government agency has an identified Minister responsible for it, and senior public sector decision-makers are accountable to at least one particular identifiable Minister. The *ALRA* actually comes within the portfolio responsibility of the Minister for Aboriginal Affairs (except when the Premier was personally responsible for that Act between 25 March 1988 and 26 May 1993), but s.36 of the Act is very specific about which Minister deals with ALCs, namely the **Crown Lands Minister**. The Crown Lands responsibilities of government are discharged by the Minister for Lands (with his/her portfolio sometimes called Natural Resources, or Land and Water Conservation, or Conservation and Land Management). 4 The government agency established in 1976 as the Land Commission of New South Wales has always been known as "Landcom". It originally came within the Housing portfolio, but later (including the most relevant period – 1997-2003) the Planning portfolio (sometimes "*Urban Affairs and Planning*"). The National Parks and Wildlife Service ("NPWS") has generally been the responsibility of the Minister for Environment. "*Central agency*" departments like Premier/Cabinet and Treasury closely liaise across the government. Complexities arise when one person holds more than one ministerial portfolio at a time, and during part of the relevant period one Minister was Minister for both Planning and Aboriginal Affairs. However, the above distinctions are important to the facts of this case, in which issues have arisen about authority of one particular public official within one particular portfolio (not being a Minister) to bind "*the government*" or express its "*political will*".**The Claims**5 On 22 February 2000, the New South Wales Aboriginal Land Council ("*NLC*") claimed land in the

Berowra area of Hornsby Shire (ALCs 6323, 6324 and 6326), and on 19 May 2000, the Metropolitan Local Aboriginal Land Council ("*MLC*") also claimed land near Berowra (ALC 6465). All claims were made pursuant to s.36(4) of *ALRA*, and all lands were covered by the *Crown Land Act* 1989 (NSW) ("*CLA*") at the date of claim.6 The Minister ultimately **refused** each of the four ALCs on 25 October 2005 under s.36(1) of the *ALRA*, which provides the exceptions to "*claimable Crown lands*". Essentially, and in summary, the Minister's grounds for refusing the four claims were that the land claimed was needed, likely to be needed, used, or occupied for an essential public purpose, ie as residential lands, or for nature conservation.**These proceedings**7 On 16 December 2005, the Applicant Land Councils filed these four appeals. 8 On 22 October 2007, ie almost two years after the appeals were commenced, the respondent Minister issued "*conclusive certificates*" pursuant to s.36(8)(a) of the *ALRA*, on the grounds that part of the land claimed is needed or is likely to be needed as residential lands. Then, on 17 January 2008, the Minister issued further certificates, pursuant to s.36(8)(b), on the grounds that part of the land is needed or likely to be needed for the essential public purpose of nature conservation.9 Such certificates take effect only when tendered in appeal proceedings (*Darkingung LALC v Minister for Natural Resources (No.2)* (1987) 61 LGRA 219 ("*Darkingung*")), and on 22 February 2008, the Applicant Land Councils filed a Notice of Motion seeking to have the Court restrain the Respondent from tendering them in these appeal proceedings on four articulated grounds. The Land Councils bear the onus of proof on the issue of the certificates' validity, and they argue that these "*final and conclusive*" certificates are invalid on the basis of jurisdictional error. 10 The Notice of Motion must be dealt with in advance of the substantive appeals, but there is overlap among the issues and evidence relevant to the different aspects of the proceedings.**B. The Notice of Motion** 11 The Notice of Motion filed on 22 February 2008 seeks orders, and states grounds, in the following terms:*"1. The Respondent be restrained from tendering in the proceedings:(i) the Certificates purportedly issued by the Minister on or about 22 October 2007 in relation to part of the land the subject of these proceedings ('the Residential Lands Certificates'), and(ii) the Certificates purportedly issued by the Minister on or about 17 January 2008 in relation to part of the land the subject of these proceedings ('the Nature Conservation Certificates')on the grounds set out below.2. Such further or other order*

*as the Court deems fit.***GROUND 1***3. Each of the Nature Conservation Certificates is void for jurisdictional error on the ground that the Minister asked the wrong question in determining that the claimed land was, at the date of claim, needed or likely to be needed for an essential public purpose, namely the following questions contained in the Brief to the Minister (LANDS 07/614/A) and which the Minister signed on 16 January 2008 and acted upon:(a) 'To the extent the Minister is considering issuing a certificate or certificates stating that land is 'needed' for an essential public purpose, is there a* ***decision of, or*** *some other* ***manifestation of political will*** *by or on behalf of, the government of New South Wales (including a decision maker with relevant authority within the Government of New South Wales)* ***that the claimed land be used*** *for an essential public purpose.' (emphasis added)(b) 'To the extent the Minister is considering issuing a certificate or certificates stating that land is 'likely to be needed' for an essential public purpose, was there a real and not remote chance at the date the claim was made that there would be* ***such a decision of or manifestation of political will*** *by or on behalf of the government of New South Wales (including by a decision maker with relevant authority within the Government of New South Wales).' (emphasis added)***GROUND 2***4. Each of the Residential Lands Certificates is void for jurisdictional error on the ground that the Minister asked the wrong question in determining that the claimed land was, at the date of claim, needed or likely to be needed as residential lands, namely the following questions contained in the Brief to the Minister (LANDS 07/614) and which the Minister signed on 22 October 2007 and acted upon:(a) 'To the extent the Minister is considering issuing a certificate or certificates stating that land is 'needed' as residential lands, is there a* ***decision of, or*** *some other* ***manifestation of political will*** *by or on behalf of, the government of New South Wales (including a decision maker with relevant authority within the Government of New South Wales)* ***that the claimed land be used*** *as residential lands when the claim was made?' (emphasis added)(b) 'To the extent the Minister is considering issuing a certificate or certificates stating that land is 'likely to be needed' as residential lands, was there a real and not remote chance at the date the claim was made that there would be* ***such a decision of or manifestation of political will*** *by or on behalf of the government of New South Wales (including by a decision maker with relevant authority within the Government of New South Wales).' (emphasis added)***GROUND 3***5. Each of the Nature Conservation*

*Certificates is void for jurisdictional error on the ground that the Minister failed to consider the following mandatory relevant considerations in determining that the claimed land was, at the date of the claim, needed or likely to be needed for an essential public purpose:a. the relevant requirements in the Crown Lands Act 1989 (NSW) and the National Parks and Wildlife Act 1974 (NSW) in relation to the dedication and reservation of Crown land in New South Wales;b. that there was no decision of the Executive Government or other expression of political will that the claimed land was needed or likely to be needed for the essential public purpose of nature conservation;c. that the Deputy Premier Dr Refshauge on 9 February 2004 expressly clarified that 'there was no decision of the Executive Government before eight Aboriginal land claims were made to the effect that the lands claimed were needed for nature conservation';d. that Mr Sean O'Toole of Landcom had no relevant authority to make a decision to 'preserve the areas recommended in the ESD study for nature conservation', or to otherwise make a decision on or behalf of the Government of New South Wales that the claimed land was needed or likely to be needed for nature conservation;e. that, in any event, Mr Sean O'Toole of Landcom did not make any relevant decision that the claimed land be used for nature conservation, or was needed or likely to be needed for the essential public purpose of nature conservation;f. that the ESD study of Crown land in the Hornsby area had been commissioned without reference to the Department of Land and Water Conservation, and without regard to the land assessment provisions of the Crown Lands Act 1989 (NSW); and/org. that the National Parks and Wildlife Service had no current proposal in relation to the claimed land, and did not object to the granting of the Aboriginal land claims.**GROUND 46**. Each of the Residential Lands Certificates is void for jurisdictional error on the ground that the Minister failed to consider the following mandatory relevant considerations in determining that the claimed land was, at the date of claim, needed or likely to be needed as residential land: a. the relevant requirements in the Crown Lands Act 1989 (NSW) and in the Land Acquisition (Just Terms Compensation) Act 1991 (NSW) in relation to dealings with and the acquisition of Crown land in New South Wales;b. that Mr Sean O'Toole of Landcom had no relevant authority to make a decision for or on behalf of the Government of New South Wales that the claimed land, or any Crown land, was needed or likely to be needed as residential lands; and/orc. that, in any event, Mr Sean O'Toole of*

*Landcom did not make any relevant decision that the claimed land be used as residential lands, or was needed or likely to be needed as residential land."***C. Issues to be determined** 12 In summary, therefore, the following issues arise for determination:***Conclusive certificates – the Notice of Motion***(a) Is the Minister restrained from tendering the Nature Conservation certificates within the meaning of s. 36(8)(b) of the *ALRA* on the grounds of invalidity for jurisdictional error for asking the wrong question? (b) Is the Minister restrained from tendering the Nature Conservation certificates within the meaning of s. 36 (8)(b) on the grounds of invalidity for failing to take into account mandatory relevant considerations?(c) Is the Minister restrained from tendering the Residential Land certificates within the meaning of s. 36 (8)(a) on the grounds of invalidity for jurisdictional error?(d) Is the Minister restrained from tendering the Residential Land certificates within the meaning of s. 36 (8)(a) on the grounds of invalidity for failing to take into account mandatory relevant considerations?***Substantive claim***(e) At the date of claim was any part of the subject land in ALCs 6465, 6323, or 6324 not claimable Crown land within the meaning of s. 36(1)(b1) of the *ALRA*, on the ground that it was needed or likely to be needed as residential lands? (f) At the date of claim was any part of the subject land in ALCs 6465, 6323, or 6326 not claimable Crown land within the meaning of s. 36(1)(c) of the *ALRA*, on the ground that it was needed or likely to be needed for an essential public purpose, nature conservation? (g) At the date of claim was any part of the subject land in ALC 6465 not claimable Crown land within the meaning of s.36(1)(b) of the *ALRA*, on the ground that it was lawfully used or occupied?(h) The location of an 11 Kv transmission line erected in 1963: It was conceded by the Applicants that some easement arrangement is needed pursuant to s.36(5A) of the ALRA, and the court is asked to exercise the power to impose an appropriate condition on any grant (pursuant to *Wanaruah Local Aboriginal Land Council v Minister Administering the Crown Lands Act* [2001] NSWLEC 20 ("*Wanaruah*")).**D. The claimed lands**13 Berowra and Berowra Heights form an irregularly shaped urban development north of Hornsby, and west of a land corridor through which pass the old Pacific Highway, the main northern Sydney-Newcastle railway line, and the F3 freeway.14 To the east of that corridor are lands comprising part of Ku-ring-gai Chase National Park and to the west of the Berowra township is the Berowra Valley Regional Park ("BVRP"), which was formally created under the

