

University of Southern Queensland

Faculty of Engineering and Surveying

**IMPEDIMENTS TO IDENTIFYING  
FREEHOLD LAND RIGHTS  
IN N.S.W.**

A dissertation submitted by

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in fulfilment of the requirements of

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# Abstract

The objective of an efficient land administration is to clarify the extent, duration and purpose of land rights enjoyed over any given land resource.

Achieving certainty in the definition and application of all Rights, Obligations and Restrictions (RORs) over a parcel of land is of utmost priority. It is the primary intention of this project to recognise any impediments that may hinder the efficient identification of *all* RORs that may exist over a parcel of freehold land in N.S.W.

A comprehensive typology for the investigation of all RORs that can exist over freehold land was created and applied to a freehold parcel of land, with any impediments noted.

Several impediments were identified being that extensive research is required prior to any search, that an exhaustive typology is required prior to any search, that the administration system is currently split amongst independent organisations with different methodologies and little cross communication, that difficulties were experienced with the public interface of several land administration organizations, that registrars limit their liability and therefore it cannot be assumed all relevant detail has been obtained, that unforeseeable interests may exist and that RORs are continuously evolving.

The application of the created typology was found to be relatively efficient and inexpensive when tested on the subject case study. This has implications for land administration reform and may not require a complete overhaul as suggested by some authors.

The assumption that the land administration system is inefficient and requires reform has been supported by the findings of this project.

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A handwritten signature in black ink, appearing to read 'Frank Bullen', with a stylized, cursive script.

**Prof Frank Bullen**

Dean

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# Certification Page

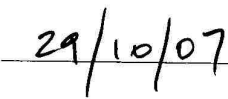
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# Nomenclature and Acronyms

The following abbreviations have been used throughout the text: -

AHIMS	Aboriginal Heritage Information Management System
D.P.	Deposited Plan
LPI	Land Property Information division of the N.S.W Department of Lands
RORs	The term ROR encompasses all rights, obligations and restrictions pertaining to a parcel of land.
NNTT	National Native Title Tribunal
N.S.W.	New South Wales



# Chapter 1

## Introduction

### 1.1 Project Background.

The objective of an efficient land administration is to clarify ‘who has rights to how much of a given land resource, for how long and for which purposes.’ (Riddell et al 1999, p.1).

Lyons et al (2002) determined that a first priority should be achieving certainty in the definition and application of all RORs pertaining to any parcel of land. Traditionally land rights have been bundled within a land title controlled by an extensive regulatory regime, ensuring security of title and any registered property rights. Lyons definition of land rights takes on a much broader definition to include *all* land rights, obligations and restrictions, existing over a parcel of land, using the term RORs synonymously. An increasing complexity of public and private interests in land is driving the need to re-examine the traditional methods of identifying land rights that are failing to provide sufficient detail to identify clearly these RORs.

### 1.2 ROR Definition.

The rights to a given land resource is commonly understood to be within lawful purposes, however little is known by most professionals, lest a landowner, as to what limits these lawful rights, obligations and restrictions extend. Property rights can and do effect land use, value and resale often without the landholder’s or potential purchaser’s knowledge.

The term ROR encompasses all rights, obligations and restrictions pertaining to a parcel of land.

The two essential characteristics of property rights as identified by Chambers (2001) are:

1. The property right is related to, and depending on the existence of a thing
2. The property rights can be enforced against a wide range of people

Property rights in land are therefore vested in the parcel of land, rather than the person entitled to those rights. There is no specific person responsible for the fulfilment of property rights.

All property rights have correlating *obligations* that are enforceable against any person not to obstruct the enjoyment of that right. No person may interfere with a right held by a landowner, nor may a landowner interfere with a right held by any person. Property rights are a collection of rights against every member of society, each of who is under obligation not to interfere with those rights. Remedies are determined by a court of law for any breach of such rights.

*Restrictions* in relation to land are limitations on the use of land that are enforceable against a landowner. They can include the corresponding obligations of traditionally regarded property rights or any number of personal rights.

Property rights differ from personal rights in that they are related to the land parcel, regardless of the identity of the current owner. Personal rights can exist as contracts between right holders but are not attached to the parcel of land and may terminate once their rights to that land are severed. Personal rights can allow land related activity that would otherwise be considered illegal. Given that an infinite number of contractual rights that may affect land exist it has been deemed impractical, and even impossible to attempt to identify all types of personal rights that may affect land.

### **1.3 The Problem.**

The management of resource use to mankind is vitally important for both livelihood and quality of life. The debate over the distribution of rights in society will always continue. It is necessary to generate a system that upholds the rights of the individual over the competing rights of another. Disagreements about the rights to any particular thing are

serious, and society must establish a set of enforceable rules in order to avoid violent conflict.

The human-land relationship is continuously evolving. The nature of resources in terms of availability and usefulness is dynamic and this has an impact on the way in which land rights are administered. From the agricultural revolution through to the feudal system land was being utilised as the primary symbol and source of wealth. With the industrial revolution, land became a commodity, thus giving birth to land markets and the need to regulate transfer of land under the cadastre. Scarcity of land became evident with the population boom of the 20<sup>th</sup> century giving birth to an increased interest in urban and regional planning. An awareness of environmental degradation, sustainable development and social equity in the 1980's have recently complicated land administration with the implementation of various globally and locally community minded legislation and obligations (Williamson and Ting 2001).

Rights existing over a single property can be held as private property, common property (the right of every member of society) or collective property (rights governed by public institutions). For the majority of cases a complicated combination of all abovementioned property types exist simultaneously. A privately owned building may also be subject to a heritage restriction regulated by the relevant public authority. The private owner is obliged to keep from altering the building, and may even be required to maintain it subject to the heritage right. The use of rights is therefore determined both privately and collectively, and any miscommunication may create inefficiencies and lead to disastrous outcomes for all interested parties.

A common misconception is that the ownership of a parcel of land in freehold estate gives the landowner total rights over a land parcel to the exclusion of all others. The existence of property rights can have a major impact into the allowable usage of land and subsequently the land value. A clear method for accessing all relevant information pertaining to existing land RORs are necessary in order to participate in the land market with full knowledge (Lyons et al 2002). Efficient land administration systems are undisputedly related to 'economic development and wealth creation, land and environment sustainability and social stability'. It is therefore imperative that shortcomings in our land administration systems are identified and a continued effort towards best practice is implemented.

The execution of land administration and cadastral reform is a complex and difficult task to undertake; therefore a large temptation to continue in the present form of land administration exists. The importance of land markets to the economic, environmental and social stability of society means it is imperative to implement best practice policies that evolve with the market. The human-land relationship is continuing to evolve and so the broadest possible perspective of land rights must be considered for the possibility to achieve effective land management.

It is envisaged that the identification of impediments to accessing land information in N.S.W. will clarify some of the issues with the current land administration system and support the drive for reform.

It is widely assumed within the current body of literature that the existing system is inefficient and prevents landowners from identifying relevant land rights. This assumption is based only on a theoretical argument with little objective evidence that this is the case. It is the primary intention of this project to investigate the claim that inefficiencies in the current land administration system prevents the N.S.W. landowner from identifying all RORs over their parcel of freehold land.

#### **1.4 Project Aim.**

To identify impediments to efficient searching of all rights, obligations and restrictions (RORs) existing over a parcel of freehold land in N.S.W. by investigating all RORs existing over Lot 2816 D.P. 728428.

#### **1.5 Research Objectives.**

With an increasing complexity of land rights any existing inconsistencies must be identified and addressed if the land market is to continue to remain sustainable. It is essential for the implementation of profitable land use that there is no confusion as to the extent of rights. The task of identifying all RORs over the selected parcel of land may assist in pinpointing any that lack clear definition.

The task of reform is arduous, drawing on numerous resources for a lengthy period of time and requiring a total commitment across all public and private disciplines. Execution of this project is only a very minor part in the total scheme of reform but may play a useful role in the first stages of identifying problems.

## **1.6 Conclusions: Chapter 1.**

This project aims to identify any short-comings in the N.S.W. land rights management systems by attempting a comprehensive identification of all land rights existing over a real freehold parcel of land.

Given the complex nature and history of land management, this research provides clarification of major impediments to the effective identification of existing land rights.

A review of literature for this research identifies current trends in the land administration process and assist in compiling a comprehensive typology for attaining notice of existing land rights over the chosen parcel of freehold land.

The outcomes of this research will allow a practical analysis of any shortcomings in the land administration process and contribute support for any necessary reform.

# Chapter 2

## Literature Review

### 2.1 Introduction.

The literature review performed focussed primarily towards identifying current trends in land administration and to establish the value of identifying RORs on a parcel of freehold land with relation to the current body of knowledge.

RORs operate very differently between different jurisdictions, nations and states. This project is not concerned with techniques for achieving successful land administration as may be demonstrated outside of N.S.W, but rather identifying the specific inefficiencies of the local system. It is envisaged that the findings identified in this dissertation will prompt appropriate reform, with the methods for achieving this reform the subject of further research. Literature relating to land administration outside of Australia was therefore not regarded as pertinent to the cause of identifying specific inefficiencies within N.S.W. Some attention to the reform of land administration was sourced in N.S.W., however several leading and equally relevant sources in Queensland and Victoria were identified as the major drivers for unified national land administration reform in Australia.

Two major themes were recognised within the scope of relevant literature, being the description of current status in land administration and the means by which the land administration system should be reformed.

### 2.2 Current Status of Land Administration.

It has been found economies with successful land markets are wealthier, more stable and offer more opportunities than those without. Stable communities will tend to subdivide land resources for opportunities in investment, usage and security (Wallace and Williamson 2004). Organisation of these opportunity sets evolves into a collection of legal rights relating to land and land resources. Land administration is split amongst

various governing bodies independent of each other in accordance with historical evolution of property rights (Wallace et al 2005). Land related information considered vital for public knowledge extends beyond that gained upon a traditional search of bundled land rights that is restricted to a rather limited scope.

The present control of land rights in N.S.W. are concealed within numerous pieces of legislation, a multitude of Regulations under their relevant Acts and a vast range of fine details prescribed under directions issued by various registering authorities. Furthermore, property rights have reduced dramatically since Australia's recent commitments to global environmental issues. Previously implicit property rights are being defined under separate legislation, unbundled and excluded from land title (Lyons et al 2002).

A diagrammatical representation of the multiple RORs that may exist over a parcel of land is shown in the following diagram.

**Boundaries of:**

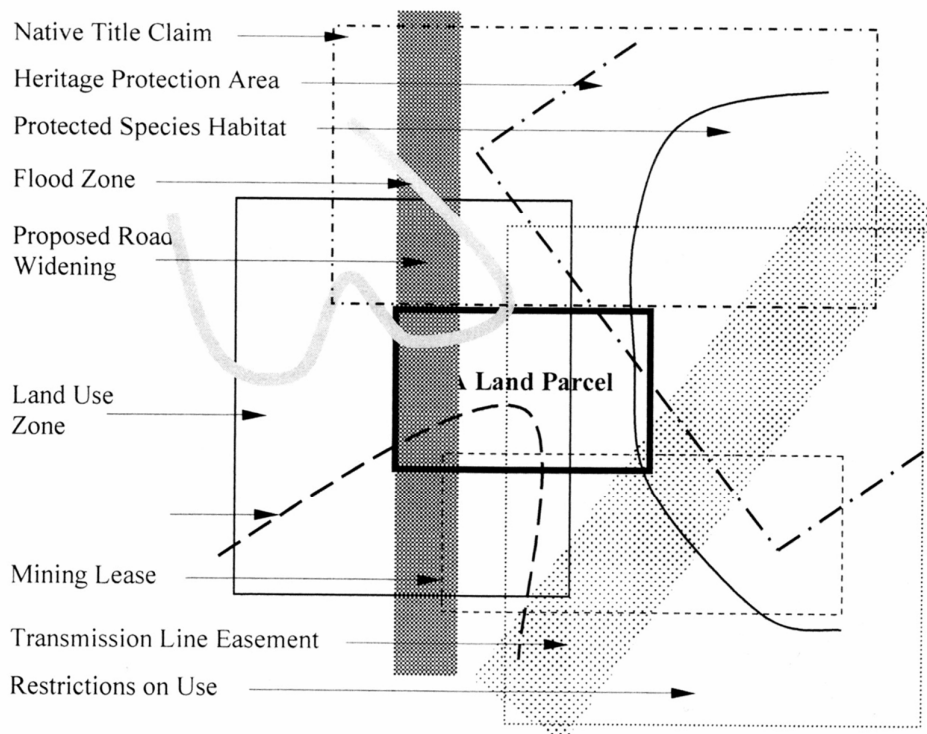


Figure 2.1: Schematic of overlapping rights, restrictions and responsibilities in a modern multi-purpose cadastre (from Williamson and Ting 2001 p.11)

The inefficiency of the current land administration system was estimated in 1999 by the Property Council of Australia to cost an estimated \$2bn per year in Australia (Lyons et al 2002).

### **2.3 Drivers for Change.**

The number of RORs attached to land is predicted to increase with a continual evolution of environmental and planning law. Unless property rights are ‘clear, searchable and definable in location’ the future sustainability of the development and land markets will be adversely affected (Lyons et al 2002 p.21).

Lyons et al 2002 lists the major drivers for land administration change as being:

1. Evolution of land administration
2. Increasing pressures to improve land sustainability and environmental quality
3. Pressures to reduce expenditure whilst improving services and accountability

### **2.4 Improving Efficiency of Land Administration.**

Despite worldwide attention given to global land use policy, sustainability and planning, little attention has been given to the infrastructure that facilitates the implementation of these regimes (Williamson 2001).

Information is vital for a society’s social and economic development, and that a society without geographical awareness is unable to effectively plan. Poorly integrated information systems are ineffective due to duplication, waste, shallow decision-making and lack of substance (Grant 1999). A cost benefit survey by Price Waterhouse in 1995 showed that every dollar invested in producing land and geographic data had a benefit of four dollars within the economy. A similar survey by Price Waterhouse Urwick into the actual benefit of land and geographic data in New South Wales concluded that a nine-dollar benefit resulted from every dollar invested into the capture of cadastral data. (Australian New Zealand Land Information Council, cited in Grant 1999).

With the rising of the new technological and information era, various solutions to improving the efficiency of land administration have been proposed. These range from the introduction of a ‘one-stop shop’ of integrated land related information across all



disciplines to the formation of a governmental department wholly responsible for the entire scope of land administration (Wallace et al 2004). It is beyond the capacity of this project to discuss the intricacies of these propositions but rather to recognise that there is a general drive towards cadastral and land administration reform.

## **2.5 Questions for Further Debate.**

Lyons et al (2002) takes the view that land administration reform is necessary. It is argued purely from a theoretical basis that the increasing complexity of land rights will stretch the current administration systems beyond its capabilities. They recommended as a priority that a manageable area or parcel of land be selected for a prototype study on all RORs affecting that land for the clarification of any shortcomings in the legal definition of RORs and in the provision of correct information (p.71).

By performing a real life case study of attaining information relating to all RORs over a single parcel, this project seeks to clarify the problems associated with the current land administration systems from the experience of the average land owner and build on the theoretical argument in the current body of research that calls for reform.

## **2.6 Conclusions: Chapter 2.**

The existing literature on Australian land administration urges for reform based on assumed inefficiencies in the current system and proposed complexities in the evolution of property rights, without any real evidence that any problems actually exist. It is the purpose of this project to examine the reliability of these assumptions by performing a real life case study of obtaining all RORs over a freehold land parcel in N.S.W. to identify any impediments.

# Chapter 3

## Methodology

### 3.1 Stage 1: Research Design

A comprehensive identification of any land rights that *may* exist over the chosen freehold parcel of land depends heavily on the ability to gather a complete list of rights, obligations and restrictions that *can* exist. This requires an extensive knowledge of relevant concepts in property law and can only occur following a large amount of research into current literature, background information and contact with relevant participants in the land administration profession.

It was therefore proper that a large part of this project consisted of diligent research into all relevant background information prior to the gathering of any specific ROR details existing over the chosen parcel of land.

For the purpose of achieving a satisfactory result it was important that no type of ROR was overlooked. It was therefore perceived as appropriate that the research design began generally and concluded specifically. The research component of this project was performed in accordance with the following headings.

#### 3.1.1 Overview of Property Law

The nature of land administration in N.S.W. has developed from a highly complicated history and combination of legal and equitable theory contrived from various factions of law including international, federal, state and local statutory and regulatory bodies, courts of law and courts of chancery. Any attempt to identify all the rights existing over a parcel of land requires appreciation of all the relevant components of property law. This project therefore began with general research into appropriate legal texts.

### **3.1.2 Classification of Property Rights**

Considering that the current status of land administration in N.S.W. is made up of various governing bodies each administering their own directions independently, there is no document that was found to claim a complete listing of all RORs that can exist over a parcel of freehold land. Separate land rights existing over a single parcel can be and are administered very differently. The first stage in investigating the complete range of rights is to create a comprehensive classification of rights that then allows the task to be broken into several components in accordance with the various methods of administration. This was performed by compiling information from various legal texts, current land administration literature, research into practices of the relevant administrative organisations and guidance from appropriate professionals.

### **3.1.3 Investigation into Characteristics of Specific RORs**

Once a manageable categorisation of RORs was completed, an investigation into the characteristics of specific ROR types, and the implications of the identification of these rights found. The characteristics of rights were shown to have important implications for the management of those rights including their registration and identification. Prior to forming a typology for investigating rights, the entire breadth of RORs that could exist was established.

### **3.1.4 Formation of Typology for Investigating RORs**

A full typology for investigating RORs existing over freehold land was then created for each identified ROR under section 3.1.3 in accordance with the public institutions responsible for administering them. The development of a typology for identifying land rights that could claim completeness depended primarily on the ability to identify all rights that could exist. Once the existence of an ROR was established, then the method for identifying that right was investigated, with a compilation of all investigation methods forming the typology that could be used for identifying all RORs over any freehold parcel of land in N.S.W. This allowed a comprehensive methodology for identifying RORs and was suitably tested on the subject case study.

### **3.2 Stage 2: Case Study**

The subject property Lot 2816 D.P. 728428 was selected for the collection of all relevant information and documentation pertaining to RORs existing over the subject land parcel. This case study was designed to test the reliability of the theoretical typology developed under Section 3.1.3 and identify any fallibilities.

With the collection of ROR related information, particular notice was given to the difficulties that were encountered. These impediments were subsequently noted for discussion, thus fulfilling the primary objective of this project.

Some attention has also been given to the appropriateness of the costs associated with gathering of the relevant information pertaining to the subject parcel of land. These have been subjectively judged according to what is considered as reasonable compared to the costs of operating such administration services. Any inefficiency that unnecessarily burdens a landholder is of particular interest to this project.

### **3.3 Stage 3: Documentation of Results.**

All gathered information and documentation has been compiled and presented under the various classifications outlined in section 3.1. The results serve as a complete record of RORs affecting the abovementioned case study land parcel that were possible to identify using the created typology. This is accompanied with a discussion regarding the limitations of the searching methods utilised.

Each impediment encountered and the reasonableness of such impediments has been discussed with the purpose of clarifying inefficiencies in the current land administration systems to assist in the process of reform.

### **3.4 Conclusions: Chapter 3.**

This project was completed in three stages as follows:

1. The extensive review of current literature to compile information relating to RORs and create a comprehensive typology that would allow the identification of the various ROR types.

2. The application of the created typology to discover any RORs existing over the chosen parcel of freehold land.
3. The analysis of the results with particular regard to impediments faced throughout the implementation of the ROR identification typology on the subject land parcel.

# Chapter 4

## Results – Overview of Property Law

### 4.1 Classification of RORs.

Two methods for classifying RORs were contemplated for the fulfilment of this project.

The first method was to consider the natural categorisation that has occurred through the evolution of property law over the many years of development. Each form of property right had an independent history founded in many hundreds of years of cases and legislation, as well as through many periods of differing social structures. A general categorisation of property rights is followed by Chambers (2001) and flows from greatest to least as follows:

1. Ownership
2. Possession
3. Tenure
4. Estates
5. Equitable Rights
6. Security Rights
7. Shared Rights
8. Non-Possessory Rights to Land
9. Licences

Chambers (2001) also discusses Native Title rights separately to the general classifications given that they exist outside the traditional legal categories of land rights.

The categorisation that has occurred over time in property law is useful to obtain the entire scope of rights that may exist. All RORs can only be upheld within a body of law that recognises that right. The problem with reliance on the lawful definitions of all RORs is that, although enforced by the law, those in the legal profession do not necessarily regulate or administer these rights in practical terms. Many regulatory bodies are given statutory authority to govern specific parts of land administration, and this resultant specialisation can create overlap, inefficiencies, confusion and

mismanagement. It may be difficult to recognise specific RORs by limiting the identification to this general classification method.

The second method was to identify the various land right categories in accordance with the varying departments with which they are administered. Lyons et al (2002) identifies major pieces of legislation affecting land related property rights in Queensland under the following categories:

1. Possession / Ownership
2. Minerals
3. Water
4. Development
5. Vegetation
6. Environment and Heritage

This second method has distinct advantages for practical purposes, in that the typology for identifying land rights is managed by the same authority and easily identifiable. The problem with this method however is that it risks being incomplete. It relies heavily on the completion of the whole by the summation of the separate parts. Any deficiencies in the identification of RORs are likely to involve an entire collection of rights rather than being isolated to an individual right.

An amalgamation of these two methods has been attempted to capitalise on the benefits of both systems. Firstly the characteristics of RORs are discussed under the various legal types of rights that exist. Secondly the methods for identification of RORs are discussed with regard to the departments that administer them.

#### **4.2 Characteristics of Land Related RORs.**

Details relevant to RORs over freehold land are sequentially arranged in accordance with their varying legal typologies.

#### **4.2.1 Estates.**

It should be noted that the categories for ownership and tenure have been purposely omitted. The terms ownership, title and tenure are used interchangeably to identify a property right in freehold estate. The concepts relevant to ownership and tenure have therefore been discussed under the heading of 'Estates'.

In Australia the Crown is the absolute owner of land, and any landholder is a tenant of the Crown. Evidence of the Crown's ownership is the right to 'compulsory acquisition' of land or when land 'escheats' to the crown following the death of an owner without heir. Citizens are therefore not outright owners of land but are said to have estate in the land. An estate is defined by Chambers (2001) as 'the right to possess land as a tenant for a period of time'.

An estate comprises of four distinct dimensions being:

1. Width
2. Depth
3. Height
4. Time

There are two major forms of estate, being freehold and leasehold. Holders of freehold estate effectively obtain ownership rights to land whereas holders of a leasehold estate only obtain rights to the temporary possession of the land.

This project is concerned only with freehold estates; however knowledge of the general characteristics of a leasehold estate is necessary as any existence of possessory rights may impact rights to a freehold estate.

Limitations and obligations affecting the estate holder's use of their land and the subsequent development rights are also discussed under the heading of Estate. These have each been documented within a separate category, not because they relate to an estate other than freehold or leasehold, but because the related obligations form an important part of this project and there does not seem to be an appropriate category under the general legal classification of property rights.



#### **4.2.1.1 Freehold Estates.**

There are three different types of freehold estate being an estate in fee simple, fee tail and life. Each is measured in a period of lifetimes, as opposed to leasehold that is measured in specific periods of time.

‘Fee’ means inheritable and ‘simple’ means that the estate is not qualified in any way. The estate belongs entirely to the tenant with which they could do whatever they please. An owner of an estate in fee simple is free to transfer his right to another during his lifetime or upon death through a will to his beneficiaries. Upon death of a tenant without heirs the estate is owned by no one and passes to the Crown under Bona Vacantia, where the estate is ceased.

Fee tail is a qualified form of fee simple in which the land must pass to heirs of the tenant’s direct family line. It is no longer possible to create an estate in fee tail and all fee tails have been converted to fee simple in N.S.W. under the Conveyancing Act 1919.

A life estate is the estate in land for the period of the tenant’s life. This right is transferable but remains bound by the lifetime of the original life tenant. A life tenant is obliged to not commit ‘waste’ to the property, but leave it in much the same state as when the estate was acquired.

Ownership is described as the permanent right to possession, and possession as a temporary right to possession which is subject to the greater right of ownership. Given that freehold estate is the greatest claim to land apart from the Crown, that it is granted for an indefinite period and that it is the right to permanent possession, the title of ownership is commonly used to describe a freehold estate, although not strictly accurate in legal terms. A tenant with freehold estate is considered furthermore as having obtained ownership rights.

Honore (1961) sets out the following ‘bundle of rights’ that constitutes ownership:

- The right to possession
- The right of usage
- The right to manage the usage

- The right to income obtained from the property
- Security from interference with their property rights
- The right to transmit their property rights to a successor of choice
- The duty to prevent harm
- The liability to execution (property may be seized by the government for the greater good of society or for the repayment of the owners debts)

Ownership and possession are two different concepts in property law that are often difficult to separate. This is indicated in the common understanding of the items of ownership as 'possessions'. Ownership of an item often includes the right to possession, and for the majority of property items, this possession is evidence enough to affirm ownership. Such is the case with the purchase of goods when a retailer's possession is taken by the purchaser as evidence of their authority to transfer the ownership rights. However, ownership does not necessitate possession, nor does possession necessitate ownership.

The owner has a greater right to possession than a possessor without ownership, characterised by a reversionary right that returns the right to possession to the owner once the term of possessory rights is fulfilled.

Given that ownership can exist without possession, such as for the duration of a lease, it is insufficient to examine property rights in the limited scope of current rights being exercised. Honore (1961) suggests looking towards future land use to determine greatest claim to land rights. The permanence of a right to possession constitutes ownership. Waldron (1986) takes a different approach by looking back to the creation of land rights, and the extent of the rights that had been transferred. A temporary grant of possession, with the right to possession reverted to the transferor after a given period of time would constitute a transfer of a right to possession without ownership.

