FEDERAL COURT OF AUSTRALIA

Esposito v Commonwealth of Australia [2014] FCA 1440

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| Citation: | Esposito v Commonwealth of Australia [2014] FCA 1440 |
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| Parties: | **JUNE YVONNE ESPOSITO, MARGARET-ANNE HUTTON, DANIEL WALTER MASSAIOLI, SAM DE MARIA, BRIAN GEORGE EDWARD SMITH and FRANCESCO JOHN TALARICO v COMMONWEALTH OF AUSTRALIA, STATE OF NEW SOUTH WALES, SHOALHAVEN CITY COUNCIL, FOUNDATION FOR NATIONAL PARKS AND WILDLIFE and THE MINISTER FOR THE ENVIRONMENT (CTH)** |
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| File number: | NSD 924 of 2013 |
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| Judge: | **FOSTER J** |
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| Date of judgment: | 24 December 2014 |
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| Catchwords: | **ADMINISTRATIVE LAW –** whether certain decisions taken by the Commonwealth Minister for the Environment pursuant to the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) in 2007 and 2009 were invalid because the Minister failed to take into account relevant considerations which he was obliged to take into account – whether the Commonwealth provided funding to the State in breach of Commonwealth legislation  **CONSTITUTIONAL LAW** – whether the actions of the Commonwealth, the State of New South Wales, Shoalhaven City Council and the Foundation for National Parks and Wildlife in acting to protect the environment in the Jervis Bay area impaired or contravened the Constitutional guarantee provided for in s 51(xxxi) of *The Constitution* vis-à-vis the applicants  **EQUITY –** unjust enrichment – whether, in the events which have happened, the respondents, or one or more of them, have been unjustly enriched at the expense of the applicants |
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| Legislation: | *The Constitution*,s 51(xxxi)  *Environmental Planning and Assessment Act 1979* (NSW), s 119  *Environmental Protection and Biodiversity Conservation Act 1999* (Cth), Pt 7, ss 18, 18A, 26, 27A, 67, 68, 75, 87, 100, 130, 136, 519  *Federal Court of Australia Act 1976* (Cth), Pt IVA  *Financial Management and Accountability Act 1997* (Cth), reg 9  *Natural Heritage Trust of Australia Act 1997* (Cth), ss 4, 5, 8, 19  *National Parks and Wildlife Act 1974* (NSW) |
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| Cases cited: | *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1  *Commonwealth of Australia v Tasmania* (1983) 158 CLR 1  *Esposito v Commonwealth* [2013] FCA 546  *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498  *ICM Agriculture v Commonwealth* (2009) 240 CLR 140  *JT International SA v Commonwealth* (2012) 250 CLR 1  *Minister of State for the Army v Dalziel* (1944) 68 CLR 261  *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513  *Spencer v Commonwealth* (2010) 241 CLR 118 |
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| Date of hearing: | 21–25 October 2013 and 6 May 2014 |
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| Date of last submissions: | 6 May 2014 |
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| Place: |  |
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| Division: | GENERAL DIVISION |
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| Category: | Catchwords |
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| Number of paragraphs: | 156 |
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| Counsel for the Applicants: | Mr PE King |
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| Solicitor for the Applicants: | Whitfields Solicitors |
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| Counsel for the First and Fifth Respondents: | Dr SE Pritchard SC and Mr CL Lenehan |
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| Solicitor for the First and Fifth Respondents: | Australian Government Solicitor |
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| Counsel for the Second Respondent: | Mr EC Muston |
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| Solicitor for the Second Respondent: | Legal Services Branch, Office of the Environment and Heritage |
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| Solicitor for the Third Respondent: | The Third Respondent submitted save as to costs |
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| Counsel for the Fourth Respondent: | Mr SJ Duggan |
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| Solicitor for the Fourth Respondent: | Bartier Perry |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 924 of 2013 |

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| BETWEEN: | JUNE YVONNE ESPOSITO  First Applicant  MARGARET-ANNE HUTTON  Second Applicant  DANIEL WALTER MASSAIOLI  Third Applicant  SAM DE MARIA  Fourth Applicant  BRIAN GEORGE EDWARD SMITH  Fifth Applicant  FRANCESCO JOHN TALARICO  Sixth Applicant |
| AND: | COMMONWEALTH OF AUSTRALIA  First Respondent  STATE OF NEW SOUTH WALES  Second Respondent  SHOALHAVEN CITY COUNCIL  Third Respondent  FOUNDATION FOR NATIONAL PARKS AND WILDLIFE  Fourth Respondent  THE MINISTER FOR THE ENVIRONMENT (CTH)  Fifth Respondent |

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| JUDGE: | FOSTER J |
| DATE OF ORDER: | 24 DECEMBER 2014 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. The whole of this proceeding and the Application filed herein be dismissed.
2. The applicants pay the respondents’ costs of and incidental to this proceeding.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 924 of 2013 |

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| BETWEEN: | JUNE YVONNE ESPOSITO  First Applicant  MARGARET-ANNE HUTTON  Second Applicant  DANIEL WALTER MASSAIOLI  Third Applicant  SAM DE MARIA  Fourth Applicant  BRIAN GEORGE EDWARD SMITH  Fifth Applicant  FRANCESCO JOHN TALARICO  Sixth Applicant |
| AND: | COMMONWEALTH OF AUSTRALIA  First Respondent  STATE OF NEW SOUTH WALES  Second Respondent  SHOALHAVEN CITY COUNCIL  Third Respondent  FOUNDATION FOR NATIONAL PARKS AND WILDLIFE  Fourth Respondent  THE MINISTER FOR THE ENVIRONMENT (CTH)  Fifth Respondent |

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| JUDGE: | FOSTER J |
| DATE: | 24 DECEMBER 2014 |
| PLACE: | SYDNEY |