National Parks & Wildlife Act 1974 ("*NPW Act*") in 1998, and lies on the western bank of Berowra Creek, the northern section of which is known as Berowra Waters. To the north of Berowra is Berowra Reserve (Reserve 77011), and north of Berowra Reserve is Muogamarra Nature Reserve. ***ALC 6465***15 ALC 6465 concerns the largest area of land involved in this matter, and the most complex claim. The area claimed in ALC 6465 is part of Berowra Reserve known as Berowra Park and is an irregularly shaped piece of land abutting the northern boundaries of Berowra Heights (Turner, Wideview and Woodcourt Roads). Part of this land was/is apparently used by the public for recreation and bushwalking (See affidavits of Polly Thompson, Patricia Pike, and Carol Nolder, plus *Exhibit M3*, to which evidence I will return).16 The Minister refused ALC 6465 on the grounds that, at the date of claim, 19 May 2000, and with reference to a plan attached to the Statement of Issues in matter no.31515 of 2005: *1. that part of the land shown in yellow background and green hatching was needed or likely to be needed for the essential public purpose of nature conservation.2. that part of the land shown in yellow background and orange hatching was needed or likely to be needed as residential lands.3. the whole of the land was lawfully used and occupied by Hornsby Shire Council.4. the whole of the land was lawfully used and occupied by the general public for the purpose of public recreation and bush regeneration*.17 Part of the ALC 6465 land is traversed by the 11kV transmission line referred to in par [12](h) above. (See *Exhibit M5*, vol 3 fol.1247)***ALC 6323 and ALC 6324***18 ALC 6323 and ALC 6324 concern much smaller, generally rectangular areas of land, situated quite close together and very close to the Pacific Highway (The Gully Road). The Applicants no longer press the claim for the area within the ALC 6323 lands known as "*Sean's Corner*" (T25.03.08, p5 LL45-46).19 The Minister refused ALC 6323 on the grounds that, at the date of claim, 22 February 2000, that part of the land shown in yellow background and green hatching on the plan filed with the statement of issues in matter no.31513 of 2005 was needed, or likely to be needed, for the essential public purpose of nature conservation, and that part shown in yellow background and orange hatching was needed, or likely to be needed, as residential lands.20 The Minister refused ALC 6324 on the grounds that, at the date of claim, 22 February 2000, the land shown in yellow background and orange hatching on the plan filed with the statement of issues in matter no.31516 of 2005 was needed or likely to be needed as residential lands

within the meaning of s 36 (1)(b1) of the *ALRA*.***ALC 6326***21 The fourth subject area of land is that involved in ALC 6326 at the southern extremity of the Berowra urban development (Greenview Parade). The Minister refused this claim on the grounds that, at the date of claim, 22 February 2000, the land shown in yellow background and green hatching on the plan filed with the statement of issues in matter no.31514 of 2005 was needed or likely to be needed for the essential public purpose of nature conservation.**E. The Statutory Scheme in more detail*Generally***22 The Preamble to the *ALRA* expresses the remedial nature of the legislation, establishing a compensatory regime for Aboriginal people aimed at redressing the impact of dispossession on Aboriginal people in New South Wales: "*WHEREAS:(1) Land in the State of New South Wales was traditionally owned and occupied by Aborigines:(2) Land is of spiritual, social, cultural and economic importance to Aborigines:(3) It is fitting to acknowledge the importance which land has for Aborigines and the need of Aborigines for land:(4) It is accepted that as a result of past Government decisions the amount of land set aside for Aborigines has been progressively reduced without compensation*".23 The intention of the Act as expressed in the Preamble has been interpreted as beneficial and remedial legislation: *Minister for Natural Resources v New South Wales Aboriginal Land Council and Another* (1987) 9 NSWLR 154, by Kirby P at 157. 24 The beneficial and remedial character of the legislation means that, "*exceptions to the right to make claims on Crown land should be narrowly construed*" (*Minister Administering the Crown Lands Act v Deerubbin Local Aboriginal Land Council [No.2]* [2001] NSWCA 28; (2001) 50 NSWLR 665 ("*Maroota*") at 674; *NSW Aboriginal Land Council v Minister Administering Crown Lands Act* [2007] NSWCA 281; (2007) 157 LGERA 18 ("*Wagga Wagga*") at [21] and [25]).***Section 36 – claims***25 Section 36 of the *ALRA* establishes the land claims regime by which the aims of the legislation can be achieved. 26 The definition of "*claimable Crown lands*" in s.36(1) relevantly includes lands that: "*(a) are able to be lawfully sold or leased, or are reserved or dedicated for any purpose, under the Crown Lands Consolidation Act 1913 or the Western Lands Act 1901,(b) are not lawfully used or occupied,(b1) do not comprise lands which, in the opinion of a Crown Lands Minister, are needed or are likely to be needed as residential lands,(c) are not needed, nor likely to be needed, for an essential public purpose*" ...27 Section 36(1) then defines "*Crown Lands Minister*" to mean "*the Minister for the time being*

administering any provisions of the Crown Lands Consolidation Act 1913 or the Western Lands Act 1901 under which lands are able to be sold or leased". Subsections (2), (3) and (4) deal with the making of claims, and then subsection (5) requires the Minister to grant [s.36(5)(a)] or refuse [s.36(5)(b)] claims, on the basis of his/her being "*satisfied*" on the question of "*claimability*". Subsection (5A) deals with the imposition by the Minister of a condition to which the Land Council agrees, and subsection (14) entitles the Land Council to require the Minister to provide information regarding Crown Lands.28 Section 36(6) grants an Aboriginal Land Council the right to appeal to the Court against a refusal under s.36(5)(b). On such an appeal, the Minister bears the onus of satisfying the Court that the land is not claimable Crown lands (s.36(7)) (*New South Wales Aboriginal Land Council v Minister Administering the Crown Lands (Consolidation) Act and the Western Lands Act* (1988) 14 NSWLR 685 *("Winbar")*).29 If the Minister fails to discharge the onus of proof to satisfy the Court that the claimed land is not "*claimable Crown land*", the claimant is entitled to have that part of the land that is claimable Crown land transferred to it. The Court is bound to transfer that land to the Land Council (*Winbar* per Hope JA at 692D-693D). 30 The elements of s.36(1) are to be determined at the date of claim. (*Winbar; Minister Administering the Crown Lands Act v Deerubbin Local Aboriginal Land* Council (1998) 43 NSWLR 249 ("*Castlereagh Nature Reserve*"); *Maroota*. In these proceedings the relevant dates of claim are 22 February 2000 (ALCs 6323, 6324, and 6326) and 19 May 2000 (ALC 6465).31 The relevant principles regarding the application of s.36(1)(c) – "*not needed, nor likely to be needed, for an essential public purpose*" – were usefully summarised by Jagot J in *Dorrigo Plateau Local Aboriginal Land Council v Ministering Administering the Crown Land Act* (2007) 155 LGERA 307 at [10]. The question of whether land is not needed or not likely to be needed for an essential public purpose is one of fact (*Winbar*), which "*is essentially a question of the view held by the government on the day the claim was made*" (*Castlereagh Nature Reserve* per Meagher JA, who dissented on other grounds, at 252C). The relevant search is for an "*expression of political will*" to declare an area to be a national park (*Maroota* at [62], [73] and [74]). Likewise, the question of whether the claimed land was, at the relevant time, lawfully used or occupied is a question of fact (*New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (The Department of Education Claim)* (1992) 76 LGRA 192

("*Department of Education*")). For a discussion on the differences between *use* and *occupation* see Clarke JA in *Minister Administering the Crown Lands (Consolidation) Act v Tweed Byron Local Aboriginal Land Council* (1992) 75 LGRA 133 ("*Tweed Byron*"), and Jagot J's discussion in *NSW Aboriginal Land Council v Minister Administering the Crown Lands Act* [2008] NSWLEC 35 ("*Shoalhaven*").32 For the land to be "*occupied*" for the purposes of s.36(1)(b), there must be some physical occupancy over at least part of the land, as opposed to constructive occupation. It must be occupied to more than a notional degree (*Daruk Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (1993) 30 NSWLR 140 ("*Daruk*")). Mere proprietorship is insufficient (*Tweed Byron*). Likewise, the mere exercise of control over or maintenance of the land without any occupation is insufficient (*Department of Education*; *Darkingung)*. However, *"continuous physical presence on every part of the land does not have to be shown to establish occupation."* (*Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (1993) 31 NSWLR 106 ("*Nowra Brickworks*")).33 "*Use*" for the purposes of s.36(1)(b) must be to more than a notional degree (*Daruk*; *Nowra Brickworks*). The fact that land is reserved for a particular purpose is not sufficient to establish that it is lawfully "*used*" within s.36(1)(b). Something more is needed, and the Court has to be satisfied that there was actual use at the date of the claim, that is, not just a contemplated or intended use (*Wagga Wagga*).34 "*Needed*" means "*required"* or *"wanted*". The Court does not have to "*second guess*" the government. The only question is whether the purpose was an essential public purpose and, if so, whether the government "*required*" or "*wanted"* the subject land for that purpose (*Castlereagh Nature Reserve* at 254D).35 "*Likely*" means "*real or not remote chance*" or "*real chance or [real] possibility*", not "*more probable than not*". The essentiality required by s.36(1)(c) counter-balances the implication of a beneficial construction to which the *ALRA* would be otherwise entitled (*Maroota*; *New South Wales Aboriginal Land Council v The Minister Administering the Crown Lands Act* (2007) NSWLEC 481 ("*Evans Head*") at [17]). 36 Post-claim evidence may be logically probative in determining whether the land was needed or likely to be needed for residential lands or an essential public purpose or was lawfully used or occupied. Post claim evidence may be used subject to the so-called *Falconer* principle, in that such evidence may not be used to "*prove a hindsight, but to confirm a foresight*" (*Housing Commission of*

