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Martins Creek Quarry Expansion – Application No SSD-6612

Dear Sir/Madam

I am responding to the submission by Daracon Group on its Martins Creek Quarry expansion proposal as the accompanying statement from the Department of Planning advises that anyone can make a submission. The writer lives some 20 kilometres distant from the quarry and feels his enjoyment of the area would be compromised by the proposal although not nearly as much as the immediate neighbours on whom it would have a devastating impact.

Other correspondents have pointed out that the cumulative impacts of the Brandy Hill Quarry and the Martins Creek Quarry would have an enormous impact on traffic using the Bolwarra, Lorn and East Maitland roads. There is thus a significant social impact and a significant road safety issue none of which has been adequately addressed by Umwelt or by Daracon in any of their submissions. On Daracon's own figures, the proposal is for several hundred truck movements a day and this would by a simple calculation involve a truck movement in either direction of one truck every 90 seconds (280 per day or 40 movements per hour). The requirement for a source of gravel from the area is more than adequately supplied by the large Brandy Hill operation. The amount of gravel to extract is a truly staggering figure and this is a state significant development project involving as it does the removal of 38.07 million tonnes of gravel (Daracon's figures). On the assumption that all of the material worked is gravel (and there is no indication to the contrary) given an area affected by the proposal of 37.8 hectares this would leave an additional huge hole to be remediated measuring 800 metres by 45 metres by some 100 metres deep, on the basis that one cubic metre of gravel weighs one tonne, which is conservative, one can only imagine that this could conceivably have a significant future impact on the north coast railway line.

The extraction of 1.1 million tonnes involves, on Daracon's figures, some 600 thousand tonnes being transported by rail - why on earth the balance of the material worked can not be moved by rail is not adequately explained.

In view of the effect that the proposal will have on the Martins Creek, Paterson, Lorn, Bolwarra and East Maitland areas, why on earth can not an official public meeting be held to discuss the proposals. I note that it is not envisaged that there will be any such meeting.

Daracon's SSDA largely reiterates the proposal which was rejected by the courts, which rejection was upheld on appeal. This is a very lengthy judgement, longer than that held in the Mabo inquiry. The reasons for and against the quarry were decisively viewed by no less than four superior judges and rejected. An examination of the table setting out the manner in which the present proposal varies from the earlier proposals which were rejected may be summarised as follows:

1. Amended timetable makes provision for 25 years instead of 30 years. There is no real difference here having regard to the amounts of the gravel to be extracted and moved by road. Indeed, the proposal of the material to be moved by road exceeds the earlier proposals.

2. Limitation on extraction. This is reduced from 1.5 million tonnes per annum to 1.1 million tonnes per annum. Again, there is no real difference here given that there is one truck movement every 90 seconds. Anything more than that and the trucks would be virtually bumper to bumper through the residential areas. The revision in effect involves a greatly expanded rate of extractions.
3. Hours of operation: there is no real change.
4. Extent of quarry: In effect this is an increase to an area of 36.8 hectares.
5. Air quality: This is stated as being minimal. This is unlikely given that trucks are moving through residential areas. Similar transportation of coal through rail corridors has yielded significant pollution. This is a highly technical report which is largely incomprehensible and which doesn't set out the social impacts.
6. Blasting: This is not set out as regards the impact it is likely to have.
7. Biodiversity: These are only set out in accordance with Daracon's legal advice. Essentially this is to be an in-house determination.
8. Rehabilitation: No change compared to that set out in earlier applications which have been refused. The rehabilitation required would be colossal in view of the dimensions of the enormous impact of the hole and the area to be excavated. It seems unlikely that this will be addressed in any proper manner. I comment upon this later.
9. Road haul rates: no change.
10. Present transportation: There is essentially no change.
11. Loading and operation: The only change is for the unladen trucks to be parked overnight thus facilitating the early commencement of operations on the following day.

Incidentally, none of the concerns expressed by the director of resources developments to Adam Kelly at Monteath and Powys on the 2nd December 2016 (see letter) regarding residents' concerns for the volume and frequency of truck movements, noise blasting and vibration, heritage value and lifestyles are properly addressed.
The submission might be summarised as follows under the following headings employed by the applicant:

1. Environmental impacts. Attachment containing 199 pages.
2. M C Quarry project.
3. Blasting report
4. Flora and Fauna
5. Rehabilitation
6. Environmental Controls