**REASONS FOR JUDGMENT**

1. In February 1988, June Esposito, and her husband Peter, agreed to purchase Lot 77 in Deposited Plan 8770 for $9,750. At the time, Lot 77 was vacant land and was zoned Rural 1(a) under the Shoalhaven Local Environmental Plan 1985. Under that zoning, the Espositos were not permitted to build on the land. Lot 77 is still vacant land and remains subject to a prohibition on construction.
2. Lot 77 is in an area on the south coast of New South Wales known as the Heritage Estates at Worrowing Heights (**Heritage Estates**) which is near Jervis Bay.
3. The other five applicants also purchased land in the Heritage Estates at a time when the allotments in the Heritage Estates were being aggressively marketed by Interpacific Property Corporation Pty Ltd (**Interpacific**).
4. All of the applicants claim that they were led to believe by representatives of Interpacific that the allotments in the Heritage Estates would be rezoned in the not too distant future so as to permit the erection of dwelling houses on those allotments. Notwithstanding those assertions on the part of the applicants, there is no doubt that they were all well aware that, as matters stood at the time when they acquired their lots in the Heritage Estates, they were not permitted to build on the land. This restriction on the use of the allotments was made very plain in the Agreements for Sale entered into by the applicants.
5. Since the early 1990s, the applicants and other landowners within the Heritage Estates have persistently agitated for their land to be rezoned so as to permit the erection of dwelling houses on that land.
6. The applicants bring the present proceeding under Pt IVA of the *Federal Court of Australia Act 1976* (Cth). They claim to represent those persons or entities who owned a lot in Deposited Plans 8590, 8591, 8770, 8771 and 8772 as at 13 March 2009 and who still own that lot and have done so at all times since 13 March 2009 or who owned that lot continuously from 13 March 2009 until transferring it via the voluntary tendering process being managed by the Foundation for National Parks and Wildlife (**Foundation**), which is the fourth respondent in this proceeding.
7. 13 March 2009 is a significant date for the landowners in the Heritage Estates. On that day, the Minister for the Environment, Water, Heritage and the Arts (Cth) (**the Minister**), who is the fifth respondent in this proceeding, made a decision under s 130 of the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (**the EPBC Act**) to refuse approval of a proposal by Shoalhaven City Council (**the Council**), which is the third respondent in this proceeding, to rezone the land in the Heritage Estates (**the EPBC Act decision**). The EPBC Act decision put paid once and for all to the possibility that the land in the Heritage Estates would be rezoned so as to permit the erection of dwelling houses thereon.
8. After the EPBC Act decision, the Commonwealth Department of the Environment, Water, Heritage and the Arts (**the Department**), the State Government of New South Wales through the Office of Environment and Heritage (**OEH**), the Council and the Foundation entered into arrangements by which the Commonwealth provided funds to OEH which in turn provided an equivalent grant to the Foundation for the purpose of devising and implementing a voluntary acquisition scheme in respect of the land in the Heritage Estates. That scheme commenced in operation in October 2012 and ceased operation on 31 December 2013.
9. By the present proceeding, the applicants seek to challenge the EPBC Act decision and to bring about a state of affairs whereby they secure for themselves and the other members of the relevant class appropriate compensation for the financial impact upon them and the land owned by them in the Heritage Estates of the EPBC Act decision and the subsequent conduct on the part of the Commonwealth, OEH, the Council, the Foundation and the Minister.

# The Applicants’ Pleaded Case

1. The causes of action pleaded by the applicants may be summarised as follows.
2. First, the applicants contend that the Commonwealth effected an acquisition of their property other than on just terms in contravention of the Constitutional guarantee in s 51(xxxi) of *The* *Constitution*. It is their case that the action of the Commonwealth in imposing a national park over their developable land was sufficient to constitute an acquisition of property requiring just terms. In particular, they argue that, but for the EPBC Act decision, the Council intended and proposed that all of the land in the Heritage Estates would be rezoned as residential land with the consequence that each landowner within the Heritage Estates had a legitimate expectation that his or her land had significant development potential and use as residential land with a corresponding market value as developable land. The applicants seek declaratory and pecuniary relief as a result of this alleged acquisition other than on just terms. It should be noted at this point that, as at the date of the hearing before me, not all of the land in the Heritage Estates had been acquired as a result of the actions of the respondents. Such lots as had been acquired were acquired by the State.
3. It is part of the applicants’ case that, as a result of the EPBC Act decision, the market value of the land owned by them fell dramatically.
4. In their Particulars of Acquisition set out in par 2 of their Amended Statement of Claim filed on 16 October 2013 (**the ASC**), the applicants also rely upon an informal arrangement allegedly entered into between the first to fourth respondents which the applicants have labelled as a *“joint venture”*. It is the applicants’ case that this informal arrangement was initially proposed by an officer of the State (Ms Garrood) in about September 2009 and was thereafter developed and put into effect. Particular reliance is placed upon events in 2012. The particular matters relied upon are the actions of the Commonwealth in funding the State in order to enable the State to make a grant to the Foundation for the purpose of acquiring the lots in the Heritage Estates under a voluntary acquisition scheme. The applicants allege that the informal arrangement to which they have referred in par 2 of the ASC was a circuitous device designed to impair the Constitutional guarantee afforded to the applicants by s 51(xxxi) of *The Constitution*.
5. As at the date of the hearing before me, approximately 500 lots in the Heritage Estates (a little over one third of all allotments in the Estates) had been transferred to the State.
6. In par 4 of the ASC, the applicants identify the economic advantages of a proprietary nature which they allege the respondents have acquired at the expense of the applicants. Those advantages are:
   1. The Commonwealth has placed a restriction on the use and development of the land in the Heritage Estates which benefits Commonwealth land nearby;
   2. The Foundation has gained economic and other benefits *“by acting as intermediary for the acquisition scheme”*; and
   3. The State has acquired land in the Heritage Estates at a significant undervalue.
7. The applicants claim compensation under s 519 of the EPBC Act.
8. Second, the applicants claim that the EPBC Act decision, a Funding Agreement dated 12 June 2012 between the Commonwealth and the State (**the Funding Agreement**) (to which I will refer in more detail later in these Reasons), the E2 Zoning Arrangement (to which I shall also refer later in these Reasons) and various statutory provisions are all invalid as impairing the Constitutional guarantee in s 51(xxxi) of *The* *Constitution* and *“are otherwise unauthorised at law”*. This claim on the part of the applicants appears to be based upon the notion that the funds made available by the Commonwealth to the State were not used for a legitimate Commonwealth purpose.
9. Third, the applicants claim that the EPBC Act decision was invalid because the Minister failed to pay due regard to the adverse socio-economic impact of that decision. In particular, the Minister is criticised for failing to take into account either at all or sufficiently the contents of a report dated 20 March 2008 prepared by Judith Stubbs & Associates for the Council entitled: *“Heritage Estates Social Impact Assessment”* (**the Stubbs report**), the views of landowners and a 1994 report of Ms Gabrielle Kibble.
10. Fourth, the applicants bring a second administrative law challenge to the EPBC Act decision. They claim that the Minister failed to have regard to the consideration whether or not the proposed residential development of the Heritage Estates area was likely to have a significant impact on the environment on Commonwealth land in circumstances where there was no or insignificant impact as a viable habitat on Commonwealth land.
11. Finally, the applicants claim that the respondents have been unjustly enriched at the expense of the landowners in the Heritage Estates because the State has acquired land in the Heritage Estates at a significant undervalue and the other respondents have acquired other advantages.

# The Issues

1. In their Submissions, the Commonwealth and the Minister helpfully identified and addressed a number of specific issues which they contended were required to be considered by the Court. In doing so, the Commonwealth and the Minister established a useful structure for the Court’s consideration of the matter. In broad terms, I propose to consider the issues in this proceeding by reference to the contentions made on behalf of the Commonwealth and the Minister which, in my judgment, appropriately come to grips with the applicants’ case.
2. The specific contentions which I shall address are:
3. There was no acquisition by the Commonwealth or by any other entity of an interest of a proprietary character as a result of the operation of a Commonwealth law;
4. There was no informal arrangement of the kind alleged by the applicants;
5. Just terms were offered in any event;
6. The Minister did not fail to take into account relevant considerations as alleged; and
7. Relief by way of judicial review should be refused on discretionary grounds on account of the applicants’ delay.
8. It will be necessary also to consider the claim for unjust enrichment against the respondents and against the State in particular.
9. The only relief sought against the Foundation is an order requiring it to vary its Offer to Sell in order to provide for just terms.