New South Wales v Falconer and Others [1981] 1 NSWLR 547 at 558 ("*Falconer*")).***Section 36(8) – Conclusive certificates***37 Section 36(8) of the *ALRA* provides:"*A certificate being: (a) a certificate issued by a Crown Lands Minister stating that any land the subject of a claim under this section and specified in the certificate is needed or is likely to be needed as residential land, or(b) a certificate issued by a Crown Lands Minister, after consultation with the Minister administering this Act, stating that any land the subject of a claim under this section and specified in the certificate is needed or likely to be needed for an essential public purpose,shall be accepted as final and conclusive evidence of the matters set out in the certificate and shall not be called into question in any proceedings nor liable to appeal or review on any grounds whatever."*38 The *ALRA* comes within the Ministerial responsibility of the Minister for Aboriginal Affairs, so s.36(8)(b) requires that Minister to be consulted by the Crown Lands Minister before a certificate is issued under that provision.39 Both parties agree that certificates issued pursuant to s.36(8) are taken to be final and conclusive, and so should be given a strict construction: *Woolworths Ltd v Pallas Newco Pty Ltd and Another* [2004] NSWCA 422; (2004) 61 NSWLR 707 at [69]; *Plaintiff S157/2002 v The Commonwealth of Australia* (2003) 211 CLR 476 at [72]. However, s.36(8) does not protect any jurisdictional error made by the Minister in issuing a certificate. See Jagot J's judgments in *Jerrinja Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (2007) 156 LGERA 65 ("*Jerrinja*") at [81] and [119], and *NSW Aboriginal Land Council v Minister Administering the Crown Lands Act (No 2)* [2008] NSWLEC 13 ("*Nambucca 2008*") at [95], in both of which Her Honour refers in this regard to *Craig v State of South Australia* [1995] HCA 58; (1995) 184 CLR 163 and *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323.40 It appears also to be common ground that there is authority for the proposition that the Court must differentiate between the effect of a certificate issued under s.36(8)(a) and that of a certificate issued under s.36(8)(b). *Nambucca 2008*.41 A certificate issued under s.36(8)(b) operates to determine conclusively the factual issue of claimability at the heart of an appeal involving the essential public purpose of nature conservation. If the certificate is not accepted into evidence, the Minister still has the onus of proof that at the date of claim the lands were needed or likely to be needed for an essential public purpose of nature conservation.42 Section 36(8)(a)

allows the Minister to certify only to the question of need or likely need as residential lands. If the Certificates are not accepted the Minister will have to prove both that the Minister (ie the Crown Lands Minister of the day) held that opinion, and prove also that part or the whole of the land claimed was needed or likely to be needed as residential lands. The Minister must still satisfy the court that the Minister held an opinion to that effect as at date of claim (*Nambucca 2008* at [67]). The Minister's submissions argued that the effect of a certificate issued under s.36(8)(a) is to protect the opinion referred to in s.36(1)(b1) from challenge because it is final and conclusive evidence of the fact asserted in the certificate. **F. The Evidence1. The factual evidence Pre the first date of claim, 22 February 2000*1977 Cabinet Minute***43 A Cabinet Minute dated 5 April 1977 submitted by the then Minister for Housing (Mr Mulock) provided the charter for the relationship between the then Land Commission of New South Wales (known as "*Landcom*"), which came within his portfolio, and the Department of Lands that had responsibility for Crown Lands (*Exhibit M4,* tab 12). 44 Cabinet considered the Minute at a meeting held on 4 October 1977 (*Exhibit M4,* tab 11). A comprehensive decision was made, including that "*in the interest of co-ordinated urban development and marketing strategies, the oversight of the development and production of home sites on the Government's behalf in major urban centres*" should be the responsibility of one authority, the Land Commission. Crown lands in those regions available for home site development were to be transferred to the Land Commission as and when it required them. The Land Commission was to pay compensation once the home sites were disposed of. In organising the development and disposal programme, the Land Commission was to have regard to, and consult with the Treasury in regard to, "*the need for maintaining an appropriate flow of revenue to the Consolidated Revenue fund*". 45 On or about 7 October 1977 (actual date unclear) Premier Wran issued that Cabinet decision formally, and there is evidence before the Court on this appeal that that decision largely remained operative in 2005 (if not later). (See *Exhibit M4*). The *Housing Act* 1985 established "Landcom" as a statutory corporation, and the *Landcom Corporation Act* 2001 made it a statutory state owned corporation from 1 July 2001.***Berowra land and Landcom***46 On 3 September 1954, Reserve 77011 was created for public recreation purposes. It covers the northern part of ALC 6465 (*Exhibit M5,* vol 4, fol 2). On 20 October 1954, the Hornsby Shire Council ("*Council"*) was

appointed **trustee** of the reserve (*Exhibit M5,* vol 4, fol 3). The reserve was renamed on 22 August 1997 and a private trust appointed (*Exhibit M5*, vol 4, fol 256).47 The BVRP was created in 1998 and in November 1998 the trust of that park sought to have adjoining Landcom sites of high conservation significance incorporated into the park. 48 Landcom was already active in the Berowra/Hornsby region. There is some evidence that there was consultation regarding the Berowra Land between Landcom and Treasury. Landcom may have identified in the latter part of the 1990's the possibility of some 500 sites to be developed in the Berowra region and the Treasury at some point appears to have set a target for revenue realisation from the development of such land. 49 The Council and a highly organised group of local residents, United Residents Action Group ("URAG") expressed their concern about Landcom's "*proposed development ... at Berowra*". They were concerned about over-development of land in the area, and potential loss of sensitive bushland. 50 A mediation meeting was arranged between Landcom, URAG and the Council on 14 May 1997. An "*agreement*" was executed at this meeting that included an undertaking to appoint a consultant (at Landcom's expense) to conduct an ecologically sustainable development study ("*ESD study*") of all Crown Land home sites in Hornsby Shire with two exceptions (*Exhibit M2,* tab 1). An undertaking was given that Landcom would refrain from the development of nominated sites until the study was completed, and "*all parties agree[d] to act in good faith to achieve a resolution*".51 The then Minister responsible for Landcom, Mr Knowles, issued a press release the next day announcing the agreement (*Exhibit M2*, tab 2).52 A "*mediation meeting*" described as the "*second mediation meeting*" was held at Hornsby Library on 23 May 1997 and another written agreement was made on that date (*Exhibit M2,* tab 3). That agreement notes a decision to invite NPWS to become a member of the steering committee for the ESD study. NPWS was unable to be present at the 23 May meeting.53 Another mediation agreement dated Friday 4 July 1997 was concerned with the preparation of the ESD study brief (*Exhibit M2,* tab 5). A letter from Landcom's Mr Sean O'Toole to the then local MP Stephen O'Doherty dated 14 November 1997 confirmed the engagement of Jeff Angel, Director of the Total Environment Centre ("*TEC*"), to do the study. 54 O'Toole sent O'Doherty a copy of the draft brief (*Exhibit M2*, tab 6). Those documents list streets in Berowra, Hornsby Heights and Asquith: "*[I]n general the sites adjoin or are near to*

a series of reserved Berowra Valley bushland park, Ku-ring-gai Chase National Park, Muogamarra Nature Reserve, Marra Marra National Park. At least two are near areas that have been the subject of aboriginal land claims. They are (except for one site) in the Hawkesbury-Nepean catchment and, on a smaller scale, most of them are in the catchment for Berowra Creek" (*Exhibit M2,* tab 6, fol 22). This document is dated 12 November 1997, well before the ALCs involved in this matter were made.

The ESD study 55 The ESD study took 2 years to complete (see *Exhibit M2*), and surveyed all 18 crown land sites zoned for urban residential purposes, having an estimated total potential of 563 lots. During that time (in April 1999) the Deputy Premier (Dr Refshauge) took over from Mr Knowles as Minister responsible for Landcom. Both relevantly held simultaneously both the Urban Affairs and Planning, and Housing portfolios.56 A letter written by Mr William Sarkis, the relevant development officer of Landcom, dated 4 November 1999, notes that the four final studies were submitted in October 1999 for review by the steering committee. TEC's recommendations were received by O'Toole on or about 12 November 1999 (*Exhibit M2,* tab 18, fol 655-840). 57 Mr Sarkis reported to Mr O'Toole on his assessment of the impact of the TEC's recommendations on the Crown Lands home sites programme in Hornsby (*Exhibit M2,* tab 20, fol 842-846). The TEC review of the 563 potential lots produced a "*practically and economically developed*" lot yield of 58, and Landcom's review of that lot yield resulted in a lot yield of 23 in three different locations. This lot reduction of 540 represented a revenue loss to the government of $99-100M. The rest of the relevant land studied was recommended by TEC (in the ESD Study report) to be added to Muogamarra Nature Reserve (ALC 6465) or BVRP (ALC 6326), or to be reserved under the *CLA* as local bushland reserve (ALCs 6323 and 6324). Sarkis had told Treasury on 4 November that Landcom had "*consistently raised concerns, with TEC, about the studies and we still have reservations about the intended application of the ESD principles. Nevertheless, Landcom feels constrained to abide by TEC's recommendations*", despite the significant loss of revenue involved. 58 The ESD study steering committee had met on 5 November 1999. Landcom is recorded as expressing concern at that meeting that the studies "*had left gaps in relation to economic issues which should have been considered*". The minute from the meeting continues: "*notwithstanding these reservations Landcom reaffirmed the progress that had been made to*

