

THE NEW CROSS VESTING PROVISIONS AND MINING JURISDICTION OF THE LAND AND ENVIRONMENT COURT

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1. In this short introduction to today's seminar I will address two important new developments in the Land and Environment Court:
 - (a) a new liberal power to transfer proceedings between the Land and Environment Court and the Supreme Court; and
 - (b) the Land and Environment Court's new mining jurisdiction.

2. Before doing so, I would comment in passing on the recent High Court decision in *R & R Fazzolari Pty Ltd v Parramatta City Council; Mac's Pty Ltd v Parramatta City Council* [2009] HCA 12, 165 LGERA 68, which is the subject of Marion Carpenter's paper to be delivered later today. It is the most important case on the power of compulsory acquisition in over half a century, since the decision of the High Court in *Thompson v Randwick Corporation* (1950) 81 CLR 87. Ms Carpenter will tell you about subsequently enacted amendments to the *Land Acquisition (Just Terms Compensation) Act 1991*. It may not be widely understood that the amendments appear to have been an attempt to negate the High Court's decision by permitting compulsory acquisition for the purpose of resale when acquired land adjoins land already owned by the resuming council.

TRANSFER OF PROCEEDINGS

3. The Land and Environment Court and the Supreme Court are both superior courts of record. Sometimes closely related matters arise, some of which are within the jurisdiction of one court and some within the jurisdiction of the other, necessitating proceedings in both courts. This has

caused wasteful duplication of costs and judicial resources and considerable inconvenience.

4. In one unprecedented case last year, this was overcome by a cumbersome but effective procedure whereby arrangements were made for me to be commissioned as an acting judge of the Supreme Court in order that I could hear concurrently a proceeding in the Supreme Court as an acting judge of that court and a closely related proceeding in the Land and Environment Court as a judge of this court: *Neighbourhood Association DP 285249 v Watson* (2008) NSWSC 876, 162 LGERA 322.
5. In future, this cumbersome procedure should no longer be necessary because liberal cross vesting provisions have recently been enacted in the *Civil Procedure Act 2005* Part 9 Division 2A(ss 149A – 149E) whereby the Land and Environment Court and the Supreme Court can each transfer a proceeding in that court to the other court if the transferor Court considers that it is “more appropriate” for the other court to hear the proceeding. It now appears to be almost as easy to transfer proceedings between the two courts as it is to transfer proceedings between divisions of the Supreme Court.
6. Sections 149A-149E provide:
 - “**149A Definitions**
 - (1) In this Division:
 - transfer order*** means an order referred to in section 149B (1) or (2).
 - transferee court*** means the court to which proceedings are to be transferred pursuant to a transfer order.
 - transferor court*** means the court from which proceedings are transferred pursuant to a transfer order.
 - (2) For the purposes of this Division, proceedings are related if the matters with which they deal are so closely associated as to form part of the same controversy.

149B Transfer of proceedings between Supreme Court and Land and Environment Court

- (1) If either the Supreme Court or the Land and Environment Court is satisfied, in relation to proceedings before it, that it is more appropriate for the proceedings to be heard in the other court, it may, on application by a party to the proceedings or of its own motion, order that the proceedings be transferred to the other court.
- (2) If either the Supreme Court or the Land and Environment Court is satisfied, in relation to proceedings before it, that:
 - (a) there are related proceedings pending in the other court, and
 - (b) it is more appropriate for the proceedings to be heard, together with the related proceedings, in the other court,it may, on application by a party to the proceedings or of its own motion, order that the proceedings be transferred to the other court and heard together with the related proceedings.
- (3) No appeal lies against a decision of the transferor court to make, or not to make, an order under this section.

149C Transfer orders

- (1) A transfer order takes effect when it is made.
- (2) A transfer order does not invalidate any order made or other thing done in the proceedings before the order was made.
- (3) Any order made by the transferor court (other than the transfer order) may be varied or revoked by an order of the transferee court.