#### **4.2.1.2 Leasehold Estates.**

A landowner is free to transfer their right to possession to another person for exclusive use of that land, or part of that land for a given period of time. This right is known as a lease, which is subject to the conditions specified as part of that lease, in return for the payment of rent (Registrar General Directions 2007).

A lessee was not considered to hold a property right, but was under a contract to use the land in chattel real, until the introduction of the action of ejectment in equitable law. This empowered the courts to allow the recovery of possession as a remedy for a breach of a lessee's right. Leasehold estates continue to exist as a combination of property and contractual law.

Identifying the characteristics of differing leasehold estates is beyond the scope of this project; however it is important to investigate the methods for which they are formed to distinguish a freehold estate from a leasehold estate, and determine when a freehold landholder is free from any obligations to an existing leaseholder.

Leaseholders are under obligation to pay rent to the lessor under the terms of their lease and therefore a freehold estate holder may enjoy the corresponding right to receive rental payments.

#### **4.2.1.2 Limitations to Use of Land.**

Certain statutory rights attached to the ownership of land exist without easement. Under section 177 of the *Conveyancing Act 1919* a landowner has a right to support from adjacent land. Under section 52 of the *Water Management Act 2000* a riparian owner has the right to take water from a river, estuary or lake (Hallman 2007).

The owner of an estate is obliged to neighbours at common law not to do anything that would prevent the enjoyment of a like right to their land. Obligations of this nature exist as a vast array of restrictions on the use of land enforced for the common good, created through a variety of laws in planning, environmental and taxation to name but a few.

A landowner is liable for half of what is considered cost of a reasonable dividing fence between adjacent properties. The interested party must meet any additional costs for a higher quality fence.

The private ownership of land is limited by collective decisions on behalf of society by public institutions through zoning laws and other regulations. The duty of care not to

interfere with the greater good of society is an obligation borne by the landowner to a corresponding right enjoyed by all people.

An estate holder is also liable to pay various taxes, fees and charges to the relevant public or government authority for their use of a public service or as part of their contribution to public works and infrastructure.

These obligations are best identified by reference to the public institutions that are responsible to enforce them. This is done under section 4.3 of this report. As discussed previously, professionals outside the traditional legal framework perform the administration of these obligations. There are a vast number of restrictions that can and do exist, which makes their administration and therefore the identification difficult.

#### **4.2.1.4 Development Rights.**

Council is required under the *Environmental Planning and Assessment Act 1979* to create and implement Local Environment Plans for the management of natural and artificial resources within their municipality. They are vested with the authority of regulating the erection and demolition of buildings under the Act. Local policies are also subject to State Planning Policies and Regional Environment Plans maintained by the Department of Urban Affairs and Planning.

An application for the development of land will be determined under section 79C of the Act. Development is classed out of the ten classifications in accordance with the Building Code of Australia. An application may be refused or approved with various conditions of consent. This consent, with a construction certificate and occupation certificate will authorise the use, construction and occupation of that development in accordance with the consent. A dissatisfied applicant may appeal to the Land Environment Court.

The Building Code of Australia sets out performance standards for the erection of buildings. Professionals dealing with land development must be aware of the requirements of the code in order to design and maintain suitable buildings; however it is not imperative for the average landowner to understand the specific details of building design or own a copy of the Building Code of Australia.

Council can approve an existing building without prior consent or one that sustains an encroachment with the issue of a building certificate. This extinguishes the councils right to issue an order for the alteration or removal of that building for a period of seven years. A purchaser under a contract of sale or a person with the landholders consent may apply for a building certificate under section 149E of the Environmental Planning and Assessment Act.

Under section 28 of the *Environmental Planning and Assessment Act 1979* inconsistent regulatory instruments including 'rules, regulations, by-laws... agreements, covenants and instruments' can be overruled in favour of development otherwise permissible under planning legislation. This definition includes easements and covenants, such as a covenant that prohibits dual-occupancy that could be overridden by planning legislation that allows such a development. Precedence is given over the rights of use that may be held under the Real Property Act, the Conveyancing Act and the general law (Hallman 2007) although covenants are given appropriate consideration given their relevance to neighbourhood amenity.

#### **4.2.2 Native Title.**

Native Title is a legal term for traditional ownership of land and waters in accordance with their traditions, laws and customs as defined by the Department of Lands (2007).

Prior to the European colonisation of Australia the Aboriginal people held traditional ownership of land and waters according to their laws and traditions. As discussed previously all Australian land was vested in the Crown of the Commonwealth under the misapplication of terra nullius (land of no one). The customs and laws of the Aboriginal people were not recognised until the recent developments under the *Racial Discrimination Act 1975* and native title legislation.

Prior to the *Native Title Act 1993* (Cwlth) Aboriginal people in N.S.W. were able to lodge claims for the right to ownership of vacant Crown land not required for essential purposes or for residential land under the *NSW Aboriginal Land Rights Act 1983*. These claims were assessed by the State Government Department of Lands. The right to make a claim is inconsistent with the existence of freehold tenure.

### **4.2.3 Possession.**

The two essential elements of possession are:

- Control and
- Intention.

A possessory right is established as soon as a person takes possession of land and intends to control it. The right to possession is enforceable against everyone except someone with a better right to possession.

The different implications for the possession acquired with consent and that acquired without consent of the owner are discussed further.

#### **4.2.3.1 Possession Acquired by Consent.**

It is possible for an owner of a tangible thing to transfer their rights to possession to others. This is the case when a landholder rents their house to a tenant and thus temporarily forsakes their right to possession for the term of that lease.

The possessor not only holds a possessory right enforceable against everyone except those with a greater right, but also enjoys the right of ejectment against the owner for the term of the possession right. The right to possession is normally exchanged for the payment of rent.

Where possession is transferred by consent it is a legal estate that is at a minimum a tenancy at will. The estate created by possession acquired by consent is therefore a leasehold estate. A tenancy at will is expired after one year and possession is regarded as without consent unless the terms of the tenancy are renewed. A lease of part of a parcel of greater than a period of five years is considered a subdivision and requires Council approval.

#### **4.2.3.2 Possession Acquired without Consent.**

Possession without consent from those with immediate right to possession is called adverse possession. This can occur by the possession of land without knowledge of the owner or when the conditions of a lease are breached by the non-payment of rent. Possession must include the exclusion of the owner and cannot be referable to legal title.

As discussed previously, possession does not constitute ownership, however there are provisions in law that allow possession and the right to possession to become ownership over a specified time period. In N.S.W. this period known as the limitation period under the *Limitations Act (NSW) 1969* is 12 years. The adverse possessor claims ownership over the former right of ownership by controlling a parcel of land for a period greater than the limitation period. In N.S.W. this only applies for whole estates. The adverse possessor is said to have greater right to the possession of land than the former right holder and is entitled to the ownership of the estate.

The limitation period also bars trustees dispossessed of their land and mortgagers from recovery of interest after a period of twelve years from the last payment.

#### **4.2.4 Equitable Rights.**

Equitable law has developed as a complex branch of English law, separate to common law, for the purpose of addressing situations that had no remedy at common law. The most significant equitable rights to exist today (apart from mortgages and restrictive covenants discussed elsewhere) include:

- Trusts: where an interest is held for the benefit of another. Common law recognises the legal estate of the trustee whereas equitable law recognises the interest of the beneficiary.
- Doctrine of part performance: such as under a contract for sale prior to the transfer of title. 'Equity regards as done what ought to be done' (Butt 1988)

Deeds or registration are only required for the creation of legal property rights. Equitable property rights and personal rights do not necessarily require the same degree of formality as legal rights. In fact, a failed attempt to create a legal right can instead

create an equitable or personal right. Where the registration of a right is required to obtain a legal right, the unregistered version may create an equitable property right.

Where the merits of a conflicting legal and equitable interest are equal the legal interest will prevail. Therefore an equitable right will be extinguished by the bona fide purchase of a conflicting legal interest.

#### **4.2.5 Security Rights.**

The transaction that makes real property a security right for the repayment of a debt is called a mortgage. The mortgagor borrows money from the mortgagee under contract to pay the money back with interest. As security the mortgagee receives an interest in the land to recover any losses if the mortgagor defaults on the repayment of the loan. The mortgagor is entitled to title or at least possession of the land.

Mortgages exist today as a combination of common law, equity and contractual law. Remedies available to the mortgagee on permanent default on the repayments of the loan include:

- Retention of estate under common law
- Take possession and lease it for rent
- Sell the land, subdivide, create easements, restrictive covenants or dedicate roads
- Foreclosure (take estate in exchange for debt settlement)

A mortgagee or mortgagor may transfer their rights to others, who will then take on the role as either mortgagee or mortgagor. When a mortgagor is willing and able to pay they enjoy an equity of redemption, meaning that they may retain the title to the land even upon a lateness of repayment.

#### **4.2.6 Shared Rights.**

The shared right to a given land right can exist under joint tenure or as tenure in common. An estate under shared ownership enjoys the same bundle of rights as an estate under single ownership except that it is vested in more than one party. The method for creating and identifying shared rights is the same as that of single rights.



The character of shared rights, other than those that are common to ownership discussed under the heading of estates, are therefore deemed to be irrelevant to the objectives of this project.

Mention of these shared rights is made here to demonstrate that co-ownership can exist for completeness of our listing of possible RORs that can exist over a parcel of land. What is more relevant to the cause of this study is to consider the obligations on a landowner in estate of a parcel in Strata or Community Title as follows.

#### **4.2.6.1 Strata/Community Title.**

Land can be subdivided into smaller strata lots and common property under the *Strata Schemes (Freehold Development) Act 1973*. An owner of an estate in a strata lot enjoys the same rights as discussed under section 4.2.1. The major difference relevant to this project between an estate in a complete parcel and that of a strata lot is that there are obligations to the body corporate as a shareholder in the common property. The body corporate controls the use of common property through by-laws and takes contributions for the work through the authority given under the *Strata Schemes Management Act 1996*. Any dealings in a lot will also affect the owner's share in common property.

Similarly, land can be subdivided under the *Community Land Management Act 1989* to form individual private lots and association property of which each private lot owner holds an interest as a tenant in common. As with property under the strata scheme, proprietors of a lot have obligations under the Act of compliance with the by-laws set out in the management plan and the benefits and liabilities arising from these by-laws.

An appropriate easement for support or shelter in favour of the two parcels and/or the whole building is automatically created under the *Strata Schemes (Freehold Development) 1973* or the *Strata Schemes (Leasehold Development) Act 1986*.

A scheme for managing stratum lots (defined by spatial reference including heights with relation to Australian Height Datum) under a building management statement is provided for under Division 3B of Part 23 of the *Conveyancing Act 1919*. The building management statement may be registered with the plan of subdivision of a building with the Department of Lands and is legally binding on all subsequent stratum lot owners.

#### **4.2.7 Non-Possessory Rights.**

In order to maintain a manageable scope of property rights the courts are reluctant to accept any additional categories of rights beyond those that exist. Therefore a very specific list of non-possessory rights can be found in most legal texts mentioning profits a prendre, easements, restrictive covenants, and several other groupings such as mineral rights and riparian rights to water. This study has also included rights such as heritage rights and environmental rights under the broad category of non-possessory rights. It is evident that this category is currently stretched and there is any number of possibilities that can exist in a continually evolving human-land environment.

Non-possessory rights are limited to those that are vested specifically in a particular parcel of land, rather than rights that may affect land but are vested in a person or group of people. These personal rights or licenses are discussed further under section 4.2.8.

##### **4.2.7.1 Profits a Prendre.**

A profits a prendre allows the removal of a natural produce of the land such as timber, soil or gravel without giving the right holder a possessory right to any part of the land. A profit a prendre does not go beyond the right to take from the land that which naturally occurs. Therefore the right to enter the servient land, to cultivate and to harvest a crop is not contained within the limitations of profits a prendre.

##### **4.2.7.2 Forestry Rights.**

The *Conveyancing Act 1919* was amended in 1988 to allow for the plantation of trees to exist as a profits a prendre and further in 1998 by the *Carbon Rights Legislation Amendment Act 1988* to allow the ownership of trees on land to exist under a forestry covenant, where removal was subject to the covenant and allowed carbon rights trading for the investment in new forests in return for the right to make carbon emissions under the Kyoto Protocol of 1990. Such an interest consists of the legal, commercial or any other benefit arising from the carbon sequestration (the process by which a tree removes carbon dioxide from the atmosphere) of any existing or future forest upon the subject land.

Forestry rights include the right to enter land to establish, maintain and harvest a crop of trees and construct or to use any buildings, works or facilities as may be necessary or to a carbon sequestration right. The particulars of the right will be detailed within the instrument creating the registered covenant.

A plantation for the production of timber must be authorised by Minister of the Department of Natural Resources under the *Plantation and Reafforestation Act 1999*. An applicant is required to demonstrate compliance with the requirements of the Plantations and Reafforestation Code made under the Act. The copy of the application will be forwarded to the local council, to the adjoining landholders and to any other person required under the Code to be given notice. The minister may then make a determination or refer the application to other relevant authorities. A public register of these authorities are maintained by the Minister and searchable through the Department of Lands website. Upon approval by the Minister written notice must be given to the local council.

Contributions for regional transport infrastructure are levied on owners of timber plantations. Regional committees that are established under the Act manage contribution plans with contributions being paid to the relevant local authorities.

#### **4.2.7.3 Easements.**

An easement, as opposed to profits a prendre, is a right annexed or appurtenant to land giving another the right of use without the right to take any of the natural produce. Normal easements involve a dominant and servient tenement and easements in gross are granted without a dominant tenement but may benefit only a statutory authority or the Crown. They can be positive giving the owner of the dominant tenement the right to do something on the servient tenement, or negative giving the owner of the dominant tenement the right to restrict the use of the servient tenement. The negative easement is restricted to light, air and support given the more appropriate means of negative restrictions through restrictive covenants.

Common easements include provision for infrastructure, services, access, encroachment, storage, mining operations or support. The *Conveyancing Act 1919*, among other relevant Acts set out the terms for specific easements known as short

forms of easement. Mention of any of the particular terms such as ‘right of carriage way’ in the instrument creating an easement will incur the expanded terms set out in the relevant Act. The Land and Environment Court under the *Encroachment of Buildings Act 1922* can determine easements for encroachment, the removal or the granting of relief. The right to develop land or the right to plant and harvest is beyond the capabilities of an easement and must be created by a greater interest such as a grant of estate in fee simple or a lease.

The enjoyment of an easement will normally entail necessary activities for the upkeep of that easement. These include any right to enter or perform certain works on the servient tenement such maintaining the integrity of a wall in an easement for support or a pipe in a drainage easement. These ancillary rights automatically exist with the creation of an easement, unless the terms of those rights are specifically stated in the instrument creating the easement.

The grantor is under no obligation to make good their land for the enjoyment of the easement unless bound by a positive covenant, but rather the grantee is responsible and liable for the maintenance, additions and repairs. Where several people enjoy the easement, the obligation to the upkeep of that easement on successive owners is whether or not it is considered to be an integral part of the easement.

A contract to grant an easement creates an equitable interest in the land that can be protected by caveat, and the courts may act to order a specific performance of the contract. An equitable interest founded solely on the actions of parties may also be recognised by the courts.

The Minister for Lands may construct water, sewerage and drainage works under the *Public Works Act 1912* and *Local Government Act 1993*, with the land, works and easements vested in the council. An application may also be made to the Minister for the licence to construct any major pipeline under the *Pipelines Act 1967*, with any appropriate resumptions made and easements created and registered with the Department of Lands.

#### **4.2.7.4 Covenants.**

Covenants are agreements between parties that obligate a landowner to either do something (positive covenant) or not do something (restrictive covenants). Covenants are created for the protection of the amenity to land by binding subsequent landowners to the terms of the covenant. The land to benefit must be near to the burdened land to form a valid covenant. Remedy for any breach of a covenant may include either an injunction on use or to be rewarded damages. Like easements covenants also enjoy ancillary rights necessary for the enjoyment of the covenant such as right of entry for maintenance or repair.

Covenants are frequently created in favour of public authorities in order to maintain control over the subject land for their required purposes. Agreements binding the landowner to specific performance can be recorded as a covenant under the *National Parks and Wildlife Act 1974*, the *Native Vegetation Conservation Act 1997*, the *Heritage Act 1997*, the *Contaminated Land Management Act 1997* and the *Crown Lands Act 1989*.

#### **4.2.7.5 Mineral Rights.**

Most estates do not include the valuable minerals within the ground. The right to the minerals will firstly depend on the rights stipulated upon the land grant, which in turn depends on the established legal practices of the time that the land parcel was alienated from the Crown and the nature of the alienation. Several Acts have been enacted and repealed concerning mineral rights and therefore the grant of mineral rights between differing land parcels will vary. To determine what mineral rights were transferred upon the grant of land it is necessary to investigate the terms of the relevant Crown Lands Act in force at the time.

Gold and silver have generally been removed from the estate and are reserved for the Crown since the first express reservation in 1828. Likewise coal was mostly reserved since 1850 and then completely reserved since the introduction of the *Coal Acquisition Act 1981*, although for a brief period between 1990 and 1998, under section 5 of the *Coal Ownership (Restitution) Act 1990* a person could make a claim for the re-grant of coal under the 1981 Act that was found outside a colliery holding. Reservations in

accordance with specific lists of statutorily defined minerals or the collective reservation of 'all minerals' have been enforced under various Acts since 1861. All petroleum, helium and carbon dioxide was reserved to the Crown regardless of the Crown Grant under the *Petroleum (Onshore) Act 1991*. All prescribed substances including uranium, thorium and any other substance capable of energy production is vested in the Commonwealth Government under the *Atomic Energy Act 1953*. Land vested in the Aboriginal Land Council by the *Aboriginal Land Rights Act 1983* includes all minerals other than gold, silver, coal and petroleum.

Mining and exploration is performed onshore in N.S.W. under *the Mining Act 1992* and the *Petroleum (Onshore) Act 1991*. Several forms of title are administered under these Acts being:

- Exploration License for the exploration over State lands with the intention to assess for potential mine sites or extend existing sites for a maximum period of 5 years.
- Exploration License Renewals for extensions on the period stipulated in the above license.
- Assessment Lease where a proposed mining project is found to be not viable but a future potential may exist, or an extension of an existing mine lease application is impractical.
- Mining Lease and Mining Leases for Mining Purposes.
- Mineral Claim for small-scale operations of an area equal to or less than 2 hectares, outside specified mineral claims districts.
- Opal Prospecting Licence
- Petroleum Exploration Licenses

Mining title-holders are not entitled to carry out works on land without the appropriate lease, access and compensation arrangements with the landholder and tenants (including land under Native Title). An arbitrator can be summoned to determine an access arrangement where one cannot be made.

Title-holders are required to lodge a security deposit to cover any obligations under the relevant Act including protection and required buffer distances from any houses, gardens and improvements, rehabilitation. A landholder may object to the granting of a mining lease on the basis that land is agricultural land or holds a form of valuable work

or structure. A mining lease generally cannot be granted without development consent from the local council or State Minister under the *Environmental Planning and Assessment Act 1979*. An applicant for a mineral title is required to inform the landholder prior to application.

The exception to the abovementioned mining titles is for the mining of minerals that are privately owned. An owner or person permitted by an owner may mine or prospect for those minerals in compliance with the Mining Act and associated regulations. Notice of intention to mine must be given to the Director General of the Department of Mineral Resources along with a security deposit to fulfil the obligations under the Act. Application for a development consent may also be needed from the local council along with all the required documents. Any mining operations would also be required to observe the provisions of the *Mines Inspection Act 1901* and *General Rule 2000*.

Any extraction of materials is subject to a royalty payable to the crown in accordance with the rate prescribed in the regulations associated with the relevant Act.

#### **4.2.7.6 Riparian Rights to Water.**

At common law an owner of land has rights in relation to the water of an abutting stream including the right to non-interference with the streams natural flow and the use of water for all domestic and ordinary purposes. These rights are considerably limited by the *Water Management Act 2000* and other Acts specific to certain water bodies such as the *New South Wales-Queensland Border Rivers Act 1947*.

The Water Management Act provides for the management of the State's water resources through the gazetted State Water Management Outcomes Plan. Chapter 3 part 1 sets out landholder water rights.

A landowner or occupier is entitled to construct and use a water supply work to take water from any river, estuary or lake to which the land has frontage or from an aquifer underlying the land without an access license or approval for the purpose of domestic consumption and stock watering.

A landowner or occupier within a harvestable rights area is entitled to construct and use a dam without an access license or approval to capture and store up to 10% average rainwater runoff for that property to use in accordance with the harvestable rights order for the area.

A native titleholder is entitled to take and use water without an access license or approval for the enjoyment of the native title rights.

A water access license entitles a holder to a certain share of water within a specific water source, drawn from a certain location, at certain times and via a certain method of extraction. The Minister will give notice of the determined amount of water available. There are generally no new access licenses being granted with the intention to encourage the trade of existing licenses.

A water access license may be used as security for a loan. A caveat may also be lodged against a license to prevent the registration of any conflicting interest. An access license may also be under a lease type arrangement called a 'term transfer' for a period of no greater than 6 months. A license may also be consolidated or subdivided by the cancellation of the previous licenses and registration of the new licences of equal summed value as the first subject to the approval of the Minister. Any rights such as a security interest created under the former *Water Act 1912* are regarded as an equivalent interest under the new Act.

It is permissible to construct a bank to protect land on the side of a river from flooding; however it is not permissible to obstruct the flow of the river, including the flow of natural flood channels or do such a thing that would cause flooding to another property.

Any land with a slope greater than 18 degrees from horizontal, or situated in or within 20 metres of the bed or bank of any part of a river or lake or likely to be affected by soil erosion can be deemed by the Minister as State protected land under the *Native Vegetation Conservation Act 1997*.

Protected land under the *Rivers and Foreshores Improvement Act 1948* includes land that is the bank, shore or bed, or within 40 metres from the bank or shore of a river, lake into or from which a river flows, coastal lake or lagoon including any channel to the



sea. No excavation can be made on protected land without a permit obtained from the Minister of Ports where the bed of water is vested in the Waterways Authority or a Port Corporation, or from the Minister for Public Works for other tidal waters, or the Ministerial Corporation in any other case.

Local councils assess development under section 79C of the *Environmental Planning and Assessment Act 1979* to achieve a balance between allowing development while minimising impacts such as those on water environments. Further restrictions on development are given under the *Coastal Protection Act 1979* and State Environmental Planning Policies No.14 (Coastal Wetlands) and No.26 (Littoral Rainforests).

Catchment Management Committees and Trusts managing catchment areas by funding from levy rates on land in their areas are set up and coordinated by the State Catchment Management Co-ordinating Committee under the *Catchment Management Act 1989*.

It is an offence to discharge waste or pollutants into waters, however the Environment Protection Authority may regulate an activity that pollutes waters by license under the *Protection of the Environment Operations Act 1997*.

#### **4.2.7.7 Drainage Rights.**

A number of rights and corresponding obligations with regard to draining stormwater exist at common law. Surface water is regarded differently to natural watercourses for which riparian rights exist.

The higher proprietor is not liable for the natural surface flow of stormwater onto the lower proprietor, however they may be found liable if they cause the flow of stormwater to be more concentrated at a certain point. They are also obliged to maintain pipes for the protection of neighbouring property. They are not liable if the damage is regarded as reasonably unforeseeable.

The lower proprietor may construct barriers to the flow to protect their land, but not with the intention to harm the higher proprietors land or to cause unnatural flows to affect a third property.

In order to protect lower proprietors and natural environments from excessive or concentrated flows, drainage factors play an important role in the determination of a development proposal under the *Environmental Planning and Assessment Act 1979*. As such, councils may make orders with regard to inadequate drainage or drainage easements.

#### **4.2.7.8 Contaminated Land.**

Development rights are further restricted on land subject to a use resulting in the contamination of the land. Contamination is the existence of a substance at a concentration harmful to human or environmental health. A process for investigating and remediation of land subject to contamination is set out under the *Contaminated Land Management Act 1997*.

The Environmental Protection Agency is responsible for the assessment of contaminated land and the implementation of a scheme to manage or eliminate contaminants to minimise any associated hazard.

The Environmental Protection Agency can declare land to be a remediation site by written notice to the appropriate person or public authority, requiring a person to take steps towards remediation within a reasonable time frame.

It is the responsibility of the contaminator to finance the remediation of the land, however if that person cannot be found, then the responsibility may pass on to the current owner.

#### **4.2.7.9 Environmental Rights.**

A landowner is limited with regard to their use of land to the terms of the Local Environment Plan and other planning instruments of the local council under the *Environmental Planning and Assessment Act 1979*.

The Act requires that in terms of threatened species of flora and fauna that the critical habitats are recorded in the Local Environment Plan. Development applications are determined with regard to the impacts on the species, populations and habitats in

fulfilment of the requirements of the *Threatened Species Conservation Act 1995*. This Act provides for the protection of all endangered and vulnerable species of animals, plants and birds which are listed within Schedules 1 and 2. Approval from the Director-General of National Parks or the Minister of Urban Affairs and Planning may be required for any development likely to impact on a listed species.

The Director-General of National Parks may make a stop work order, enter into agreements with public authorities or require the implementation of sustainable farming practices to prevent harm to the habitat or species listed.

Council is required under the *Local Government Act 1993* to include the details of methods to protect environmentally sensitive areas and to promote ecological sustainability in each draft management plan.

Landholders hold obligations under the *Native Vegetation Conservation Act 1997* to preserve the native environment. Any clearing of native vegetation is subject to the requirements specified in the Local Environment Plan and requires prior consent from the local council. Approval may also be necessary from the Minister. State protected land (as described in section 4.2.7.6) must not be cleared except in accordance with development consent. Clearing for bush fire, clearing of noxious weeds and harvesting in accredited timber plantations are excluded from the Act.