date through the goodwill and intent of the Committee and was of the view that the studies could be considered satisfactorily completed" (*Exhibit M2,* tab 17, fol 652-654*;* O'Toole affidavit, 26 April 2007, par 28). The committee unanimously acknowledged that the studies had been satisfactorily completed.59 Sometime between 5 and 19 November 1999 Mr O'Toole is agreed to have made the relevant decision to accept the TEC recommendations in the ESD study (*Exhibit A1*, tabs 6-7) – that was conceded by the Minister in his responses to questions put to him under s.36(14).60 On 15 November 1999 Treasury sought a meeting with Landcom "*to gain an understanding of the content of the final report of the study and Landcom's response*", and "*to understand Landcom's view of the implications of the report for Landcom at Hornsby; Landcom's other projects; NSW Government land development activity; and private sector land development and activities in NSW and elsewhere*" (*Exhibit M2,* tab 19, fol 841).61 Mr O'Toole sent a memorandum to senior Treasury officers on 18 November 1999, and a briefing note to his Minister on 19 November 1999. Mr O'Toole deposes (at par 34 of his 26 April 2007 affidavit) that he discussed the briefing note with Minister Refshauge at one of their regular meetings. He does not "*recall Dr Refshauge querying or disputing the contents*". He also deposes (par 35) to a conversation at around that time with the Treasury officer Dr Gul Izmir where she attacked him for not consulting Treasury much earlier. "*You do not have authority to agree to a plan that effectively sterilises this land*" to which he responded "*this land cannot be developed due to its conservation value and the attitude of the local residents and council*".62 Mr O'Toole concedes that he should have consulted Treasury earlier, but thought that the decision to accept the recommendations of the ESD study "*would*" stand (par 36). He accepted that the Treasurer might override his decision, but he considered that that was highly unlikely, given the conservation value of the land.63 On or about 2 December 1999, Sarkis and O'Toole met two Treasury officers. The Treasury's prime concern was the revenue impact and Landcom wanted the government to get public credit for its decision to conserve significant land. Landcom was suggesting the land be transferred to Council and/or National Parks. 64 On or about 16 December 1999 the Landcom officers discussed the concern expressed by URAG about the time taken by deliberation on the TEC report within government. URAG thought that the Minister would rubberstamp the conclusion of the last mediation meeting. URAG's Chairman, Ken Fox, feared a reversal of

Landcom's acceptance of the recommendations, and advised he was feeling pressure from the community for more public information on the studies. 65 In January or February 2000 Treasury suggested to O'Toole that there be a meeting between the Deputy Premier and the Treasurer, but that meeting did not take place until 29 March 2000 (see par 42 of the affidavit). **2. The factual evidence between the two dates of claim, 22 February 2000 and 19 May 2000**66 Mr O'Toole's written record of the meeting on 29 March states that he reported to the Treasurer that the lands were particularly sensitive and that he had recommended TEC's Angel, because if Angel did recommend some land be developed the recommendation would have credibility within the local community. The written record notes that "*At the end of the discussion the Treasurer indicated that he was happy*" (*Exhibit M2*, tab 25, fol 854).67 On 31 March 2000, Mr O'Toole formally recommended to his Minister that he announce the outcome of the study. Significantly, the document includes this item: "*consideration of aboriginal issues: N/A*" (*Exhibit M2*, tab 26, fol 855). Treasury wanted to look at the draft press release before it was submitted to Minister Refshauge.68 On 13 April 2000 (par 46, O'Toole affidavit of 26 April 2007) Mr O'Toole attended a meeting with the Mayor of Hornsby and the members of URAG, which agreed the Minister should take the first opportunity to make the announcement and should seek some involvement with the Council and URAG and the general community (*Exhibit M2*, tab 28, fol 857).69 A Hornsby Council officer sent Mr O'Toole on 10 May 2000 some draft press releases putting quite a significant slant on the decision (*Exhibit M2*, tab 29). The outcome is described as the inclusion of 563 housing blocks into the BVRP for preservation as urban bushland for future generations. "*URAG identified the implications of development of these sites in March 1997, and quickly acted to blockade one of the sites where development was imminent with the bulldozer on site ready for land clearing*". It noted that 5000 handwritten protest letters had been sent.**3. The factual evidence post the later date of claim, 19 May 2000**70 On 25 May 2000 the Department of Land and Water Conservation ("DLWC") advised the NPWS that: *The ESD study of Crown land in the Hornsby area was commissioned without reference to this office and the inherent requirements of the Crown Lands Act 1989. The ESD Study does not appear to satisfy the land assessment provisions of the Crown Lands Act, a legislative pre-requisite before the land can be dealt with under the Crown Lands Act however the study will*

be of assistance should land assessment ultimately be required.71 Dr Andrew Refshauge, as the Deputy Premier and the then Minister for Urban Affairs and Planning, and Minister for Housing (rather than in his capacity as also Minister for Aboriginal Affairs), made a media announcement on 29 June 2000 that the government would dedicate 60 hectares of land at Berowra as open space. No particulars were given as to how the land was to be dedicated. The value of the land (c.f. the revenue lost) was wrongly noted at $90M instead of $300M, and the statement contained some other inaccuracies (*Exhibit M2*, tab 31, fol 865). 72 On 24 October 2000 the DLWC was formally advised that Landcom had withdrawn its "*development interest*" in relation to some of the home site land. This appears to be the first time the Department of Lands had been involved in the study and its subject matter. Mr Sarkis's summary document of 20 November 2000 records that 13 sites would be returned to DLWC for incorporation into adjacent parks and reserves or dedication to Council as public reserve. Five sites would be the subject of downsized development totalling 34 residential allotments. Any residue land created from the sites proposed to be developed would also be returned to DLWC for dedication. 73 On 21 December 2000, the DLWC, in response to Landcom's proposal to develop, advised in a memo: *On the assumption that the land to which you refer is Crown land, it should be noted that it is not the prerogative of Landcom and/or the Service to enter into negotiations for the future disposition of the land without consultation with, and the consent of, this Department. The Department is prepared to consider, on its merits, any proposals for inclusion of the lands in the Berowra Valley Regional Park. No consideration will, however, be given to any proposal until such time as the Service substantiates its need for the land and provides complete and accurate details of the land from its own resources*. (*Exhibit A4,* fol 14)74 On 10 January 2001 the DLWC advised Landcom: *The Department will also make a note of the sites that Landcom does not wish to develop if you would let us know the lot and DP numbers for the affected properties. The Department is not in a position to incorporate these sites into adjoining Nature Reserve's (sic) and National Park without first completing a land assessment, subject to our legislation. The National Parks and Wildlife Service may apply for compulsory acquisition, if required, for certain sites*. (*Exhibit A4*, fol 15)75 On 25 May 2001, the DLWC advised the NPWS: *The ESD study of Crown land in the Hornsby area was commissioned without reference to this Office and the inherent*

requirements of the Crown Lands Act, 1989. The ESD Study does not appear to satisfy the land assessment provisions of the Crown Lands Act, a legislative pre-requisite before the land can be dealt with under the Crown Lands Act, however, the Study will be of assistance should land assessment ultimately be required. (*Exhibit A4,* fol 18) 76 During the latter half of 2001 the Council and various State government agencies expressed their views on some of the ALCs:· In July 2001, NPWS communicated that it was not interested in the ALC 6323 land. · In August 2001 the Hornsby Council communicated that it was not interested in the ALC 6465 land, except for the land already reserved as 77011. In May 2000 it had disavowed any interest in the ALC 6326 land (suggesting it should be added to the BVRP, but in August 2000 the NPWS did not see that as a priority).· In the same month DLWC recommended the grant of ALC 6326, and NPWS, while expressing no objection to ALC 6465, said it would like to manage that area cooperatively with the Aboriginal Land Council. Landcom, apparently verbally, expressed "*no objection*" to the grant of ALC 6326.· In October 2001 NPWS said it had no objection to ALC 6324.· In November 2001 DLWC recommended the grants of both ALC 6323 and ALC 6465. The DLWC also noted:*The fact that the land has been identified in the Landcom ESD Study as being partly suitable for development and the northern part of the claim is residentially zoned is an acknowledgment that the land has potential for development, not that the land is needed for residential purposes. (Exhibit A4,* fol 40)77 On 6 March 2002 DLWC questioned Mr O'Toole over the ESD study and he formally replied on 16 April 2002. 78 On 17 July 2002 the Director General of DLWC complained to his Minister that DLWC was not involved at any stage, nor consulted by any relevant party, regarding the decision reported in the press release of 29 June 2000. The Court also notes that no involved party appears to have been made aware of the ALCs while the inter-agency dialogue went on following the ESD study.79 On 2 December 2002 the then Minister for Land and Water Conservation (Mr Aquilina) wrote to Dr Refshauge indicating that DLWC needed to clarify "*one final matter*" before making recommendations to him on the ALCs – the question of whether anything had occurred, which might represent a decision by the Executive Government relevant to the claimed lands, **before** the claims were made. He specifically referred to the Court of Appeal's decision in *Maroota* and suggested a meeting (see *Exhibit A2* and *Exhibit A4*, fols 76-7).80 On 12 December 2002 Dr Refshauge replied that