# The Relevant Facts

1. With the exception of certain expert valuation evidence, the critical evidence in this proceeding is essentially documentary. The applicants, on the one hand, and the respondents, on the other hand, mostly rely upon the same documents. For the most part, the documents speak for themselves although, from time to time, the parties have urged upon the Court different interpretations of some of the documents.
2. Nonetheless, despite these differences of interpretation, the primary facts in this matter are not in dispute.
3. The summary of the important facts which follows in this section is essentially drawn from the chronology prepared on behalf of the Commonwealth and the Minister (MFI-2) although I have supplemented the account given in that chronology when necessary.
4. In about 1915 or 1916, Henry F Halloran, a surveyor and real estate developer, prepared a 180 hectare paper subdivision comprising approximately 1220 lots in Deposited Plans 8590, 8591, 8770, 8771 and 8772. The relevant land is now known as the Heritage Estates. In Mr Halloran’s plan of his proposed subdivision, the land was described as *“Pacific City”.*
5. In 1964, land use zoning was introduced into the Shoalhaven area. At that time, the Heritage Estates land was zoned rural under an Interim Development Order made and dated in the same year.
6. In 1985, the current planning controls were introduced into the Shoalhaven area. The relevant planning instrument is the *Shoalhaven Local Environmental Plan 1985*, an instrument made under the *Environmental Planning and Assessment Act 1979* (NSW) (**the EPA Act**). Under the 1985 LEP, some parts of the Heritage Estates land were zoned Rural 1(a) (Rural “A” (Agricultural Protection) Zone) and Rural 1(b) (Rural “B” (Arterial and Main Road Protection) Zone) while other parts were zoned Rural 1(d) (Rural “D” (General Rural) Zone). This zoning regime imposed a prohibition on the erection of dwellings on individual lots which are less than 40 hectares in area: see cl 8 and cl 14(2)(a) of the 1985 LEP. The area of each of the lots owned by the applicants is less than 40 hectares. For this reason, as I have already mentioned, none of the applicants has been lawfully entitled to construct a dwelling on his or her lot.
7. In the period from the early 1980s until about 1992, sales of individual lots (including those of the applicants) took place. During that period, approximately 1,200 lots were sold. Mr Austin, the Commonwealth’s expert valuer, describes the marketing campaign which led to those sales as *“high powered”*. According to the applicants, the applicants were given assurances by the selling agents that the lots in the Heritage Estates would be rezoned in the near future so as to permit the construction of residential dwelling houses on lots of less than 40 hectares in area.
8. The lots purchased by the named applicants were all purchased in the period between 18 November 1981 and 20 July 1989.
9. The evidence suggests that at least some of the applicants were well aware of and expressly acknowledged that the planning restrictions prevented the construction of dwellings on their land: See, for example, Special Condition 4 in the Agreement for Sale of Land dated 27 February 1988 pursuant to which Mr and Mrs Esposito purchased Lot 77 in Deposited Plan 8770 which is in the following terms:

The Purchaser expressly acknowledges that the property is zoned such that a dwelling house may not be erected thereon and that they [sic] have read the Council’s comments regarding the status of the roads and the zoning in the Certificate under Section 149 of the Environmental Planning and Assessment Act, 1979 annexed hereto.

1. In January 1999, the NSW Minister for Urban Affairs and Planning directed that a Commission of Inquiry (**COI**) under s 119 of the EPA Act be established in order to:

(a) Determine the suitability for, and scale and density of, residential development on the land in the Heritage Estates; and

(b) Examine the environmental issues raised by, and the feasibility of providing the infrastructure to support, any residential development on the land in the Heritage Estates.

1. In August 1999, the COI published its report. In that report, the author of the report, Mr Kevin Cleland, Deputy Chairman, Commissioners of Inquiry, said:

Landowners who bought Heritage Estate land following the necessary enquiry prudent before such commitment would have been in no doubt as to the development status of the land.

1. In his report, Mr Cleland said:

(a) The land in the Heritage Estates was not included in the Jervis Bay Regional Development Plan 1996 as land having opportunities for urban development;

(b) The land was not, as at August 1999, included in the Jervis Bay Settlement Strategy (**Settlement Strategy**), which was then in the course of preparation;

(c) Perhaps a case-by-case approach to other zoning should be considered;

(d) If any development is to occur on land in the Heritage Estates, such development should not pre-date the publication of the Settlement Strategy. It should be assessed within the Settlement Strategy framework;

(e) A thorough assessment of the fundamental attributes of the land (being the land’s wildlife habitat/corridor values and its existing water quality) and of its development capabilities in a locational context as part of a basic planning requirement must take precedence over the landowners’ social and economic situation;

(f) The fundamental attributes of the land must be maintained in order to ensure that there is consistency with local and regional land use planning objectives and no significant adverse impacts on important environmental values;

(g) There should be no expectation on the part of landowners that any significant ecological values or the water environment downstream of the land in the Heritage Estates would be compromised in the interests of development;

(h) A *“precautionary approach”* was warranted;

(i) A staged development generally in conformity with Option 4 should be considered and evaluated. 730 lots out of the total of 1220 lots in the Heritage Estates were suitable for rezoning for residential development; and

(j) The cost of development should be borne wholly by those landowners who ultimately obtain development rights. Compensation for those landowners who do not obtain development rights should be a matter for the landowners themselves to resolve.

1. The COI report included a detailed analysis of the ecological value of the land.
2. In about December 1992, the Council resolved to investigate rezoning the land from rural to residential.
3. Ultimately, the Heritage Estates land was included in the Settlement Strategy. That document was published by the NSW Department of Infrastructure Planning and Natural Resources in October 2003. The Settlement Strategy was not a legal planning document but rather a document which was intended to provide direction and guidance. In respect of the land in the Heritage Estates, the following was said in the Settlement Strategy:

Consideration of development potential in the Heritage Estates will be undertaken in accordance with the findings and recommendations of the [COI] and the outcomes of any relevant environmental investigations completed in accordance with this strategy [dealt with in Chapters 5 and 9 of the COI].

1. There were several issues that needed to be resolved before any rezoning could take place. These issues included the protection of important habitat and wildlife values; the protection of water quality and flow within the Heritage Estates; the provision of services such as roads, electricity and the like; and the need to address any issues of compensation in respect of land required for pollution control. In addition, two of the allotments (Lot 11 in DP 8771 and Lot 43 in DP 8771) were in areas that were proposed to be rezoned *“Environmental Protection”*. Those lots would not be rezoned residential. Those lots belonged to two of the applicants.
2. Of the remaining lots owned by the applicants, only one (Lot 77 in DP 8770) (the Espositos’ lot) was to be included in the first part of the subdivision to be developed if rezoning were approved.
3. On 9 May 2007, the Council submitted a referral to the Minister under Pt 7 of the EPBC Act for the purpose of the Minister determining whether or not the Council’s proposal the subject of the referral was a *“controlled action”* within the meaning of s 67 of the EPBC Act.
4. The action proposed by the Council was described in s 3.1 of the referral in the following terms:

Council is undertaking [sic] that may culminate in the rezoning of land from a rural to residential zone to enable the construction of up to 730 dwellings on 730 lots (recommendation 5 of the 1999 [COI]).