The first of these is an environmental Impact Survey revised in September 2016 and prepared by Liz Lamb of Monteath and Powys. The document deals with the proposal under 10 chapters. The first recites that quarry operations were carried out on the site since 1914 by SRA and subsequently by the applicant since 2012 but substantially ramped up in 2016. The total area of the site is 124 hectares, Much of this was done illegally. Up to 1.1 million tonnes of gravel is proposed for extraction and removal. The hours of operation will be 7am until 6pm Monday to Friday. EPA has previously granted extensions up to 24 hours per day. SRA, in its letter of 15/4/91 advised Dungog Shire Council that it was the customers who determine the form of transport of material. Given that 600 tonnes are being transported by rail and 500 tonnes by road, it cannot be considered that anyone other than Daracon and its associates would determine the method of transport.
Option 3 is recommended by the author, as Option 2 for the quarry – realisation of existing operations would not deliver the additional social and economic benefits associated with the extending the quarry area (whatever they may be other than confirming economic benefits on the applicant given that the applicant already operates 5 quarries in the area (Section 1.5 of the EIS)).
The EIS dismisses the option of increasing rail haulage: given that the proposal includes removing 600,000 tonnes by rail and 500,000 by road, it is unlikely that this objection can be sustained.
If the current restrictions on loading trains under the EPL and existing consents result in trains not being able to deliver a load every 2 days rather than daily, then the method of preparation could be

changed. This increased use of rail transport would result in increased revenue for the State Government which would be lost by road transport with its consequential impact on the roads.
If the total transported by rail is 600,000 pa, it seems unlikely that the objections based on the cost of infrastructure upgrades and the low value of aggregate for the construction industry can be sustained. In any event, these costs would be at the very least offset by the damage done to the road networks and the consequent costs to the NSW Government of road repair. Rail is the most effective way of moving bulk products as indicated by the SRA by use of very long freight trains.

No Rail Terminals for Aggregate

The suggestion that there are no suitable operating terminals for aggregate is not justified in view of the quarries servicing large infrastructure projects including Hexham Rail upgrades, Nelson Bay Road upgrade and Newcastle inner city by-pass. If these projects no longer exist then it seems likely that there will be others given that the applicant proposes to extract and move 1.1 million tonnes pa.
Reference is made in part 1 of the EIS to Sydney road congestion. Road congestion cannot be improved by the presence of another 280 heavy articulated vehicle movements on the road each day.

Water Quality

The report suggests that there are not significant ground water eco systems in the area. The operations are not far removed (1.1km) from the Williams and Paterson Rivers which are an essential part of Hunter Water Corporations activities in the area.

Martins Creek Heavy Vehicle Assessment

This identifies that if production and delivery hours were delayed 1.5 hours (out of a total of 21.5 hours) this would decrease productivity by 26.87%. One wonders how, and how if so the decrease cannot be minimised by a more efficient use of delivery, operations and loading. Operations have in any event to be dovetailed to facilitate the movement by rail of 600,000 tonnes pa. It is noted that the EIS suggest that consideration be given to extending the rail sidings to allow for operations of longer trains. Why not adopt this?

Appendix B Aggregates and sand

Appendix C Cleaning areas

Appendix L – Site rehabilitation

Post quarry use is identified as being stock grazing, horticultural facilities, poultry production, outdoor activity park and solar generation. It remains to be seen whether this “grab bag” of uses can be achieved. The area is not large enough for significant stock grazing and unsuitable by virtue of the different levels, left by quarrying operations, and poultry production could be achieved more easily on flat land. Bush land rehabilitation will take many decades. The huge scope of remediating an area from which 38 million tonnes of material has been removed, becomes apparent as with the user by subsequent persons or authorities of any kind whilst any quarrying operations (and the vast amount of truck haulage) continues. The proposals are largely a pious hope.
If none of these things happen, what guarantee do we have that future State Governments won’t fill the hole with an endless supply of garbage trucks coming from Sydney as has happened elsewhere? How can this be written into any development consent and how is it going to bind the government?

6.1 EPA Act

There will be a significant impact on native flora and fauna. Adjacent lands to the site are densely vegetated and comprise a total of 125 ha. Koalas, quolls, echidnas and numerous species of birds among others populate the area. In addition to the destruction of vegetation in the immediate area, the disturbance has a “knock on effect” displacing animals within the area of the quarry and promoting their destruction as roadkill. This would of course be considerably exacerbated by the hugely increased volume of trucks both during daylight areas and during twilight.

The visual effects

Cannot be overstated.

The social and economic impacts

Will be devastating to local land owners and home owners.

Consultation

This has taken place but only to a very limited extent (eg no public meeting envisaged). Why not?

Air Quality

Not adequately addressed.

Road – Influence noise levels

Not addressed

Appendix K (Section A)
This discusses interalia Sep 3 and Sep 44 respectively relating to koalas and the transfer of hazardous materials by road.
Dungog LEP
Dealt with at some length
6.6 Upper Hunter Strategic Regional Land use
Whilst the quarry does employ a number of workers, these are chiefly truck drivers who drive in and drive out and who do not contribute significantly to the local or regional economy. This has to be offset against the large number of people who live with their families in and around the quarry area and use shops, schools, transport, and local businesses and are considerably affected adversely by the proposal and who will be significantly discouraged from living in the area by the constant stream of almost bumper to bumper truck traffic. (one every 90 seconds). So would future potential residents.
6.8 Protection of the Environment Operation Act 1997
The requirement to "maintain ecologically sustainable development" and "reduce risks to human health and protect the degradation of the environment". This proposal cannot be said to comply. The trigger for an EPL is a mere 30,000 tonnes pa which is exceeded here by a factor of 50 times.
Environment Protection Conservation Act 1999 (Commonwealth)
This is a requirement interalia to provide for the protection of the environment and the DoEE has determined that the proposed development will have effect on the Slaty Red Gum (vulnerable), koalas (vulnerable), Regent Honey Eaters (critically endangered), Swift Parrots (critically endangered), Spotted Quolls (endangered) as well as Pied Monarchs and other threatened species. This is inconsistent with the findings of Conacher Environmental (Appendix L).