Regional management plans operating under the Native Vegetation Conservation Act prevail over any other environmental planning instrument in the occurrence of any inconsistency.

The Director General of the Department of Environment and Conservation may create a native vegetation code of practice by which a landowner can clear native vegetation without approval unless that land is protected.

A landowner may enter into an agreement with the Director-General of the Department of Environment and Conservation for the conservation of the land. Such an agreement is registered as an encumbrance on the land in the register at the Department of Lands and is binding on all subsequent owners.

Clause 8 of the Model Provisions to the Environmental Planning and Assessment Act also permit council to make a Tree Preservation Order which prevents any removal, injury or lopping of any tree within the council kept Register without prior consent.

Under the *Noxious Weeds Act 1993* the Minister can issue an order to a private landowner to control or eradicate a noxious weed found on their property. Furthermore an occupier of land must notify the local authority within three days from when they become aware of a notifiable weed as defined by the Act.

The National Parks and Wildlife Service administer the conservation of nature, culturally valuable objects, places and features, natural and cultural heritage and land management under the *National Parks and Wildlife Act 1974*. Under the Act the Governor may reserve land for National Park, a historic site, a State conservation area, a regional park, a karst conservation reserve, a nature reserve or an Aboriginal area. Upon reservation of the area the land described becomes Crown land and dedication or vesting in the land is revoked.

Detrimental activities as defined by the *Protection of the Environment Act 1997* are generally acts that will cause pollution. In this Act all people seeking to perform an activity that would cause harm to any natural or human environment is obliged to minimise that impact. Any environmentally relevant activity will require approval in the form of an environment protection licence by the Environmental Protection Agency established under the Act.

Recent global interest in environmental issues has led to international summits such as the Rio Earth Summit and the creation of international environmental law such as the Kyoto Protocol for the unified world movement towards environmental sustainability. Such laws will continue to drive Commonwealth law towards making the landholder more accountable for their use of natural resources.

#### **4.2.7.10 Agreements under the Nature Conservation Trust Act 2001.**

Under the abovementioned Act the Nature Conservation Trust of New South Wales protects private land of high natural conservation value through either the revolving funds or covenanting programs. The revolving fund program allows the trust to

purchase land of high conservation value for the resale to a private landowner under a covenant to protect the natural environment. The funds obtained from resale are then used to finance the next purchase. The covenant is registered on the landowner's title with the Trust as a body corporate and is therefore binding on all subsequent landowners.

Furthermore a private landowner along with all parties holding an interest in the land can enter into a conservation agreement with the Trust to perform certain works through the stewardship program for the conservation of the natural environment and biodiversity on the property. Landowners are assisted in compliance with a negotiated contract for performance of such activities as fencing, revegetation, weeds and feral species control.

#### **4.2.7.11 Heritage Rights.**

A property is protected as a legal heritage item if it is listed as an item of heritage significance under a variety of Acts including but not limited to the *Environmental Planning and Assessment Act 1979*, *Heritage Act 1977* or the *Environment Protection and Biodiversity Conservation Act 1999*.

A listing on one of these registers means that the property is deemed as significant to society for the enriching of the understanding of history and is protected against any disturbance. A property holder of a heritage item is under obligation to not damage, to maintain and possibly improve heritage items in accordance with its historical, cultural or social significance. Any significant works will need prior approval from the Heritage Council as a referral agency of the Local Authority. Large penalties are given for any damage caused to a heritage item. Reduced land tax and Council rates, grants and funds are also available to assist the owner in the management of a heritage-listed property.

The owner of any item listed on the State Heritage Register can enter into an agreement with the Minister under the *Heritage Act 1977* for the conservation, management or restoration of the item, restrictions on or the requirements of any works on the item, any exemptions to specified activities, details of any funding supplied by the Minister and any repayment requirements, public access to and appreciation of the item, permissible admission fees and any other requirement for the conservation of the heritage item.

Such an agreement is defined in terms of time, beginning and ending on the dates specified in the agreement and is registrable with the Department of Lands. Agreements are subject to change upon formation of a subsequent agreement with the Minister.

#### **4.2.7.12 Marine Parks.**

Marine Parks areas are proclaimed over the sea and waters subject to tidal influences and land adjacent to such waters under the *Marine Parks Act 1997* for the protection of marine biological diversity and marine habitats. When a Marine Park is established, the ownership and tenure of adjacent lands will not change although any land use will need prior approval from the local council, the Director-General of the Premier's Department, the Director of NSW Fisheries and the Director-General of National Parks and Wildlife.

#### **4.2.8 Licence.**

A licence is generally a personal right to do what is otherwise deemed as unlawful. Licences may give a person permission to use another land, however that right is usually a contractual agreement between people rather than a right in the land. A license is not transferable or binding on successors of title. A licensor is obliged however to compensate for any breach of a license. Licences operate under the principles of contractual law rather than property law, with an infinite number of agreements possible (Chambers 2001).

There may be instances however where licence can be coupled with an interest that establishes a property right. This right is irrevocable and assignable (Hallman 2007). This occurs without a clearly established place in property law.

Where an easement is created that does not comply with the legal requirements then it becomes a license, which is not binding on subsequent owners.

It has been determined therefore that it is impossible to identify all personal rights to land that may exist. For the sake of this project some of the clearly defined licences are discussed below, however no claim of completeness can be made.

#### **4.2.8.1 Water Access License.**

At common law the estate holder does not own water that is available on their estate. Under the *Water Management Act 2000* an estate holder does enjoy some rights to water, however Water Access Licenses are granted for the entitlement to a share of water from a given water source. Entitlements under this Act have been discussed under section 4.2.7.6.

#### **4.2.8.2 Environment Protection License**

Any person responsible for the emission of any pollution is guilty of an offence under the *Protection of the Environment Operations Act 1997*. The introduction of environment protection licenses allows a person to contribute a limited amount of pollution emission as specified in the license. Animal and Plant licenses also allow a license holder to keep protected animals and plants under the *National Parks and Wildlife Act 1974*. Regulatory authorities are responsible for keeping a register of all licenses and the conditions of each license.

A list of all premises based activities that require a license under the Protection of the Environment Operations Act is given in Appendix B.

#### **4.2.8.3 Crown Land Licence.**

A Crown land license is an agreement by contract that allows a person to occupy and use Crown land for a specific purpose. It does not grant a right to the land, nor does it grant exclusive possession of the land and as such may permit land use by others. Occupation of such land does not transfer to a possessory right to the land after any length of time. Such a right will not interfere with a freehold estate as the Crown is contractually bound to not grant freehold, as it will conflict with the interest held in the Crown lease.

#### **4.2.8.4 Conservation Agreements.**

Under the *National Parks and Wildlife Act 1974* an owner of land may enter into a conservation agreement by written consent with the Nature Conservation Trust of New

South Wales binding the owner to terms for the protection of the natural environment of the subject land. Such agreements can restrict or require certain use or activity on the land, obligate the owner to certain costs involved, set out the terms of use of any provided funds, any other matter relating to the conservation or enhancement of the area, any obligations on the Minister to provide financial assistance, technical advice or specified activities.

Similarly a landowner can enter a property agreement under the *Native Vegetation Conservation Act 1997* with the Director-General of the Department of Lands, or the Nature Conservation Trust of New South Wales to conserve and manage vegetation on the subject land.

Neither conservation agreement nor property agreement can be effected without the written consent of all owners. Nor do they bind any subsequent landowners to the terms of such agreements. Therefore it is determined that a landowner will not need to perform any specific search to discover any relevant conservation or property agreements.

#### **4.2.8.5 Access to Neighbouring Land.**

A person may apply to the courts to gain permission under the *Access to Neighbouring Land Act 2000* for the access to adjoining or adjacent land subject to the conditions stipulated in section 20 of the Act and by the court, to carry out work on utility services or carry out work on their own land. 21 days notice must be given to the owner of the land being accessed, any person entitled to the use of the utility or anyone that will be affected by the order.

An order will only bind the people party to the proceedings and any successor of title. The order is not expressly bound to any person independent of the proceedings.



### **4.3 Identification of RORs.**

Land rights are typically grouped with reference to the public departments authorised to administer them. A typology for the identification of RORs has been compiled accordingly.

#### **4.3.1 Department of Lands.**

A brief history of land tenure is given on the N.S.W. Department of Lands website. Following the settlement of Australia the Surveyor General's office was established to administer the lands vested in the Crown. The Department of Lands and Public Works (now the Department of Lands) was established in 1856 to manage the expanding duties of the Surveyor's General's office. Given the first State land records were documented by the Department of Lands, they have continued as the 'guardians of all land information in NSW' (Department of Lands 2007).

Of particular importance to this project is the Land and Property Information (LPI) Division of the Department of Lands that is responsible for the provision of information relating to existing land rights including land title registration, property information, valuation, surveying and mapping. There is a limitation on the type of rights that are documented within the Department of Lands as discussed further under the relevant headings, so the self-professed title of guardians of *all* land information in N.S.W. is somewhat misleading. Specific details relating to landholders rights to estate nonetheless *are* documented within the LPI.

In N.S.W. there are two systems used for the conveyancing of freehold estates. These are known as Old System and Torrens Title. Old system is a form of transferring property rights by written deed inherited from English law. Torrens system was introduced in N.S.W. under the *Real Property Act* 1863 to rectify some problems associated with Old System. Both systems continue to coexist, however a process of conversion to Torrens system has occurred since its introduction with a goal of eventual elimination of the deeds registration system.

#### **4.3.1.1 Land Grant.**

An estate is created by the alienation of a defined parcel of land by the Crown. Up until 1 October 1981 the Crown would transfer private ownership in the form of a Crown grant. With the introduction of the *Real Property (Crown Land Titles) Amendment Act* 1980 it was possible to create an ordinary folio under the Torrens Title Register for any unalienated Crown land or any Crown land holdings for which a Certificate of Title was issued under the 'State of New South Wales'.

Details of the specific rights granted by the Crown in the estate are notified on the Certificate of Title or on the Crown grant. Once an estate is created the owner is free to transfer their rights, which include the conditions of the grant.

#### **4.3.1.2 Old System.**

Old system operates in accordance with the English *Statute of Frauds* 1677 and under the *Conveyancing Act* 1919, where a deed is a written document that must be signed, sealed and delivered before it achieves its legal recognition. In the deeds system, the transfer of the property right occurs by the deed itself. A vendor under the contract to acquire title to an estate or other interest was required to provide sufficient evidence for proof of title. Good title depended not only on the deed of conveyance but also on the chain of predecessor's title. A total search of all deeds back to the Crown grant was not required under the *Conveyancing Act* 1919 but was only required up to a relevant link greater than thirty years old. Land was also subject to changes outside the chain of title such as realignment of roads.

Under the *Registration of Deeds Act* 1825 a system for registering deeds was established by the Department of Lands called the General Register of Deeds. It contains common law deeds for land transactions and incorporates the register of Causes Writs and Orders, Bills of Sale, Register of Resumptions, Powers of Attorney and other land related deeds. This was introduced to improve the efficiency of searching the chain of deeds. It is used as a means of protecting an interest in land against bona fide purchasers. Under section 184G of the *Conveyancing Act* 1919 order of priority will only determine priority if the deed is made 'bona fide, and for valuable consideration'. Therefore donees of a gift cannot receive priority over an older

unregistered interest. Registration acts as a defence to show that adequate care was taken to protect that right and that it should not be postponed to a conflicting right that was obtained without notice of the registered right.

#### **4.3.1.3 Torrens System.**

The Torrens Title Register was introduced in 1863 to address the inefficiencies of the old deeds system. Under Torrens Title an interest is created upon registration of that interest, thus creating good title available on public record. Registered interests in land hold priority over any unregistered interest and earlier registration holds priority over a later registration of a conflicting interest. The intention of the Torrens system is to create indefeasibility of title with remedy available for any person suffering loss due to its administration.

Under the Torrens system the Registrar creates a folio, which contains the documents and records relating to that land. Each registered document is given a distinct reference number and recorded in that folio. A Certificate of Title is created that identifies the dimensions of the parcel of land with reference to a plan or survey, the estate granted and the people to whom it was granted. It also contains the details of registrable encumbrances on the land such as mortgages, leases and easements. Upon registration of a transfer of the land a new Certificate of Title is produced and replaces the former Certificate of Title.

Where title to Torrens Land is noted as 'qualified' on the Certificate of Title, it may occur that an unregistered instrument can defeat the title. In this circumstance the conversion of land from Old System to Torrens Title has been performed by the Registrar General without the performance of normal procedures of a Primary Application to determine that the current owner holds good title. Therefore no guarantee is given that all deeds that may affect that parcel have been identified. Qualified title will expire after 6 years if a person has become a registered proprietor under a transfer for value and without fraud, or otherwise after 12 years.

For Torrens land the existence of a right in land is noted on the Certificate of Title. For Old System land the right to land can be found by a thorough search through the chain of deed supplied by the vendor and also registered in the General Deeds Register. No

assurance can be given without a thorough search of the chain of title, and even then certainty cannot be achieved.

The Certificate of Title will also note any conditions as to use that exist over the parcel of land that were created upon grant from the Crown. The grantee and subsequent tenants are bound by these conditions, unless it can be proven in a court of law that they are not authorised by statute and are then held to be null and void.

#### **4.3.1.4 Freehold Estate.**

Legal estates in freehold can only be created by registration under the *Real Property Act* 1900, or deed under the *Conveyancing Act* 1919. Identification involves the appropriate search of the property folio or of the chain of title as described in sections 4.3.1.2 and 4.3.1.3 of this report. The methods for investigating the existence of shared rights are the same methods utilised to identify singularly held rights.

#### **4.3.1.5 Leasehold Estate.**

Legal leasehold estates greater than a period of three years can only be created by registration under the *Real Property Act* 1900, or deed under the *Conveyancing Act* 1919. Short term leases for a period less than three years cannot be registered but can be created by deed, under contract or even under informal arrangements.

A categorisation system for grouping registrable leases is applied by the Department of Lands in accordance with the different plan types required to define the land or premises being leased as follows:

- General purpose leases
- Caravan parks and mobile home estates
- Lease of airport sites
- Lease of additional common property (strata schemes)
- Lease of additional association land (community schemes)
- Telecommunication sites
- Agricultural leases
- Forestry leases
- Leases affecting roads

- Leases affecting crown land
- Lord Howe Island leases

Registration of leases with the Department of Lands is not compulsory, however ‘an unregistered lease, excluding the short term residential or commercial lease prepared under *the Landlord and Tenants Act 1899*, has no guarantee of its standing at law’ (Registrar General Directions 2007). Despite the inability to register short-term leases they are given special priority because they were exempt at common law from registration.

Identification involves the appropriate search of the property folio or of the chain of title as described in sections 4.3.1.2 and 4.3.1.3 of this report. As mentioned above however a lease of less than three years is not registrable and requires identification by other means, which may include consulting current tenants or the registered proprietor.

#### **4.3.1.6 Possessory Title.**

Possession adverse to the true owner can be brought under the *Real Property Act 1900* after the limitation period by possessory title. This title bars the true owner from taking action against the possessor. Possessory title is recognised once application is made at the Department of Lands, the true title of the parcel is established, adverse possession for the duration of the limitation period is proven and possessory title is registered in the folio for the land parcel.

Prior to application for possessory title, a possessory right may exist if the limitation period has lapsed although no formal claim has been lodged. The only way of establishing any possible right to adverse possession is by identifying the occupant of the land, the duration of this possession and whether consent has been granted.

#### **4.3.1.7 Equitable Interests.**

Many equitable interests in land are not accepted for registration. In a deeds registration system registration merely protects an equitable interest against a bona fide purchaser. Priority is predominately given between registrable interests but registration does not

extinguish an unregistered interest. Such a system of unpredictability is unsurprisingly inefficient and lacks surety.

Most equitable interests are not registrable in the Torrens register, and to protect the indefeasibility of title, are defeated by a conflicting registered right. Unregistered interests can be protected by caveats which act as warnings that an unregistered interest exists and prevents the registration of a later conflicting interest. Caveats are included in the folio and noted on the Certificate of Title.

#### **4.3.1.8 Security Rights.**

Land in old system under the *Conveyancing Act 1919* will recognise mortgages by deed in the same way as any other land dealing as described above. The mortgage will most probably be registered in the General Register of Deeds given the large investments made by both parties, although mortgages can exist outside the register.

Torrens mortgages operate as a charge on the land, in that under the *Real Property Act 1900* the mortgagee does not hold title to land, but rather is notified on the Certificate of Title as being an encumbrance on the land. The Act also provides for the mortgagees right to realise the land following default of the repayment of the loan. A mortgagee will hold the Certificate of Title until the loan is settled to hold some security over any dealings with the property.

#### **4.3.1.9 Shared Rights.**

Co-ownership to a whole land parcel is created and identified in the same manner as an estate to a single landholder and is not discussed further.

The by-laws associated with the management of strata lots, those contained within the management plan for association property in community title and the building management statement are registered within the folios and noted on the Certificate of Title of both the private lots and the common lot. The common property is given its own unique identification number and folio by the Department of Lands with any relevant dealings registered within.

#### **4.3.1.10 Non-Possessory Rights.**

Legally defined non-possessory rights such as profits a prendre, easements and restrictive covenants are registrable with the Department of Lands and created under section 88 of the *Conveyancing Act 1919*. Such registered legal interests will take priority over conflicting informal or equitable arrangements. A bona fide purchase of land will extinguish any covenant that may exist. Easements over land that is not under the *Real Property Act 1900*, such as Crown land, can also be created by notification in the gazette; however this is not the method used for a parcel of freehold land. A re-grant of coal under the *Coal Ownership (Restitution) Act 1990* will be registered by the creation of a folio on the register.

Covenants benefiting the National Conservation Trust of N.S.W. are also registered.

#### **4.3.1.11 Heritage Agreements.**

Heritage agreements can be registered under the Torrens Register for land administered under the Real Property Act or under the General Deeds Register for land not under the Real Property Act if there is consent from each person with either an estate or interest registered in the Torrens Register or otherwise any person seised or possessed of an estate or interest in the land.

#### **4.3.1.12 Water Access License Register.**

The revised scheme of access licenses under the *Water Management Act 2000* establishes a Water Access License Register, which is maintained by the Land and Property Information division of the Department of Lands on behalf of the Minister of Natural Resources. Any dealings, security interest, caveat etc in an access license must be recorded on the register to take effect. Any encumbrances on the license are recorded against the license on the register.

#### **4.3.1.13 Searching Department of Lands Records.**

Land Information Brokers can search the records of the Department of Lands on behalf of the public upon the payment of the prescribed fee. Contact details of the registered

brokers can be obtained from the Department of Lands as well as details of the charges incurred for their services. An online service for the search of the computer folios is also available through the Department of Lands website.

Costs associated with a search through the Department of Land records as shown on the LPI website on 9 September 2007 are given below:

Search Type	Cost
Title Search	\$10.50 (Inc. GST)
Historical Search	\$10.50 (Inc. GST)
Lease Premises Index Search	No Charge
Lease Folio Data Extract	\$29.10 (Inc. GST)
Document Inquiry	No Charge
Plan Inquiry	No Charge
Lots Created Search	No Charge
Sub Folio Search	No Charge
Prior Title Search	No Charge
CT Inquiry	No Charge
Street Address Inquiry	No Charge
SIGA Search	\$10.50 (Inc. GST)
CWO Search	\$10.50 (Inc. GST)
Deed Name Search	No Charge
Deed Number Search	No Charge
Dealing Image	\$10.50 (Inc. GST)
Plan Image	\$10.50 (Inc. GST)
Old System Deed Image	\$10.50 (Inc. GST)
Cancelled Title Image	\$10.50 (Inc. GST)
Crown Plan Image	\$10.50 (Inc. GST)
Primary Application Image	\$10.50 (Inc. GST)
SCIMS Image	No Charge
CAC Inquiry	No Charge
Land Value Search for NSW Landowners	No Charge (Landholder or Authorised Delegate)
Land Value Search	\$10.50 (Inc. GST)



#### **4.3.1.14 Standard Property Information Inquiry Form.**

As described by Hallman (2007) a purchaser under contract of sale may lodge a Standard Property Information Inquiry Form with the Registrar-General, or with the relevant authorities to obtain the following information:

- Zoning and other relevant planning information from a section 149 certificate issued by the council under the *Environmental Planning and Assessment Act 1979*,
- Payment of council rates from a section 603 certificate under the *Local Government Act 1993*,
- Rates and charges from the relevant Water Corporation and position of sewer lines,
- Charges under the *Land Tax Management Act 1956*,
- Any heritage listing under the *Environmental Planning and Assessment Act 1979* or the *Heritage Act 1977*,
- Details of any interests or proposals by AGL Gas Networks Limited, Department of Education and Training, State Forests of New South Wales, Transgrid or other electricity authority, the Roads and traffic Authority or the State Rail Authority,
- Any proposal under the *Pipelines Act (NSW)* or the *Pipeline Authority Act 1973* or other Commonwealth legislation,
- The existence of any mine subsidence district affecting the parcel and any other relevant details under the *Mine Subsidence Act 1961*,
- Details of any affect by title or application for title under the *Mining Act 1992* or the *Petroleum (Onshore) Act 1991*,
- Any rates, charges, notices or orders under the *Rural Lands Protection Act 1989*, the *Water Management Act 2000*, the *Stock (Chemical Residues) Act 1975*, the *Rivers and Foreshores Improvement Act 1948*, the *Catchment Management Act 1989*, the *Wild Dog Destruction Act 1921* and the *Prickly-pear Act 1987*,
- Any effect of the *Soil Conservation Act 1938*,
- Any lease, licence or profit a prendre under the *Forestry Act 1916*.

#### **4.3.1.15 Spatial Definition of Land Parcels.**

The spatial definition of an estate is defined in the registered plan contained within the folio for that land parcel. These plans are prepared by a Surveyor authorised under the *Surveyors Act 2002* and describe the boundaries of the land parcel.

Similarly a Surveyor will be required to identify the exact ground location of a parcel of land. Prior to any development, the boundaries of a parcel must be established to ensure neither breach of consent with regard to setbacks nor any encroachments onto adjoining property. Prior to purchase, a vendee will be encouraged to obtain an Identification Report prepared by a Surveyor to certify the estate correlates to the land being purchased, as well as identifying any encroachments onto adjoining land.

The holding of a 'limited' title means that a satisfactory plan of survey has not been completed in the conversion from old system to Torrens system.

The fees and charges associated with the employment of a Surveyor will vary greatly between firms and between different estates. The charges will be a function of the time and resources required to achieve adequate definition. Given that this process requires some time and expertise to perform, it is not a cheap exercise for the private investor.

#### **4.3.1.15 Tax, Rates and Charges.**

The Department of Lands is responsible for the yearly valuation of land in N.S.W., with the updates reported to the Local Council every 3-4 years. Land tax and council rates payable are determined with reference to these valuations. Places of residence and land used for primary production are generally exempt from land tax.

A land value search facility has been established on the Department of Lands website in which a landholder can obtain the details of their property and land value free of charge. Searches on any other property incur a minor cost of either \$10.50 or \$12.50 per property.

Information on Land Tax provisions and access to a Land Tax calculator is available on the Office of State Revenue's website. Information regarding the calculation of rates

payable is available for public access by the Local Authority. Details of payments, fees and charges, if not already known, are available by either contacting the relevant authority or by lodging a Standard Property Information Inquiry Form as mentioned in section 4.3.1.13.

#### **4.3.2 Local Council.**

The local council is responsible for the management of a wide range of public rights over private land. The responsibilities of the Council continue to evolve as the human-land relationship develops and requires a flexible but comprehensive infrastructure to sustain effective control.

The local council maintains records pertaining to the development of specific land parcels. A file is kept with all relevant documents including development application documentation, determinations and conditions of consent for all applications including those determined by independent referral authorities such as the Department of Natural Resources.

Council is required under the *Environmental Planning and Assessment Act 1979* to create and maintain a Local Environment Plan that reports all considerations for the determination of a development application. The Local Environment Plan is created with reference to all relevant State Environmental Planning Policies, local heritage considerations and environmental concerns.

The Local Environment Plan will include or refer to such considerations as any requirements for development, planning provisions, neighbourhood amenity, any sensitive areas such as land slip, acid sulphate soils, flood plains, Marine Parks, foreshore scenic protection areas, conservation areas, threatened or vulnerable species and map the critical habitat areas, trees under the Tree Preservation Order register, items of local heritage significance and any other item deemed relevant to the management of development and land use in the municipality.

All relevant planning documents such as the Local Environmental Plan, any Development Control Plans, regulations and codes are available for free perusal at council and over the council website.

Further to this, any advice pertaining to the development potential of a parcel of land is available through council planning staff, including a duty planner whose responsibilities include the consultation with the public. The planning staff will draw upon their intimate knowledge of the local planning legislation and policy to inform the public of any restrictions that may exist over a parcel of land.

Under section 149 of the *Environmental Planning and Assessment Act 1979* a landholder or a person with consent from a landholder including a purchaser under contract of sale may apply for a section 149 certificate that describes the zoning and any other relevant planning information held by the Council including any details of any obligations under the *Contaminated Land Management Act 1997*.

Council also issue a certificate under section 603 of the *Local Government Act 1993* that shows the details of the payment of council rates.

Costs associated with all relevant services and searches will vary between councils however the details of all costs is public information and available without charge from the council. Services are charged in accordance with associated costs for the performance of the purchased service.

#### **4.3.3 National Native Title Tribunal (NNTT).**

Since the Mabo decision, and under the subsequent *Native Title Act 1993* (Cwlth), the Commonwealth Government now administers native title claims by the authority vested in the NNTT. The NNTT manages Land Title Claims in advisory, mediation, arbitration, determination and registration roles. The NNTT is the means by which any native title rights that may exist over a parcel of land can be identified.