If the proposed rezoning proceeds as currently proposed, there will be a requirement to construct the road network, undertake bushfire asset protection clearing and maintenance and provide services and infrastructure within the subdivision.

If the land is rezoned, it is intended that development would occur in four stages (COI recommendation 6) subject to further investigations and pre-development water quality monitoring etc.

1. In s 3.5 of the referral, the Council set out the steps which had already been taken to assess the environmental impact of the proposal under both Commonwealth and State legislation. In that section of the referral, there is mention of a meeting with landowners held in March 2006.
2. In cl 4.1(d), the Council listed the following species listed under the EPBC Act as threatened flora and fauna:

*Threatened Flora*

* Leafless tongue orchid
* Biconvex paperbark

*Threatened Fauna*

* Eastern bristlebird (endangered)
* Grey headed flying-fox (vulnerable)

1. Clause 4.2(n) (Proposed land uses) in the referral was in the following terms:

It is proposed to rezone the land to a suitable residential zone to enable the construction of dwellings and to construct the road network and provide other infrastructure as required. The requirements for bushfire protection dictate that hazard reduction would need to be undertaken in the proposed residential areas before the individual lots could be developed. This task may have to be co-ordinated by Council.

1. In cl 5.1(d) of the referral, the Council recorded the concerns of an organisation called Bushfire and Environmental Services (**BES**). In that clause, the Council recorded BES’ view that the study area has a high level of conservation value for threatened and non-threatened species. BES had also expressed the view that the study area also functions as an important component of habitat connectivity in the wider landscape. BES concluded that the land in the Heritage Estates should not be rezoned at all but rather should be managed so as to protect and enhance the biodiversity values of the study area and surrounding lands.
2. On 22 June 2007, Ms Vicki Middleton, who was, at that time, Assistant Secretary, Environment Assessment Branch of the Department, as the delegate of the Minister, formally notified the Council of her decisions under s 75 and s 87 of the EPBC Act to the effect that the proposed action which the Council had referred to the Department was a controlled action within the meaning of the EPBC Act. Ms Middleton decided that the project would require assessment and approval under the EPBC Act before it could proceed. She said that the project was likely to have a significant impact on listed threatened species and communities (s 18 and s 18A of the EPBC Act) and Commonwealth land (s 26 and s 27A of the EPBC Act). She also decided that the project would need to be assessed by a public environment report (**PER**).
3. In January 2009, the Council published the PER required as a result of the decisions made by Ms Middleton on 22 June 2007. The PER was a lengthy document to which a number of other documents and reports were attached.
4. In s 3.3 of the PER, the authors concluded that there would likely be significant adverse social and related economic impacts for landowners in the Heritage Estates if the rezoning did not proceed. The authors noted that a strong majority of landowners had invested a great deal of emotional effort and money in their hopes of owning a home near the coast. The authors noted that, if the land was not rezoned, the landowners in the Heritage Estates would be left with an asset of no value, a significant economic loss and an ongoing financial liability. They also noted that, if the land were rezoned but there was no assistance with development costs or co-ordination, there might still be only limited utility in holding the land to some of the least well-off owners.
5. The Stubbs report was attached to the PER as Attachment 3. This report was a lengthy and in-depth study of the social impacts of the various options for the Heritage Estates land on the landowners within the Heritage Estates. Particular emphasis was placed in this report upon the social and economic impacts on the landowners in the event that rezoning did not proceed.
6. On or about 10 February 2009, the Department provided a decision brief to the Minister (**Proposed Decision Brief**). In that Brief, the Department recommended to the Minister that he:
7. Consider the PER and attachments thereto (including the Stubbs report); and
8. Write to the Council advising that he proposed to refuse approval of the controlled action.
9. The Proposed Decision Brief was in the following terms:

**HERITAGE ESTATES REZONING AND PUBLIC INFRASTRUCTURE WORKS FACILITATING DEVELOPMENT OF 730 LOTS, WORROWING HEIGHTS, NSW (2007/3448) – PROPOSED DECISION**

**Timing:** Your proposed decision is required by 13 February 2009, to allow 10 business days for the Shoalhaven City Council to comment on the proposed decision and recommendation report under section 131AA. The statutory timeframe for your final decision is 9 March 2009.

**Purpose:**

• To advise you of the department’s recommendation report; and

• To seek comments from the person proposing to take the action, under section 131AA of the EPBC Act, if you decide to accept the department’s recommendation on refusal.

**Background:** Shoalhaven City Council referred the proposal to rezone and construct infrastructure on the Heritage Estates site to facilitate the development of a maximum of 730 lots. The site is located on the Bherwerre isthmus, which forms a habitat corridor for species and ecosystems of Booderee National Park (Commonwealth Land). The Heritage Estates site also provides habitat for listed threatened species, including the endangered Eastern Bristlebird and vulnerable Leafless Tongue-orchid. Attachment A contains background information about the assessment of the proposal.

The proposal is locally contentious. During the referral stage, the department received 25 submissions opposing the proposal, and 7 supporting it. During the assessment phase, the Shoalhaven City Council received 124 submissions opposing the proposal, and 265 supporting it. Attachment B provides copies of the public comments, and a summary of comments from scientists and government agencies during both public comment periods.

**Issues/Sensitivities:**

• The Heritage Estates consists of 1232 1ots of land, which were sold to approximately 1100 individuals in the late 1980s and early 1990s. However, the land is zoned rural and cannot be developed for urban housing. The current proposal to facilitate development of 730 lots generally aligns with the outcomes of a NSW Commission of Inquiry (1999), which recommended that a maximum of 730 lots may be developed, contingent on further studies.

• The Director of Parks Australia advises that the proposed development has the potential to “impact on the viability of this protected areas estate, particularly Booderee National Park” and add to local extinctions of species within the Park. That advice is reflected in the department’s recommendation report at Attachment C. The NSW Department of Environment and Climate Change has made similar comments.

• Development of the Heritage Estates would result in direct impacts on key populations of the Eastern Bristlebird and Leafless Tongue-orchid at the site. In addition, it would have long­term impacts on remaining populations of those species within the Booderee National Park and Bherwerre Peninsula, which rely on adequate habitat connectivity to maintain gene flow and population viability. The development would also have indirect impacts on other listed species through increased predation, fire frequency, and weed encroachment.

• Shoalhaven City Council consultants have advised that the impacts of the proposal on Commonwealth land and listed threatened species cannot be mitigated or offset.

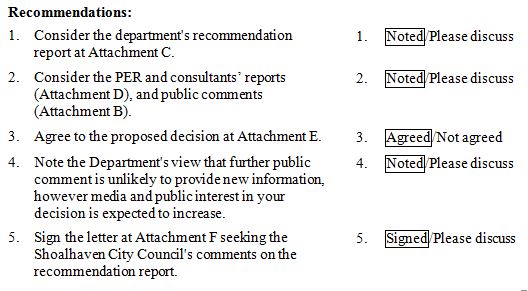
• If you decide to accept the department’s recommendation to refuse the proposal, you are required to seek comment from the Shoalhaven City Council on your proposed decision under section 131AA of the EPBC Act, for 10 business days.

• Seeking public comment on your proposed decision is not mandatory. If public comment is not sought, you have no mechanism to prevent Shoalhaven City Council from communicating your proposed decision to landholders.