7.4 Local Government
This discussed contact with local government officers.
7.5
Discuss conference with HWC – Not interested. Project not within catchment area.
7.6 Other Groups
This includes Hansen Construction materials the operator of the large quarry at Brandy Hill. The extension to which was recently approved by the Federal Government notwithstanding its destruction of koala habitat.
7.7 Summary of consultation
(This was done some years ago prior to the consideration of an earlier application by the Supreme Court of NSW and by the Court of Appeal and duly rejected following a lengthy decision.)
8.0 Air Quality
The issue of dust was considered and the nearest 22 dwellings identified (all in Martins Creek).
8.2 Traffic and Access
These issues were discussed in theory but no reference was made to the number of daily truck movements.
Figure 18 estimates the volume of traffic generated on various roads including a total of 50 vehicles per hour (one way only). The TIA concludes that the delays at the Melbourne Street and Pitnacree Road intersections cannot be linked to the MCQ operations as the traffic involved with MCQ only involves 1.9% and 3.6% of flows (though most of the MCQ traffic is not currently happening and when it does, the impact of a B Double truck will be several times that of a car, considerably increasing the impact).
Safety
Only light vehicles have been involved in accidents so far but a considerable increase in the number of heavy trucks might be expected to change all of this.
Funding
The predicted funding required for Dungog roads is $6,427,000, an increase of $904,000 over 25 years. One wonders why so, given an increase of perhaps 500 thirty-two wheeled vehicles per day compared with a reduced number of cars (4 wheel vehicles). One could imagine that our roads are going to wear at a much faster rate than $1/6^{th}$ the rate without the growing heavy duty traffic generated.
Incidentally, where is the additional funding of $36,000 (or 1.1 million or some figure in between) going to come from? Even if paid by Daracon, it would go a long way otherwise to funding the rail infrastructure that seems so difficult to achieve.

Rehabilitation

Conacher Consulting has prepared a site rehabilitation plan (SRP). Will this be included as part of the development consent? How is this going to bind present and future State Governments? It is only a concept plan and proposed to be undertaken as Lots 5 and 6 reach their extraction limits. Since the removal of the road hauls, culverts, storage and drainage areas will be expensive and are any guarantees being given by the developer (supported by bank guarantee) that this will be done? We have numerous examples in the Hunter Valley and elsewhere, including uranium mines in the Northern Territory where promises given to rehabilitate mining sites, have not been kept.

8.6 Surface Water Quality and other matters

The noise abatement proposals set out at some considerable length the proposals for noise abatement. Apparently in relation to rail transport only one train weekly is proposed. Subsequently it concluded that only 6 train movements per day would be contemplated. Clearly, Daracon is not limited to dispatching trains only once a week. In view of the fact that they propose to dispatch vehicles daily, this could be replaced with a train every second day.

Biodiversity report

One was prepared by Conacher Consulting (Appendix L) some 4.9 hectares of the Whalebone Tree, Red Kamala, dry subtropical rainforests is listed as lower hunter dry rainforest under the Threatened Species Conservation Act (TSC Act). These are listed under Appendix L.

A number of threatened species were observed. Koalas, Powerful Owls, Yellow bellied Sheath Tailed Bats. These occur throughout the area at low frequency which may account for the reporter suggesting that there was scant evidence of their presence.

Approximately 26.9ha of suitable koala habitat will be removed.

The impacts on koalas and Eucalypts Glaucina (Slatey Red Gum) are considered to meet the threshold for the Commonwealth. Has this been done?

10.0 Justification and Conclusion

Environmental Impacts

The writer recommends that the proposal does not justify being granted having regard to the lack of intergenerational equity.

Social

The social effect with the proposal in its present form would be devastating on locals and a moments consideration would show that 280 truck movements per day or anything approaching that figure would be totally unreasonable.

Economic

The applicant hasn't given any suitable economic justification complete with figures as to why rail transport should not be used for the transport of all material worked. It is, after all, the majority of it. We have seen no figures to suggest that the rail charges would be vastly in excess of the cost involved with road transport and it seems unlikely that if some 6/11 of the material can be transported by rail, that the balance cannot be similarly transported.