The Native Title Registrar is responsible for the registration of Native Title Claims, the National Native Title Register and the Register of Aboriginal Land Use Agreements and to provide public access to these registers. To find out whether an area of land or water is affected by a native title determination, application or indigenous land use agreement it is possible to perform a search of the register held by the NNTT.

The associated costs with searches of the NNTT register are dependant on the time taken to perform the search and any disbursements involved. These charges are kept at a minimum and even waived for those parties holding an interest in the application, party to negotiations regarding an interest or those unable to pay due to financial hardship.

Examples of costs provided on the NNTT website as viewed on 9 September 2007 are as follows:

#### Examples of costs

GST is included where applicable.

#### Search

\$21.45 for first 15 minutes

\$7.15 for every 5 minutes thereafter

#### For example:

10 minutes = \$21.45

25 minutes = \$35.75

50 minutes = \$71.50

#### Photocopy

50c per page

#### Fax

50c per page

#### Delivery

Cost depends on requested dispatch method (ordinary mail, courier or express courier).

#### Geospatial service

Cost varies, depending on the complexity of the request. The average cost is \$79.20 per hour.

Where determination of Native Title exists, the Registrar General will record the rights and interests of the Native Title holders in the folio for that land parcel under the *Real Property Act* 1900. Thus any interest that exists will be referenced on the Certificate of Title for any Torrens land. Any interest that is granted pursuant to the *Native Title Act* 1993 that is inconsistent with the existence of Native Title such as freehold estate, extinguishes the right to a Native Title Claim.

#### **4.3.4 Environmental Protection Agency.**

The Environmental Protection Agency incorporated by the Department of Environment and Climate Change maintains a record open for public inspection of declarations and orders, site audit statements, and environmental protection licenses. They are also responsible for informing the local authority of any declarations and orders. Any information regarding land subject to the Environmental Protection Agency is noted on the section 149 certificate issued by the local authority under the *Environmental Planning and Assessment Act 1979* as discussed in section 4.3.2.

An online search facility is available free of charge for the information relating to any license or license application on the Department of Environment and Climate Change website.

Searching of any Department of Environment and Climate Change information that is not available elsewhere as public information is available through the department for an application fee of \$30. Any searches of greater than one hour in duration may incur further costs.

#### **4.3.5 Items of Heritage Significance.**

In N.S.W. there are separate statutory listings for items of heritage significance being:

- Items of local significance listed in the Heritage Schedule of the Local Environment Plan (LEP) or Regional Environment Plan (REP) under the *Environmental Planning and Assessment Act 1979*.
- Items of State significance listed in the State Heritage Register under the *Heritage Act 1977*.

- Items of national significance listed in the Australian Heritage Database under the *Environmental Protection and Biodiversity Conservation Act 1999*.
- Items of Aboriginal heritage significance are listed in the Aboriginal Sites Register under the *National Parks and Wildlife Act 1974*.
- Items of world significance listed in the World Heritage List under the World Heritage Convention ratified by the Australian Government in 1974.

An item of heritage significance owned or leased by the Commonwealth is listed under the Commonwealth Heritage List. Items of heritage significance owned or leased by the State are registered under Section 170 Registers but are also included in the State Heritage Register.

Under section 21 of the *Heritage Act 1977* the Heritage Council is responsible for maintaining a listing of all state and local items of environmental and cultural heritage significance in the State Heritage Inventory. It is possible to search through the listings for all items under the State Heritage Inventory and the State Heritage Register at the Heritage Office or on the online database available without charge on their website. These databases also include items of local significance listed in the Heritage Schedule of each Local Authority. For an individual search on local items of heritage significance, the relevant documents are available without charge at the local Council. The State Heritage Database also includes listed items of world heritage significance that are found within N.S.W.

Items of national heritage significance can be found by searching the Commonwealth Heritage List free of charge by contacting the Australian Heritage Council or on their website search engine.

The N.S.W. National Parks and Wildlife Service under the Department of Environment and Conservation maintains a list of items of Aboriginal heritage significance under the Aboriginal Heritage Information Management System (AHIMS). This register lists Aboriginal items that have been reported only and given that all Aboriginal objects and places are protected under N.S.W. legislation a survey for Aboriginal objects by an Aboriginal heritage consultant is recommended prior to development of a property. The fees associated with searching this register are as follows:

**AHIMS service fee (inc. GST)**

AHIMS database search	Printed AHIMS report plus cover letter	\$50.00
AHIMS/GIS search	Cover letter & digital data	\$75.00
Express search surcharge	Service provided in 2 working days	\$50.00
Processing surcharge	Specialist services that cannot be processed under normal service conditions	\$60.00/hr
Archive visit	Access to AHIMS archive	\$0
Archive visit AHIMS search	AHIMS report only	\$50.00
Archive visit photocopy	Photocopies	\$0.40 ea
AHIMS staff photocopy	Photocopies faxed to client, normally after an AHIMS database search	\$1.00 ea
Data Licence Agreement	Use of or access to data for up to two years	\$50.00
Resupply of data from DLA	Resupply of data based on current DLA	\$25.00

The N.S.W. National Parks and Wildlife Service also maintains a register of items held under their management called the Historic Heritage Information Management System under section 170 of the *Heritage Act 1977*. As mentioned previously all section 170 registers are listed in the State Heritage Register searchable through the Heritage Office.

Further community registers and listings provide information about heritage items of local significance that are not listed under statute and therefore are not legally protected. Such registers include:

- The National Trust Register of the National Trust of Australia being a charity body established to work with the community to protect the natural, built and social heritage. It provides for the education of landowners of the heritage significance of their property but does not have any authority to enforce any limitations of use. However, the Trust has the authority under the *National Trust of Australia (New South Wales) Act 1990* to acquire property by gift, devise, lease or purchase and then sell, lease or mortgage the land subject to a covenant in favour of the Trust to make by-laws for the management of the heritage land.
- The register of 20<sup>th</sup> Century Buildings of the Royal Australian Institute of Architects for significant buildings of today
- The Art Deco Society Register for significant buildings from the interwar period
- The Geological Society Register for important geological sites
- A list by the Australian Institute of Engineers Australia of significant



engineering sites

- The Register of Historic Objects and Places of the Professional Historians Association (NSW).

Any number of such registers can exist, and while they are not legally binding, they may influence a decision regarding the appropriateness of land use under section 79C of the *Environmental Planning and Assessment Act 1979* in a development determination.

#### **4.3.6 New South Wales Department of Primary Industries.**

Mining rights are administered in ten different divisions across N.S.W by regional offices. The relevant Mining Registrar of that regional office registers mining titles within their division. An online TAS Map service for the identification of any mining interests is provided free of charge for public access via the Department of Primary Industry website.

The Titles Program further maintains significant amounts of information on exploration and mining titles, mine working record plans and other plans. For detailed information regarding mining titles a search can be performed at the following costs:

##### **Titles Information:**

Initial request for information	\$132
Rate beyond first hour or part thereof	\$132 per hour
Printing A3 & A4 (black & white)	\$1.10 per page
Printing A3 & A4 (colour)	\$2.20 per page
Plots A0 size (black & white)	\$33
Plots A0 size (colour)	\$55

##### **Mine Workings Plans:**

Compact discs (CDs),	\$55 per CD + \$20 per image
Hard copy images in accordance with schedule of fees above.	

##### **State Maps and Digital Data:**

State Mineral Exploration Licence Map	\$77 Hardcopy / \$66 Digital
State Map Schedules	\$11 Digital
State Petroleum Map	\$77 Hardcopy / \$66 Digital

State Coal Map	\$66 Digital
Digital Data (per layer)	\$66
<b>Postage:</b>	
1 to 2 items	\$6
3 to 5 items	\$8
5 to 10 items	\$10
More than 10 items (per 10 items)	\$10

Where title to certain minerals is ambiguous on the Grant, or where a person desires confirmation regarding the ownership of a certain mineral, the Royalty Branch of the Department provide a mineral ownership search service to clarify the private ownership of minerals.

#### **4.3.7 Consultation with Landowner.**

Given the large vested interest in their property, a landowner is likely to hold a vast array of relevant information pertaining to various rights over their land. Quality and extent of information obtained will obviously depend on the relationship experienced between the landholder the inquirer and the purpose of such an inquiry and is therefore a more subjective method for property rights inquiry.

According to Hallman (2007) following a contract of sale an enquiry can be made to the vendor to disclose a number of relevant details to the sale including:

- their legal capacity to transfer the land,
- any pending court order or litigation affecting the property,
- any non-compliance with covenants, building provisions under the *Local Government Act 1993* or the *Swimming Pools Act 1992*,
- ownership of dividing fences and any related disputes or claims,
- rights arising under any lease, license, adverse possession, sharefarming or any similar agreement,
- any payments required by a public or local authority and
- any statutory charges.

As discussed under section 4.2 personal rights are binding only to those parties that have entered into a contractual agreement, and not vested in the land itself. For the sake

of this project it is perhaps somewhat hazardously assumed that the landowner will be the best source for obtaining information relating to personal rights that bind them to fulfilling their obligations under such an agreement or license. It is also assumed that personal licenses contribute little interest to any party outside of such an agreement.

A remarkably safer assumption is that a landowner will have full knowledge of any taxation obligations, charges and rates payable, although it is more likely that such information may be withheld as confidential, private information.

Details of a stewardship from the Nature Conservation Trust of New South Wales will be assumedly readily gained from the landowner given that they are actively involved in the fulfilment of the terms although any terms that are not contained within the covenant registered on the title may not be legally binding on the subsequent owners and a new agreement may be negotiated.

#### **4.4 Conclusions: Chapter 4**

Following detailed research into the administration of property rights a typology for the investigation of each type of land related ROR in N.S.W was created.

Two general classification systems for categorising RORs were recognised in the supporting literature being that by traditional legal classification and that by reference to specific methods of administration. Both methods were utilised for the creation of an ROR investigation typology.

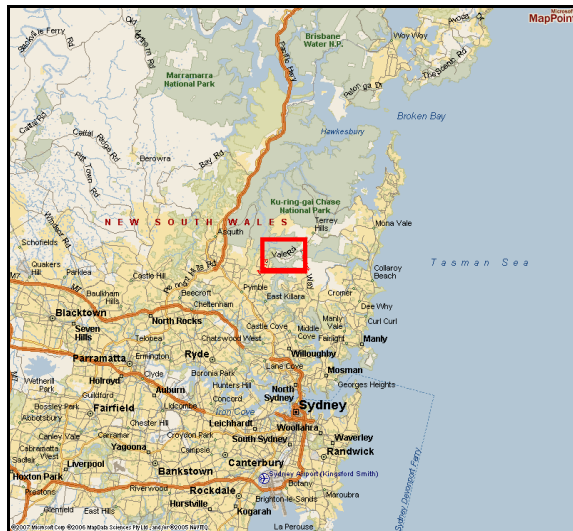
Firstly all ROR types and characteristics were identified. This allowed for a comprehensive analysis of all rights that could exist over a freehold parcel of land in N.S.W.

Secondly the ROR types identified were described with reference to the organisation responsible for their administration. As such this typology could then be readily applied to any parcel of freehold land in N.S.W., including that of the subject case study land parcel.

# Chapter 5

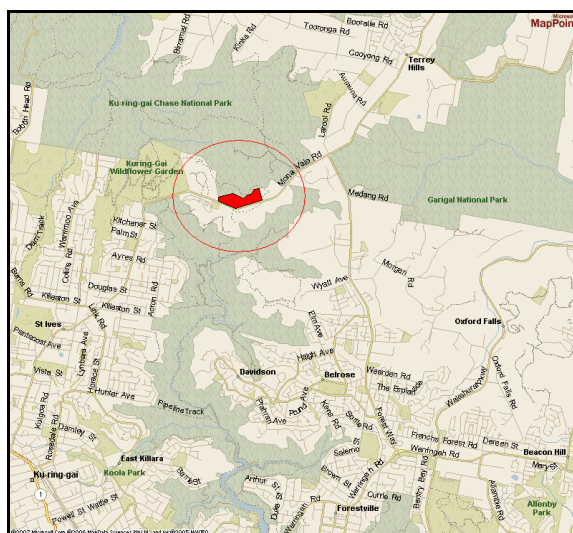
## Results – Case Study

The following results apply the typology constructed under sections 4.1 – 4.3 to the subject land parcel, Lot 2816 D.P. 728428.



**Picture 5.1: Locality Map**

The locality of the subject land parcel is outlined in red.



**Picture 5.2: Site Map**

The subject land parcel is circled and shaded in red

## 5.1 Estate.

### *Department of Lands:*

Cadastral System:	Torrens Title
Folio Identifier:	2816/728428
Locality:	Terrey Hills
Local Government Area:	Ku-Ring-Gai on Certificate of Title Ku-Ring-Gai, Warringah in accordance with Departmental Dealing 7204401 Ku-Ring-Gai, Warringah in accordance with spatial extents of parcel boundaries with the majority of the land, including that part used for residential purposes being within Warringah. Warringah in accordance with payment of rates, development control and supplied services.
Parish:	Broken Bay
County:	Cumberland
Title Diagram:	DP728428
Estate:	Fee simple
Shared Rights:	Joint tenancy
Security Rights:	Mortgage to Gateway Credit Union
Conditions on Title:	Land excludes road shown on the title diagram The reservation and exception to the Crown of all gold, silver, coal and petroleum
Registered Dealings:	Y639926 – Grant to Aboriginal Land Council 3757789 – Mortgage 7068130 – Discharge of mortgage 7068131 – Transfer 7204401 – Departmental Dealing AA936929 – Mortgage
<i>Total Searching Cost:</i>	\$52.50

See Appendix C for relevant documents obtained from the Department of Land records.

<i>Survey</i>	An example of a survey being an identification survey is shown in Appendix D.
<i>Consultation with Landowner:</i>	No knowledge of any short term or unregistered leases, equitable interests or any interests in the estate additional to those recorded on the register.
<i>Site Visit:</i>	Confirmation that the registered proprietors are in full possession of land and that there is no evidence of any unregistered leases being acted upon or of any adverse possessor.

The operation of the Torrens titling system protects registered interests against unregistered interests, especially when the land was purchased bona fide. Given that no equitable or any other unregistered interests has been protected by caveat and that the landowners have no knowledge of such an interest, then it can be safely assumed that there is no sch interest that would affect the legitimacy of the registered interests.

Furthermore the registered proprietors have been in full ownership and possession of the land for a period of greater than three years then any tenants right to possession arising from a short-term lease under the *Landlords and Tenants Act 1989* would have expired.

## **5.2 Native Title.**

<i>National Native Title Tribunal:</i>	Following a phone call to the Tribunal it was established that all Native Title rights were extinguished upon formation of freehold estate. It was also established that all rights held by the aboriginal people on the subject land was transferred to the current proprietors upon the sale of the land. It was therefore considered that any search of the register would be futile.
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<i>Department of Lands:</i>	No record of any Native Title claim was registered on the folio.
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### 5.3 Development Rights

*Warringah Council:*

Section 149 Certificate:

Local Environment Plan:	Warringah Local Environment Plan 2000
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Locality:	A7 Mona Vale Rd North
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Demolition of a building:	Permissible with Council consent
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Applicable Section 94

Contribution Plan:	Warringah Section 94 Contribution Plan
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Affected by Coastal Protection Act:	No
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Within mine subsidence district:	No
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Affected by road widening:	No
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Development restricted by landslip,

bushfire, flooding, subsidence,

tidal inundation or any other risk:	No
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Affected by heritage item:	No
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Subject to flood related controls:	No
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Subject to coastal management plan:	No
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Land use permissible without

consent:	Nil
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Land use permissible with consent:	Agriculture
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Housing

Other development no prohibited or within  
Category 1 or 3

Land use permissible only with

consent from independent

assessment panel:

Animal boarding or training establishments

Bulky good shops

Business premises

Child care centres

Community facilities

	Entertainment facilities
	Further education
	Health consulting rooms
	Heliports (not ancillary to housing)
	Hire establishments
	Hospitals
	Hotels
	Industries
	Medical centres
	Motor showrooms
	Offices
	Places of worship
	Primary schools
	Recreation facilities
	Registered clubs
	Restaurants
	Retail plan nursery
	Service stations
	Shops
	Short term accommodation
	Vehicle repair stations
	Veterinary hospitals
	Warehouses
Prohibited development:	Brothels
	Extractive industries
	Housing for older people or people with disabilities
	Potentially hazardous industries
	Vehicle body repair workshops
	Canal estate development

See Appendix E for a copy of an old section 149 certificate created prior to the current Warringah Local Environment Plan 2000.

Local Environment Plan (further to



information shown on Section 149

certificate):

Acid sulphate soil class: None

Within bushfire prone area: Yes

Within landslip area: No

Permissible subdivision: None

General principles of

development control:

Minimise glare and reflection.

Construction sites not to unreasonably impact surrounding amenity, safety or environment.

Noise emission not to unreasonably impact amenity of area.

No atmospheric, liquid or other pollutants that would unreasonably impact adjoining property, locality or waterways.

Not to pose significant health risk on human health, life or property or the biophysical environment.

To maintain or enhance public safety and security.

Fences to be constructed within street setback and compatible with streetscape, in a manner to allow casual surveillance, with visual interest and not greater than 1.2m high without consent.

To complement landscape of surrounding bushland and unique environmental features.

Requires buffer for bushfire protection.

Utilities to be provided where required, an integral part of the development and underground or screened from public view.

Need for cut and fill minimised on sloping land with the amount of fill not to exceed 1m in depth.

Geotechnical support to be demonstrated.

Proposed stormwater to be designed by suitably qualified engineer.

To minimise the impact on remnant indigenous flora.

To allow for reasonable sharing of views

Not to reduce unreasonably sunlight to surrounding properties with at least 50% of sunlight to principle private open spaces between 9m and 3pm is maintained or where existing shadow is greater not to be further reduced by 20%.

Landscaped open space to be sufficient to allow compliance with streetscape and desired future character of the locality, compatible with the bulk of the development, enhance privacy and recreation, facilitate drainage and water management and enhance the natural landscape of the site.

Rear building setback to allow open and planned rear yard and preserve amenity of adjoining land and locality.

Private open space to be provided with adequate sunlight and direct access from primary living areas.

Not to cause unreasonable direct overlooking, being at least 9m away from windows of habitable rooms and principle open spaces of other dwellings. Planters and screening to be used to screen minimum of 50% of principle open space.

Roofs to be compatible with local skyline.

Development to make the most of efficient use of energy and water by orientation, layout and landscaping of buildings and works making best use of natural ventilation, daylight and solar energy. Re-use of stormwater for irrigation encouraged subject to public health risks.

Parking facilities to be designed to not dominate street frontage or other public spaces.

Vehicular access points to be located to minimise traffic and pedestrian hazards.

Stormwater runoff to discharge to a Council drainage system and have minimum impact on stormwater infrastructure and downstream water bodies.

Landfill to have no visual or adverse impact on visual and natural environment or adjoining properties.

Development to minimise potential soil erosion and managed to prevent reduction in water quality downstream of site.

Exempt Development in  
accordance with Schedule 1  
(not requiring consent):

Access ramps  
Air conditioning units  
Barbeque  
Broadband aerial cabling  
Canopies, awnings and blinds  
Children's play equipment  
Clothes line  
Deck  
Driveways and pathways  
Earthworks/landfill  
Fence  
Flagpole  
Garbage enclosures  
Heating appliances  
Hoardings  
Letterbox  
Minor alterations to buildings  
Outbuildings  
Patio

Pergola  
 Portable classrooms and school buildings  
 Portable spa pool  
 Private electricity service pole  
 Repairs to existing roof/walls  
 Retaining wall  
 Roof ventilators and skylight roof ventilators  
 Satellite Dish  
 Scaffolding  
 Television aerial  
 Temporary structures  
 Water heaters  
 Water tanks  
 Windows and doors  
 Demolition of an exempt building  
 Minor change of use  
 Home business  
 Bushfire hazard reduction  
 State policy to protect and preserve bushland in urban areas.  
 To protect remnants of plant communities.  
 To enable long term survival of flora and fauna.  
 To protect wildlife corridors.  
 To protect soil stability.  
 To protect scenic value of bushland.  
 To protect significant geological features.  
 To protect existing landforms and drainage features.  
 To protect archaeological relics.  
 To protect the recreational potential of bushland.  
 To protect the educational potential of bushland.  
 To maintain bushland where readily accessible for community.  
 To encourage management of bushland to protect and enhance quality.

Bushland in urban areas:

Bushfire hazard reduction:	<p>Asset protection zone required around development.</p> <p>Outer protection zone of non-continuous vegetation and low volumes of fine fuel loadings to be minimum 10m wide.</p> <p>Inner protection zone of minimal ground fuel, non continuous shrub and canopy to be minimum of 20-40m wide.</p> <p>Species of conservational significance not to be removed for fire risk reduction protocol.</p> <p>Development to comply with standards for building works under <i>Rural Fires and Environmental Assessment Legislation Amendment Act 2002</i>.</p>
Carparking provisions:	Requires 2 spaces per dwelling.
Desired future character:	<p>Present character to remain unchanged.</p> <p>Natural landscape to be protected</p> <p>Buildings grouped to result in minimal disturbance of vegetation and landforms.</p> <p>Buildings to blend with colours and textures of natural environment.</p> <p>Building limited to low intensity, low impact detached housing.</p>
Housing density:	1 dwelling
Building height:	Maximum of 8.5m in height.
Front building setback:	<p>Minimum 10m.</p> <p>To be landscaped and free of any major structures.</p>

The Local Environment Plan was created to incorporate all relevant State Planning Policies being SEPP Nos. 1, 4, 5, 6, 9, 11, 19, 21, 22, 33, 35, 44, 45 and 46 and Regional Environment Plans being REP Nos 9, 20, 21, Warringah Local Environment Plan 1985.

Draft Local Environment Plan:	Council is preparing a new Local Environment Plan with proposed implementation by September
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2008. Under the new format land will be rezoned to comply with standard zonings initiated by the Minister for Planning in 2006 across the State.

Changes may potentially alter the potential development potential of a site and a public exhibition of the draft Local Environment Plan and corresponding Development Control Plan will be on public exhibition early 2008. This will give the public a chance to make objections relating to the new planning documents prior to gazettal.

Total Search Cost: \$0 (obtained from landowners but ordinarily \$79 for section 149 certificate)

*Consultation with Landowner:* A bushland plan of management given in Appendix F identifies developmental, environmental and bushfire obligations on the site. These are further discussed under their relevant headings.

#### **5.4 Forestry Rights.**

*Department of Lands:* None identified on the folio.

*Warringah Council:* None identified on the section 149 certificate.

*Consultation with Landowner:* None identified.

#### **5.5 Mineral Rights.**

*Department of Lands:*

Conditions of Grant: Alienated from the Crown in 1990  
Granted under *Aboriginal Land Rights Act (NSW)* 1983

Minerals excluded on Grant: Gold, silver, coal and petroleum in accordance with section 45(2) Aboriginal Land Rights Act 1983

*Department of Primary Industries:*

TAS Map Investigation Online:

TAS Map Block/Unit: Sydney Basin SYD 1455m

1 Minute Graticule Search Tool: No Features Found

Coal Tenure Identified: None

Mineral Tenure Identified: None

Petroleum Tenure Identified: None

Sensitive Areas Identified: Ku-ring-gai Chase National Park  
Garigal National Park  
Dalrymple-Hay National Park

*Warringah Council:*

Minimal feasibility of any mining operations approved on subject land as 'Extractive Industry' (extractive material defined as sand, gravel, clay, turf, soil, rock, stone, sandstone or any similar substance) is listed as Prohibited Development for Locality A7 Mona Vale Road North under Appendix A of the *Warringah Local Environment Plan 2000*.

*Consultation with landowner:*

No knowledge of any interests in any minerals or petroleum.

Given the unusual circumstances for the Grant, ownership of more minerals than the usual estate has been obtained. There is some confusion as to whether the owner of the subject parcel could obtain permission to mine for minerals privately owned by grant, outside the definition of 'extractive material' in the Warringah Local Environment Plan. However given the statements such as the area is to 'remain unchanged', the 'natural landscape including landforms and vegetation will be protected and, where possible, enhanced' and development is to result in the 'minimum amount of disturbance of vegetation and landforms' documented within the Desired Future Character statement

of Appendix A7 of the Local Environment Plan, it is unlikely that an approval for any such mining operations will be obtained.

### **5.6 Riparian Rights to Water.**

Subject land parcel does not contain, nor is it adjacent to any water body.

*Department of Land:* No Water Access License held by any registered proprietor identified.

*Consultation with Landowner:* No Water Access License identified.

### **5.7 Contaminated Land.**

*Warringah Council* No mention of any contaminated land on the section 149 certificate.

*Consultation with Landowner* No current or past use that could contribute any contaminants in accordance with contaminated uses under the *Contaminated Land Management Act 1997*.

No remediation management plan with the Environmental Protection Agency reported.

Further to any records regarding contaminated land kept on the property file within the Council archives, Council will screen for any potential contamination of land and take appropriate action through a description of past uses on the Development Application form, which is mandatory for completion with any land use application.

### **5.8 Environmental Rights.**

*Environment Protection Agency:* No registered license found using the online register search tool.



*Department of Lands:*

No registered encumbrances on land found.

*Warringah Council:*

All development applications for the use of land to supply relevant Tree Preservation Order form and map of any trees to be removed for Council approval.

Any Development Application may require a Flora and Fauna Survey or appropriate Environmental Impact Statement prepared by a suitably qualified consultant for Council to assess the potential impact of the proposed development and make an appropriate determination. This will include details relating to any protected or threatened species and any noxious or environmental weeds found on the site.

Warringah Council classifies weeds as either noxious weeds in accordance with the *Noxious Weeds Act 1993* or environmental weeds as identified by the Warringah Council Conservation and Land Management Team.