• The Department is of the view that a further public comment period is unlikely to provide new information given the proposal has already undergone extensive public comment.

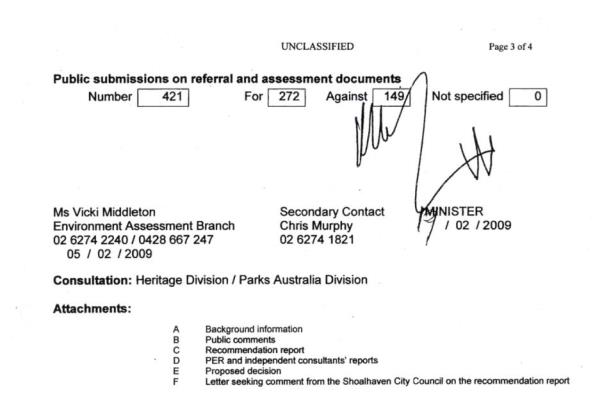
• The Shoalhaven Landowners Association actively promotes the interests of Heritage Estates landowners. The Department expects this group will continue to increase their lobbying efforts through various Members of Parliament, as well as seeking to increase local media interest in the lead up to your final decision on 9 March 2009. It is expected that if further comment was sought the majority of comments would be from landholders urging you to change the proposed decision so that they can develop their land. Regardless of whether or not you seek public comment the department anticipates an increase in the level of media and landholder interest over the coming month and appropriate media handling material is being prepared.

• The Department is of the view that you are not required to consult with other Commonwealth Ministers. Although the proposal impacts on Commonwealth land, neither the Attorney­General or the Minister for Home Affairs makes administrative decisions with respect to urban development outside Territory land.

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**Summary of recommendations on each controlling provision:**

|  |  |  |
| --- | --- | --- |
| **Controlling Provisions for the action** | **Recommendation** | |
| **Approve** | **Refuse to Approve** |
| Listed threatened species and communities (ss 18, 18A) |  | X |
| Commonwealth land (ss 26, 27A) |  | X |



1. The rectangular boxes placed around the words *“Noted”*, *“Agreed”* and *“Signed”* in [53] above signify that each of those words was circled by the Minister on the original of the Proposed Decision Brief. Those actions taken on the part of the Minister should be viewed, in the case of *“Noted”* and *“Agreed”*, as evidence that the Minister read and considered Attachments B, C, D, E, and F and agreed with the Department’s recommendation (Attachment E).
2. Attachment A to the Proposed Decision Brief was in the following terms:

**Attachment A**

**Background information on assessment process**

**•** On 9 May 2007 the Shoalhaven City Council referred a proposal to rezone and undertake public infrastructure works at the Heritage Estates, to facilitate residential development of the 179.6 ha site at Worrowing Heights, NSW. The proposal includes the implementation of bushfire protection and hazard reduction measures. The Heritage Estates site, located south of The Wool Road near Vincentia, has an average width of between 1.2km and 1.75 kilometres. The referred proposal was made available for public comment and 32 submissions were received.

• The referral (EPBC 2007/3448) included a report entitled ‘Threatened Biodiversity Survey and Assessment Rezoning Investigations’ by Bushfire and Environmental Services (BES 2007). That report concluded that the site had high conservation values owing to its function as a wildlife corridor, high species richness and diversity, and high number of listed threatened species that were found, and that it should not be rezoned for residential development.

• The department sought independent advice from scientific experts (see paragraphs 12-14 of the recommendation report at Attachment C) at the referral stage to determine whether the proposal could be considered to be clearly unacceptable under section 74B of the Act, on the basis of the impacts identified by the BES report (2007).

• On 22 June 2007, a delegate for the Minister, Ms Vicki Middleton, decided that the proposal was a controlled action, and that it would be assessed by a public environment report (PER). On 10 June 2008 the Shoalhaven City Council publicly displayed this documentation for 30 business days until 21 July 2008. Owing to incorrect dates in the notice requesting public comments, a second notice was published from 26 July 2008 to 12 September 2008. During this time 389 public submissions were received.

• On 19 January 2009, the department received independent advice on the environmental impacts of the proposal from UNSW Global Pty Ltd and independent advice on the social and economic impacts of the proposal from Gillespie Economics Pty Ltd (Attachment D). On January the Shoalhaven City Council provided a summary of the public submissions in the finalised PER (Attachment D) to the department. The PER has been available to the public since 5 January 2009 for a 40 business day period.

• The receipt of the final PER triggered the department’s statutory timeframe to prepare the recommendation report as required under section 95C of the EPBC Act.

• On 3 February 2009 a delegate for the Secretary, Ms Vicki Middleton, accepted the recommendation report (Attachment C).

1. The recommendation made by the Department in Attachment C to the Proposed Decision Brief was in the following terms:

**Recommendation**

That the proposed Heritage Estates rezoning and associated public infrastructure works (EPBC 2007/3448) not be approved under the [EPBC Act] due to unacceptable impacts on listed threatened species and ecological communities (sections 18 and 18A) and Commonwealth land (sections 26 and 27A).

1. On p 4 of Attachment C, the Department listed the material upon which the Minister’s findings would be based. There then followed a briefing note of 25 pages in length which addressed in detail the various considerations which the Minister was obliged to take into account and otherwise advised to take into account.
2. The Minister accepted the Department’s advice and notified the Council of his intention not to approve the controlled action.
3. By letter dated 3 March 2009, the Council provided comments to the Minister in respect of his proposed decision.
4. The Council’s response included reference to a resolution of the Council passed on 24 February 2009 requesting that stronger consideration be given by the Minister to the proposal on social and economic grounds.
5. Included within its response, the Council said:

As you would be aware, the Heritage Estates land under consideration for residential development is owned by approximately 700 individual landowners. Many of these landowners are from relatively disadvantaged socio-economic backgrounds. As detailed in the PER, a decision to not approve the Heritage Estates proposal will potentially have significant adverse impacts on these people.

Council specifically engaged Judith Stubbs & Associates (JSA) to examine the potential social and financial impacts on the landowners if the matter does not proceed. It is highly likely that if this proposal is refused that the affected landowners will be socially and economically disadvantaged. Thus, I urge you to review the information from the JSA study which is in the PER and request that stronger consideration be given to the proposal on social and economic grounds.

The Recommendation Report prepared by DEWHA [referring to the Department] concludes that the proposal would have unacceptable impacts on the biodiversity of Booderee National Park, yet the report makes no mention of what would happen to the land in the event that it is refused.

If the proposal is not ultimately approved, Council strongly believes joint Government acquisition would be an appropriate solution to allow the land to be managed for conservation purposes whilst alleviating the financial impacts on the landowners. If the Commonwealth does not take immediate proactive action to resolve the land ownership matter, I believe the continued preservation of the biodiversity values could be jeopardised.