As set out above every aspect of the current proposal was considered in full by the Land and Environment Court. An appeal by the Company against the decision of the Land and Environment Court was refused. The decision of Molesworth AJ in the Land and Environment Court covers every aspect of the current proposal which differs only in minor details from the position as obtained when the decision was handed down. It is referred to in the current application as "the previously exhibited proposal". The changes are said to include

- A reduced approval term from 30 to 25 years. This is really no change. The proposals will have the effect of making life a nightmare for residents for many, many years.
- The reduction of the extraction limit from 1.5 to 1.1 million tons. Again no real change - cosmetic only
- Changes to road and rail transportation limits - no real change
- Reduced peak hourly truck movements - to one every 40 seconds
- Reduced disturbance footprint - There is no real reduction

It would be appropriate to summarize the findings of Molesworth J. This followed a hearing which spanned 22 days including an onsite view. The evidence book totalled 2784 pages and a word count of written submissions of 100,000 words.
It is now proposed by the applicant that exactly the same behaviour as was the subject of orders made against the Company should be continued even though there were findings that the provisions of the Environmental Law had been breached. Among other things Molesworth J. quoted with approval Street CJ in Hannan & Electricity Commission
(n)"the task of the Court is to administer social justice in the enforcement of the legislative scheme of the Act. It is a task that extends far beyond administering justice inter partes.
The present application is an attempt by the applicant to batter its way through notwithstanding the findings made against it. It is essentially a bold faced and brazen attempt to bypass the judgement of the Court which as I have said was upheld on appeal.
The decision of the Court occupied some 364 pages. I shall refer to the judgement giving the page reference number and the paragraph number of His Honour's judgement and setting out in summary the salient points of the judgement. As the appeal was refused I do not set out the reasons of the appellant court as it in effect approved the findings of the judge at first instance.

Page 25 Background Quarry comprises
Lot 5 in DP 242210
Lot 6 in DP 242210
Lot 1 in DP 1006375
Lot 1 in DP 204377
Lots 5 and 6 are referred to as the western lands.
Lot 1 in DP 1006375 and Lot 1 in DP 204377 are referred to as the eastern lands
Around 1914 or 1915 a state owned quarry commenced operation on part of the eastern lands.
On the 18th May 1999 the Dungog Shire Council resolved to (inter alia) notify the State Rail Authority (SRA) that it had granted development consent for part of the eastern lands (the 1991 Consent)
The 1st Respondent (Hunter Industrial Rental Equipment P/L) and
the 2nd Respondent (Buttai Gravel P/L) respectively occupied and managed the Quarry

Page Para

The Council sought to enforce the provisions of the Environmental Planning & Assessment Act 1974(EPA Act).

29 The Council sought various orders and prayers

33 The judgement provides a detailed summary of the competing positions of the parties. Each summary of the competing positions of the parties is followed by the Courts determination of that issue

36 This paragraph sets out the Courts decisions and

37 Sets out the overall conclusion

41 In this paragraph His Honour sets out that the Council Town Planner lists 8 State Authorities which (on the 12th February 1990) were sent a copy of the 1991 EIS accompanied by the 1990 DA

42 The Evidence
Annexed to the judgement were (1) An aerial image of the quarry (taken on the 14th June 2015
(2) Plan "2" received by Council on the 15/10/1990
(3) The interim Environmental Management Plan (I.E.M.P.)

47 The layperson evidence included evidence of residents of Paterson and Martins Creek and persons who have worked or who work at the Quarry.

It could no doubt have included evidence from residents of Bolwarra, Bolwarra Heights, Lorn and East Maitland but these are not part of the Dungog Shire Council and while these persons (residents of Bolwarra, Bolwarra Heights, Lorn and East Maitland) would no doubt be affected to a similar extent their opinion was not sought (the writers comment).

49 The layperson evidence included that of Frank Martin who has lived nearby since 1940 and Paul Walker who was the Quarry Manager of Buttai Gravel. Also Ms Jacqueline Tupper Manager of Planning at the Council, Darren Robson of Daracon.

52 Evidence was given by an acoustics/noise expert Raymond Tunney and Steven Cooper. The Company respondents also relied on the evidence of a surveyor David Wallace, a roads and

pavements expert, Roy Bartlett and an air quality expert Aleksander Todoroski. The case was heard prior to the amendments to the EPA which commenced on the 1st March 2018 and the updated section references are set out alongside the originals.

58 Discusses development that needs consent

47 63 Defines "existing use"

69 Incorporation

This and succeeding paragraphs discuss the incorporation of the 1990 DA and 1990 EIS into the 1991 Consent (by setting out the relevant legal principles)

115 In this paragraph reference was made to the conditions imposed that the applicant should not transport greatly more than 30% of quarry products by road

117 The enduring function of the 1991 Consent was to allow a railway ballast quarry within a limited area of Lot 5, with ancilliary works and activity within a limited area of Lot 6. The enduring function was not ……..to pursue unrestrained quarrying for all purposes…far beyond the area envisaged…….massively increasing the quarrying activity…..and so increasing consequential off-site impacts, such as truck traffic through the nearby historic town of Paterson

122 & 123 In this paragraph reference is made to the comments of Ward JA to permitting quarry operations on two portions of land and on incorporation (in this case of the 1990 DA with its 1990 EIS and Plan 2)