149D Proceedings after transfer

- (1) Subject to the rules of court applicable in the transferee court:
 - (a) any proceedings with respect to which a transfer order takes effect continue in the transferee court:
 - (i) as if the proceedings had been duly commenced in the transferee court on the date on which they were commenced in the transferor court, and
 - (ii) as if any cross-claim in the proceedings had been duly made in the transferee court on the date on which it was made in the transferor court, and

- (b) any proceedings with respect to which a transfer order under section 149B (2) takes effect are to be heard together with, and are taken to form part of, the related proceedings in the transferee court.
- (2) For the purposes of any proceedings continued in the transferee court:
 - (a) any admission duly made in the transferor court is to be treated as if it had been made in the transferee court, and
 - (b) in the case of proceedings affected by a transfer order under section 149B (2), any process or other documentation before the transferee court may be amended so as to reflect the merger of the proceedings concerned.
- (3) Subject to the rules of court applicable in the transferee court, the power of the transferee court to make orders as to costs includes a power to make orders with respect to the costs of:
 - (a) the application for, and the making of, the transfer order, and
 - (b) any step taken in the proceedings before the transfer order was made.

149E Jurisdiction of transferee court

The transferee court has, and may exercise, all of the jurisdiction of the transferor court in relation to any proceedings to which a transfer order relates, including jurisdiction to determine any question arising in any such proceedings.”

NEW MINING JURISDICTION

7. The second new development is that from 7 April 2009 the Land and Environment Court has acquired an extensive mining jurisdiction under the *Mining Act* 1991 and the *Petroleum (Onshore) Act* 1991. This jurisdiction was formerly vested by those statutes in the Mining Warden. However, many matters within this jurisdiction also appear to fall within the jurisdiction of the Supreme Court. It may be that in future they will be litigated more in the Land and Environment Court than the Supreme Court. The transfer of jurisdiction to the Land and Environment Court from the Mining Warden was effected by amendments to the *Land and Environment*

Act 1979 (in the *Courts and Crimes Legislation Further Amendment Act 2008*), the *Mining Act 1992* and the *Petroleum (Onshore) Act 1991*..

8. The Land and Environment Court’s jurisdiction is conferred by s 21C of the *Land and Environment Court Act 1979*, which provides:

“21C Class 8—mining matters

- (1) The Court has jurisdiction (referred to in this Act as “Class 8” of its jurisdiction) to hear and dispose of proceedings arising under the *Mining Act 1992* or the *Petroleum (Onshore) Act 1991*.
- (2) This section does not apply to proceedings for an offence under either of those Acts.”

9. The new jurisdiction and powers under the *Mining Act* are set out in Part 15 (ss 293 – 296) of that Act. Section 293 contains a long list of matters within the new jurisdiction (including conventional commercial claims such as a demand for debt or damages arising out of mining), as follows:

“293 Jurisdiction of Land and Environment Court

- (1) The Land and Environment Court has jurisdiction to hear and determine proceedings relating to any of the following matters:
 - (a) the area, dimensions or boundaries of land subject to an authority or mineral claim,
 - (b) the right to the possession or occupation of any land by virtue of an authority or mineral claim,
 - (c) any question or dispute arising as to:
 - (i) a right of way, right of access to water or right of entry conferred by or under this Act, or
 - (ii) any condition imposed by or under this Act (including any condition imposed pursuant to a registered access management plan) on a person’s exercise of any such right of way, right of access to water or right of entry,
 - (d) the right to the use and enjoyment of water for prospecting or mining and any dispute or question relating to such a right,
 - (e) trespass or encroachment on, or injury to, land subject to an authority or mineral claim, or interference with, or injury to, any mining improvement,

- (f) any demand for debt or damages arising out of prospecting or mining,
- (g) any demand for specific performance of any contract relating to any authority or mineral claim,
- (h) the right to any mineral in, or to be recovered from, any land subject to an authority or mineral claim, and the rights under, or arising out of, any contract relating to any such mineral,
- (i) any transfer or disposition of, or charge on, land subject to an authority or mineral claim,
 - (j) matters concerning:
 - (i) any partnership relating to an authority or mineral claim, or to prospecting or mining, or
 - (ii) the existence, formation and dissolution of any such partnership, or
 - (iii) the taking of accounts in connection with any such partnership, or
 - (iv) the contributions of the partners as between themselves, or
 - (v) the determination of questions arising between the partners,
- (k) contributions by or between persons holding joint or several interests in an authority or mineral claim towards rent or other expenses in relation to the authority or claim,
- (l) trespass or encroachment on, or injury to, land as a result of prospecting or mining,
- (m) trespass or encroachment on, injury to or any matter affecting, roads, railways or other property of whatever kind constructed, held or occupied under this Act,
- (n) the partition, sale, disposal or division of any mining improvements, or the proceeds of the sale of any mining improvements, held by 2 or more persons,
- (o) any question or dispute arising as to the working or management of land subject to an authority or mineral claim,
- (p) all rights claimed in, under or in relation to an authority or mineral claim or purported authority or mineral claim,
- (q) any question or dispute as to:
 - (i) the validity of an authority, mineral claim or opal prospecting licence, or