1. Enclosed with the Council’s response to the Minister was a copy of a report made by its General Manager together with a number of submissions received by Council in light of the Minister’s publication of his proposed decision. In that proposed decision, the Minister referred to s 18 and s 18A (listed threatened species and communities) and s 26 and s 27A (Commonwealth land) as the relevant controlling provisions.
2. On 13 March 2009, the Minister made the EPBC Act decision.
3. At the time when he made the EPBC Act decision, the Minister had before him a final Decision Brief (**Final Decision Brief**) which contained, in addition to the Council’s letter dated 24 February 2009 and a summary of the further comments made by the owners of allotments which had been passed on to the Minister by the Council:
4. The whole of the Proposed Decision Brief (which included the PER and the Stubbs report);
5. The *Final Recommendation Report* *for Heritage Estates Rezoning and Associated Public Works* prepared by the Department pursuant to s 100 of the EPBC Act, in relation to the significant biodiversity values of the Heritage Estates land. That Recommendation Report was in the same terms as the recommendation contained in Attachment “C” to the Proposed Decision Brief and recommended that:

The proposed Heritage Estates Rezoning and Associated Public Infrastructure Works (EPBC 2007/3448) not be approved under the [EPBC Act] due to unacceptable impact from listed threatened species and ecological communities (sections 18 and 18A) and Commonwealth Land (sections 26 and 27A).

and

1. A summary of the contents of telephone conversations between interested persons and officers of the Department which had taken place after publication of the Minister’s proposed decision in February 2009.
2. It was common ground before me that, whatever the value of the various allotments in the Heritage Estates was prior to the EPBC Act decision, once that decision was made, all of the allotments thereafter had only nominal value—somewhere between $0 and $500.
3. Included within the Final Decision Brief was the following:

* The department recommends that you do not entertain the possibility that the Commonwealth might purchase the land as a result of your decision. It is not government policy to acquire land purchased in the hope that it may be zoned for development when landowners’ speculations are not realised. Although the environmental significance of the site has been established through the EPBC assessment process, this process does not determine whether or not land is suitable for Commonwealth acquisition.

1. This observation was made immediately after the Department’s officers had specifically referred to the Council’s submissions on behalf of the landowners to the effect that a refusal of the proposal would have adverse effects upon the landowners.
2. The EPBC Act decision was communicated to the Council by letter from the Minister dated 13 March 2009. Omitting formal parts, that letter was in the following terms:

Thank you for your letter of 3 March 2009, responding to my proposed decision on the Shoalhaven City Council’s proposal to rezone and undertake public infrastructure works to facilitate residential development at the Heritage Estates, Worrowing Heights, NSW.

You will recall that on 20 February 2009, I advised the Shoalhaven City Council that I was proposing to refuse the proposal, but that I would not make a final decision until I had given the Council opportunity to comment on my proposed decision.

I have given careful consideration to the comments you have provided, as well as to recent public comments that were received by the Council and my department from members of the public. I have also spoken with the Shoalhaven City Council Mayor, Paul Green, regarding the Council’s views on this matter.

Although I appreciate the social and economic concerns that have been raised, nothing has been brought to my attention that I did not previously consider in making my proposed decision. I have therefore decided to refuse the Shoalhaven City Council’s proposal to rezone and undertake public infrastructure works at the Heritage Estates in accordance with Part 9 of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). A Copy of my decision is attached.

If you have any queries, please contact Chris Murphy in my Department on phone 6274 1821 or email chris.murphy@environment.gov.au.

1. Nothing of significance appears to have happened between 13 March 2009 and 17 May 2011 when the Council resolved to prepare and submit an application for funding under the Australian Government’s *“Caring for Our Country”* program to acquire the Heritage Estates land for addition to the National Reserve System (**NRS**), in partnership with the NSW National Parks and Wildlife Service (**NPWS**) and another body.
2. In about June 2011, the Foundation, in partnership with the Council, NPWS and Southern Rivers Catchment Management Authority submitted a Caring for Our Country application entitled *“Purchasing Land Establishing Protected Areas for the National Reserve System (NRS)”* to the Department (**the first application**). By that application, the partners sought a grant of $5,526,400 exclusive of GST.
3. In late November 2011, the then Minister was asked to agree that the Department should continue to work with proponents on various funding proposals, including the Heritage Estates proposal. The Briefing Note provided to the Minister at this time described the Heritage Estates project as *“complex”*. The Department noted that the proposal had very strong connectivity values, including by linking the majority of the Jervis Bay National Park to Booderee National Park. The Department informed the Minister that the proposal warranted further discussion about potential alternative avenues of support.
4. On 8 February 2012, the Foundation submitted an amended application for funding entitled *“Purchasing Land and Establishing Protected Areas for the National Reserve System (NRS)”* (**the final application**). In the final application, the Foundation applied for a grant of up to $5,493,400 (GST exclusive) to assist with the purchase of all of the Heritage Estates allotments (if possible) for inclusion in the NRS. In s 16(a) (Public Benefit) of the final application, the Foundation described the public benefit of its application in the following terms:

This land is a priority biodiversity asset, identified in the Catchment Action Plan. Its acquisition will go towards meeting the CAP targets for this region. The protection of the significant biodiversity is of public benefit as is improving the connectivity of Jervis Bay and Booderee National Park. This linkage will help to maintain ecological processes across the landscape and improve the resilience and capacity for biodiversity to adapt to climate change.

It will give closure to the 1,100 landholders who effectively cannot otherwise sell the land.

1. The final application was treated by the Commonwealth as an application for funding from the Natural Heritage Trust of Australia Account (**NHT Account**).
2. The following matters are relevant to the NHT Account:
3. The NHT Account was continued in existence by s 4 of the *Natural Heritage Trust of Australia Act 1997* (Cth) (**NHT Act**);
4. The NHT Account is, pursuant to s 5 of the NHT Act, a special account for the purposes of the *Financial Management and Accountability Act 1997* (Cth) (**FMA Act**); and
5. The purposes of the NHT Account, specified in s 8 of the NHT Act, include the NRS.
6. On 4 April 2012, a meeting took place to discuss the final application. The meeting was attended by Mark Taylor, Assistant Secretary of the Department, and three other Departmental employees. The meeting was also attended by Ms Garrood, Regional Manager, South Coast, NPWS, OEH and another employee of that service. The meeting was also attended by representatives of the Council and of the Foundation. Minutes of this meeting were kept. Those Minutes were in the following terms:

**DEPARTMENT OF SUSTAINABILITY, ENVIRONMENT, WATER, POPULATION AND COMMUNITIES**

**Meeting to discuss the Caring for Our Country Application for the acquisition of Heritage Estates**

**Date**: 4 April 2012

**Time**: 2:00pm–4:00pm

**Venue:** Department of Sustainability, Environment, Water, Population and Communities

Level 3, Lovett Tower, 13 Keltie Street, Woden, Canberra, ACT.