127 It is important to understand that the purpose of incorporation of the 1990 EIS is to provide clarity as the limited nature of the development that was proposed and the context for environmental controls. The requirement that "not greatly more than 30%" transported by road…….embodied the expectation that "the other 70% would go by rail"

128 What was the greater evil……accept the difficulty that future owners might have or ……..by allowing development far beyond that which was envisaged in the original proposals

The Court prefers the submissions of the Council

75 129 The purpose of an EIS is the …….process

The Court also agrees with the Council's submissions. If not potentially allowing a condition-less consent as the Company argued, the Court would then be allowing an approval of an unconstrained proposal never applied for over an area much larger than ever envisaged (the whole 52.5 ha of the property) with likely significant greater external impacts never examined. The unacceptable implications of such ramifications are clear.

130 The Court rejects the Company's proposition that the EIS is exhausted once the decision is made

131 The Company's propositions, if accepted would make a mockery of the public participatory processes established by the legislation. The Court rejects ……..the assertion that the representations in the 1990 EIS were not relied on by the public. The Court can accept there will often be scepticism about assurances. As it turns out these concerned people may well have been insightful…… .The Court does not accept the Company's argument as it would mean that the process is to be disregarded or dismissed with assurances in such documents being given little or no weight. Such a proposition would invite a deplorable disregard of the statutory scheme that requires compliance with the EIS process, a scheme which the legislasture presumably saw merit in enacting.

132 An EIS does not impose conditions of consent. In short it was suggested that there would be unapproved incorporated conditions. The Court rejects this argument.

136 The Company respondents suggest that the failure to include words meant that the Council chose to omit such inclusion or contemplated a consent to activities far beyond the 1990 EIS With due regard to the ingenuity of the argument such a suggestion stretches credibility. The implication that the Council was condoning extraction far beyond the 5 ha limit to potentially 52.5 ha must be treated with incredibility.

145 Reference is made to "a Round Hill" only location is on Lot 5 DP 242210. See contour lines on Plan 1 and Plan 2

147 The Company's Rebuttal

154 Consideration and Determination - Issue 2

The Relief Sought

155 The Outcome

The Court finds that the arguments submitted by the Company cannot be sustained

85 157 It would be chaos if the delimitations of use and development for one area within the overall land were simply cast aside allowing a "free for all".

158 One of the seminal planning cases in the High Court dealing with extractive industry assists us with understanding this (sensible approach)

88 159 In this respect the Court accepts the Council's submissions (about the reference to Lots 5 & 6)

160 The Court does not accept the Company's submissions that the area of extraction would extend beyond the designated area shown for the quarry. The Court does not accept that the words marked on the plan "Quarry Floor 40.0 m R/L" provides information other than that the Quarry Floor will be at 40m RL. The words are rather an indication of maximum depth.

165 The Court finds that the Company's interpretation was a convenient post factum reconstruct. The Court rejects this reconstruct.

91 168 The Court found Mr. Walker's (of the Company respondents) evidence to be vague and unhelpful. On this issue Mr. Walker was not a credible witness. Alternative interpretations of Plan 2 and the 1991 consent as proferred by Mr. Walker are not accepted by the Court.

169 For this to have progressively followed this course……. constitutes a significant breach of the requirements of the EPA Act

173 The substantial majority of material …… has been transported ……. by truck rather than by rail

98 190 The 1991 consent was not granted for "extractive industry" generally

192 Constraining, as in this case, a genus of quarry to a species, being a railway ballast quarry

194 -----being the production of crushed rock, and dependant on railway rolling stock to transport the raw rock ballast thereby obviating the need for (much) road transport.

195 The Company's operations at MC have moved far away from that which could still be characterised as a railway ballast quarry.

196 The Court rejects the Company's alternative position……that the description of the development as being…….primarily for railway ballast was a non-binding statement of intention rather than a constraint upon the lawful activities permitted

197 The distinction is not just about the product rather it is about the operational interface between the quarry and the broader community

199 <u>Transformation of railway…….quarry into General Quarry</u>

This transformation never had planning approval

204 The inextricable linkage of the railway ballast quarry to the primary mode of transport of extracted raw material by rail is one of the most critical factors. The RTA is generally not in favour of the transport of quarry products on the public road system.

254 I have decided that the Company's submissions as to whether or not conditions were imposed on the 1991 consent largely fail. The 1991 consent was issued imposing conditions which had received the requisite approval from the SRA.