he was seeking detailed advice about "*any consideration given to the ... Claims within my portfolio areas*" (note his use of the plural). Counsel (Mr Michael Wright) provided the Deputy Premier with an opinion regarding the status of his 29 June 2000 public statement on 23 September 2003. Dr Refshauge eventually replied to Mr Aquilina's letter on 9 February 2004: *"At the time I made the public statements I had not been advised of the existence of the seven Aboriginal land claims that had been lodged with the Registrar ... I have investigated the matter in response to the letter from your predecessor of 2 December 2002 and I have taken appropriate advice. I am now able to inform you that public statements do not have any bearing on your capacity to determine these land claims and confirm there was no decision of the Executive Government before the eight Aboriginal land claims were made to the effect that the lands claimed were needed for nature conservation*". (*Exhibit A4,* fol 106-107)81 By that time Dr Refshauge had left the Housing and Planning (or Urban Affairs and Planning) portfolios to become (on 2 April 2003) Minister for Education and Training, while remaining Deputy Premier and Minister for Aboriginal Affairs, and Mr Kelly (also on 2 April 2003) had become Minister for Lands.**4. Determination of the Claims**82 Between July and October 2004, DLWC appear to have been preparing formal recommendations that ALCs 6323, 6324 and 6326 be granted, and in January 2005 the Department approached the MLC regarding a possible easement over the ALC 6465 land in favour of Energy Australia. The MLC agreed on 15 March 2005 and the Department prepared a recommendation for the granting of ALC 6465. (See *Exhibit A2* and *Exhibit A*4 at fols 108-201, and *Exhibit M5*, vol 4, fols 430-434).83 DLWC advised the Minister in a brief in relation to ALC 6465 on 30 March 2005 (*Exhibit A4* fol 197):*Accordingly, advice was sought from Dr Refshauge in relation to his involvement in the Government's commitment, through the media release, to implement the recommendations of the ESD Study. In response Dr Refshauge commented that the public statements do not have any bearing on the Minister's capacity to determine the claims and confirmed that there was no decision of the Executive Government before the claims were made to the effect that the land was needed for nature conservation. In light of Dr Refshauge's response it is apparent that the land in Claim 6465 is not needed for an essential public purpose related to environmental protection/nature conservation and remains claimable from this aspect*. 84 On 20 October 2005, NPWS noted that it

did not want the ALC 6326 land for addition to the BVRP. 85 On 24 October 2005, the Department recommended the **refusal** of all 4 claims. The relevant brief written by DLWC refers to the Deputy Premier's s 29 June 2000 media release. It makes no reference to Dr Refshauge's letter of 9 February 2004 putting the statement of June 2000 into some context. The Minister signed the refusals on 25 October 2005.86 On 16 December 2005 the Class 3 proceedings now before the Court (but including also ALC 6327) were commenced. They proceeded slowly and the Minister began to consider issuing s.36(8) certificates at the end of 2006. The Applicants made written submissions to him during 2007 and a scheduled hearing of the appeals 5-8 November 2007 was vacated on 26 October 2007, some certificates having been issued on 22 October 2007. The March 2008 hearing dates were set on 16 November 2007 and further certificates were issued on 17 January 2008.**5. The Intra-governmental arrangements for Crown Lands Home Sites**87 I have earlier referred to arrangements decided by State Cabinet in October 1977 regarding Landcom's role in the development of Crown Lands home sites – see pars [43]-[45] above. As I disclosed during the hearing, I have some knowledge of these matters from my time as Minister responsible for Landcom 1980-83.88 The evidence regarding the subsistence of those arrangements in at least 2005, to which I adverted in par [45], is a three-page document (in *Exhibit M4*) which is unsigned, and undated. Clearly it was prepared at some time prior to 17 October 2005, and refers to the 1977 Cabinet decision. It was faxed by a Department of Lands officer to a Landcom officer and is titled "*Crown Lands available for Residential Development*". 89 The document refers to a meeting between representatives of the two organisations and speaks of "*recent events*" necessitating the taking of an opportunity "*to re-affirm the roles of each organisation with respect to the development of Crown land for residential purposes within the Sydney area*". The document reads "*Notwithstanding subsequent changes of government since that date, the essence of the relationship between Landcom and the Crown Lands Service remains unaltered*". (The government changed in 1988 and again in 1995). The primary role of Landcom in coordinating the development and production of home sites on the government's behalf and the areas where available home sites are to be identified, are repeated. The document then continues "*It is appreciated that after some 20 years, there may have been some variance to the above doctrine, however the general thrust of the 1977 directive remains applicable today*". (These remarks

date the document to be somewhere presumably between the change of government in 1995 and the faxing of the copy in 2005). 90 The document also lists the obligations of each organisation. The words "*identified*" and "*available*" continually appear in quotation marks. Collaboration between the two organisations is elaborated in detail and, relevantly, the following obligation of Landcom is identified: *"With any preliminary investigations/negotiations affecting Crown land, Landcom shall not make any undertaking/commitment to a third party without the prior written consent (sic) of the Crown Lands Service"*.91 These arrangements clearly deal with use of Crown land for "*home sites*" (ie, residential development). The objects of Landcom under the *Housing Act* 1985, which amalgamated the then separate Housing and Land Commissions into one Department of Housing, with Landcom as a component, include the following:*(f) to promote orderly and economic urban development and the adequate supply of affordable and suitably located land for housing at the minimum practicable cost to consumers,(i) to encourage social mix and the integration of different housing forms in existing and new communities,(j) to encourage the planning and development of new urban areas as communities with a full range of appropriate services and facilities available in the shortest practicable time*.92 The 1979 *ALRA*, 1985 *Housing Act,* and the 1989 *CLA* were all legislated after the 1977 arrangements, but do not appear to have altered them in any material respect.**6. Mr O'Toole's evidence**93 Reference has already been made (at pars [50]ff) to the role played in this matter by Mr Sean O'Toole, Landcom's Managing Director (or equivalent, from 1996). Mr O'Toole gave oral evidence to supplement his affidavit (of 26 April 2007), read in the substantive proceedings and not on the Notice of Motion. In his role as "*head*" of Landcom he had ultimate management responsibility for the use of the subject lands for residential purposes, and he saw himself as operating under the arrangements detailed in the preceding section of this judgment.94 Mr O'Toole had frequent meetings with his portfolio Minister from the time he commenced in the job (1996), despite changes in the identity of his Minister during the relevant period (Mr Knowles April 1995-April 1999, and Dr Refshauge April 1999-April 2003). As noted above (in par [71]), when Dr Refshauge was his Minister he was, as well, Deputy Premier and Minister for Aboriginal Affairs. Under cross-examination Mr O'Toole conceded that, on average, these meetings occurred less frequently than on a monthly basis, but he believes that at

one of his regular meetings with Minister Knowles they would have discussed his committing "*the NSW government to accept and implement the recommendations made in the ESD study"*. 95 There is no evidence that Mr Knowles was empowered by the government to so authorise him, or even that he did in fact so authorise him, and no evidence that such authority came from elsewhere in the government. No evidence has been tendered consistent with the requirement of s.49 of the *Interpretation Act* 1987 that delegations "*be in, or be evidenced by writing*". Mr O'Toole thought he could bind the government, but whether he could is a complex question of mixed law and fact. His personal subjective understanding of discussions with his Minister (Knowles when the study commenced, and Refshauge when its findings were received) is not determinative of that question of power. He certainly does not derive such power merely from the subsistence of the 1977 arrangements down through the years.96 The Crown Lands Home Site programme was conducted on behalf of the Treasury. In cross-examination by Dr Griffiths, Mr O'Toole conceded that it would have been wiser to have spoken to Treasury with regard to his undertaking, given he was effectively an agent of Treasury and that he was "*answerable and accountable*" both to his Minister and Treasury. During his cross-examination the following exchanges occurred (see T26.03.08, p94-108 – reprinted here as recorded): **(a) T. p96 L24-p97 L4***Q. You say in paragraph 21 that it was your understanding that in you representing Landcom and agreeing to that matter that you were making a commitment on behalf of the New South Wales government to accept and implement the recommendations made in the study, is that correct?A. That's correct.Q. When you say there that you were making a commitment on behalf of the New South Wales government, do you mean to suggest to his Honour that it was your understanding that you had the power or authority to bind the New South Wales government to a legally enforceable agreement or are you using the word "commitment" there in a sense other than a legally enforceable agreement?A. You need to put that into context. The issue was discussing with parties who were totally opposed to any development an undertaking to work with them cooperatively to see whether the land should or should not be developed because of its conservation value. So therefore my agreement was, yes, that whatever was the outcome of that study that I on behalf of the government would accept that. My role was in fact to try to get that crown land developed and the process was to deal with the parties who were opposed to the development in a consultative*

*way to try and get a compromise outcome.Q. Let me just ask you a few more questions then about your subjective understanding of what it is that you were binding the New South Wales government to, is it your evidence that in entering into the agreement that you refer to in paragraph 20 that you believed that if a recommendation was made by the study to the effect let's say that 58 lots were suitable for development that you were duty bold at law to develop those 58 lots?A. I have to - to be honest I didn't consider it in those terms. I considered the undertaking as abiding by what the report said. So if the report said that only 58 could be developed then I understood that I had agreed to abide by that decision.***(b)* T.p100 L25-L39***Q. When you say it was your subjective understanding that you were committing the New South Wales Government to implement the recommendations of this study did you consider when you read that recommendation that you were under a legal obligation - let me withdraw that, that the New South Wales government was under a legal obligation to gazette the central section as local reserve? A. The commitment to abide - I think you have to take the commitment to abide by the decision in context. The commitment was that the development would be limited in the upper direction if you like by the study but there was no commitment to carry out development which may or may not have been viable. For example we were of the view that medium density development in that location was not viable and so I did not believe that I had committed to doing all of the development which the report said that you could do. I must admit that at the time I've agreed t that I hadn't pondered that outcome but it was to do with the maximum that could be developed.* **(c)** **T.p102 L3-L44***Q. Did you not also recognise that at the time that you entered into this agreement that you would need to obtain the concurrence of Treasury to any decisions made arising from that study?A. When we went in to the exercise, again just to put it into context, there were hundreds, potentially - possibly thousands, of people marching through the streets of Hornsby. We were faced with a development not of 500 and something odd lots in one parcel but 18 individual ones, each of which was potentially damaging to the government in terms of its environmental credentials, so when we went into this exercise I believed that I had no choice but to work through a process of negotiation and consultation with both the council and the local residents groups. I didn't - I hadn't contemplated at the time that the outcome was going to be so few lots able to be developed. When I contemplated that at the time, in hindsight I*