**Attendees:**

|  |  |
| --- | --- |
| Mark Taylor | Assistant Secretary, Parks and Protected Areas Programs Branch, DSEWPaC |
| Leanne Wilks | A/g Director, NRS Section, DSEWPaC |
| Warren Wicks | Director, Caring for Our Country Finance, DSEWPaC |
| James Trezise | A/g Assistant Director, NRS Section, DSEWPaC |
| Diane Garrood | Regional Manager, South Coast. NSW NPWS (Office of Env. & Heritage) |
| Miles Boak | Conservation Planning Officer, NSW NPWS (Office of Env. & Heritage) |
| Eric Hollinger | Senior Project Planner, Shoalhaven City Council |
| Peter Adams | Director Strategic Planning & Infrastructure, Shoalhaven City Council |
| Steve Corbett | Chief Executive Officer, Foundation for National Parks and Wildlife (FNPW) |
| Susanna Bradshaw | Marketing Manager, Foundation for National Parks and Wildlife (FNPW) |

**Apologies:** Lisa Nitschke, NRS Section, DSEWPaC; Warren Wicks, Director, Caring for Our Country Finance, DSEWPaC

1. *Introductions*

2. *Overview of the Heritage Estates proposal*

• The overall values of the Heritage Estates property were briefly discussed. All those present noted the important environmental values of the property as both habitat for threatened species and ecological communities as well as an important corridor between Jervis Bay National Park and Booderee National Park.

• The current ownership situation of the Heritage Estates was discussed. It was noted that the property has approximately 1050 individual land owners holding approximately 1200 lots. There are two large private land owners in the estate along with the Shoalhaven City Council, which owns the largest percentage of land in both private lots and road reserves.

3. *DSEWPaC Ministerial briefing and decision making process*

• Mark Taylor thanked all for attending at short notice and noted that this meeting was needed to constructively discuss the details of the Heritage Estates application prior to preparing a brief for the minister. A brief on the project will be prepared shortly and any decision on whether to approve the project or not was at the discretion of the minister. Mark further noted the current opportunity with funds available in 2011/12 financial year. There is less certainty Australian Government funds would be available after June 2012.

4. *Discussion of the proposed methodology for acquisition (tender process)*

• It was noted that two acquisition models are being considered for Heritage Estates: a floating price tender model as referenced in the current application; and a fixed price model. It was agreed that a fixed price model offers better certainty in budgetary terms as well as simplicity in communicating its implementation to both stakeholders and landowners.

• It was agreed that a new addendum to the current application would be submitted by the Foundation for National Parks and Wildlife outlining a fixed priced acquisition model. Mark Taylor noted that the proponents will need to commission an independent market valuation of the individual blocks on which to base the agreed fair value by block. The value would underpin the fixed price application. The Commonwealth is bound to expend public funds in accordance with the Financial Management and Accountability (FMA) Act in relation to efficient and effective use of Commonwealth resources.

• Communications and incentive approaches were discussed in some detail, including incentives for bulk acquisitions. It was noted that these measures needed to be finalised as part of the overall acquisition strategy. The Australian Government would not support a mark-up on the independent valuation as a form of incentive for land holders, noting again obligations of the FMA Act. It was agreed by all parties that in communicating with landholders and the market in general, it needed to be clear that purchases were acquisitions and not any form of compensation.

• All parties present noted that there was no current commitment or endorsement of any form of compulsory acquisition within Heritage Estates.

• The poor uptake of the acquisition process was raised as a risk affecting protection objectives. It was noted that the acquisition methodology needed to account for this risk.

• It was noted that it was imperative that all landowners clearly understand that there is no alternative land use for Heritage Estates following the 2009 EPBC refusal decision. All levels of government should communicate this message consistently and effectively to avoid confusing the market and hindering any acquisition process.

• It was agreed that all parties would brief their respective ministers/councillors regarding the project, noting that discussions amongst agencies have been productive to date, and Commonwealth funding for the project was yet to be approved.

• There was discussion around the recent Shoalhaven City Council decision to reject a bid to have the Heritage Estates area rezoned to E2 (environmental use). The question was raised whether this rezoning could be approved to further indicate the future use of the land to existing landholders. Shoalhaven City Council noted that they could investigate the potential for this option given the current understanding of the project.

• Shoalhaven City Council explained the current mechanism through which council acquired defaulting lots in Heritage Estates through unpaid rates. It was agreed that this mechanism was likely to yield fewer lots in the estate due to lower defaulting rates of existing properties. The prospect of council bequeathing its land in the estate (excluding road reserves) to NPWS was raised as an additional strategy to signal the future use of the land to the market. There was no resolution around this point.

5. Timing for potential acquisitions and payment methods

• Discussion around timeframes centred around how the proposed acquisition strategy would work, however specific details associated with the timeframe would be contingent on the completion of the strategy itself.

• A hypothetical completion date, if the project was approved by the Commonwealth, was discussed as being the end of 2013. This was thought to be feasible by all parties noting the absence of a detailed acquisition strategy.

6. Discussion of proposed management arrangements for Heritage Estates

• It was agreed that the ultimate aim of the project is for all of Heritage Estates to become part of Jervis Bay National Park managed under the existing Management Plan and funded through NSW recurrent state budget. A strategy and trigger point for the inclusion of lots in the park is yet to be established and also needed to be articulated as part of the acquisition strategy.

• The inclusion of road reserves in the National Park also needed to be considered as a component of the acquisition strategy, in light of potentially triggering an acquisition overlay. Similarly, any issues around title claims regarding the Crown land on the western boundary of the estate will need to be resolved as a result of the project.

7. Other business

• None

**Summary of Actions Arising**

|  |
| --- |
| **Action:** Foundation for National Parks and Wildlife to submit to DSEWPaC an addendum to the current application outlining the proposed fixed price acquisition strategy. This will include:  - The proposed fixed priced method of acquisition, including a sound basis for and independent market valuation of individual properties and any incentive mechanisms;  - A broad communications strategy, noting that a more detailed strategy will need to be developed in the future;  - Proposed timeframes for the implementation of the strategy, including timeframes for communication, acquisition and administrative tasks;  - Point(s) at which acquired parts of Heritage Estates will be ceded to NPWS for inclusion in the Jervis Bay National Park;  - Key risks and mitigations associated with the acquisition process; and  - Measures of success for the project and strategies to deal with varying levels of landholder up-take. |
| **Action:** All agencies present to brief respective Ministers/Councillors regarding the Heritage Estates proposal. |
| **Action:** Shoalhaven City Council to investigate potential rezoning of Heritage Estates to E2 (environmental use) as a stepping stone in the acquisition process. |