260 The SRA did consent to conditions of consent.

262 It follows that the Court accepts as accurate the Councils closing submissions

266(c) The applicant seeking development consent - constrained by the limitations contained in its own EIS and DA

130 264 The Court found Mr. Walker to be an unconvincing witness. His recollections were not reliable. Mr. Walker's interpretations are not to be preferred

The Court accepted the submissions of Council

270(7) With or without consent conditions the Company respondents would still be in a predicament - breaking the planning law

281 The Council referred to evidence in support of its claim that the Company respondents have breached condition 1 by interfering with the amenity of both Martins Creek and Paterson

142 300 <u>The Company's assertion that many of the impacts are the fault of the Council</u>

313 Condition 1 in the 1991 Consent is as follows

"The development being conducted in such a manner as not to interfere with the amenity of the neighbourhood in respect of noise, vibration, smell, dust, waste water, waste products or otherwise"

319 The Court rejects the Company's preference for the relevant "neighbourhood" to be interpreted as being a limited geographical area surrounding the quarry …….

essentially the village of Martins Creek. The Court finds the reference to those conditions conditions was unhelpful.

150 322 This is a reference to the judgement of Sugarman J in Mayo & North Sydney "The amenity of a neighbourhood…….is the quality it has of being pleasant or agreeable"

325 ……the lay witnesses describing how the quarry development has impacted on their lives…….the Court found the evidence of these witnesses telling and persuasive subject to some qualifications. The Court is convinced that by reason of the truck traffic the amenity which they could enjoy, compared to the baseline, has been interfered with.

328 The Court would go further concluding that the amenity has been unacceptably interfered with, to the extent that it has been, and is, contrary to condition 1 of the 1991 consent.

329 The Court cannot dismiss the lay evidence in this regard as being untenable. However that evolved context is not enough, in the Courts assessment to discount the impact of a massive increase in quarry related truck movements

330 However if there are hundreds more trucks passing down that road than were originally envisaged and taking into account the "evolving context" it is not surprising the road has deteriorated.

335 <u>Exhibit E Rail Corp's letter of 9th August, 2004</u>
Railcorp's table of figures over 10 years of product by rail. None of the "other product" and even for ballast nowhere near as low as "not greatly more than 30%"

336 From the second respondents own material non road transportation a mere 2.5% of product a massive increase in truck volumes sitting at 97.5% rather than 30%

338 to 343 Frequency and scale of blasting

346 The conclusion the Court has reached with respect to the amenity of the neighbourhood particularly in Paterson by reason of the massive (as the Court has concluded) increase in road traffic - giving rise to all of noise, dust, vibration, traffic congestion and traffic danger impacts

163 356 To illustrate just how stark is the differential (that exceedance is the norm) the Court refers to paras 168 - 169 of the Council's closing submissions (- only 2.5% of the total transported by ballast train. <u>Does western lands quarry product morph with eastern lands quarry product</u>
To assert that extracted rock, once processed, is no longer quarry product originating from operations approved by the 1991 consent is quite frankly a nonsense

360 The Court was disappointed that it had to deal with such a submission and incredulous that it was even put. If the Court was to accept that condition 6 was not to apply to rock, having been moved from the western lands to the eastern lands in the manner suggested by the Company it would be tantamount to condoning a devise improperly conceived by the Company respondents to circumvent their legal obligations

362 If the Court was to give any credence to this spurious argument (how to treat a truckload that is lost) Does western lands quarry product become protected by eastern lands continuing use rights

363 A further "ingenious" argument put forward by the respondents which the Court also rejects as being without merit

364 The Court rejects this "continuing use right" argument on a similar basis

365 Is condition 6 unworkable and so 26 years later should be struck down. The Court rejects the argument that the condition is unworkable

367 The Court is not persuaded that it was ever beyond the capacity of the respondents to assign these appropriately to a mode of transport as required or to ……..assign to truck or rail respectively. With the assistance of modern technology advance forecasting should be perfectly capable of determining (tip the balance - not greatly more than 30%)

169 372 The Council has placed into evidence voluminous material and painstakingly taken the Court through an evidence book approaching 3000 pages in length

375 There is a strong prima facie case of breach and the onus then shifted to the Company

378 The Court finds the Council's submissions persuasive in contradistinction to the Company's submission

CONSENT TO EXTRACT A FINITE RESOURCE - The Martins Creek Quarry conundrum

396 Arguably all truck movement associated with the unauthorised continuing quarrying constitutes unreasonable interference with amenity. Likewise any blasting associated ……..could be seen as constituting unreasonable interference with amenity

CONSIDERATION 7 DETERMINATION -ISSUE 6 (Non) COMPLIANCE WITH CONDITION 7 - ENVIRONMENTAL SAFEGUARDS

426 The Court has already confirmed that ……rail……..is itself an environmental safeguard. That approval was repeated many times in the 1990 EIS

432 (The restaurant parallel)

437 The primary limiting factor was the true quarry site ……5 ha……together with a 40m RL depth limitation

448 In summary the Court will make declarations sought in prayer 1,2,4,6 & 11 and make the orders sought in prayer 3,5,7,9 & 12

CONSIDERATION AND DETERMINATION - ISSUE 70

UNLAWFUL PROCESSING ON LOTS 5 & 6

194 452 The Court has decided to grant the relief sought in prayer 25 and 26

468 It is inconceivable that 14 years later the same quarry within its allowed 5 ha limit is still Producing andesite at volumes considerably greater than was the case in the first 11 years