*believe that it would have been wiser to have spoken to Treasury however at no time had I really considered that and I believe that my authority to act on behalf of the Crown land through this process, that's precisely what I was doing, I was acting in a process of negotiation and discussion with the other parties.Q. You just said a moment ago that it would have been wiser for you to have spoken with Treasury earlier in the process, is that right?A. Yeah look I said that. I think - it's one of those things with the benefit of hindsight but I don't believe that I would have done anything differently as - in the process. I believed I had really no choice but to go through that process of discussion with the local community.Q. But can I put it to you that part of the reason why you indicated a moment ago that it would have been wiser for you to have spoken to the Treasury earlier than you did is because you recognised at all times, did you not, that you were managing the home sites program on behalf of Treasury?A. That's correct.Q. You were the agent of Treasury were you not?A. Correct.Q. And you were answerable and accountable, both to your own minister for the discharge of your functions but also you needed to get concurrence from Treasury to things that you did on Treasury's behalf as their agent in managing the home site program, isn't that the case?A. No it isn't the case, in all of the period that I've been at Landcom we haven't had a process where we've had to get the concurrence authority of Treasury to go through on any of these things. There is a regular over - every so often a review of the agreement but it's very much a hands-off process from Treasury.***(d) T.p103 L31-p104 L17****Q. Well do you recall – she [Treasury officer Dr Gul Izmir] was challenging your authority was she not, to go off on your own and agree to a plan that effectively sterilises the land without getting concurrence of Treasury, wasn't that what she was saying?A. She certainly was concerned at the potential loss of revenue to the State and I took that as given the quantum of that potential loss, that that was the issue. Had the quantum been a lot less than that I don't think she was questioning my authority to act on behalf of the Crown in developing land.Q. Isn't it the case that from the time that Dr Izmir challenged your authority to sterilise the land that you recognised from late 1999 and early 2000 that you had to get the concurrence of Treasury to proceed with the development of any lots of the land in this area?A. No. I wouldn't agree to that. I certainly had a concern having - after it was raised by Dr Izmir that - and she said that I needed to actually speak to the treasurer of the time about that issue but I don't believe that there was any revocation, if you*

*like, of Landcom's authority to act on behalf of the Crown.Q. Isn't it the case that as at December 2000 you, as the chief general manager of Landcom, took the view that you had to obtain the express agreement or concurrence of Treasury to proceed with any action arising from the ESD study recommendations?A. I don't - no I can't agree with that. I - the concern that I - the concern I had - the opinion that Dr Izmir expressed to me was that I needed to brief the Treasurer in person but I didn't - did not see that as a revocation of Landcom's authority to deal.***(e) T.p104 L39-p105 L19***Q. When Dr Izmir urged you--A. Yes.Q. --to go and see the Treasurer you understood that the purpose of that meeting was to obtain the Treasurer's concurrence to what you thought should happen in terms of implementing the ESD study recommendations, is that correct?A. Yes.Q. Because it's the case is it not Mr O'Toole that as agent of Treasury as you saw it you wouldn't as Landcom be able to proceed down a course of action in respect of this study which did not have the concurrence of Treasury, isn't that the case?A. I'm not trying to avoid the question but the issue was - the answer that I gave earlier that was in all the period I've been at Landcom there has never been any involvement of Treasury in any of these projects, save for where do we - what are we sending to Treasury by way of returns this year, no involvement in any of those, so I was never under the - I never believed that we had to get the approval of Treasury in acting on their behalf in any of these issues.Q. Wasn't it the case that you reached an agreement with Treasury in December 1999 that all further development of the relevant sites, whether for residential, commercial or community land, would be placed on hold while Treasury conducted a review of the ESD study and consulted with other Government stake holders as to what ought to happen?A. Yes.Q. Your actions up until the date of that agreement were all frozen were they not?A. Yes.***(f) T.p105 L39-p106 L2***Q. ... You accept do you not that all your actions as Landcom and any decisions that you made, vis a vis the study, were still subject to concurrence from Treasury in the case of residential lands and the involvement of other relevant government entities insofar as nature conservation is concerned, is that correct?A. That's correct. Q. Yes and so in terms of that recommendation that I took you to, about nature conservation and gazettal of a reserve, you appreciated did you not back in late 1999 that there were quite detailed and specific statutory provisions in both the National Parks and Wildlife Act and in the Crown Lands Act concerning the processes that had to be gone through before land could be*

reserved or dedicated for nature conservation purposes? A. Yes. **7. Local evidence of *use* or *occupation* of some of the land (ALC 6465)**97 In evidence is a Hornsby Shire Council document titled "*Bushland (Nature Areas) Generic Plan of Management & Action Plan*", dated November 1998 (*Exhibit M3*, tab 2). The plan is labelled "*Draft*". "*This particular generic plan covers all natural areas, which are predominantly classified as bushland*" (fol 2 of the generic plan). A virtually identical plan, titled "*Parks and Reserves Generic Plan of Management*", and dated August 1996, is also in evidence (*Exhibit M3*, tab 4).98 Polly Thompson works professionally in the area of Biodiversity. She was employed with Hornsby Shire Council from September 1998 to January 2002 as the Bushland Manager within the Water Catchments Team. Her responsibilities included "*the management of natural areas throughout the Hornsby Shire, strategic planning for bushland areas, reviewing the Council's plans of management and implementing bushland restoration and bush care programmes*". In her affidavit of 26 April 2007 she states at par [6]: "*The Crown land the subject of ALC 6465 is made up of parcels identified...in the Generic Plan of Management. These areas are commonly known as 'Berowra Park' by staff members and myself*", and in par [7] she deposes "*that those bushland areas are managed in accordance with the generic plan of management*."99 *Exhibit M3* is a bundle of documents exhibited to Thompson's affidavit. It contains (at tab 4) photographs depicting past upgrade works on a fire trail (including the construction of a retaining wall), and past road surface improvements. Photo 7 shows a fire trail gate across the trail leading to part of the unreserved Crown land the subject of ALC 6465.100 The evidence also details the activities of a local Bushcare group known as the "*Gooraway Place Bushcare Group*" in the area of Gooraway Place, within the unreserved Crown land area of Berowra Park, but not within R77011 (compare maps at *Exhibit M3,* tab 1, and Annexure A to the affidavit of Patricia Pike, affirmed 10 May 2007).101 Patricia Pike is a retired botany teacher. She deposes to being employed/contracted by Hornsby Shire Council as a bushcare trainer who "*trained and supervised the work of various Bushcare groups in the Hornsby Shire*" (par 7). Hornsby Council (pars 12-14):"*supplied each Bushcare Group with a first aid kit; loppers and saws; a composting facility for weeds; bags for weed propagules; indigenous plants grown from local seed; and plant guards. The Gooraway Place Bushcare Group received that equipment...Hornsby Council also arranged for Council employees to*

spray weeds at Bushcare sites, including at Gooraway Place and arranged for the Rural Fire Service to carry out pile burns...Hornsby Council Bushcare Program supplied each volunteer with a tool kit (pouch, knife, secateurs, trowel); sunscreen and hat; round-up weed killer and applicator; goggles; and gloves. Hornsby Council also provided Bushcare code training workshops, Bushcare nursery training workshops and published a quarterly newsletter for volunteers." 102 The Gooraway Place Bushcare Group worked mainly within Gooraway Place but occasionally weeded to the west of that area, apparently not within R77011. Local bushcare volunteer, Carol Nolder (affidavit 1 May 2007), deposes to weeding along a trail which runs over a sewerage pipe. Annexure B to her affidavit indicates that the sewerage pipe and trail are located primarily within the unreserved Crown land but also traverse R77011. The work carried out by the group mainly centred on weeding (see reports annexed to the Pike affidavit, and the evidence contained in the Nolder affidavit).103 As regards the use of the balance of ALC 6465, Ms Nolder deposes to bushwalking along the entire fire trail, which continues through both the unreserved Crown land and R77011, about four times a year since 1995. She deposes to walking with a group of friends or visitors and to seeing "*other people and other groups of people walking along the same tracks*" (par 16).**G. Conclusive certificates – The Notice of Motion1. Applicants' Submissions**104 The Land Councils claimed and submitted that all the certificates in this case were void for jurisdictional error on the grounds stated in the Notice of Motion and set out in full in par [11] above. ***2.*** **Respondent's Submissions**105 The Minister submits that the briefing notes provided to him are evidence of a manifestation of political will. In relation to Grounds 1 and 2, the Minister submits that the word "*use*", and "*need"* and "*likely need"* have been held to be related concepts. Stein J raised the relation between "*used*" or "*likely to be used*" and "*needed*" or "*likely to be needed*" in *Worimi Local Aboriginal Land Council v Minister Administering the Crown Lands Act and Another* (1991) 72 LGRA 149, at 163: *"[I]t is obvious that the waters of Port Stephens and particularly Corlette, in the area of the land claim, are used for the purposes of public recreation and access...The evidence satisfies me that the area of the subject land claim is used or likely to be used for the essential public purpose of recreation and access. The land the subject of the claim is therefore not claimable crown land..."*. 106 An acceptable distinction between whether land was needed or likely to be needed turns