- (ii) the decision of the Minister or a mining registrar in relation to an application for the granting, renewal or transfer of an authority, a mineral claim or opal prospecting licence, or
 - (iii) the decision of the Minister or a mining registrar to cancel an authority, a mineral claim or opal prospecting licence,
 - (r) any question or dispute in connection with a consolidated mining lease arising under section 109, including any question or dispute concerning the rights and obligations conferred or imposed by an interest referred to in that section or the priority of any such interest,
 - (s) any question or dispute in connection with an interest (whether legal or equitable) in, or affecting, an authority or mineral claim,
 - (t) any question or dispute in connection with an assessment or agreement in respect of compensation under Part 13, arising because of the transfer of an authority or mineral claim or of part of such an authority or claim,
 - (u) the review of an arbitrator's determination under Division 2 of Part 8 or of a mining registrar's decision referred to in section 206,
 - (v) any question or dispute as to the provisions of an access arrangement or as to any matter arising as a consequence of such an arrangement,
 - (w) any question or dispute as to whether section 20 (1), 31 (1), 39 (1), 49 (1), 60 (1), 62 (1) (a) or (b), 185 (1) or 188 (1) applies in a particular case,
 - (x) any other matter in respect of which jurisdiction is conferred on the Court by this Act.
- (2) Nothing in this section limits or restricts the jurisdiction conferred on any other court by any other Act or law."

10. Sections 294-296 of the *Mining Act* 1991 confer additional remedial powers on the Land and Environment Court, as follows:

"294 Land and Environment Court may order deposit of mineral etc

- (1) On application by any party to proceedings in the Land and Environment Court, the Court may order any other party to the proceedings to deposit, pending its decision, any earth, mineral, money or chattels:

- (a) the right to which will, in the opinion of the Court, be put in issue in the course of those proceedings, and
 - (b) which may then be in, or at any time before the termination of the proceedings may come into, the possession or control of that other party.
- (2) Such an order must specify the thing to be so deposited and must direct the deposit to be made, at or before a time specified in the order, with a person or at a place so specified.

295 Land and Environment Court may grant injunction

- (1) If an application is made to the Land and Environment Court by a person claiming to hold a legal or equitable interest in any land subject to an authority or mineral claim, or in any property, the Court may, on such terms as to costs or otherwise as it may consider just, grant an injunction restraining any specified person:
- (a) from encroaching on, occupying, using or working the land or property, or
 - (b) from seeking, washing out, extracting or removing any earth or minerals from the land, or
 - (c) from selling or disposing of or otherwise interfering with the property, or
 - (d) from doing any act that may affect the interest concerned in the whole, or any part, of the land or property.
- (2) An injunction remains in force for the period specified in the injunction, unless it is sooner discharged.

296 Granting of injunctions in cases of urgency

- (1) If an applicant for an injunction satisfies the Land and Environment Court that there are urgent reasons for granting the injunction, the Court may, in any case in which the Court might otherwise grant an injunction, grant an injunction to have effect for a period of not more than 2 months (including the day on which the injunction is made) without notice of the application having been served on any other party.
- (2) The Land and Environment Court may not grant a continuance of an injunction granted under this section, and may not grant a further injunction under this section, but application for a further injunction may be made under section 295, either during or after the period of the injunction granted under this section.”