470 The finite use of the andesite in the approved location must have been exhausted so it follows there is no longer a lawful development and use of the land

The Applicant Councils claim of unlawful use of the eastern lands

241 600 Transfer or Control

CONSIDERATION AND DETERMINATION ISSUE 8 -

THE (UN)LAWFULNESS of the use of the eastern lands

Summarizes the relief sought by the Council in prayers 17 - 24

250 627 There was always a nexus to the extraction of stone onsite or on associated land

256

635 Continuing use rights of an ancillary land use can only co-exist with a dominant lawful land use

646 The Court found the oral evidence of Mr. Martin persuasive. Mr. Walker was also helpful however Mr. Walker had a tendency to be too "self-serving" in the interests of the Company which sadly infected the objectivity and so usefulness of his evidence

267 671 The Court accepts that the evidence of the sale transaction is instructive. A summary was provided in Councils closing submissions (The quarry was not sold as a going concern but as an asset sale only. No warranties were given in relation to the use of the Quarry).

677 Properly analysed the Court is of the opinion that the Company pays too little regard to processing as a mere component. The Court does not accept that processing was anything other than an ancillary activity. ……..the Court is satisfied on the evidence that the operations on the eastern lands ……. eventually destroyed all the continuing rights asserted by the Company respondents via the multiplicity of ingenious arguments they submitted to the Court

678 In explaining its overall reasons the Court will recap the reasons why the Company's arguments concerning existing and continuing use rights fail (therein set out 1 - 9)

681 The Court accepts the Council's view that……. the processing……. would require development consent (Quoting Court of Appeal in Egan & Hawkesbury City Council)

686 The Council is correct to emphasise the company case relying on rehabilitation as the means to continue active quarrying……One could ask when does a rehabilitation requirement conclude. Would it conclude when young tube stock trees grow to maturity over many decades

ISSUE 9 : The role of the FIRST RESPONDENT

690 The Council asserts that the first respondent leases under two leases the eastern and part of the western, and another part of the western lands

691-

695 Certain terms of the leases are set out

697-

698 The Company suggests that the first respondent is the trustee only of the Susan Mingay Family Trust

CONSIDERATION AND DETERMINATION - ISSUE 9

The role of the First Respondent

283 701 The Court is satisfied that the First Respondent is properly a respondent in these proceedings

702 The Court finds that the arguments submitted on behalf of the Company respondents cannot be sustained

286 708 It would be improper for these corporate arrangements between the Company respondents to be allowed to provide a cloak of protection for one company

ISSUE 10 - The validity of the variation of EPL 1378

726 It was argued by the Council that an increase of this magnitude would automatically result in an increase in extractive activities such as blasting, rock hammering and drilling and the operation of heavy machinery …….together with a commensurate increase in the transportation movements from the quarry

727 The Council contended that the licence variation would authorise a significant increase in the environmental impacts of the quarry

741 The Company respondents said that it was intended to leave the determination of the s58(6) matters to the EPA rather than the Courts

745 The Company submitted (7) reasons why the Court should not follow Donnelly

Discretion

762 The Company contended that the Court should decline to exercise its jurisdiction

767 CONSIDERATION AND DETERMINATION OF ISSUE 10

EPL Variation

The Relief sought - Pages 27 & 28

773 Notwithstanding the no fewer than 7 grounds on which the Company respondents ought not to follow Donnelly I find no basis that would justify this

794 The Court rejects the Companys (somewhat extraordinary)submission that …….the Council has failed to demonstrate why that failure should lead to the invalidity because public participation is not necessarily an important aspect

In rejecting that assertion finding it to be without merit

……public input into the licensing process is a key component of the statutory scheme reinforced by the objects of legislation

795 I find the Company's critical interference of His Honour's (Bignold J) "great reliance" to be quite misplaced. Further, as Kirby J in Hillpalm emphasised the role of this expert/specialist court ought not be underplayed

796 Legislative intent to allow public participation

The decision making process of regulatory authorities is normally strengthened after the benefit of public input

800 The Council submits that the EPA was obliged by s.58(6) to invite and consider public submissions. The failure to do so……means that the purported licence variation was invalid and of no effect

801 In Scurr & Brisbane City Council the High Court found that central to the process providing for the consideration of a DA was the necessity for proper and accurate public notification of the process. If a decision to approve the development followed deficient notification the decision should be struck down

320 808 The Court concluded that the procession of use of the eastern lands was largely unlawful

810 Ought the Court to exercise judicial discretion in declaring the variation of EPL 1378 invalid

811 The Council argued that the effect of the licence variation has been to deny members of the public their right to participate in the assessment process

Issue 11 DISCRETION

The Company respondents contended that the Council delayed taking action acquiesced in the conduct

ECONOMIC IMPACTS OF RELIEF

327 828 The Company claimed that if its operations were significantly limited …….the economic viability of the quarry would be threatened

834 The Council said it was relevant that the proceedings were commenced in response to a "dramatic increase in community complaints and submissions" in about March 2014 which coincided with a substantial increase in road transportation of quarry products along public roads

842 Relevantly the Council submitted that the first respondent did not purchase the quarry as a going concern and that it knew there were planning approval risks relating to its purchase of Railcorp's quarry assets and leases

331 848 The Council referred to both the evidence from members of the Martins creek and Paterson communities as to the significant impact of quarry operations on their day to day lives

850 The Council submitted that the language of "in any 12 month period" in condition 1 is "a compliance nightmare".

CONSIDERATION AND DETERMINATION OF ISSUE 11 ON DISCRETION

851 The Court has decided that the company respondents have failed to satisfy it that the Council is not entitled to much of the relief it seeks. The Court finds that the arguments of the company not to make the orders sought fail.