on whether or not a decision "*concerning the use*" of the land has in fact been made. *Maroota*.107 The Minister submits in relation to Ground 3, concerning the nature conservation certificates, that the Minister wasn't bound to consider the statutory scheme of the *NPW Act*. The Minister would have been aware of the existence of that scheme, and it is up to the Applicant to establish he was not aware. 108 The Minister submits that conclusions of law and conclusions of fact need to be distinguished (Jagot J in *Nambucca 2008* at [92]). In this case s.36(1)(c) can still be engaged notwithstanding it is contingent on other "*mechanical*" steps being taken or decisions being made.109 The Minister submits that Mr O'Toole had the authority to bind the NSW government on behalf of the Minister. The Minister submits that it doesn't require a specific delegation, as in an opinion held by a Crown lands Minister, but rather what was required was an opinion of the executive government. Pain J in *Griffith Local Aboriginal Land Council* v *Minister Administering the Crown Lands Act* [2008] NSWLEC 108 ("*Griffith*") held at [105]-[106]: *The wording of the subsection does not suggest that the ALR Act requires that the formation of the opinion under s.36(1)(b1) must be specifically delegated, particularly as the Minister administering the ALR Act may not be the Minister administering the CL Act. The reference to a Crown Lands Minister confirms this view*.110 The Minister wasn't bound to consider the statutory scheme for reservation under the *CLA* raised in Ground 4. These are mechanical steps which are required to implement the decision of Mr O'Toole, or "*simply mechanical steps involved in the process of Landcom's application of land to residential purposes*" and do not impede s.36(1)(c), and the decision as to whether land is needed or likely to be needed for an essential public purpose. It was already open to the Minister to consider, on the basis of Mr O'Toole's decision, that there was a real and not remote chance that the lands would be needed. The briefing note clearly advised the Minister that the decision required further action.111 In relation to Ground 4, concerning the residential lands certificates, the Minister submits that the evidence establishes that Landcom had authority as the "*agent*" of the New South Wales Government. The Minister refers to the Cabinet minute of 1977. As such, a decision regarding s.36(1)(c) can still be taken notwithstanding the requirement for an assessment under part 3 *CLA* which was a mechanical step yet to be taken (*Evans Head*).**3. Discussion*(a) Certificates generally***112 I agree with Jagot J's conclusion in *Nambucca 2008* that the distinction needs to be carefully drawn

between the question of *use* of land on the one hand, and *need* or *likely need* on the other – the statutory formulation for a certificate issued under s.36(8)(a) or (b). The Applicant's submission in this case is that addressing the issue in terms of *use* constitutes a misdirection in the sense of a decision-maker asking itself the wrong question.113 The recommendations made to the Minister in respect of issuing s.36(8) certificates relied on the decisions made by Mr O'Toole in response to the ESD recommendations. That study did not involve the Crown Lands Minister or his department at any stage, and so did not address either the *CLA*'s assessment requirements in respect of legally dealing with land, nor any relevant provisions of the *Land Acquisition (Just Terms Compensation) Act* 1991 ("*JTCA*"), in so far as they may be relevant to getting suitable land into Landcom's ownership.114 I do not accept the Minister's submissions that these provisions prescribe "*simply mechanical steps*" and need not be factored into any decision-making process upon which the Minister embarked in respect of the functions he is required by the *ALRA* to perform. The "*proper assessment*" mandated by s.10 of the *CLA* (and possibly also the question of compensation under the *JTCA*) required specific and adequate consideration by the Minister in reaching his decision to issue a certificate.115 Section 36(8)(b) also requires that the Minister consult the Minister administering the *ALRA* before issuing a certificate in respect of "*an essential public purpose*", as distinct from "*residential land*", and that task is far from "*mechanical*".116 This Court has all the relevant material squarely before it as it considers this appeal, and that material is the subject of competing submissions. However, there is no evidence that all the most relevant material was properly drawn to the Minister's attention in the recommendations made to him in the Department's "*briefs*", albeit that some of it may have been available to him among attachments. The evidence clearly establishes that in deciding whether or not to issue the certificates the Minister had before him **only** those briefs. The actual recommendation document in each brief is comprehensive, and includes purported summaries, or at least a purported statement of the real effect, of the attached documents. One would expect a busy Minister to pay close attention to the primary document and scant attention to the others.***(b) Residential Lands Certificates***117 The residential lands brief (*Exhibit A1*, tab 10) comprises a 16 page recommendation document, plus 62 pages of attachments, and a good example of the point I made in the preceding paragraph about "*most*

relevant material" not being "*properly drawn to the Minister's attention*" is Dr Refshauge's letter of 9 February 2004, which puts his press release of 29 June 2000 concerning "*preservation of Berowra Bushland*" into an important context. The press release is highlighted in the brief (at par 5.3 (29)), but the letter is buried among attachments to an attachment to the brief (the letter is the last two pages of the papers in attachment "C" to the residential lands brief). It is also clear (from par 8.1 of the brief) that not all potentially relevant documents were included in the supporting material. 118 The brief informs the Minister that it is open to him to conclude that Mr O'Toole had government authority to accept the recommendations of the ESD study and commit to its implementation. No evidence is placed before the Minister to support such a conclusion, and I have already noted that there is no evidence of it, other than Mr O'Toole's assertion that such was his understanding. There is actually evidence before the Court, not included in the brief put to the Minister, which casts doubt on that assertion – in *Exhibit A2* (at fols 3 and 61) it is made clear that Treasury did not commit at any stage to abide by any recommendations such as emerged from the ESD study, and in March 2002, and in his oral evidence, Mr O'Toole conceded that any adoption of the ESD recommendations was "*subject to concurrence of NSW Treasury*". (The Minister was made well aware that his own administration was not involved in, or consulted about, the study).119 The report of the ESD study indicated the "*capability and suitability*" of the relevant lands for residential purposes. The acceptance of its recommendations indicates a *desire* to use them for that particular purpose. As Lloyd J observed in *Wanaruah* (at [14]) (set out in par 6.7 of the residential lands brief): "*The fact that the land is zoned for residential purposes is not, however, conclusive of the questions of whether it is needed or likely to be needed as residential lands. The zoning of the land is merely evidence in favour of the respondent [Minister] that there was at the relevant date an acknowledgement in public documents of the capacity or suitability of the land for the future residential use: it does not of itself establish that the claimed land was relevantly likely to be needed as residential.*"120 A similar statement was made by Bignold J in the *Daruk Local Aboriginal Land Council v Minister Administering the Crown Lands Act [No. 2] [The Londonderry Claim]* (1995) 89 LGERA 194 at 204:*[There is] a significant difference between an acknowledgment of a capacity for future urban development and an acknowledgment of a need for land as residential*

land...evidence of future urban development is not evidence of likely need for residential land.(See also *Maroota* at [24] and [73]).121 Despite these considerations the Minister was asked to infer not only that Mr O' Toole had made that decision to develop the land in accordance with the TEC recommendations, but also that that decision about the development of the land was enough to equate to *need* or *likely need* under the *ALRA*. It is not the "*government of NSW*" which must make the relevant determination or form the relevant opinion, nor the officer of any department not directly involved, it is the Crown Lands Minister, and there is no evidence that that Minister delegated that function to anyone in this case. 122 Clearly governments need ministerial functions to be discharged, wholly or in part, by way of delegation to officers, or by way of agency or "*alter ego*" arrangements, "*short of delegation*", of the type considered in *Carltona Limited v Commissioners of Works* [1943] 2 All ER 560 (endorsed in *Minister for Aboriginal Affairs and Another v Peko-Wallsend Limited and Others* [1986] HCA 40; (1985-1986) 162 CLR 24 at 37-38, and *Re Patterson; ex parte Taylor* [2001] HCA 51; (2001) 207 CLR 391 at 449). See also *O'Reilly and Others v The Commissioners of the State Bank of Victoria and Others* (1983) 153 CLR 1, at 30 per Wilson J, and the discussion in both Aronson, Dyer, and Groves "*Judicial Review of Administrative Action*" (Third Edition, 2004), and per McClellan ChJ in *Centro Properties Limited v Hurstville City Council and Another* [2004] NSWLEC 401; (2004) 135 LGERA 257. Statutes such as *ALRA* and *CLA* provide specifically for delegation by the Minister responsible. However, those provisions must be strictly construed, and strictly observed. An agency appointment by a minister, or a delegation by a Minister of a power, especially in favour of an officer of a department **outside** his/her ministerial portfolio should not be lightly inferred without firm evidence, probably written. As Dr Griffiths put it (T27.03.08, p158, L8-13):*"...at the root of the Carltona principle is the principle of ministerial responsibility. The minister carries the can for the actions of those for whom he is politically accountable. The Crown lands ministers had no ministerial responsibility for the actions of Landcom and for that reason alone, quite independently of all the other reasons that I'll come to, Carltona offers no comfort on this issue."*An agency arrangement would not be sufficient to bind the Crown Lands Minister in his/her functions under the *ALRA* – only a proven delegation would suffice.123 The questions put to the Minister (in the brief at par 6.16) are clearly directed to *"use"* rather than *"need"* or

"likely need", and I have come to the conclusion that the Minister was directed to ask himself the wrong question. As Jagot J held in *Nambucca 2008,* the question whether claimed land was needed or likely to be needed for a specified purpose is not the same issue as whether there is a decision, or some other manifestation of political will, that the land "*be used*" for such purpose, or whether there is a real and not remote chance of such a decision or manifestation of political will. In searching for such "*use*", the Minister was directed to the decision of Mr O'Toole, who it was said, had the authority to bind the NSW Government, but the Minister was not directed, and could not be directed, to any evidence that established that Mr O'Toole actually had that authority. 124 I have concluded that the residential lands certificates are void as the Minister asked himself the wrong question when directing his attention to *use* rather than *need* or *likely need*, and failed to consider some mandatory relevant considerations.***(c) Nature Conservation Certificates***125 There are similar considerations in play regarding the Minister's nature conservation certificates and I will not repeat my remarks in the previous section. Here again his Department presented him with a voluminous brief (*Exhibit A1*, tab 14), comprising a 17 page recommendation paper plus 75 pages of attachments.126 The ESD study identified various lands which should not be developed, and canvassed various conservation options, involving either addition to existing reserves (like BVRP or Muogamarrra Nature Reserve), or fresh dedication. Neither the DLWC (the department responsible for crown land) nor the NPWS (the agency responsible for much of the government's activity in relation to nature conservation) was involved in the Study. Indeed, neither was aware of its recommendations until after the ALCs were made. Neither agency ever agreed that TEC could discharge their statutory land assessment functions. The Study reported to Landcom which had no powers to deal with lands under the regimes prescribed in the *CLA* or the *NPW Act*. Nor did Landcom have any specific nature conservation functions, except concerning matters clearly incidental to carrying out its land development work.127 The *NPW Act* establishes an exclusive statutory scheme for the establishment, *inter alia*, of nature reserves and regional parks (see *Nambucca 2008* at [78] and [106]). Some of the processes are quite specific and vest power to deal with the land in exclusive bodies, such as the Minister for Environment or the Governor (see ss.470 and 49 for examples relating to regional parks or nature reserves). The process for reservation or gazettal of land as a local