*Consultation with Landowner:*

The Bushland Management Plan in Appendix F identifies obligations under council consent to the existing residential use being:

Clearing of native vegetation limited to the bushfire asset protection zone.

Prohibition of removing bush rock.

Prohibition of removing fallen logs and litter outside the asset protection zone.

Limiting fire frequency by managing fire hazards.

Report any foxes or feral animals to Council Pest Officer.

Removal of weeds in accordance with prescribed management zones.

Weeds found on site as per the last Flora and Fauna Survey taken by Actinotus Environmental Consultants on behalf of council are shown in appendix F.

No threatened species were identified on the subject site in the Flora and Fauna report.

Of particular interest to the control of the environment by the local council is the treatment of a development application on the subject land parcel in 2002 as shown in appendix G. As part of the application it was proposed that upon consent, Council would require a covenant be registered on the title of the subject land binding the proprietors to an environmental management plan. While this requirement was rescinded for the final consent, the consent for the existing residential dwelling was given with consideration of the proposed Bushland Plan of Management, and any breach of that plan may constitute a breach of consent that may give cause for Council to issue an order. The full Bushland Plan of Management can be found in appendix F.

## **5.9 Heritage Rights.**

<i>Warringah Council:</i>	Property not affected by any heritage listing in the Warringah Local Environment Plan.
<i>State Heritage Register:</i>	Property not affected by any heritage listing on the State Heritage Register.
<i>Australian Heritage Database:</i>	Property not affected by any heritage listing on the Australian Heritage Database.
<i>World Heritage List</i>	Property not affected by any heritage listing on the World Heritage List.

<i>AHIMS</i>	Property not affected by any Aboriginal item listed under the AHIMS. See Appendix H. Cost: \$50
<i>Department of Lands:</i>	No Heritage agreements noted on folio.
<i>Consultation with Landowner:</i>	No knowledge of any heritage listing under any community heritage listing such as the National Trust, or any institute, society or association register.
<i>Total Search Cost:</i>	\$50

Any listing under a community register is difficult to search for given there is any number of community groups and associations that may have an environmental or cultural interest in the property; however any obligation under such a register is not legally binding.

Furthermore it is presumed that the holders of such an interest would make direct contact with the landowners for the sake of protecting their interest, with the only possible protection being under an agreement with the landowner. An agreement would only become a property right if the agreement is registered under the property folio in legally recognised form such as a covenant or in any other form if subsequent persons purchase the land with notice of an intentionally binding agreement. Since the landowners are not aware of any such agreement it can be safely assumed that they are not currently obliged to conform to any heritage requirements on a community register.

#### **5.10 Conservation Agreements.**

<i>Consultation with Landowners:</i>	No conservation agreements affecting the subject land identified.
	Flora and Fauna report referenced in Appendix F reports that the vegetation found on the site is of low conservation priority, being common in

Warringah and well represented in Ku-Ring-Gai and Garigal National Parks.

### **5.11 Access Agreements.**

*Consultation with Landowners:* No access agreement affecting the subject land identified.

### **5.12 Tax, Rates and Charges.**

*Consultation with Landowners:*

*Payments to Office of State Revenue:* Payment of land tax not required. Land used as primary place of residence.

*Payments to Local Council:* Payment of Council rates plus additional waste removal payable annually.

*Payment with public utilities:* Payment required for use of services on usage basis. Currently includes payment for gas, telecommunications, electricity, water (rare given primary use of tank water)

# Chapter 6

## Conclusions.

### 6.1 Introduction.

Following the construction and application of a typology to investigate all RORs existing over a freehold land parcel in N.S.W. it was possible, to a limited extent to identify the impediments to efficient land right searching. The impediments discovered have implications for the reform of the land administration system and recommendations for further work and research are given.

### 6.2 Discussion - Impediments Encountered.

This discussion is concerned primarily with the impediments to efficient searching of land RORs that was uncovered during the performance of the case study. They are subsequently discussed under their relevant headings.

#### 6.2.1 Extensive Research Required.

Extensive research was required prior to the satisfactory gathering of all RORs on the subject site. This research included the six months of intensive study performed for the completion of this task, further to completion of a four-year full time degree in surveying, several years of employment as a town planning consultant and several other years as a surveyor.

Despite all the research and experience gleaned to construct and test a full typology of ROR administration on freehold land, the changing and expansive nature of property management prevents full certainty that the given typology is complete. In fact it is almost certain that some rights such as personal rights that affect property have been overlooked for the completion of this project, thus significantly compromising the usefulness of the results.

Considering that the constructed typology for ROR administration in N.S.W. possibly lacks completeness regardless of the extensive research, study and experience, it is highly doubtful that the average landowner will be able to achieve full knowledge of all RORs affecting their property. This presumably impacts their ability to effectively plan and participate in the land market. Furthermore, they will be subject to high consultant fees such as heritage consultants, environmental consultants, surveyors, town planners, aboriginal heritage consultants and solicitors for even the most menial of searching tasks. When compared to the minimal costs expended for the completion of this task, it is not considered appropriate that a landowner need to pay such large costs to discover the details of the rights that they already hold.

Inefficiencies are unnecessarily transferred onto taxpayers and private property owners. Most purchasers will not enjoy the same relationship with the current landowners as was enjoyed for the completion of the subject case study, and therefore not privileged to the same quality and quantity of information. Large sums of money are dispensed with on consultants acting on behalf of property owners and purchasers primarily due to public inability to operate on their own behalf. The public ignorance of the existence of land rights and the lack of knowledge about the systems that administer these rights are major contributors to the inefficiency of the current system. The inhibitive nature of the required consultant fees, combined with the public ignorance of property rights results in purchasers who are unable to make an educated decision regarding the potential investment of land.

### **6.2.2 Exhaustive Typology Required.**

Most authors of legal texts in property law will quickly admit that their writings do not boast completeness. In order to maintain a manageable degree of property administration, the courts are reluctant to introduce new categories of property rights. As such, it has been found that traditional legal classifications are already stretched. The courts of chancery were once established to provide remedy for breaches that were outside of the legal jurisdiction. Equitable law has now become as intricate and bound in tradition as common law itself. The evidently exclusive nature of legal categorisation means that RORs, many of which will exist outside of property law such as contractual agreements, licenses or personal rights must be administered in a manner broader than practicing conveyancing.

No list pertaining to all RORs that can impact land use exists in N.S.W. Given the broad range of rights that continue to affect property in overlapping capacities, it is short sighted to attempt to predict potential land use with a limited breadth of such knowledge. Therefore a comprehensive typology is required prior to any planning of land use or investment in land.

The typology proposed in this project is an attempt to create such a list that would allow landowners to investigate the different types of RORs as applicable to their concerns. The ease to which the typology was administered in the application to the subject land parcel was astounding.

The lack of assurance that a complete listing of RORs has been identified is unsettling. This has detrimental implications for social, economic, environmental and sustainable development. A landholder cannot be certain that his land usage is free from any compromising land right. The lack of a complete typology accessible to landowners remains an impediment to the efficient searching of land rights over freehold land in N.S.W.

It is resolved that this blind participation in land markets occurs in most, if not all land conveyance. This is surprising given the large investment costs required in such activity.

### **6.2.3 Split Task of Administration.**

Different institutions under separate legislation perform the administration of land rights in N.S.W. It was shown in instances such as the administration of mineral and environment rights that different means for control can lead to confusion. Potentially conflicting rights can arise from miscommunication between separate organisations acting under independent and potentially conflicting interests, such as a referral authority who declines a development application even though near assurance was given the developer prior to submission by the local authority. There is no clear directive to determine which interest takes precedence for interests of equal legal priority.

A prime example of this miscommunication was found in the identification of the Local Government Area for the subject site. There was confusion following the discovery of conflicting information with different Local Government Area being used for different purposes, being Warringah, Ku-Ring-Gai or in other cases both. Not only does this create interdepartmental confusion, but a lack of clarity can have serious implications for the landowner who for this case refuses to make full investigation into potential use of land for the fear of being found eligible for obligations to both councils.

#### **6.2.4 Difficulties with Public Interface.**

It is inevitable that complicated issues will always test the reliability of a public interface. In performing the case study for this task several obstacles were met being:

- The Department of Primary Industries online tool TAS Map was found to be cumbersome. Difficult zoom and layering techniques adopted by the program potentially risked important detail being missed. Once a mining interest was discovered it was also difficult to assess title findings. Although it was not required for this task, representatives of the department should be sought to make any clarification of findings on TAS Map directly.
- When the public consultants for governing authorities were contacted directly there was some confusion to complicated legal particulars, which required some to consult their superiors, and others to make what seemed like educated guesses. Examples included the question as to whether land rights in question, administered by organisations such as the National Native Title Tribunal and the New South Wales National Parks and Wildlife Service would also be noted on the folio with the Department of Lands or other appropriate registers.
- There were some configuration issues with the online search tool administered by the Environmental Protection Agency that caused the results to be unreadable.

Although such impediments are trivial, it is necessary for the organisations responsible for informing the public to be conforming to consistent quality control measures to ensure the information is being clearly communicated.



### **6.2.5 Registrars Limiting their Liability**

A problem with the searching of current registers is that some do not guarantee that all relevant information has been registered, and therefore limit the usefulness of the search. Such is the case with the registers in the Department of Lands, particularly with the General Deeds Register, but also to some extent the Torrens register for land subject to adverse possession, qualified or limited title. This is also the case with the AHIMS that does not and cannot guarantee that all statutorily protected Aboriginal Items or places in the area have been located and recommends a survey. Such surveys are usually inhibited by cost and therefore a landowner will not usually be certain whether they will be surprised by any unregistered interest that severely compromises their plans for the parcel of land.

### **6.2.6 Unforeseeable Interests**

There is a current trend in planning ideology to move away from prescriptive control of development to encourage creativity through flexible development thus allowing enough scope for good design. While the review of planning regulation is beneficial for developing vibrant cities and towns it comes to the expense of the land developer who cannot predict with any certainty the likelihood of receiving an approval.

The ambiguity of the development determination process is also a necessary evil, purposed to protect the community at the expense of the developer. The current determination process is strongly influenced by the receiving or absence of any objections relating to a proposed land development by Council. At Warringah Council an application will go to the Independent Hearing and Assessment Panel once three or more objection letters are received (Warringah Local Environment Plan 2000). It seems that the determination will swing towards community favour until their objections are proven unfounded, which is often subjective and difficult to accomplish. Such objections are rarely raised prior to application and are often received at critical periods in the determination process after large expenses have been dispensed on consultants by the property developer.

Community representatives also receive strong Council attention. While the National Trust of Australia does not hold any authority to enforce limitations to the use of an

item classified under their register, it is envisaged that they do uphold enough of a reputation as a professionally aware community representative body to influence the determination of any proposed land use on that property under section 79C of the *Environmental Planning and Assessment Act 1979*. While this is favourable for the protection of the heritage richness of our environment it is not always foreseeable for any potential interest holder that such heritage significance exists outside the legal regulatory framework. This unpredictability is more so the case for other community groups and precinct committees that may influence a determination by subjectively and arbitrarily opposing development, but who do not keep formal registers or have members of appropriate professional esteem.

Some interests in land have even been found to be unsearchable, such as unregistered interests in a deeds system or personal agreements affecting the use of land. While these interests remain protected by law it is not possible to have a transparent system of land administration operating at full efficiency.

#### **6.2.7 Evolution of RORs**

RORs are continuously changing with new Acts being passed and others being repealed. The development rights written for the subject land parcel will cease to exist, be modified or replaced with new rights under the new Local Environment Plan being created by Warringah Council, due for gazettal in September 2008. Searches such as those through the Department of Lands records are only valid at the time of the search. The Certificate of Title provided in Appendix C is outdated, with the inclusion of a mortgage since recorded, and now soon to be removed. The section 149 certificate provided in Appendix G was created prior to the current Warringah Local Environment Plan. Changes in legislation affecting land must be monitored in order to maintain a valid searching system.

#### **6.2.8 Successful Application of Typology**

Some positive findings regarding the existing land administration systems is that once the typology was constructed its application was relatively simple, efficient and inexpensive.

The organisations responsible for the communication of rights to the public have performed their duties subject to quality control, on behalf of many clients and for long periods of time. Therefore they have developed simple and efficient public consultancy methods for the clear communication of any relevant rights to any inquirer.

It was also found that all authorities maintained their fees near to cost so as to not unreasonably impede the public from determining their rights. Some services were also offered at no cost, or no cost to those with financial hardship or the registered proprietor. When compared to the often exorbitant expenses of hiring private consultants it is regarded that the costs associated with performing the required searches are reasonable.

The organisations responsible for administering a group of rights have developed efficient systems within themselves. The problem is instead the lack of clear definition of which rights can exist over a parcel of land and who administers these rights. Once this barrier is breached, the searching of rights was found to be straightforward.

### **6.3 Limitation of Results**

Any administration system operating outside of those concerned with freehold estate was not tested as part of this project. Furthermore the application of the constructed typology is limited to the testing of the land administration systems of RORs that were relevant to the subject land parcel. It does not test systems administering rights such as Water Access Licenses or conservation agreements.

The findings from performing a singular case study are limited to the experience for that one case. Given the range of rights that exist over vast array of land parcels, it is difficult to generalise the results to apply to a wider range of property, even to parcels that exist under similar conditions. While it is asserted that specific impediments encountered to the subject parcel of land can be presumed as generally applicable, it cannot be presumed that the entire range of general impediments have been discovered.

The characteristics of each ROR identified as part of this study is only described briefly within this dissertation. Many legal particulars relating to each ROR has been purposely

omitted for the sake of brevity. Further research and consultation is recommended for any intended dealings in property law.

Personal rights affecting land have not been completely investigated for the completion of this project. Such rights operate outside of property law, are not binding on subsequent owners unless specifically agreed and are considered infinite in possibility. Furthermore, the typology constructed as part of this project cannot be confirmed as complete and must be administered with caution.

#### **6.4 Further Research and Recommendations.**

While it is not the intention of this project to make recommendations for the reform of the current administration system, it is worth noting that once a clear and concise typology was constructed, searching for RORs over the subject land parcel was relatively easy. Therefore land administration reform may not require a complete overhaul of current operations or the formation of a single department responsible for the maintenance of all land rights, but simply a service responsible for the maintenance of a continuously updated land right investigation typology. The formation of such a working typology will also allow the identification of any inconsistencies, overlap and other inefficiencies and the communication between different land right holders and administration authorities.

The formation of a working land right investigation typology would require a thorough inspection of all relevant State, National and International legislation and the active cooperation and contribution from appropriate members of all the various operating land administration organisations. Any amendments to legislation affecting the rights over land must be identified and the typology adjusted accordingly.

The typology must also be accessible and clearly communicated to all members of the public. This would empower members of the public to perform their own searches and free land administration professionals such as solicitors and planners to concentrate on more significant tasks that demand their expertise.

## **6.5 Summary of Chapter 6.**

Impediments to the efficient searching of all RORs existing over freehold land in N.S.W. were found by the subject case study to be:

- Extensive research is required prior to any search.
- An exhaustive typology is required prior to any search.
- The administration system is currently split amongst independent organisations with different methodologies and little cross communication.
- Some minor difficulties were experienced with the public interface of several land administration organisations.
- Registrars limit their liability and therefore it cannot be assumed all relevant detail has been obtained.
- Unforeseeable interests may exist.
- RORs are continuously evolving.

The application of the created typology was found to be relatively efficient and inexpensive when tested on the subject case study. This has implications for land administration reform and may not require a complete overhaul as suggested by some authors.

The assumption that the land administration system is inefficient and requires reform has been supported by the findings of this project.

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*Water Act 1912 (NSW)*

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*Wild Dog Destruction Act 1921 (NSW)*

## **APPENDIX A**

### **Project Specification**

#### **A.1 Project Specification**



## ENG 4111/4112 Research Project PROJECT SPECIFICATION

FOR: Christopher Jed TEMPLE

TOPIC: Impediments to identifying all rights, obligations and restrictions existing over a parcel of freehold land in N.S.W.

SUPERVISOR: Glenn Campbell

SPONSORSHIP:

PROJECT AIM: To identify impediments to efficient searching of all rights, obligations and restrictions (RORs) existing over a parcel of freehold land in N.S.W..


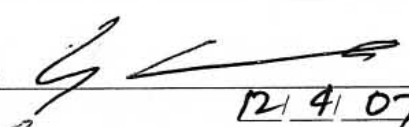
PROGRAMME: Issue A, 21 March 2007

1. Research current literature and background information relating to RORs.
2. Identify all N.S.W legislation that creates RORs over freehold land in N.S.W.
3. Identify how each type ROR is administered and recorded and develop a typology for RORs.
4. Select a suitable freehold land parcel as a case study and collect all relevant information and documentation pertaining to RORs existing over the subject land parcel.
5. Analyse the existing information and documentation pertaining to ROR's existing over the subject land parcel with particular reference to difficulties incurred.
6. Identify the impediments to efficient searching of all RORs existing over a parcel of freehold land in N.S.W.
7. Prepare and submit project dissertation.


As time permits

8. Make recommendations for the improvements to ROR searching methods.

AGREED:

 student)  (Supervisors)

28/3/07 12/4/07

EXAMINER: 

## Appendix B

### **Premises-Based Activities Requiring an Environmental Protection**

#### **License**

The following is an excerpt from the Environmental Protection Agency N.S.W 'Guide to Licensing Part B'.

9

#### **Schedule 1 Schedule of EPA-licensed activities PART 1 ACTIVITIES PREMISES-BASED**

The activities referred to in this Part are activities that are **premises-based** (i.e. the occupier of the premises at which the activity is carried on must be the holder of a licence authorising the activity to be carried on at those premises).

An activity referred to in this Part is not a premises-based activity if the activity is carried on by mobile plant.

**Agricultural produce industries** that process agricultural produce (including dairy products, seeds, fruit, vegetables or other plant material) and that crush, juice, grind, gin, mill or separate more than 30,000 tonnes of produce per year.

**Aircraft (helicopter) facilities** (including terminals, buildings for the parking, servicing or maintenance of helicopters, installations or movement areas) for the landing, taking-off or parking of helicopters (other than facilities used exclusively for emergency aeromedical evacuation, retrieval or rescue) if the facilities:

- (1) have an intended use of more than 30 flight movements per week (including taking-off or landing), and
- (2) are located within 1 kilometre of a dwelling not associated with the facilities.

**Aquaculture or mariculture** for the commercial production (breeding, hatching, rearing or cultivation) of marine, estuarine or freshwater organisms, including aquatic plants or animals (such as fin fish, crustaceans, molluscs or other aquatic invertebrates), but not including oysters, involving:

- (a) supplemental feeding in tanks or artificial waterbodies, and
- (b) the discharge of effluent, liquid sludge or other waste water into natural waterbodies (such as rivers, streams, lakes, lagoons, swamps, wetlands, watercourses (including natural watercourses that have been artificially modified) or tidal waters (including the sea)), whether or not the discharge is by means of a pipe, drain, drainage depression, canal or other artificial form of conveyance.

**Bitumen pre-mix or hot-mix industries** where crushed or ground rock is mixed with bituminous or asphaltic materials and that have an intended

production capacity of more than 150 tonnes per day or 30,000 tonnes per year. This activity does not include works of a temporary nature exclusively providing product for a construction site and located on or adjacent to that site for a period of less than 12 months.

**Breweries or distilleries** that produce alcohol or alcoholic products and that have an intended production capacity of more than 30 tonnes per day or 10,000 tonnes per year.

**Cement works** (including works involving the production of quicklime) that:

- (1) use argillaceous and calcareous materials in the production of cement clinker, or
- (2) grind cement clinker with an intended processing capacity exceeding 150 tonnes per day or 30,000 tonnes per year, or
- (3) have an intended combined handling capacity exceeding 150 tonnes per day or 30,000 tonnes per year in bulk of cement, fly ash, powdered lime, or any other similar dry cement products.

**Ceramic works** with an intended production capacity of more than 150 tonnes per day or 30,000 tonnes per year of products such as bricks, tiles, pipes, pottery goods, refractories, or glass manufactured through a firing process.

**Chemical industries or works** for the commercial production of, or research into, chemical substances at:

- (1) the following industries or works:
  - (a) **agricultural fertiliser industries** that produce more than 20,000 tonnes per year of inorganic plant fertilisers, or
  - (b) **battery industries** that manufacture or reprocess batteries containing acid or alkali and metal plates and use or recover more than 30 tonnes of metal per year, or
  - (c) **carbon black industries** that manufacture more than 5,000 tonnes per year of carbon black, or
  - (d) **explosive or pyrotechnics industries** that manufacture explosives for purposes including industrial, extractive industries and mining uses, ammunition, fireworks, or fuel propellants (except the production of explosives at mines), or
  - (e) **paints, paint solvents, pigments, dyes, printing inks, industrial polishes, adhesives or sealants manufacturing industries** that manufacture more than 5,000 tonnes per year of products, or
  - (f) **petrochemical industries** that manufacture more than 2,000 tonnes per year of petrochemicals and petrochemical products, or
  - (g) **pesticides, fungicides, herbicides, rodenticides, nematocides, miticides, fumigants and related products industries** that:
    - (i) manufacture materials classified as toxic in the *Australian Dangerous Goods Code*, or
    - (ii) manufacture more than 2,000 tonnes per year of products, or
  - (h) **pharmaceutical or veterinary products industries** that manufacture or use materials classified as toxic in the *Australian Dangerous Goods Code*, or
    - (i) **plastics industries** that:
      - (i) manufacture more than 2,000 tonnes per year of synthetic plastic resins, or

- (ii) reprocess more than 5,000 tonnes of plastics per year other than by a simple melting and reforming process, or
- (j) **rubber industries or works** that:
  - (i) manufacture more than 2,000 tonnes per year of synthetic rubber, or
  - (ii) manufacture, retread, recycle or process more than 5,000 tonnes per year of rubber products or rubber tyres, or
- (k) **soap or detergent industries** (including domestic, institutional or industrial soaps or detergent industries) that manufacture:
  - (i) more than 100 tonnes per year of products containing substances classified as toxic in the *Australian Dangerous Goods Code*, or
  - (ii) more than 5,000 tonnes per year of any other products (excluding simple blending), or
- (2) industries or works, other than those in (1) above:
  - (a) that manufacture, blend, recover or use substances classified as explosive, toxic or radioactive in the *Australian Dangerous Goods Code*, or
  - (b) that manufacture or use more than 1,000 tonnes per year of substances classified (but other than as explosive, toxic or radioactive) in the *Australian Dangerous Goods Code*, or
  - (c) that crush, grind or mill more than 10,000 tonnes per year of chemical substances. This designation of chemical industries or works does not include those where chemical substances listed in the NSW Dangerous Goods (General) Regulation 1999 are stored in quantities below the licence level set out in that Regulation.

**Chemical storage facilities** that store or package chemical substances in containers, bulk storage facilities, stockpiles or dumps with a total storage capacity exceeding:

- (1) 20 tonnes of pressurised gas, or
- (2) 200 tonnes of liquefied gases, or
- (3) 2,000 tonnes of any chemical substances.

**Coal mines** that mine, process or handle coal and are:

- (1) underground mines, or
- (2) open cut mines that:
  - (a) have an intended production or processing capacity of more than 500 tonnes per day of coal or carbonaceous material, or
  - (b) have disturbed, are disturbing or will disturb a total surface area of more than 4 hectares of land by:
    - (i) clearing or excavating, or
    - (ii) constructing dams, ponds, drains, roads, railways or conveyors, or
    - (iii) storing or depositing overburden, coal or carbonaceous material or tailings.

**Coal works** that store or handle coal or carbonaceous material (including any coke works, coal loader, conveyor, washery or reject dump) at an existing coal mine or on a separate coal industry site, and that:

- (1) have an intended handling capacity of more than 500 tonnes per day of coal or carbonaceous material, or
- (2) store more than 5,000 tonnes of coal or carbonaceous reject material except where the storage is within a closed container or building.

**Composting and related processing or treatment facilities** (including

facilities that mulch or ferment organic waste, or that are involved in the preparation of mushroom growing substrate, or in a combination of any such activities) that:

- (1) receive over 200 tonnes per year of animal waste, food waste, sludge or biosolids, or
- (2) receive over 5,000 tonnes per year of wood waste, garden waste, or natural fibrous material, or
- (3) receive any organic waste and are located within 500 metres of any residentially zoned land, or within 250 metres of a school or hospital or a dwelling not associated with the facility.

**Concrete works** that produce pre-mixed concrete or concrete products and have an intended production capacity of more than 30,000 tonnes per year of concrete or concrete products.

**Contaminated soil treatment works** for on-site or off-site treatment (including, in either case, incineration or storage of contaminated soil but excluding excavation for treatment at another site) that:

- (1) handle more than 1,000 cubic metres per year of contaminated soil not originating from the site on which the works are located, or
- (2) handle contaminated soil originating exclusively from the site on which the works are located and:
  - (a) incinerate more than 1,000 cubic metres per year of contaminated soil, or
  - (b) treat otherwise than by incineration and store more than 30,000 cubic metres of contaminated soil, or
  - (c) disturb more than an aggregate area of 3 hectares of contaminated soil.

For the purposes of this item, **contaminated soil** means soil that contains a substance at a concentration above the concentration at which the substance is normally present in soil from the same locality, being a presence that presents a risk of harm to human health or any other aspect of the environment. In this context, harm to the environment includes any direct or indirect alteration of the environment that has the effect of degrading the environment.

**Crushing, grinding or separating works** that:

- (1) process materials including sand, gravel, rock, minerals, slag, road base or demolition material (such as concrete, bricks, tiles, asphaltic material, metal or timber) by crushing, grinding or separating into different sizes, and
- (2) have an intended processing capacity of more than 150 tonnes per day or 30,000 tonnes per year.

**Dredging works** being works in which materials of more than 30,000 cubic metres per year are obtained from the bed, banks or foreshores of any waters. See also **Extractive industries**.