There is some merit in staying the restraining orders

852 (Orders stayed for 3 months)

854 The Court rejects the Companys submissions which seek to minimise the impacts on the broader community in particular those who reside in the township of Paterson, from the increase in truck movements due to the greatly expanded operation of the quarry far beyond that approved in the 1991 consent. The Court surmises that the absence of concerns from the village (Martins Creek) which would appear to be a community largely dependent on and/or associated with the quarry is unsurprising. The wider implications of the unlawfully expanded quarry <u>reinforce the Courts resolve</u> that it must exercise its discretion cognizant of those impacts and the clear need, indeed duty, in accordance with the Warringah Shire Council & Sedevci principles to uphold the rule of law.

858 The Court has found it well to keep in mind

MINISTER FOR IMMIGRATION & KURTOVIC - per Gummow J

(inter alia) Estoppel. Cannot hinder…….the exercise for the benefit of the public

861 The Court considers it is well to remember that the Council acts in a representative capacity in the public interest.

The enforcement of planning laws by the Council undoubtedly constitutes action for public benefit and is in the public interest.

863 The respondents contend that the Court should take into consideration that the company acquired the quarry from Railcorp with limited information and opportunity to scrutinize.

The Court finds these submissions unpersuasive. The portrayal of the company respondents as naive innocents is not credible. The old adage of "buyer beware" is apposite

The Court does not accept that……..the company……was not fully aware that they were acquiring a quarry for railway ballast. Even if they were so ignorant they ought not to have been

337 864 The ongoing and incremental expansion of the quarry operations have progressively moved the quarry away from railway ballast to an unpermitted operation with <u>significantly different offsite environmental impacts</u>

865 The Court concludes that the Company respondents have at some time post acquisition (perhaps prospectively) at the point of acquisition <u>decided to push the bounds of what was possible at the quarry, continuing on, accepting the commercial risk, which I observe was at their peril breaches of the planning law, on the basis that they would be seen as contributing to the local employment and so the economy.</u>

As expressed by Counsel for the Council the company respondents decided to go ahead and ramp up production without seeking any further consent and fully aware that it could blow up into a full scale dispute.

866 The Court is firmly of the view that such conduct should not be rewarded with the exercise of discretion in favour of the Company respondents

<u>DECLARATIONS SOUGHT</u>

876 The starting point of the SSD application proposal is not a lawfully operating quarry with consents in place but an operation which is in breach of the planning law. There is great utility in the decision makers who are considering the SSD application to understand the parameters of that which has been placed before them

878 The Court considers it unreasonable to grapple with a judgement of near 400 pages

880 Orders stayed for 3 months

881 The Court has little doubt that there would be a significant number of contracts for supply. If the Court were to make orders sought (by the respondents) the implications for the "innocent" community must be of concern. That "innocent" community includes those both directly affected by amenity and environmental impacts of the unlawful operations and also those who have made arrangements for a supply (though in the intervening years if the respondents companys have made arrangements for supply that ought to be at their peril - (my comment)

355 892 COSTS

364 895 ORDERS (25 in all)

It remains for the Dept of Planning Industry & Environment to determine the SSD application. I submit that the behaviour of the applicant should not be rewarded by its being granted. Even though the findings of the Land & Environment Court do not bind the EPA they are or ought to be of great persuasive authority. The project would significantly impact upon the amenity of persons in the Martins Creek, Paterson, Bolwarra Heights, Bolwarra and East Maitland communities. It would have significant environmental effects. The applicant has five other quarries in the Upper and Lower Hunter. The needs of the community are also met by the Brandy Hill Quarry. Moreover the applicant has demonstrated on many occasions disregard for the planning law. As against that it proposed a huge upheaval for the residents of adjacent areas demonstrating by its insistence upon road transport that it is only motivated by economic considerations in this deeply flawed proposal. The attitude of the applicant and its attitude towards the planning laws cannot be distinguished from the behaviour displayed by it in the hearing of the matters which were before the Court over a period of as long as 22 days. During that time the respondents have in effect demonstrated their contempt for the planning process. In reaching a conclusion about the present application regard must be had to all of the above matters and not simply ticked by the Department as being a development proposal and as such inherently something that should be granted. Rather we expect of the Department a degree of social justice.

I have not made any reportable political donation.

Yours Faithfully

Alan Mitchell