reserve is contained in the *CLA*. I do not view any of these provisions as mere "*mechanical steps*", nor as requirements that can be otherwise circumvented.128 None of these various statutory requirements or processes for the reservation of land for nature conservation were brought to the attention of the Minister in the brief. This is a significant omission, which is compounded by the fact that Mr O'Toole is put forward as the person with the authority to make decisions on nature conservation, which bind the NSW Government, with little more evidence than his subjective belief that he has that authority, and no comment made about the distinction between his real function as the Government's land developer, and the responsibility to make land conservation decisions on behalf of the government. Whether or not O'Toole had authority to deal with land under the *NPW Act* is centrally important to the consideration as to whether the subject land was needed or likely to be needed for nature conservation, and I have concluded that he did not.129 Again this brief does not draw the Minister's attention adequately to the letter of Minister Refshauge, dated 9 February 2004, which puts into context the press release of 29 June 2000. The press release is referred to in par 6.3(29). Paragraph 6.3 outlines "*the evidence filed by the respondent which the Minister may consider to be relevant*" to the task at hand. Unlike the residential lands brief, the letter is, on this occasion, mentioned in the text of the nature conservation brief, but, somewhat peripherally, in a section dealing with submissions made by the Land Councils (par 7.14, beginning "*[t]he Minister's attention is also drawn to the following submissions made by the applicants*"). It would appear that the Minister's attention is actually diverted away from Dr Refshauge's letter, in the briefs on issuing both classes of the certificates, but especially those regarding nature conservation, by the emphasis placed by the briefs on drawing the inference that Mr O'Toole had the government's authority (See T.p24 L44ff and T.86 L1ff).130 The Applicants also point to the fact that some of the evidence filed in the proceedings at the time the Minister was presented with the brief was not referred to in the brief, even though it reveals the views of the NPWS (a very relevant agency when dealing with land for nature conservation). Some of this evidence post-dates the date of claim, and is, therefore, subject to the *Falconer* principle (see par [36] above). I have earlier referred to some of this evidence – the NPWS disavowed any objection to the granting of these ALCs at various times (see *Exhibit A4* , fols 10, 19, 26 and 33), other than expressing the view that "*some or all*" of the ALC

6465 land "*may be suitable for nature conservation*".131 As with the residential lands certificates, the questions put to the Minister in the nature conservation brief (at par 7.12) are the wrong questions, directing his attention to whether the claimed land can be *used* for an essential public purpose, rather than whether the land was *needed* or *likely to be needed* for an essential public purpose. The error is compounded by the failure to consider several relevant mandatory considerations, which lead to the finding that the nature conservation certificates are void for jurisdictional error.**4. Summary**132 I accept the Applicants' submissions to the effect that the Minister in the case of each group of certificates asked the wrong questions. Grounds 1 and 2 of the challenges are made out. See *Nambucca 2008* ("*used*' rather than "*needed"* or "*likely to be needed*") and *Maroota* (manifestation of political will to establish *need*). 133 I conclude that Ground 3 (re the nature conservation certificates) is also made out – the Minister failed to consider mandatory relevant matters, relying on Mr O'Toole's decision to adopt the ESD recommendations: (i) the *NPW* regime for conserving land; (ii) whether the Executive Government (ie at Ministerial level) had made a relevant decision or otherwise expressed political will that land is needed or likely to be needed for the essential public purpose of nature conservation; (iii) the *CLA* regime for the reservation of appropriate land; (iv) in the absence of attention to Minister Refshauge's letter of 9 February 2004, whether it should properly be inferred that the Minister by his silence approved Mr O'Toole's decision on the ESD study; (v) whether Mr O'Toole had authority to make a nature conservation decision on behalf of the Crown Lands Minister or his department; (vi) whether Mr O'Toole made such a decision in any event; and (vii) whether the NPWS at the date of claim had any proposal for any of the land which would dictate an objection to the ALCs.134 I have come to a similar conclusion in respect of Ground 4 (re the residential lands certificates). The Minister failed to consider mandatory relevant matters: (i) the *CLA* regime for dedication of land; (ii) whether Mr O'Toole actually had authority to make the relevant decision on behalf of the Executive Government or express its political will regarding the need or likely need for the ALC lands as residential lands; and (iii) whether Mr O'Toole made such a decision in any event.**5. Conclusion**135 The Applicant's Notice of Motion is upheld and the Respondent's tender of conclusive certificates is rejected.136 The Court must now, therefore, turn its attention to the substantive claims.**H. The Substantive Claims**137

Once the Court moves from a consideration of the Notice of Motion concerning the s.36(8) certificates to a consideration of need or likely need for residential lands or nature conservation, or lawful use or occupation, the onus of proof shifts to the Minister.138 Much of the relevant evidence and all of the relevant authorities and principles have been surveyed above, and I need not repeat myself.139 The ESD study, the 1997 agreement by Landcom to refrain from development of the subject lands while the study was carried out, and the asserted agreement that the government as a whole, not just Landcom, would abide by the study's recommendations, cannot supplant the appropriate statutory processes under the *ALRA*, the *CLA*, the *Housing Act*, or the *NPW Act* for any of three relevant government decisions – grant of ALCs, development as crown land home sites, or reservation of land for nature conservation purposes.140 The Deputy Premier, a very senior member of the executive government, made a public statement about the "*nature conservation*" of certain relevant lands in June 2000, but that was post the ALCs, and, in any event, he later clarified its correct status in respect of those claims – it was no government decision at all. One of his agency heads (in his days as Minister for Planning) had committed his agency (Landcom) to accept the findings of the ESD study, ie not to seek to develop any more home sites on the Berowra ALC lands than the ESD had identified as suitable for that purpose. Landcom then decided it was practical to develop only 23 lots, and, therefore, the balance of the lands studied would be available for non-residential purposes, such as nature conservation. Those purposes could not be achieved without proactive steps by other arms of government, and even the ESD-compromised land development project could not be pursued without Treasury approval and transfer of the land to Landcom by (or with the consent of) the Crown Lands Minister.141 The Minister's case on these ALCs is based on the ESD study and the surrounding and subsequent events I have described. The evidence repeatedly demonstrates that the relevant Minister (ie the Crown Lands Minister) was not involved until after the ALCs were made, and there is no relevant link established between him/her and Landcom's ongoing role through Mr O'Toole. So much has been admitted by the Minister during the proceedings (see *Exhibit A3*). This contrasts with the position confronting Pain J in *Griffith* (see pars [95] and [107] of Her Honour's judgment, where a formal written delegation was proven, albeit by inference). I find it impossible to impute to the Minister the relevant opinion, when neither he nor any officers to

whom he can delegate some of his functions under the *CLA* were on notice of TEC's work. As Dr Griffiths submitted (T28.03.08, p184, L24-27), "*the court should conclude that there is no evidence that any such opinion existed and no satisfactory basis for inferring that such an opinion existed on the part of the Minister or any lawful delegate*".142 The relevant lands having either conservation values or realistic residential potential is not sufficient. Nor is some expression of political will or public desire for land to be conserved or developed for housing. Referencing land as of interest to, eg, NPWS does not establish "*need*" for a relevant purpose. Even its use or development for a public purpose is not probative of "*need*". Occasional entry on to, and/or the existence and maintenance of fire trails on, vacant crown land, and/or the existence of Council or community sponsored generic "*plans of management*" dealing with "*bushcare*" and the like (*Exhibit M3*) – even if work is done on the land pursuant to them, and even if evident prior to the date of the claim – are similarly insufficient to establish lawful use and occupation or control by Hornsby Council.143 The furthest the evidence rises is to show that Council is trustee for some lands subject to a generic plan of management; that some fire trails have been maintained; that there is sporadic bush walking by the public; and, that some weeding etc has occurred on the claimed land, including along the track covering the sewer line. Even though Council supplied the Gooraway Place Bushcare Group with equipment, it would appear that most of the group's work was done outside R77011. Many of the indicia that Clarke JA found determinative of *occupation* in *Tweed Byron* are not present here, where the situation resembles that in *Shoalhaven*. The evidence relating to the public use of R77011 amounts to no more than "*limited, casual, and sporadic*" activity by the public, insufficient to engage the "*lawful use or occupation*" exception to claimability. In so far as it might be said there is authority contrary to the principles in *Tweed Byron* and/or *Shoalhaven* I believe they sit well together, and both remain preferable authority on these issues.144 Clearly the Minister has failed to discharge his onus in respect of any of the subject lands.**I. Conclusion and Orders**145 Therefore, my conclusions are that the Notice of Motion will be upheld, and the Land Councils' appeals allowed.146 The parties should now agree upon Short Minutes of Order to implement those decisions, as outlined in these reasons, and set a timetable for the survey and transfer of the lands.147 Those Orders should attend, inter alia, to the issue of the transmission line – see par [12](h) – in

accordance with s.36(5A) of the *ALRA*.148 I formally reserve all questions of costs for later argument, if needed, noting that there is an outstanding application by the Applicant Land Councils for an order for indemnity costs in respect of the vacation of the scheduled November 2007 hearing on the grounds of the late filing of the Residential Lands Certificates by the Respondent Minister.149 The Exhibits and the "*MFI*" (the Minister's certificates) may now be returned.150 It is appropriate that I grant the parties liberty to apply on 72 hours notice.151 I acknowledge with thanks the assistance of Acting Commissioner Davis.