**Drum or container reconditioning works** that recondition, recycle or store:

- (1) packaging containers (including metal, plastic or glass drums, bottles or cylinders) previously used for the transport or storage of substances classified as poisonous or radioactive in the *Australian Dangerous Goods Code*, or
- (2) more than 100 metal drums per day, unless the works (including associated drum storage) are wholly contained within a building.

**Electricity generating works** (including associated water storage, ash and waste management facilities) that:

- (1) supply or are capable of supplying more than 30 megawatts of electrical power from energy sources (including coal, gas, bio-material or hydro-electric stations), but not including from solar powered generators, or
- (2) are within the metropolitan area of Sydney, Newcastle and Wollongong (being the area bounded by and including the local government areas of Newcastle, Maitland, Singleton, Hawkesbury, Blue Mountains, Wollondilly, Wollongong, Shellharbour and Kiama) and incorporate electricity generating plant (other than emergency standby plant that operates for less than 200 hours per year) and are based on or use:
  - (a) gas turbines, which burn or are capable of burning, in the aggregate, fuel at a rate of more than 20 megawatts on a net thermal energy basis, or
  - (b) internal combustion piston engines, which burn or are capable of burning, in the aggregate, fuel at a rate of more than 3 megawatts on a net thermal energy basis.

**Extractive industries:**

- (1) that obtain extractive materials by methods including excavating, dredging, blasting, tunnelling or quarrying or that store, stockpile or process extractive materials, and
- (2) that obtain, process or store for sale or re-use an intended quantity of more than 30,000 cubic metres per year of extractive material.

See also **Dredging works**.

**Freeway or tollway construction**, being the construction of new, re-routed or additional carriageways, that as a result will have:

- (1) physically separated carriageways for traffic moving in different directions, and
  - (2) at least 4 lanes (other than lanes used for entry or exit), and
  - (3) no access for traffic between interchanges,
- for at least 1 kilometre of their length in the Metropolitan area or for at least 5 kilometres of their length in any other area.

The Metropolitan area is the area of Sydney, Newcastle, Central Coast and Wollongong bounded by and including the local government areas of Newcastle, Lake Macquarie, Wyong, Gosford, Hawkesbury, Blue Mountains, Penrith, Liverpool, Camden, Campbelltown, Wollongong and Shellharbour.

This item does not include maintenance of any such freeway or tollway.

**Irrigated agriculture**, being the irrigation activities of an irrigation corporation within the meaning of the *Irrigation Corporations Act 1994*, but not including the irrigation activities of individual irrigators in areas administered by any such irrigation corporation.

**Livestock intensive industries** being:

- (1) **feedlots** that are intended to accommodate in a confinement area and rear or fatten (wholly or substantially) on prepared or manufactured feed more than 1,000 head of cattle, 4,000 sheep or 400 horses (excluding facilities for drought

or similar emergency relief), or

(2) **piggeries** that are intended to accommodate more than 2,000 pigs or 200 breeding sows, or

(3) **poultry farms** that are intended to accommodate, for commercial production, more than 250,000 birds, or

(4) **dairies** that are intended to accommodate more than 800 animals in milk production,

or

(5) **saleyards** having an annual throughput exceeding 50,000 cattle or 200,000 animals of any type (including cattle) for the purposes of sale, auction or exchange or for transportation by road, rail or ship.

**Livestock processing industries** comprising commercial operations that:

(1) slaughter animals (including poultry) with an intended processing capacity of more than 3,000 kilograms live weight per day, or

(2) manufacture products derived from the slaughter of animals including:

(a) tanneries or fellmongeries, or

(b) rendering or fat extraction plants with an intended production capacity of more than 200 tonnes per year of tallow, fat or their derivatives or proteinaceous matter, or

(c) plants with an intended production capacity of more than 5,000 tonnes per year of products including hides, adhesives, pet food, gelatine, fertiliser or meat products, or

(3) scour, top or carbonise greasy wool or fleeces with an intended production capacity of more than 200 tonnes per year.

**Logging operations** carried out on State forests or Crown timber lands, being:

(1) the cutting and removal of timber (being sawlogs or pulplogs) from a compartment, where:

(a) at least 20% of the compartment has a slope greater than 18 degrees, and

(b) at least 30 timber stems (at least 40 cm in diameter at breast height) are to be cut and removed from each hectare of the compartment when averaged over the net harvestable area of the compartment, or

(2) the construction of new access roads within a compartment for cutting and removal of timber as referred to in paragraph (1), or

(3) the construction of new access roads for hauling timber from more than one compartment.

This item does not include any activity on a timber plantation and does not include any activity west of the Great Dividing Range.

For the purposes of this item, the area west of the Great Dividing Range is to follow the boundaries of the relevant State Forests Management Areas and is to be as set out in a map published by the EPA.

**Marinas and boat repair facilities** comprising:

(1) pontoons, jetties, piers or other structures (whether water-based or land-based) designed or utilised to provide moorings or dry storage (other than swing moorings) for 80 or more vessels (excluding rowing boats, dinghies or other small craft), or

(2) works such as slipways, hoists or facilities for the repair and maintenance of vessels (other than boat repair facilities that are not adjacent to waters) at which

5 or more vessels (being vessels other than rowing boats, dinghies or other small craft) or any vessel 25 metres or longer is handled or capable of being handled at any one time.

For the purposes of this item, **waters** has the same meaning as it has in paragraph (a) of the definition of **waters** in the Dictionary to this Act.

**Mineral processing or metallurgical works** for the commercial production or extraction of ores (using methods including chemical, electrical, magnetic, gravity or physico- chemical) or the refinement or processing of metals involving smelting, casting, metal coating or metal products recovery that:

- (1) process into ore concentrates an intended capacity of more than 150 tonnes per day of material, or
- (2) smelt, process, coat, reprocess or recover an intended capacity of more than 10,000 tonnes per year of ferrous or non-ferrous metals, alloys or their ore-concentrates, or
- (3) crush, grind, shred, sort or store:
  - (a) more than 150 tonnes per day, or 30,000 tonnes per year, of scrap metal and are not wholly contained within a building, or
  - (b) more than 50,000 tonnes per year and are wholly contained within a building.

**Mines** that mine, process or handle minerals (being minerals within the meaning of the *Mining Act 1992* other than coal) and that have disturbed, are disturbing or will disturb a total surface area of more than 4 hectares of land associated with a mining lease or mineral claim or subject to a section 8 notice under the *Mining Act 1992* by:

- (1) clearing or excavating, or
- (2) constructing dams, ponds, drains, roads, railways or conveyors, or
- (3) storing or depositing overburden, ore or its products or tailings.

**Paper, pulp or pulp products industries** that manufacture paper, paper pulp or pulp products and that have an intended production capacity of more than:

- (1) 30,000 tonnes per year, or
- (2) 70,000 tonnes per year if at least 90% of the raw material used is recycled material and no bleaching or de-inking is undertaken.

**Petroleum works** that:

- (1) produce, other than in the course of exploratory activities, crude petroleum or shale oil, or
- (2) produce more than 5 petajoules per year of natural gas or methane, or
- (3) refine crude petroleum, shale oil or natural gas, or
- (4) manufacture more than 100 tonnes per year of petroleum products (including aviation fuel, petrol, kerosene, mineral turpentine, fuel oils, lubricants, wax, bitumen, liquefied gas and the precursors to petrochemicals, such as acetylene, ethylene, toluene and xylene), or
- (5) store petroleum and natural gas products with an intended storage capacity in excess of:
  - (a) 200 tonnes of liquefied gases, or
  - (b) 2,000 tonnes of any petroleum products, or
- (6) dispose of oil waste or petroleum waste or process or recover more than 20 tonnes of oil waste or petroleum waste per year.



### **Railway systems activities**

(1) A railway systems activity is any one or more of the following:

- (a) installation of track,
- (b) on-site repair of track,
- (c) on-site maintenance of track,
- (d) on-site upgrading of track,
- (e) construction or significant alteration of any of the following, but only if it is connected with an activity listed in paragraphs (a)–(d):
  - (i) over track structures,
  - (ii) cuttings,
  - (iii) drainage works,
  - (iv) track support,
  - (v) earthworks,
  - (vi) fencing,
  - (vii) tunnels,
  - (viii) bridges,
  - (ix) level crossings,
- (f) operation of rolling stock on track.

(2) The following activities are not railway systems activities:

- (a) activities in railway workshops (including the use of fuel burning equipment),
- (b) re-fuelling of rolling stock,
- (c) activities at railway fuel depots,
- (d) repair, maintenance or upgrading of track away from the track site,
- (e) activities at railway station buildings (including platforms and offices),
- (f) loading of freight into or onto, and unloading of freight from, rolling stock,
- (g) activities at freight depots or centres,
- (g) operation of signalling, communication or train control systems.

(3) In this clause:

**rolling stock** means:

- (a) rolling stock used or intended to be used to transport passengers or freight for reward, or
- (b) rolling stock used or intended to be used to maintain track and equipment (whether or not for reward), but does not include rolling stock used or intended to be used solely for heritage purposes.

**track** means railway track that forms part of, or consists of, a network of more than 30 kilometres of track and that is not solely used for heritage value rolling stock.

**Note.** The Rail Infrastructure Corporation (RIC) manages and controls track on which the State Rail Authority (SRA) operates its rolling stock. The RIC is required to be licensed under section 48 of the Act as the occupier of the premises (the track) at which the SRA's railway activities are carried on. The SRA on the other hand is not required to be licensed because it is not the occupier of the track. Similarly, where a private person or body manages and controls track (i.e. a private railway line) and allows other persons or bodies to operate their rolling stock on that track, the manager and controller of the track is required to be licensed under section 48 of the Act as the occupier of the premises (the track). In such a case, the operator of the rolling stock is not an

occupier of the track.

**Sewage treatment systems** (including the treatment works, pumping stations, sewage overflow structures and the reticulation system) that have an intended processing capacity of more than 2,500 persons equivalent capacity or 750 kilolitres per day and that involve the discharge or likely discharge of wastes or by-products to land or waters.

**Shipping facilities (bulk)** for loading or unloading, in bulk, agricultural crop products, rock, ores, minerals or chemicals into or from vessels (but not where any material is wholly contained within a shipping container), being wharves or associated facilities with an intended capacity exceeding 500 tonnes per day or 50,000 tonnes per year.

### **Waste activities**

(1) **Hazardous, industrial or Group A waste generation or storage**, being any activity that:

(a) is carried on for business or other commercial purposes, and  
(b) involves the generating or storage of any one or more of the following types of waste:

- (i) hazardous waste,
- (ii) industrial waste,
- (iii) Group A waste.

(2) The following activities are not waste activities for the purposes of this item:

(a) the generating or on site storage of contaminated soil, recyclable oil or stabilised asbestos waste in bonded matrix,  
(b) the generating or on site storage of hazardous waste, industrial waste or Group A waste in or at a concrete batching plant,  
(c) the generating of not more than 10 tonnes per year, or the on site storage of less than 2 tonnes at any one time, of hazardous waste, industrial waste or Group A waste by any of the following:

- local authorities,
- dry cleaners,
- printers,
- photographic and processing laboratories,
- pharmacies,
- hairdressers,
- businesses carrying out any skin penetration procedure to which Part 3 of the Public Health Regulation 1991 applies,
- veterinary surgeons,
- nursing homes,
- funeral parlours,
- painters,
- builders,
- machinery and vehicle repair and servicing workshops,
- panel beaters,
- jewellers,
- educational institutions,
- hotels, clubs, restaurants and related hospitality industries,
- (d) the generating of not more than 2 tonnes per year, or the on site storage of less than 500 kilograms at any one time, of hazardous waste, industrial waste

or Group A waste by any of the following:

- dental or doctors surgeries,
- hospitals, pathology laboratories or pre-term clinics,
- farming operations,
- landscaping or fire hazard reduction works (such as those carried out by local and public authorities),

(e) the generating of not more than 10 tonnes per year, or the on site storage of less than 2 tonnes at any one time, of hazardous waste, industrial waste or Group A waste in the form of oil, paint, lacquer, varnish, resin, ink, dye, pigments, adhesives, hydrocarbons or emulsions,

(f) the storage of no more than 40,000 litres at any one time of non-hazardous waste hydrocarbon oil prior to its being burnt as fuel on the premises on which it was stored.

### **Waste facilities**

(1) A waste facility that is of any one or more of the following classes:

(a) **hazardous, industrial, Group A or Group B waste processing facilities**, being waste facilities that treat, process or reprocess hazardous waste, industrial waste, Group A waste or Group B waste (or any combination of those types of waste),

**except those:**

(i) that only treat, process or reprocess sewage, or gases specified as Dangerous Goods Class 2 in the 6th edition of the *Australian Code for the Transport of Dangerous Goods by Road and Rail*, in force as at 1 January 1998, or

(ii) that only treat, process or reprocess waste that is generated on site,

(b) **hazardous, industrial, Group A or Group B waste disposal facilities**, being waste facilities that dispose of hazardous waste, industrial waste, Group A waste or Group B waste (or any combination of those types of waste), **except those:**

(i) that only lawfully discharge waste into a sewer, or

(ii) that are located outside the Sydney metropolitan area or the extended regulated area and:

(A) where the only hazardous, industrial, Group A or Group B waste that is disposed of is asbestos waste, or

(B) are operated by a local authority and where the only hazardous, industrial, Group A or Group B waste that is disposed of is asbestos waste, liquid, grease trap waste or clinical waste,

(c) **used tyre processing or disposal facilities**, being waste facilities that:

(i) treat, process or dispose of more than 5,000 tonnes per year of used, rejected or unwanted tyres (including shredded tyres and tyre pieces), or

(ii) store such tyres at any one time in quantities of more than 50 tonnes,

(d) **waste storage, transfer, separating or processing facilities**, being waste facilities that store or transfer, or recover by way of separating or processing, more than 30,000 tonnes of waste per year,

(e) **waste incineration facilities**, being waste facilities that treat or process:

(i) any quantity of chemical waste, or

- (ii) any quantity of cytotoxic waste, or
- (iii) more than 25 tonnes per year of clinical waste, or
- (iv) more than 25 tonnes per year of quarantine waste, or
- (v) more than 1 tonne per hour of any other type of waste,

(f) **landfill or application sites within the Sydney metropolitan or extended regulated areas**, being landfill or application sites that are located in the Sydney metropolitan area or the extended regulated area, **except those**:

- (i) that receive only coal washery rejects or slags at a rate of not more than 20,000 tonnes per year, or
- (ii) that are situated on residential premises, or on land used principally for farming operations, and only if the disposal of waste is carried out on site, or
- (iii) that receive no more than 20,000 tonnes of inert waste only over any period of time, and only if the disposal of the waste is incidental or ancillary to the land being used for a purpose other than as a landfill or application site (e.g. the construction of buildings or roads or other similar types of infrastructure development),

(g) **landfill or application sites in environmentally sensitive areas**, being landfill or application sites that are located in an environmentally sensitive area described in Technical Appendix 8 of the Waste Guidelines, **except those**:

- (i) that are within an environmentally sensitive area by reason only of being located within 250 metres of a residential zone or of a dwelling, school or hospital not associated with the landfill or application site and:
  - (A) receive only coal washery rejects or slags at a rate of not more than 20,000 tonnes per year, or
  - (B) were in operation as at 30 June 1997 and receive no more than 200 tonnes of waste per year, or
- (ii) that are situated on residential premises, or on land used principally for farming operations, and only if the disposal of waste is carried out on site,
- (h) **solid waste landfill or application sites**, being landfill or application sites that receive over 5,000 tonnes per year of solid waste or solid waste and inert waste,

(i) **coal washery rejects or slags landfill or application sites**, being landfill or application sites that receive over 20,000 tonnes per year of coal washery rejects or slags (or both),

(j) **large-scale landfill or application sites**, being landfill or application sites that receive over 20,000 tonnes per year of any waste.

(2) For the purposes of this item, the following are taken not to be waste:

- (a) virgin excavated natural material,
- (b) non-hazardous bulk agricultural or crop waste that is not putrescible,
- (c) effluent.

(3) The following premises are not waste facilities for the purposes of this item:

- (a) premises where coal washery rejects or slags (and no other type of waste) is disposed of on site,
- (b) premises where only coal washery rejects or slags are used solely for the purposes of road or railway construction,

- (c) premises where biosolids (and no other type of waste) are disposed of on site,
- (c1) premises on which:
  - (i) no more than 40,000 litres per annum of non-hazardous waste hydrocarbon oil is burnt as fuel, and
  - (ii) no other activity that would render the premises a waste facility is carried on,
- (d) premises (other than premises in the extended regulated area, the local government area of Blue Mountains or Wollondilly or the Sydney metropolitan area) on which any one or more of the following types of organic waste (and no other type of waste) is applied to land for agricultural or environmental rehabilitation purposes:
  - (i) animal waste,
  - (ii) food waste,
  - (iii) natural organic fibrous materials waste,
  - (iv) wood waste,
  - (v) a type of waste specified in paragraph (d1) (i)–(vii),
  - (vi) any mixture of the types of wastes specified in subparagraphs (i)–(v),
- (d1) premises (being premises in the extended regulated area, the local government area of Blue Mountains or Wollondilly or the Sydney metropolitan area) on which any one or more of the following types of organic waste (and no other type of waste) is applied to land for agricultural or environmental rehabilitation purposes:
  - (i) garden waste,
  - (ii) biosolids categorised as Unrestricted Use in accordance with the criteria set out in the Biosolids Guidelines,
  - (iii) biosolids categorised as Restricted Use 1, 2 or 3 in accordance with the criteria set out in the Biosolids Guidelines (but only if they are applied to the land in accordance with those Guidelines),
  - (iv) liquid food waste,
  - (v) manure,
  - (vi) treated grease trap waste from the preparation or manufacturing of food,
  - (vii) any mixture of the types of wastes specified in subparagraphs (i)–(vi),
- (e) mines referred to in this Part, where the only waste disposed of on the premises is either or both of the following:
  - (i) tailings, waste rock or inert waste generated on the premises,
  - (ii) any other type of waste that is authorised, under the licence for the premises, to be disposed of on the premises,
- (f) electricity generating works referred to in this Part, where the only waste disposed of on the premises is either or both of the following:
  - (i) ash generated on the premises,
  - (ii) any other type of waste that is authorised, under the licence for the premises, to be disposed of on the premises,
- (g) other premises referred to in this Part that are used solely for the purposes of disposing of any of the following types of waste:
  - (i) non-hazardous tailings or waste rock generated on or at any mine,
  - (ii) non-hazardous ash generated from any electricity generating works.

**Wood or timber milling or processing works** (other than a joinery, builders' supply yard or home improvement centre) that saw, machine, mill, chip, pulp or compress timber or wood and that:

- (1) have an intended processing capacity of more than 6,000 cubic metres of

timber (or timber products) per year and burn waste (other than as a source of fuel), or

(2) have an intended processing capacity of more than 50,000 cubic metres of timber (or timber products) per year.

**Wood preservation works** that treat or preserve timber using chemical substances (containing copper, chromium, arsenic, creosote or any substance classified in the *Australian Dangerous Goods Code*) and that have an intended processing capacity of more than 10,000 cubic metres of timber per year.

## **Appendix C**

### **Documents Registered with Department of Lands**

- C.1 Certificate of Title
- C.2 Crown Grant
- C.3 Historical Title Search
- C.4 Departmental Dealing 7204401S
- C.5 Memorandum Y757000
- C.6 Cadastral Records Enquiry Report

BOX 37Y  
(7068131)

NEW SOUTH WALES

# CERTIFICATE OF TITLE

REAL PROPERTY ACT, 1900

TORRENS TITLE

REFERENCE TO FOLIO OF THE REGISTER

DEPOSITED 2816/728428

EDITION

3

DATE OF ISSUE

5/10/2000



I certify that the person described in the First Schedule is the registered proprietor of an estate in fee simple (or such other estate or interest as is set forth in that Schedule) in the land within described subject to such exceptions, encumbrances, interests and entries as appear in the Second Schedule and to any additional entries in the Folio of the Register.

*David Mulesky*



REGISTRAR GENERAL

## LAND

LOT 2816 IN DEPOSITED PLAN 728428  
AT TERREY HILLS  
LOCAL GOVERNMENT AREA: KU-RING-GAI  
PARISH OF BROKEN BAY COUNTY OF CUMBERLAND  
TITLE DIAGRAM: DP728428

## FIRST SCHEDULE

MICHAEL HENRY TEMPLE  
CATHERINE ALICE TEMPLE  
AS JOINT TENANTS

(T 7068131)

## SECOND SCHEDULE

1. LAND EXCLUDES THE ROAD SHOWN IN THE TITLE DIAGRAM
2. 7068131 THE RESERVATION AND EXCEPTION TO THE CROWN OF ALL GOLD, SILVER, COAL AND PETROLEUM

PERSONS ARE CAUTIONED AGAINST ALTERING OR ADDING TO THIS CERTIFICATE OR ANY NOTIFICATION HEREON

*Receipt of Original  
Certificate of Title  
Acknowledged 13/5/04*

*Fisher*



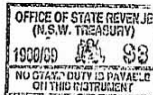
WARNING: BEFORE DEALING WITH THIS LAND SEARCH THE CURRENT FOLIO OF THE REGISTER



RP 130



STAMP DUTY



OFFICE USE ONLY



Y636928

CROWN INSTRUMENT not liable  
to payment of registration fees

*Chris Seale*  
for the Secretary for Lands

**TRANSFER**

TN

REAL PROPERTY ACT, 1900

Q	1 of 1	X	R 11
\$	0 HMS		

Torrens Title Reference	If Part Only, Delete Whole and Give Details	Location
2816/728428	WHOLE	AT TERREY HILLS

THE STATE OF NEW SOUTH WALES

(being the Transferor) in consideration of payment of \$~~xxxxxxx~~ paid by ~~xxxxxxx~~ under the provisions of the Aboriginal Land Rights Act, 1981, transfers ~~an~~ estate in fee simple in the land above described to the Transferee

OFFICE USE ONLY

fee simple in the land above described to the Transferee		OFFICE USE ONLY
METROPOLITAN LOCAL ABORIGINAL LAND COUNCIL		S
<input type="checkbox"/> joint tenants <input type="checkbox"/> tenants in common		
Type of Holding	Holding Number	Land District

~~Subject to the provisions of the~~ xxxxxxxxxxxxxxxxxxxxxxxxxxActyixxxandRegulations  
~~thereunder or repeal of~~ xxxxxxxxxxxxxxxxxxxxxxxxxxand,in particular,to

② (b)(7)(C) the conditions of sale set out in clause xx Memorandum No. xxxxxxxxxxxxxxxxx filed in the Land Titles Office and as set out below.

- (11) Sections 40, 41, 42, 44 and 45 of the Aboriginal Land Rights Act, 1983.

(xix) xxxforfeiture provisions x and  
(xix) xxx restrictions on dealing x section

DATE 22 SEP 1989

I hereby certify this application to be correct for the purposes of the Real Property Act, 1900.

Signed on behalf of the Minister for Natural Resources for the State of New South Wales.

LODGED BY		LOCATION OF DOCUMENTS	
CROWN LANDS OFFICE		CT	OTHER
DELIVER C.T. etc. to Transferee at-			Herewith.
Ref H087 H1375			Not Recorded Folio Not Created
Delivery Box Number			Produced by
Checked	Passes	REGISTERED	Secondary Directions
EAH		15 FEB 1980	OVER
Signed	Extra Fee		OVER

RP 130  
 1988

FIRST SCHEDULE DIRECTIONS

1900

(A)	FOLIO IDENTIFIER	(B) DIRECTION	(C) NAME		
SECOND SCHEDULE & OTHER DIRECTIONS					
(D)	FOLIO IDENTIFIER	(E) DIRECTION	(F) NOTIN TYPE	(G) DEALING NUMBER	(H) DETAILS
		ON	A		Land is subject to the conditions contained in
		ON	A		Purchase
					- subject to the provisions of the Crown Lands Consolidation Act, 1913, particularly as regards -
		UNDR	A		PAYMENT OF BALANCE OF PURCHASE AND OTHER MONIES
		ON	U		
		UNDR	A		forfeiture provisions
		ON	U		
		UNDR	A		restrictions on dealings, see section
		ON	U		
		ON	A		Attention is directed to the provisions of Sections 40-42, 44 and 45 of the Aboriginal Land Rights, Act, 1983
		SET			SAGI
		ON	AB		LAND IS SUBJECT TO THE CONDITIONS CONTAINED IN MEMORANDUM Y757000
		ON	AC		RESTRICTIONS ON DEALINGS - SEE SECTION 40 ABORIGINAL LAND RIGHTS ACT 1983
		CT		4695	

# Department of Lands



## HISTORICAL TITLE SEARCH

Certificate issued under Section 96G  
of the Real Property Act 1900

No. B136

Search certified to: 10/8/2007 3:00PM

Computer Folio Reference: 2816/728428

Page 1

First Title(s): 2816/728428

Prior Title(s): CROWN LAND

Recorded	Number	Type of Instrument	C.T. Issue
5/7/1989	DP728428	DEPOSITED PLAN	FOLIO CREATED CT NOT ISSUED
15/2/1990	Y636926	TRANSFER BY STATE OF NSW	EDITION 1
10/3/1998	3757789	MORTGAGE	EDITION 2
5/10/2000	7068130	DISCHARGE OF MORTGAGE	
5/10/2000	7068131	TRANSFER	EDITION 3
7/11/2000	7204401	DEPARTMENTAL DEALING	
7/9/2004	AA936929	MORTGAGE	EDITION 4

\*\*\* END OF SEARCH \*\*\*

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The Registrar General certifies that at the date and time specified above the information set out in this search constitutes the historical record of all dealings recorded in or action taken in respect of the mentioned title which is required to be kept by the Registrar General under section 32(7) of the Real Property Act 1900.