11. The Court's new jurisdiction under the *Petroleum (Onshore) Act 1991* is set out in s 115 of that Act (again, including conventional commercial claims such as a demand for debt or damages arising out of or made in respect of a contract relating to the search for or mining of petroleum) as follows:

“115 Jurisdiction of Land and Environment Court

- (1) The Land and Environment Court has jurisdiction to hear and determine proceedings relating to any of the following matters:
- (a) any demand concerning the ascertainment and adjustment of boundaries of land held under a petroleum title, or occupied by virtue of an easement or right of way granted under this Act, where such boundaries are in dispute or doubtful—in which case the Court is to ascertain and determine such boundaries by such means as may be found convenient, and may make and give all such orders and directions as may be necessary for the purpose of carrying out or giving effect to its determination,
 - (b) the right to the occupation of areas of land comprised in a petroleum title and the right to or ownership of petroleum and other materials obtained from them,
 - (c) the right to the use of areas of land comprised in an easement or right of way granted under this Act,
 - (d) any encroachments on, infringements of or damage to any land comprised in a petroleum title,
 - (e) any encroachments on, infringements of or damage to an easement or right of way granted under this Act,
 - (f) any demand for debt or damages or both arising out of or made in respect of any contract whatever relating to the search for or mining of petroleum,
 - (g) the right to any petroleum in or to be taken out of any land comprised in a petroleum title or in respect of any matter concerning or arising out of any contract relating to any such petroleum,
 - (h) any demand concerning or arising out of any partnership or joint venture for or in relation to the search for or mining of petroleum in any land comprised in or held under any petroleum title, easement or right of way granted under this Act, or any partnership or joint venture in any such land, or in any works, machinery or petroleum, or

- concerning or arising out of any contract for or in connection with any such search or mining, or for the dissolution wholly or in part of any such partnership or joint venture,
- (i) any demand concerning contributions to calls or to the expense of working or using any such land or works or any share or interest in any such contributions,
 - (j) any demand concerning or arising out of any mortgage or assignment by way of security of or charge on any such land, works, machinery, petroleum or any share or interest in any such mortgage or assignment,
 - (k) any demand concerning the cancellation and delivery up of instruments relating to:
 - (i) mortgages, charges or encumbrances of or on any such land, works, machinery or petroleum, or any share or interest in them, or
 - (ii) any assignment of such mortgages, charges and encumbrances, or
 - (iii) any contract respecting the working or use of any such land, works or machinery or any partnership or joint venture for or in relation to the search for or mining of petroleum or the total or partial dissolution of any such partnership or joint venture,
 - (l) any money claimed to be due on any account relating to a partnership or joint venture for or in relation to the search for or mining of petroleum or in any way accruing to the complainant from any such partnership or joint venture, or any adventure or interest,
 - (m) any question or dispute as to:
 - (i) the validity of a petroleum title, or
 - (ii) the decision of the Minister in relation to an application for the granting, renewal or transfer of a petroleum title, or
 - (iii) the decision of the Minister to cancel a petroleum title,
 - (n) the recovery of any money which any person is liable to pay under this Act or the regulations and for which no other mode of recovery is provided under this Act or the regulations,
 - (o) all questions and disputes which may arise:

- (i) between holders of petroleum titles, or
 - (ii) between holders of petroleum titles and landholders,
 - (p) all questions or disputes which may arise as to operations on or the working or management of the land comprised in a petroleum title,
 - (q) any other matter in respect of which jurisdiction is conferred on the Court by this Act.
- (2) Nothing in this section limits or restricts the jurisdiction conferred on any other court by any other Act or law.”
12. The Land and Environment Court’s mining jurisdiction can only be exercised by judges of the Court or by commissioners of the Court who are Australian lawyers: ss 33(2A) and 30(2C) *Land and Environment Court Act* 1979. Several of the commissioners, including the Senior Commissioner, are Australian lawyers. While exercising the mining jurisdiction or functions, a commissioner is called a “Commissioner for Mining”: s 122AC).
13. In mining matters, there is an appeal, but only on a question of law, to a judge of the Court against an order or decision of a Commissioner for Mining: s 56A *Land and Environment Act* 1979. There is an appeal, but again only on a question of law, to the Supreme Court from an order or a decision of a judge: s 57.
14. Mining matters are subject to the *Civil Procedure Act* 2005 (see Schedule 1) in the same way as other civil proceedings in the Land and Environment Court, and is subject to the *Uniform Civil Procedure Rules* 2005 (see Schedule 1) in the same way as class 4 proceedings. It is also subject to the same contempt of court and neutral evaluation rules as other civil proceedings in the Court: *Land and Environment Court Rules* 2007 Part 6. A Practice Note for class 8 mining matters should be published later this year.