Registrar General

Form Number:  
97-18DD  
Licence Number:  
10V/0162/95

New South Wales Land Titles Office

# DEPARTMENTAL DEALING



Page 1 of 1 Page(s)

This document is designed to record the effect of  
Departmental actions and amendments on computer folios

**DD**

Folio

Identifier

2/871296	53/880017		
21/705751			
222/752017			
317/752017			
2816/728428			

Reason for Preparation: Amendment to LGA

## FIRST SCHEDULE DIRECTIONS

FOLIO IDENTIFIER	DIRECTION	DETAILS

## SECOND SCHEDULE AND OTHER DIRECTIONS

FOLIO IDENTIFIER	DIRECTION	NOTFN TYPE	DEALING NUMBER	DETAILS
2/871296	LGA			KOGARAH, ROCKDALE
21/705751	LGA			HORNSBY
222/752017	LGA			WARRINGAH
317/752017				
2816/728428	LGA			KU-RING-GAI, WARRINGAH
53/880017	LGA			HORNSBY, KU-RING-GAI

Deliver Title to:

NOCT

Prepared by

UB

Table no.

CB2

Directed by

Table no.

Authorised by

Table no.

RI-63  
1987



OFFICE USE ONLY



Y757000

MEMORANDUM

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the document, and to be  
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Registrar General  
with the document.

On behalf of The Registrar General

I certify that this memorandum (comprising 1 page(s)), contains the provisions which are deemed to be incorporated in such  
Folios of the Register as refer to this memorandum.

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Registrar General  
on the day of lodging  
the document, and to be  
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Registrar General  
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on the day of lodging  
the document, and to be  
forwarded to the  
Registrar General  
with the document.

*Edson W. Ray*  
Signature of Authorised Officer

1. The reservation and exception to the Crown of all gold, silver, coal and petroleum - see section 45(12)(a) Aboriginal Land Rights Act 1983.
2. Inclusion of minerals:- Title includes the right to all minerals except gold, silver, coal and petroleum - see section 45(2) Aboriginal Land Rights Act 1983.
3. Restraint on resumption:- Land vested in an Aboriginal Land Council shall not be appropriated or resumed except by Act of Parliament - see section 42 Aboriginal Land Rights Act 1983.
4. Barring of execution against land for unpaid rates:- Land vested in an Aboriginal Land Council shall not be sold, whether by way of writ of execution or otherwise, for unpaid rates - see section 44 Aboriginal Land Rights Act 1983.

THIS MEMORANDUM  
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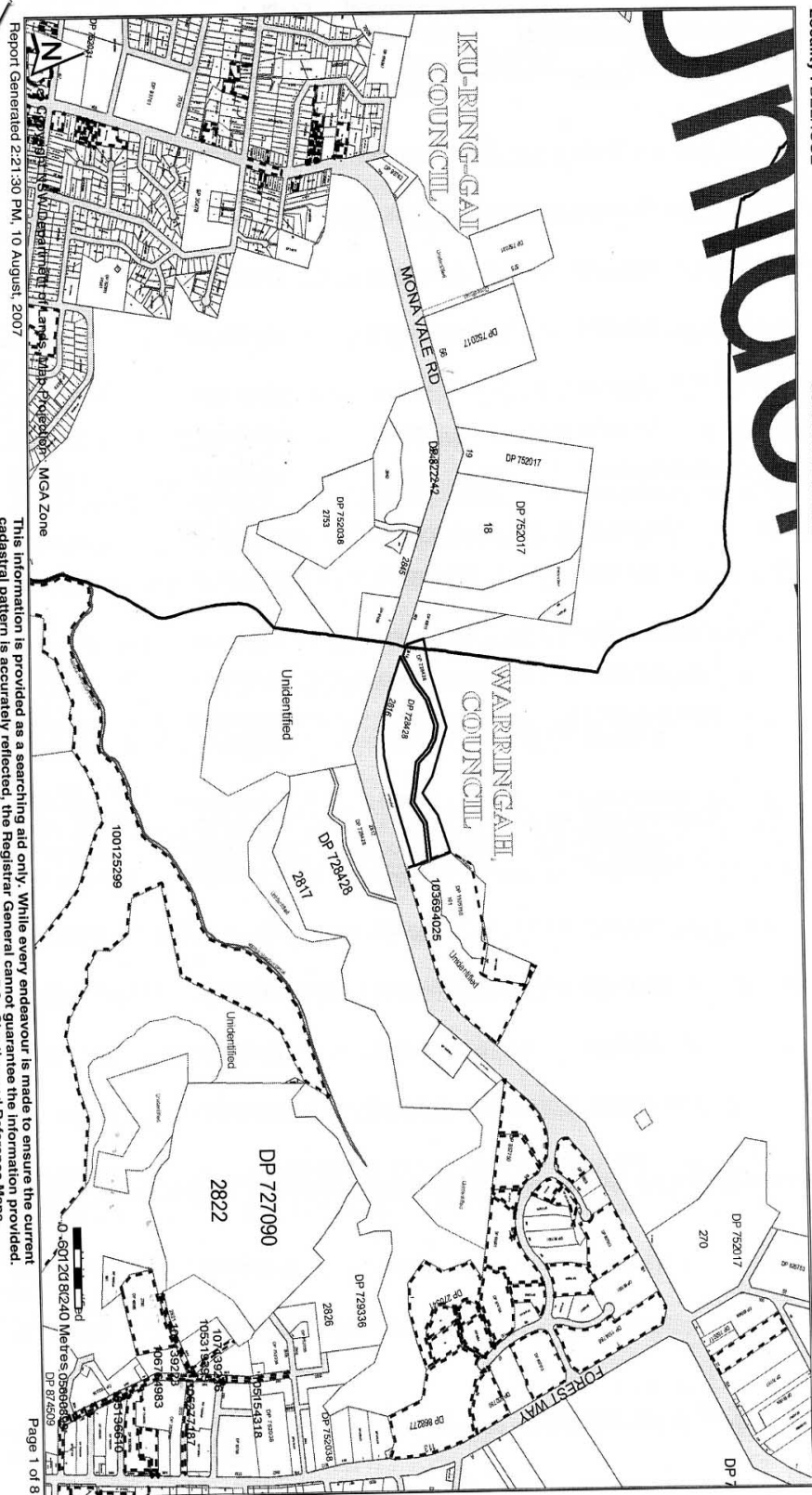
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This information is provided as a searching aid only. While every endeavour is made to ensure the current cadastral pattern is accurately reflected, the Registrar General cannot guarantee the information provided. For all ACTIVITY PRIOR to SEPT 2002 you must refer to the RGS Charting and Reference Maps.

## Identification Survey

<sup>5</sup> **DENNY LINKER & CO.**

17 RANDLE STREET  
SURRY HILLS NSW 2010  
TELEPHONE (02) 9212 4655  
FAX (02) 9212 5254 DX 630 SYD  
EMAIL: [linker@linkerbarker.com.au](mailto:linker@linkerbarker.com.au)

We have surveyed for identification purposes the whole of the land comprised in Certificate of Title Folio Identifier No. 2816/728428 being Lot 2816 in Deposited Plan No. 728428 situated at Terrey Hills in the Local Government Areas of Warringah & Ku-ring-gai Parish of Broken Bay and County of Cumberland. The subject property is known as Lot No. 2816 Mona Vale Road, Terrey Hills.

The subject land has a total frontage of 177.2 metres to Mona Vale Road with other measurements as shown on the sketch herewith.

The land is not fenced.

Y636926 Land is subject to the conditions contained in Memorandum Y757000.  
Y636926 Restrictions on dealings – see Section 40 Aboriginal Land Rights Act, 1983.

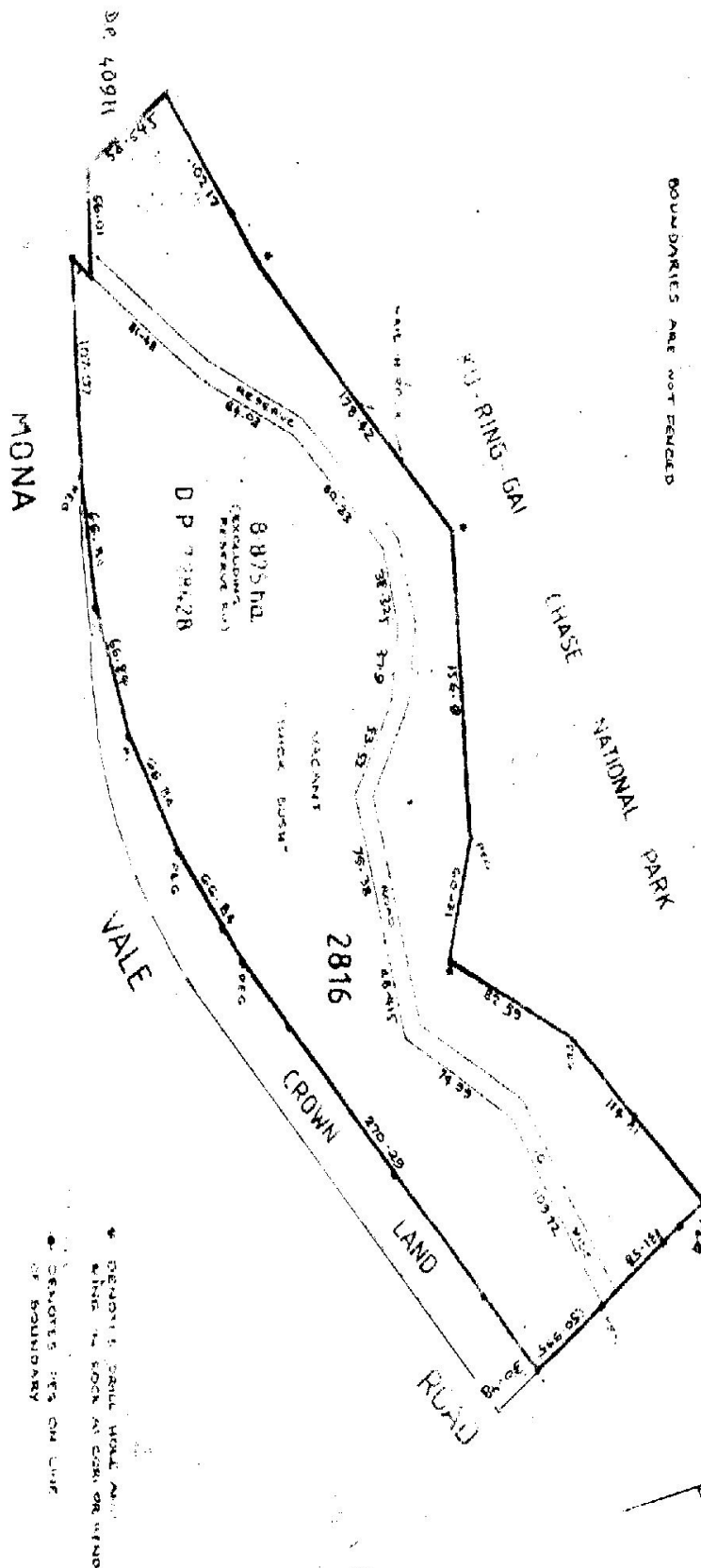
## ENCROACHMENTS

M. S. Andrew

Registered Surveyor

LINKER & BARKER PTY. LIMITED A.C.N. 002 312 405  
ROBERT W. BARKER B.SURV., M.ENG.SC., M.I.S.AUST. DENNY LINKER M.I.S.AUST  
MARK J. ANDREW B.SURV., M.I.S.AUST. TASY MORAITIS B.SURV., M.I.S.AUST

NOTE: VARIOUS UNFENCED TRACKS  
AND FIRE TRAILS CROSS  
LOT 2816 U.P. 728428  
BOUNDARIES ARE NOT FENCED





## **Appendix E**

### **Section 149 Certificate**

#### **E.1     Section 149 Certificate**

**Section 149 Environmental Planning and Assessment Act, 1979  
(As Amended)**

1. Applicant: Woolf Associates  
DX 1556  
SYDNEY

Applicant Reference: m 1041

2. Property Address: L 2816 MONA VALE ROAD TERREY HILLS NSW 2084

Property Description: Parcel ID: 46602 Lot 2816 Deposited Plan 728428

3. (a) The prescribed matters required by section 149(2) of the Environmental Planning and Assessment Act are as follows and relate to the subject land at the date of this certificate.

i. Name of the Local Environmental Plan that restricts or purports to restrict the purpose for which development may be carried out on the land:-

Warringah Local Environmental Plan 1985 (as amended)  
1(A1) (NON URBAN "A1")

ii. Purposes for which the Development is permissible without development consent; with development consent; and the purpose for which the carrying out of development is prohibited for land identified as being within the zone:-

See Attachment "A" Being table to Clause 9 Warringah Local Environmental Plan 1985 (Dated: Dec 1987)

iii. Additional purposes for which Development is permissible with development consent pursuant to Clause 4.3 of Warringah Local Environmental Plan 1985:-

Nil

iv. Other relevant provisions of Warringah local Environmental Plan 1985 relating to the purpose for which development may be carried out without development consent and with development consent for the purpose for which the carrying out of development is prohibited:-

Clauses 10; 28a; 35; 37A-H and 39 Warringah Local Environmental Plan 1985 and  
Clauses 12; 14; 26; 29 and 35 of the Environmental Planning and Assessment Model  
Provisions 1980 as adopted by Clause 6 of the Warringah Local Environmental Plan 1985

v. In addition to the controls contained in Warringah Local Environment Plan 1985 clause 29 of the Environmental Planning and Assessment (Expiring and transitional) Regulation 1998 sets out further circumstances where development consent will be required for particular development. These circumstances may include development that does not require consent under Warringah Local Environmental Plan 1985.

A copy of Clause 29 is attached

ALL LAND WITHIN WARRINGAH IS NOT NECESSARILY AFFECTED BY THE PROVISIONS OF EACH OF THE ABOVE IDENTIFIED CLAUSES.

THE SPECIFIC RELEVANCE OF EACH CLAUSE TO THE LAND THE SUBJECT OF THE APPLICATION MAY BE ASCERTAINED BY REFERENCE TO WARRINGAH LOCAL ENVIRONMENTAL PLAN 1985

3. (b) Name of Draft Local Environmental Plan that has been placed on exhibition pursuant to section 66(1)(b) of the Act that restricts or purports to restrict the purposes for which development may be carried out on the land:-

Warringah Draft LEP 1999

A7 Mona Vale Road North Draft LEP 1999

- ii. Purposes for which development is permissible without development consent; with development consent; and the purpose for which carrying out of development is prohibited for land identified as being within the zone:-  
Refer Draft Local Environment Plan.
- iii. Other relevant provisions of Draft Local Environmental Plan relating to the purposes for which development may be carried out without development consent and with development consent are purposes for which the carrying out of development is prohibited :-  
Refer Draft Local Environment Plan.
3. (c) State Environmental Planning Policies; Regional Environmental Plans; Draft State Environmental Planning Policies; and Draft Regional Environmental Plans applying to the land notified by the Minister for specification in this certificate :-  
See Attachment "B" (Dated: 8th Oct 1998) Refer to Draft Environmental Plans and State Environmental Planning Policy No(s) (5, 9, 10) and Regional Environmental Plan No(s) (23).
- i. Clause 29 of the Environmental Planning and Assessment (savings and transitional) regulation 1998 affects the provision of certain State Environmental planning policies and how they apply to the land.  
A copy of clause 29 is attached and should be read in conjunction with the State environmental planning policies listed.
3. (d) Whether the erection of a dwelling house is prohibited by reason of a development standard relating to the minimum area on which a dwelling house may be erected:-  
Refer LEP 1985
3. (e) Whether demolition of any building requires Development consent to be obtained:-  
THE DEMOLITION OF A BUILDING ON THE LAND IS PERMISSIBLE WITHOUT COUNCILS CONSENT UNDER THE PROVISIONS OF WLEP 1985 AND PROVISIONS OF THE ENVIRONMENTAL PLANNING AND ASSESSMENT ACT 1979 (AS AMENDED) UNLESS:-  
-IF SUCH WORKS CONTRAVENE A CONSENT UNDER THE ACT OR FORM PART OF WORKS OR THE ERECTION OF A BUILDING WHICH REQUIRES CONSENT UNDER WLEP 1985 AND THE EP&A ACT (AS AMENDED)  
-IF THE BUILDING IS SUBJECT TO DIVISION 8A-HERITAGE PROVISIONS OF WLEP 1985.
- ii. Warringah Local Environmental Plan 1985 does not require development consent for the demolition of a building. Where Warringah Local Environmental Plan 1985 does not require the need for a development consent, clause 29 of the Environmental Planning and Assessment (Savings and Transitional) Regulation 1998 provides that development consent is required for the demolition of a building.  
A copy of clause 29 is attached and should be read in conjunction with the State environmental planning policies listed.
3. (f) Applicable Development Control Plans :-  
SEE ATTACHMENT "C". (DATED 1ST NOV 1993) APPLIES TO DEVELOPMENT CONTROL PLANS:  
DCP11, DCP15, DCP16, DCP18, DCP2, DCP22.
- i. Applicable Section 94 Contributions Plan:-  
Warringah Section 94 Contributions Plan
3. (g) Whether any application to carry out development on the land was at the time the application for the certificate was lodged, subject of a notice by the minister under section 76A (7) (b) of the Act declaring the development to be State Significant development.  
See Attachment "D" (Dated: 1st July 1998)



Warringah  
Council

149 Certificate

3. (h) Any affection under Sections 38 or 39 of the Coastal Protection Act (as notified by the Public Works Department)

No.

3. (i) Whether or not the land has been proclaimed to be a mine subsidence district within the meaning of section 15 of the Mine Subsidence Compensation Act 1901.

No.

3. (j) Whether or not the land is affected by any road widening or road realignment under:-  
i. Division 2 of part 3 of the Roads Act 1993:-

No.

- ii. Any Environmental Planning Instrument :-

No.

- iii. Any resolution of Council:-

No.

3. (k) Whether or not Council has adopted by resolution a policy to restrict development of the subject land by reason of the likelihood of landslip; bushfire; flooding; tidal inundation; subsidence or other risk:-

No.



Warringah  
Council

14.3 Certificate

Under the Provisions of Section 149(5) of the Environmental  
Planning and Assessment Act

1. Applicant: Woolf Associates  
DX 1556  
SYDNEY

Applicant Reference: m 1041

2. Property Address: L 2816 MONA VALE ROAD TERREY HILLS NSW 2084

Property Description: Parcel ID: 46602 Lot 2816 Deposited Plan 728428

3. See Section 149(2)

4. (a) In respect of landslip Council provides the attached advice :-

N/A

4. (b) In respect of land affected by the Warringah Coastal Management Strategy, Council provides the attached advice:-

N/A

4. (c) Whether any instrument or resolution of Council varies or proposes to vary the provisions of an environmental planning instrument, other than as referred to in the Certificate under Section 149(2):-

No.

4. (d) Whether the land or any item on the land is affected by an order under Section 130 of the Heritage Act 1977:-

No.

4. (e) Is the Land subject to Council's interim policy and interim guidelines for development and use of the land likely to be affected by a 1:100 year flood - Narrabeen / Manly Lagoon. Development subdivision and building applications may be subject to flood related controls.

No.

4. (f) Is the Land subject to Council's resolution of 26th August 1997. Assessment of building and development applications will be made by reference to the Collaroy / Narrabeen Coastline Management Plan - Development Guidelines for Collaroy / Narrabeen Beach. A copy of the resolution and the Guidelines may be obtained from Council at the cost of the applicant.

No.

The advice above is provided in good faith and the Council shall not incur any liability in respect of any such advice.

Disclaimer

General Managers signature

The Environmental Planning and Assessment Amendment Act 1997 commenced operation on the 1 July 1998. As a consequence of this Act the information contained in this certificate needs to be read in conjunction with the provisions of the Environmental Planning and Assessment (Amendment) Regulation 1996, Environmental Planning and Assessment (Further Amendment) Regulation 1998 and Environmental Planning and Assessment (Savings and Transitional) Regulation 1998.  
The zoning information in this certificate is based on the Lot and Deposited Plan referred to in this certificate. If the Lot and Deposited Plan is not the current description of the land then this certificate could attribute to incorrect zoning. Persons relying on the certificate should satisfy themselves by reference to the Title Deed that the land to which this certificate relates is identical to the land to which they seek to know the zoning.



**149 Certificate**

ZONE No. 1(a1) (NON-URBAN "A1")

1. Without development consent

Nil

2. Only with development consent

Advertising structures; agriculture (other than pig-keeping or poultry farming); child care centres; drainage; dwelling-houses permitted by clause 18(3) and (4); educational establishments; helipads; open space; roads; utility installations.

3. Prohibited

Any purpose other than a purpose for which development may be carried out only with development consent.



Warringah  
Council

140 Certific

## **Appendix F**

### **Bushland Plan of Management**

The following is a report submitted to Council upon application for development following a flora and fauna survey taken on the subject property by Actinotus Environmental Consultants in October 2002

**BUSHLAND PLAN OF MANAGEMENT**

**FOR**

**LOT NUMBER 2816 IN DP 728 428**

**MONA VALE ROAD**

**TERREY HILLS, NSW 2084**

**PREPARED FOR MR. & MRS. M. TEMPLE**

***BY***

**ACTINOTUS ENVIRONMENTAL CONSULTANTS**

***7 TOWNSEND AVE.  
RD.  
FRENCHS FOREST  
NSW 2086***

***2/61A WILLS***

***WOOLOOWARE  
NSW 2230***

***OCTOBER 2002***



## **Actinotus Environmental Consultants**

Tony Smith-White BSc. (Syd), CertHEd., MSc., PhD. (UNSW)\* # +

Peter Stricker BSc. (Hons) (Syd)\*

- \* Member Ecological Consultants Association of NSW Inc.
- # Member of Flora Foundation of Australia.
- # Member of Linnean Society of NSW.
- + Member of Bird Atlassers Association of NSW

### **Consultants experience**

The principals of 'Actinotus Environmental Consultants' have collectively worked in the area of floristic impact assessment and bushland health and management services for a period of greater than 15 years. They also have over 20 years of experience in scientific research (ecological, genetic) and teaching in biological science.

## **CONTENTS**

### **1 INTRODUCTION**

**Planning for bushfire protection**  
**Legislative changes**

### **2 DESCRIPTION OF AREA**

### **3 VEGETATION CLASSIFICATION**

### **4 SLOPE ASSESSMENT**

### **5 BUSHLAND MANAGEMENT CONCEPT PLAN**

**a) Ecologically sensitive measures to construct and maintain the fire protection zone.**

**Outer Protection Zone.**

**Inner Protection Zone**

**b) Maintenance of habitat for species of conservation significance**

**c) An ongoing bush regeneration program**

**Management Zones (See Figure 2)**

**Treatment of weeds**

**Planting of locally-occurring indigenous plants.**

**d) Recommended fire regime for the ecology of the site.**

**e) Stormwater**

### **6 REFERENCES**

## 1 INTRODUCTION

Prior to approving a development application to construct a permanent residence at, Lot 2816 in DP 728 428, Terrey Hills, Warringah Council intend placing a Positive Covenant on the title of the property for the maintenance and retention of bushland outside of a designated fire protection zone. The property adjoins Ku-ring-gai National Park to the north and lies within a bushfire prone area.

### **Planning for bushfire protection**

To protect life and property from the threat of bushfires, 'Planning NSW' in partnership with the NSW Rural Fire Service has introduced a comprehensive framework for planning and development.

### **Legislative changes**

On 1 August 2002, the *Rural Fires and Environmental Assessment Legislation Amendment Act 2002* commenced. This Act amends both the *Environmental Planning and Assessment Act 1979* and the *Rural Fires Act 1997* to provide a stronger, more streamlined system for planning for bushfire protection.

The changes affect councils that are currently required to prepare Bush Fire Risk Management Plans under the *Rural Fires Act 1997*. The changes cover hazard reduction activities as well as planning and development control matters on land that is identified as being prone to bushfire.

Figure 1 is a site plan showing the boundary of the property and the locations of a temporary dwelling, large shed and access road. The proposed location of the permanent residence and the asset protection zone is also indicated on Figure 1.

The property, of 8.875 hectares, is located on the northern side of Mona Vale Road, to the east of St. Ives Showground. A strip of crown land separates the property from the dual carriage roadway (Fig 1). The property has a northerly aspect over Ku-ring-gai Chase National Park with its long axis orientated east-west (Fig 1). A 10m wide strip of crown land designated as a potential road, Reserve Road, runs in an east-west direction through the centre of the property (Fig 1). The overall responsibility and management of both parcels of crown land lies with the Department of Land and Water Conservation (M. Smith *pers comm.*) however the treatment and control of noxious weeds within these areas is councils responsibility under the *Noxious Weeds Act (1974)*.

As part of the Positive Covenant, Council require a management plan for the property which includes the following details:-

- i) Ecologically sensitive measures to construct and maintain the fire protection zone.
- ii) Maintenance of habitat for species of conservation significance such as the Southern Brown bandicoot.

- iii) Identification and recommended management of impacts such as weed invasion, horse riding and feral animals which may be causing degradation to ecological values.
- iv) An ongoing bush regeneration program including a map of the site showing bushland condition, weed areas, management zones etc
- v) A recommended fire regime to maintain the sites ecological values while protecting life and property'
- vi) An ongoing monitoring program to review the ecological health and any changes in the sites biodiversity.

## 2 DESCRIPTION OF AREA

The vegetation of the area in which the property lies is typical of the Hawkesbury sandstone plateau and includes variants of the Sydney Sandstone Ridgetop Woodland community (Map unit 10ar) as described by Benson and Howell (1994). Specifically, this vegetation includes two sub-communities as defined by Benson and Howell (1994). An open-forest to woodland/low woodland community (sub-unit 10ar(i)) occurs on ridgetops and slopes on better drained, deeper soils and a closed scrub community (sub-units 10ar(iii)/21g(iii); 21g(v)) occurs on shallow, poorly drained soil. These communities correspond to the Bloodwood-Scribbly Gum Woodland (RR) and Sandstone Heath (HH) communities respectively as further defined by Smith and Smith (1997) (Figure 1). This latter classification will be referred to in the following text.

The Bloodwood-Scribbly Gum Woodland ranges from 10 to 15 metres in height and is characterised by tree species such as *Corymbia gummifera* (Red Bloodwood), *Eucalyptus haemastoma* (Scribbly Gum), *E. capitellata* (Brown Stringybark), and *E. sparsifolia* (Narrow-leaved Stringybark).

This community is common on exposed slopes and ridges on Hawkesbury Sandstone (Benson and Howell 1994). A diverse array of understorey shrubs to two metres tall includes such species as *Hakea teretifolia* (Dagger Hakea), *Pultenaea elliptica* (Wreath Bush Pea), *Leptospermum squarrosum* (Pink Tea Tree), *Lambertia formosa* (Mountain Devil), *Grevillea speciosa* (Red Spider Flower) and *Banksia oblongifolia* (Rock Banksia).

A sparse mid-canopy layer includes *Allocasuarina littoralis* (Black She-oak) and *Angophora crassifolia* to four metres in height.

On lower slopes *Angophora costata* (Smooth-bark Apple), *Eucalyptus sieberi* (Silver-top Ash) and *Corymbia eximia* (Yellow Bloodwood) also occur in the upper canopy layer.

The Sandstone Heath community to two metres tall generally occurs on more shallow soils and is dominated by shrubs such as *Hakea teretifolia*, *Banksia ericifolia* (Heath-leaved Banksia) and *Allocasuarina distyla* (Scrub She-oak) with *Banksia oblongifolia* and *Hakea teretifolia* common on more moist soils of upland seepage areas.

The general area of vegetation is relatively devoid of major weed incursions with only minor areas associated with past disturbance containing exotic species such as Crofton Weed (*Ageratina adenophora*). Weeds associated with old access tracks and Crown land boundary tracks include Whiskey Grass (*Andropogon virginicus*), Crofton Weed, Common Cassia (*Senna pendula*) and Ground Asparagus (*Protasparagus aethiopicus*).

### 3 VEGETATION CLASSIFICATION

A requirement of the *Rural Fires Amendment Act (2002)* is that the vegetation be classified by structure using Figure A2.2 derived from AUSLIG (1990) and by description using Table A2.1 (*Planning for Bushfire Protection 2001*).

The vegetation was assessed over a distance greater than 140 metres in all directions from the proposed building line and determined to have a group two (2) classification.

Both woodland and tall heath occur within the prescribed distance.

Trees 10-30m tall; 10-30% foliage cover dominated by eucalypts.

Understorey low trees to tall shrubs to 2m.

### 4 SLOPE ASSESSMENT

The proposed house site is at ridgetop with the topography sloping gently up to the south but with steeper downslope to the north and west. A clinometer was used to measure slope angle over a distance of approximately 100 metres.

The downslope angles to the north-west, north and north-east were similar being 12.5-13°. To the south-west, south and south-east the upslope angle was between 0° and 5°.

## 5 BUSHLAND MANAGEMENT CONCEPT PLAN

**The following plan is described in accordance with the Department of Urban Affairs and Planning's Guidelines for Preparing Management Plans for Urban Bushland.**

#### **a) Ecologically sensitive measures to construct and maintain the fire protection zone.**

An asset protection zone (APZ) surrounding the proposed development site is required by current legislation. This should incorporate:

- an outer protection zone (OPZ) and
- an inner protection zone (IPZ)

#### **Outer Protection Zone.**

This is located adjacent to the hazard (natural bushland) and should be a minimum of 10m width. Trees and shrubs should be maintained in such a manner that the vegetation is not continuous. Fine fuel loadings should be maintained at a level below 8 tonnes/hectare (800g/m<sup>2</sup>). The purpose of the outer protection zone is that reduced fuel loadings will substantially decrease the intensity of an approaching fire and restricting the pathways of crown

fuels; reducing the level of direct flame, radiant heat and ember attack on the Inner protection Zone.

It is not possible to modify vegetation structure to reduce risk of fire within these zones and also retain 100% natural biodiversity. However measures which discourage frequent fire cycle regimes should have a long term benefit for the area with regard to species composition.

### **Inner Protection Zone**

The inner protection zone extends from the edge of the proposed house site to the outer protection zone.

The width of the inner protection zone is variable according to slope and aspect.

To the north-west, north and north-east of the proposed house site a downslope of 12.5-13° requires an inner protection zone of 40 metres. To the east, south and south west upslope is less than 5° and a width of 20 metres is required.

In the inner protection zone there should be minimal fine fuel at ground level which could be ignited by bushfire. Shrub species retained should not form a continuous pathway along which fire could progress.

As far as practicable the indigenous tree canopy should be retained but trees should not touch or overhang buildings or form a continuous canopy.

### **b) Maintenance of habitat for species of conservation significance**

Fuel reduction within the Asset Protection Zone should be sympathetic to flora and fauna listed as threatened or of local or regional significance. A list of these species was provided in a previous biodiversity survey of the property conducted by Actinotus Environmental Consultants in 2000. Warringah Council also has a web site which provides valuable reference information on threatened species and species of conservation significance. No plant species on this list should be removed as part of a fire risk reduction protocol.

Outside the asset protection zone no activities should be undertaken which may impact on the indigenous flora and fauna.

Maintaining the current tree canopy and conservation of the understorey vegetation will retain and enhance faunal habitat. The continuity of the tree canopy with the surrounding areas provides a natural corridor for arboreal mammals and birds.

Threatening processes which impact on biodiversity and on specific flora and fauna include the following:-

- 1) Clearing of native vegetation:  
No indigenous vegetation should be cut or cleared outside the Asset Protection Zone
- 2) Bush rock removal:  
Bush rock provides habitat for many indigenous fauna, particularly reptiles, and should not be removed from any part of the property.
- 3) Removal of dead logs and litter:  
Hollow logs and ground litter provide habitat for many indigenous fauna and should not be removed from any part of the property outside of the asset protection zone.



- 4) Too frequent occurrence of bushfire:  
Many indigenous plant species have evolved adaptations to fire such as lignotubers and epicormic buds which allow for rapid regrowth following fire. Some have also evolved adaptations to fire as part of their breeding system eg. woody fruit which open and release seed only after being burnt. These adaptations however have evolved to natural cycles of fire estimated at between 12 and 25 years. For many species, too frequent occurrence of bushfire is likely to prevent their complete recovery and could lead to their extinction in the area. Likewise, too frequent burning may prevent indigenous fauna reoccupying habitats from surrounding areas and thus lead to a loss of fauna biodiversity.
- 5) Predation by fox, feral cat and feral dog:  
Feral animals such as fox and cat are one of the major causes of a reduction in fauna biodiversity. Threatened species at risk include both terrestrial and arboreal fauna eg. the Southern Brown bandicoot, Spotted-tail Quoll and Heath Monitor. Foxes are known in the area and any sightings or signs such as scats or footprints should be reported to the Councils Pest Officer. It is recommended that feral animals be excluded from the property by trapping or others effective forms of dissuasion to provide protection for potentially occurring threatened or significant fauna in the area. Domestic animals should likewise be restricted in movement throughout the property.
- 6) Incursion of weeds which compete with native flora for space and nutrients  
(i) weeds which are transported into bushland due to changes in stormwater run-off.  
(ii) weeds introduced by horses or other traffic in bushland areas.

**TABLE1. Exotic weed species recorded on Lot 2816 and on adjacent crown land at Terrey Hills**

Scientific name	Common name	Site of proposed permanent house	Ecotank site	Drainage Line	Reservoir Rd.	Eastern boundary	Crown land beside Mona Vale Road	Noxious Weeds Act 1993 & Warringah Councils Environmental Weeds Register
		1	2	3	4	5	6	Status
<i>Acacia baileyana</i>	Cootamundra Wattle	***						E
<i>Acacia saligna</i>	Golden Wreath Wattle						***	E
<i>Agapanthus spp.</i>	African Lily						*	E
<i>Ageratina adenophora</i>	Crofton Weed			**		***	**	E
<i>Anagallis avensis</i>	Scarlet Pimpernel						**	
<i>Andropogon virginicus</i>	Whiskey Grass	**		**		**	*	E
<i>Avena stiva</i>	Common Oats						***	
<i>Bidens pilosa</i>	Cobbler's Peg						*	E
<i>Briza maxima</i>	Quaking Grass						***	
<i>Briza subaristata</i>	Shivery Grass			**				
<i>Bromus catharticus</i>	Prairie Grass						**	
<i>Chlorophytum comosum</i>	Aluminium Plant						*	E
<i>Cinnamomum camphora</i>	Camphor laurel						*	E (proposed W4d)
<i>Cirsium vulgare</i>	Black Thistle						**	
<i>Conyza bonariensis</i>	Flaxleaf Fleabane		**					E
<i>Coreopsis lanceolata</i>	Coreopsis						***	E
<i>Cortaderia selloana</i>	Pampas Grass					**	**	W2
<i>Cotoneaster glaucophyllus</i>	Cotoneaster						**	E
<i>Cynodon dactylon</i>	Common Couch						**	E
<i>Cyperus eragrostis</i>	Umbrella Sedge						**	
<i>Ehrharta erecta</i>	Panic Veldtgrass							
<i>Eragrostis curvula</i>	African Lovegrass			**		***	***	
<i>Erythrina x sykesii</i>	Coral Tree					**	**	E (proposed W4d)
<i>Hedychium gardnerianum</i>	Ginger						*	
<i>Lantana camara</i>	Lantana						**	W2
<i>Ligustrum lucidum</i>	Large-leaf Privet					**	**	W4b
<i>Ligustrum sinense</i>	Small-leaf Privet						**	W4b
<i>Lolium perenne</i>	Rye Grass						***	
<i>Lonicera japonica</i>	Honeysuckle	**				***	***	E
<i>Melilotus indica</i>	King Island Melilot	**						
<i>Tropaeolum majus</i>	Nasturtium						*	
<i>Oxalis corniculata</i>	Creeping Oxalis						*	
<i>Paspalum urvillei</i>	Vasey Grass						**	
<i>Pennisetum clandestinum</i>	Kikuyu						**	E
<i>Phoenix canariensis</i>	Canary Island Date Palm						*	
<i>Plantago lanceolata</i>	Ribbed Plantain						**	
<i>Protasparagus aethiopicus</i>	Ground Asparagus					**	**	
<i>Rubus fruticosus</i> (aggreg.) spp.	Blackberry						**	W2
<i>Senna pendula</i>	Cassia					***	**	E (proposed W4b)
<i>Solanum mauritianum</i>	Wild Tobacco Tree						*	
<i>Solanum nigrum</i>	Black Nightshade					**	**	
<i>Sonchus oleraceus</i>	Common Sowthistle						**	
<i>Stenotaphrum secundatum</i>	Buffalo Grass						***	
<i>Taraxicum officinale</i>	Dandelion						**	
<i>Tradescantia albiflora</i>	Wandering Jew						**	E (proposed W4c)
<i>Trifolium repens</i>	White clover						*	
<i>Vinca major</i>	Blue periwinkle						**	
								138

## Legend for Table 1

### **Frequency of Occurrence**

*	<b>uncommon to scattered</b>
**	<b>occasional to moderate</b>
***	<b>common to abundant</b>

### **Summary of State Weed Legislation for New South Wales (*Noxious Weeds Act 1993*)**

#### **Action and Category definition**

##### **W1: - Notifiable Noxious Weed**

A weed of limited distribution or not present in the State but which poses a threat to agriculture, the environment, or the community. Landholders must notify their local control authority within three days of detecting it on their land and they also must continuously suppress and destroy the infestation.

##### **W2: - Noxious Weed**

A weed which poses a threat to agriculture, the environment, or the community and which has the ability to spread to other areas. Landholders must continuously suppress and destroy the infestation.

##### **W3: - Noxious Weed**

A weed which poses a threat to agriculture, the environment, or the community and which has the ability to spread to other areas, but which is so widespread that total suppression and destruction is impracticable. Landholders must prevent the spread and reduce the numbers and distribution of the infestation to the satisfaction of the local control authority.

##### **W4: - Noxious Weed**

A weed which poses a threat to agriculture, the environment, or the community and which has the potential to spread and has a specific action which must be undertaken.

W4B: - Shall not be sold, propagated or knowingly distributed. Established plantings must be prevented from flowering and fruiting. Where the plant is not part of a well maintained hedge it must be fully controlled.

W4C: - Shall not be sold, propagated or knowingly distributed. Occupier must prevent spread to adjoining property.

W4D: - Shall not be sold, propagated or knowingly distributed. Any tree three metres or less in height must be removed. Any tree within 500m of remnant urban bushland, as defined in SEPP 19 and not deemed by Council as having historical or heritage significance shall be removed.

**c) An ongoing bush regeneration program**

Several inspections of the property and adjacent crown land beside Mona Vale Road were made in October 2002. Fourteen exotic weed species were recorded within the property perimeter including two which are listed as noxious (*Noxious Weeds Act 1993*) and an additional seven (7) listed as environmental weeds by Warringah Council. The two species of noxious weeds (*Ligustrum lucidum* and *Cortaderia selloana*) were at the eastern end of the property adjacent to an area of crown land.

Noticeable was a significant reduction in the extent and frequency of exotic weeds on this property since surveyed by Actinotus Environmental Consultants in 2000. Many individual plants of *Cortaderia selloana* (Pampas Grass) were visibly dead, presumably following treatment by the current owners. Table 1 lists all weeds recorded for the various areas sampled.

By contrast 44 exotic weeds were recorded on the strip of crown land between Mona Vale Road and the subject property boundary and at the eastern border of the subject property (Figure 1). Of these, five (5) are listed as noxious (*Noxious Weeds Act 1993*) and 15 as environmental weeds by Warringah Council (Table 1).

Figure 2 shows the location of suggested weed management zones on the property. There is some added risk for weed incursion in areas that have been cleared (ie within the APZ) however ongoing monitoring and removal of these weeds in these areas should prevent their establishment. The greatest risk of weed incursion, however is from those established weeds on crown land along Mona Vale Road and outside the eastern end of the property which are clearly penetrating the fringing bushland. Noxious weeds in this area are the responsibility (*Noxious Weeds Act 1993*) of the local council.

**Management Zones (See Figure 2)**

**Management Zone 1**

This area contains the access road, Asset Protection Zone (buildings, proposed permanent residence etc.) and immediate surrounding bushland. Due to disturbance as part of the building process, this whole area is exposed to weed invasion but is currently in good condition. One established 'environmental' weed at the proposed house site (*Acacia baileyana* < 12 specimens) however, should be removed. The zone should be monitored for weeds at regular intervals and new seedlings hand pulled..

**Management Zone 2**

Seepage from Mona Vale Road across the property has allowed the incursion of Crofton weed (*Ageratina adenophora*) at the bush track (Reservoir Rd.). This weed should be eradicated at site immediately before it can spread any further into the property and ultimately Ku-

ring-gai National Park. The two grass weeds at this location have probably been introduced by horses and other traffic using the path. The site should be monitored for weeds at regular intervals.

Unserviced bush tracks, such as Reservoir Rd., provide considerable potential for weed incursion into adjoining bushland. To reduce this potential, it is recommended that the Department of Land and Water Conservation be approached with the view to closing this track to trail bikes and horses.

### **Management Zone 3**

This area is heavily weed infested including some listed as environmental weeds by Warringah Council and two listed as noxious (*Noxious Weeds Act 1993*). The incursion is from a drainage line on adjoining crown land. This area requires immediate weed control and should be undertaken in concert with Warringah Council.

### **Management Zone 4**

This zone is natural bushland within the property perimeter on the boundary with Mona Vale Road. Its current condition is excellent except for a few local incursions along drainage lines.

It is, however at risk from the numerous exotic weed species along Mona Vale Road and will eventually suffer significant weed incursion. This area and its management should be discussed with Council's Noxious Weeds Officer.

### **Management Zone 5**

The remaining area of the property is in good condition and generally weed free, however ongoing monitoring should be undertaken with inspections of all areas at least once each year.

### **Treatment of weeds**

Most herbaceous weed species can readily be removed by hand. No weed should be allowed to flower or set seed and all vegetative parts of noxious or environmental weed species should be bagged and removed to the local tip.

Larger woody weed species are often also able to be hand-removed or otherwise can be cut/stumped and treated with an appropriate herbicide (for control methodologies see Buchanan 1989, Parsons and Cuthbertson 1992,). Restricted use of herbicides is preferred so as to avoid build-ups of toxic substances in the ecosystem and component food chains.

No herbicides are to be used near drainage channels without consultation first with the Department of Land and Water Conservation.

Regular, periodic, follow-up monitoring and removal of new weed incursions is fundamental for rehabilitation and maintenance of biodiversity of the site understorey.

Identification of weed species can be ascertained by phoning Warringah Councils Noxious Weeds Officer on **9942 2728**

### Planting of locally-occurring indigenous plants.

Locally indigenous plant species are recommended in the rehabilitation/vegetation restoration of any of the disturbed areas of bushland. Suitable low tree, shrub and ground cover plants can be drawn from the list of plants observed on the property (See *Actinotus Environmental Consultants 2000*) or from characteristic assemblages given for Sydney Sandstone Ridgetop Woodland community. Some examples of suitable plants commonly occurring on the surveyed sites include the following (Table 3):

**Table 3 Species suitable for replanting on cleared or disturbed subject sites  
(available from locally-occurring seedstock at local nurseries)**

Scientific Name	Common Name	Habit
<i>Acacia myrtifolia</i>	Myrtle Wattle	Small Shrub
<i>Acacia suaveolens</i>	Sweet Wattle	Small Shrub
<i>Banksia spinulosa</i>	Hairpin Banksia	Medium Spreading Shrub
<i>Billardiera scandens</i>	Appleberry	Climber
<b>Conospermum longifolium</b>	Long-leaved Conospermum	Small Slender Sub-shrub
<i>Dianella caerulea</i>	Blue Flax Lily	Tufted Herb
<i>Gompholobium grandiflorum</i>		Small Shrub
<i>Grevillea linearifolia</i>	White Spider Flower	Medium Erect Shrub
<i>Lambertia formosa</i>	Mountain Devil	Small – Medium Shrub
<i>Hibbertia bracteata</i>	Blue Mountains Guinea Flower	<b>Small Shrub</b>
<i>Hibbertia linearis</i>	Showy Guinea Flower	Small Shrub
<i>Persoonia levis</i>	Large-leaved Geebung	Medium Shrub – Small Tree
<i>Phyllota phyllicoides</i>	Heath Phyllota	Small Shrub
<i>Patersonia sericea</i>	Silky Purple Flag	Small Geophyte
<i>Platysace linearifolia</i>	Narrow-leaf Platysace	Slender Spreading Shrub
<i>Themeda australis</i>	Kangaroo grass	Tufted Grass

**d) The recommended fire regime for the ecology of the site.**

The Sydney Sandstone Ridgetop Woodland community may require a periodic fire regime for its persistence. A fire regime with recurring fires at intervals of 12 – 25 years would appear to be the most appropriate fire regime for these communities as a whole (Smith & Smith 2000). A fire regime that includes fires of varying intensity and seasonality is also likely to be most favorable for maintaining species diversity (Bradstock *et al* 1995).

Capsule-producing indigenous plant species periodically release seeds that become soil-stored and germinate readily in suitable post-fire conditions.

An inspection of node numbers on *Banksia ericifolia* downslope of the proposed dwelling but still within the IPZ indicated the area was last burn 8-9 years ago. The potential for and urgency of a fire hazard reduction burn within the OPZ should be discussed with the rural fire service. For the remaining property no artificial burning should be undertaken on the basis of the sites ecological values.

**e) Stormwater**

Storm water collected in roofing gutters will be retained for house usage. Other precipitation on access tracks will be contained by levy banks to avoid weed plumes and contamination of adjoining bushland.

## 6 REFERENCES

- Actinotus Environmental Consultants 2000. Flora and Fauna Survey for proposed development at Lot Number 2816 in DP 728 428, Mona Vale Road, Terrey Hills, NSW 2084. Unpublished report.
- Benson, D. and Howell, J. (1994) The natural vegetation of the Sydney 1: 100,000 map sheet. *Cunninghamia* 3:677 – 787.
- Bradstock, R., Keith, D. and Auld, A. (1995) Fire and Conservation: imperatives and constraints on managing for diversity. In Bradstock, R. *et al* (eds) '*Conserving Biodiversity: Threats and Solutions*' Surrey Beatty and Sons, Chipping Norton.
- Buchanan, R A. (1989) ' Bushland Regeneration' TAFE Student Learning Publications. Sydney, NSW, Australia.
- Parsons, W.T. and Cuthbertson, E.G. (1992) 'Noxious Weeds of Australia' Inkata Press. Melb. Syd.
- Smith, P. and Smith, J. (1997). *Natural Area Survey of Warringah's Bushland*. Interim report prepared for Warringah Council, Dee Why, NSW.
- Smith, P. and Smith, J. (2000). Survey of the Duffys Forest Vegetation Community. Report prepared for NSW National Parks and Warringah Council, Dee Why, NSW.



## **Appendix G**

### **Correspondence with Warringah Council**

G.1 Further information required for the determination of a Development Application for residential development on the subject property.

Attention : Tony Smithwhite

**Warringah  
Council**

PF3250/L2816-D/MW.DB/mw616.doc

M Wysman, Ph: 9942 2493

Mobile: 0418 639 586

18 September 2002

Gustavo Thiermann  
116 Allambie Road  
ALLAMBIE HEIGHTS NSW 2100Received  
25/9/02Information  
required  
within 21 days

Dear Sir,

**Re: Development Application – Proposed Dwelling and swimming pool–  
2002/1059DA Premises – Lot 2816 Mona Vale Road Terrey Hills  
Request for Additional Information**

Council has undertaken a preliminary investigation of your Development Application. To enable Council to further process your application, additional information is required. Would you please provide Council with the following:

1. Submit a Tree Preservation Order form with a detailed plan indicating all trees proposed to be removed from the site with regard to the new dwelling.
2. Where the sewer is not available submit the attached On-site sewage management system application form with a detailed plan indicating the method of waste disposal from the proposed dwelling and swimming pool, or alternatively submit details from a suitable qualified person, advising that the existing system has a capacity capable of dealing with the additional loads likely to be imposed from the proposed dwelling and swimming pool backwash.
3. Submit a Certificate of Energy rating under the National Home Energy Rating System (NATHERS) for the proposed hot water system to be installed in the new dwelling.

In this regard the proposed hot water system is to achieve a minimum 3.5 star rating based on the Greenhouse Score Card developed by Sustainable Energy Development Authority (SEDA).

4. Reference is made to the attached memo provided by the New South Wales Rural Fire Service – Warringah/Pittwater District. In this regard please submit all information as requested. Once the additional information is received the details will be forwarded to the Rural Fire Service for further consideration.

- \* 5. Prior to approval for a permanent dwelling a Positive Covenant is to be placed on the title of the property for the retention and management of the bushland

Civic Centre, 725 Pittwater Road (enter Civic Drive), Dee Why, NSW 2099 ABN 31 565 066 406  
Tel 02 9942 2111 FAX 02 9971 4522 TTY No.9942 2700 DX 9118 Dee Why. www.warringah.nsw.gov.au

outside the fire protection zone in accordance with a management plan. A management is to be submitted with the following details: -

- a) Ecologically sensitive measures to construct and maintain the fire protection zone;
- b) Maintenance of habitat for species of conservation significance such as the Southern Brown Bandicoot;
- c) Identification and recommended management of impacts such as weed invasion, horse riding and feral animals causing degradation to ecological values;
- d) An ongoing bush regeneration program to be prepared by a person suitably qualified person to include,
  - A map of the site showing bushland condition/weed areas, management zones and management issues and a bushland regeneration/weed control program relevant to the site and
  - Prioritising actions including a description of works and weeds species targeted, and
- e) A recommended fire regime to maintain the site's ecological values while protecting life and property; and
- f) An on-going monitoring program to review the ecological health and changes to the site's biodiversity.
- g) A plan showing where excess stormwater is to be directed. Given the number of environmental weeds on the lot, as identified by the original fauna and flora survey, there is a concern that a weed plume will develop and flow into the adjoining national park if the storm water is not dealt with properly. The Bushland Management Plan for the site must address this issue.

You are advised that Clause 48 of the Environmental Planning and Assessment Regulation has the effect of "stopping the clock" for the calculation of the period of time taken to assess the application, where additional information or details are sought. If Council has not received this information, to its satisfaction, within 21 days, your Development Application will be determined on the basis of information presently before Council. Should you require additional time in which to provide this information, you are requested to seek an extension in writing.

Council has adopted this procedure in the interests of streamlining the processing of all Development Applications. Your co-operation in this matter would be appreciated.

Yours faithfully

  
Mark Wyman  
Development Assessment Officer

Encs.

## Appendix H

### AHIMS Search



Department of  
**Environment  
& Conservation**

#### List of Sites ( List - Short )

Lot 2816 in DP 728428

Grid Reference Type = AGD (Australian Geodetic Datum), Zone = 56, Easting From = 332155, Easting To = 332875, Northing From = 6286386, Northing To = 6286884, Requestor like 7724%, Service ID = 20407, Feature Search Type = AHIMS Features

Site ID	Site Name	Datum	Zone	Easting	Northing	Site Features	Site Types (recorded prior to June 2001)	Recording (Primary)	Reports (Catalogue Number)	State Archive Box Number
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**No Site Recorded**

Number of Sites : 0

Page 1 of 1

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