1. On 17 April 2012, Mr Darren Austin, Registered Valuer, of Walsh and Monaghan Pty Ltd, provided valuation advice to the Foundation. In Mr Austin’s opinion, the allotments in the Heritage Estates had a nominal value only. His reasoning was that none of the allotments permitted the erection of a residential dwelling and the EPBC Act decision had effectively put a stop to any change in that position for the foreseeable future. Mr Austin suggested that the allotments were worth between $500 and $1,000 per block. Mr Austin qualified his advice by reference to earlier steps involving the Minister. He felt that, given the prevailing attitude of the landowners and the purchase prices for the nearby Pacific City Estate, it would be reasonable to assume that an average amount in the order of $5,000 per allotment would be a fair purchase price for each of the lots in the Heritage Estates. He concluded that an amount of $6,000,000 would be required by the Foundation in order to complete the acquisition of all lots.
2. On 18 May 2012, the then Minister approved, under reg 9 of the FMA Act, the transfer of up to $6,042,740 (GST inclusive) to the State of New South Wales in order to assist with the acquisition of land within the Heritage Estates for inclusion in the NRS.
3. In the decision Briefing Note dated 3 May 2012 referable to that decision, departmental officers noted that the Heritage Estates land would never be zoned for residential purposes and that the value of any residual properties would continue to decrease. The authors also noted that an *“acquisition overlay”* did not form any part of the project, as the NRS grants program only supported properties that are offered for voluntary sale.
4. On 12 June 2012, the Commonwealth and the State of New South Wales entered into the Funding Agreement which was entitled *“Funding Agreement in Relation to the Acquisition of Heritage Estates”*, being an agreement for the provision of financial assistance to the State of New South Wales under s 19 of the NHT Act for the purpose of the NRS.
5. I shall refer in more detail to the terms of the Funding Agreement below.
6. On 19 June 2012, a meeting took place involving departmental officers, NPWS representatives and Ms Bradshaw of the Foundation. That meeting was styled *“the First Steering Committee Meeting”*.
7. It was noted in the Minutes of the first steering committee meeting that the first tranche of funds had already been transferred to the State by the Commonwealth. The Minutes record that the expectation of those present was that the second part of the funding would be transferred before 30 June 2012. As required by Annexure “A” to the Funding Agreement, Ms Garrood was appointed as Steering Committee Chair and Ms Moore, a State public servant, was appointed as Secretary. Ms Bradshaw was to represent the Foundation. Ms Wilks and one other to be advised were to represent the Commonwealth. A Project Plan was expected to be completed within eight weeks. Under the heading *“6. Other Business”*, the Minutes record the following:

The importance of getting Shoalhaven City Council involved as early as possible as a key partner to the project was discussed along with the NPWS Minister’s instructions in approving the project (viz that OEH is to keep the Local Member informed as the project progresses, take steps to ensure purchases are voluntary and individual rather than collective, and to have the land zoned E2).

1. On 25 June 2012, OEH, for and on behalf of the State of New South Wales, entered into a Deed of Agreement with the Foundation. Under that Deed, the State of New South Wales agreed to make a grant to the Foundation of an amount up to $6,042,740 payable as a lump sum in order to assist with the acquisition of land in the Heritage Estates. The Foundation was required to use the grant solely for the purpose of carrying out the Project as defined in the Deed. The Project, as so defined, was the acquisition of land in the Heritage Estates in accordance with the Project Plan, a copy of which was referred to as Attachment “B” to the Deed. The Plan was not yet formed as at the date this Deed was executed but was to be developed and finalised by the Steering Committee in accordance with the guidelines set out in Attachment “C” to the Deed.
2. The Deed between OEH and the Foundation set out the detailed plan for the acquisition of the lots in the Heritage Estates by the Foundation.
3. In August, September and October 2012, the Steering Committee met on a number of occasions in order to finalise its acquisition plan. In this period, various options were considered.
4. It appears that, prior to the Commonwealth binding itself to fund the voluntary acquisitions, the Department sought a commitment from the Council that the Council would rezone the land to E2–Environmental Conservation. As a result, on 15 May 2012, the Council resolved that:

If the combined funding request from Council and the National Parks Foundation is successful, Council, at the appropriate point, undertakes to change the zoning of Heritage Estates to E2.

1. In its Environment Plan Information sheet in relation to the proposed rezoning to E2 which was published in 2013, the Council also said that:

The Heritage Estates land purchase HELP (HELP) project is a collaboration of all three levels of government and the community sector (ie the Foundation for National Parks and Wildlife). As reported to Council on 18 February 2013, the other levels of government are committed to the HELP project. It is now appropriate to rezone the land to E2 and on 26 February 2013, Council resolved to advertise its intent to rezone the Heritage Estates to E2–Environmental Conservation.

1. By proforma letters dated 15 October 2012, landowners were advised by the Council that the Commonwealth had provided funding in an amount of approximately $5,500,000. The landowners were advised that the Foundation would be managing what was described as the *“voluntary Heritage Estates Land Purchase project”*, under which each landholder would shortly be offered a fixed price for his or her land. Land sold under this arrangement would be added to the Jervis Bay National Park. Landholders were also advised at this time that the Commonwealth funding was being provided upon condition that:
2. At an appropriate time, the Council would donate its land within the Heritage Estates to the National Park and would rezone the land that comprised the Heritage Estates to E2–Environmental Conservation;
3. The Foundation would contribute $60,000 and manage what was described in the correspondence as *“the voluntary land purchase process”*;
4. OEH would manage the land ultimately acquired for conservation in perpetuity as part of the Jervis Bay National Park; and
5. The funding would expire on 30 June 2013.
6. Consistent with media releases which had been sent shortly before the 15 October 2012 proforma letters, landowners were encouraged to take advantage of the opportunity under the voluntary acquisition scheme. They were told (in no uncertain terms) that there were *“no viable alternative options to resolve the land’s tenure”*.
7. A further proforma letter was sent to landowners on 31 October 2012. A complete copy of that letter is Attachment A to these Reasons for Judgment.
8. At [13]–[14] of his Reasons for Judgment in *Esposito v Commonwealth* [2013] FCA 546 (*Esposito No 1*), Griffiths J said:

13 The Foundation distributed a pro forma letter to affected landholders on 31 October 2012. Recipients were invited to participate in the Heritage Estates project by selling their land. They were advised that the Foundation was managing the project “in partnership with all levels of government” and that the Australian government was providing the majority of the funds. The intention to add any land purchased through the project to the Jervis Bay National Park was confirmed and landholders were advised that there was an “early bird” price of $5,500 per lot for the first 800 lots who forwarded a written offer to sell form by 31 March 2013. After the first 800 lots had been purchased (or after 5:00 pm on 31 March 2013), whichever occurred first), the price would reduce to $5,000 per lot. Acceptance of all offers to sell lots at Heritage Estates would close at 5:00 pm on 3 June 2013. Landholders were advised that the purchase price offer was calculated by reference to “the actual market value of the lots, which was determined using the NSW Valuer General’s land valuations”, as well as independent valuation advice which took into account nearby sales in recent years.

14 The Foundation advised landholders that their “participation in the project is totally voluntary and you have the right to change your mind about the sale of your lot right up until settlement of the sale has occurred”. Landholders were encouraged to consider the offer as it was described as a “one-off opportunity which is only available within the dates specified”.

1. I agree with his Honour’s summary of the important features of the 31 October 2012 proforma letters. That summary is sufficient for present purposes although, as I have said, a complete copy of the letter is attached to these Reasons for Judgment and marked with the letter “A”.
2. On 1 March 2013, the Foundation forwarded to those landowners who had not yet taken up its offer a further proforma letter. Omitting formal parts, that letter was in the following terms:

Dear Landowner,

**Voluntary Purchase Offer for Heritage Estates Lots**

The Foundation for National Parks & Wildlife (the Foundation) is a non-government organisation managing a project to voluntarily purchase lots within Heritage Estates. Further to our letter of 31st October 2012, we are providing an update on the project with important dates to note, should you wish to sell your land. Comment on feedback we've received from some landowners is also provided.

The offer to purchase your land is only available for a short time. **Heritage Estates will not be zoned for development and there are no plans to repeat this offer in the future**. The process to declare the Crown Reserve at Heritage Estates as part of Jervis Bay National Park has also commenced.



**Offer Price, Deadlines & Conditions**

**The Foundation would like to remind you that the time limit to qualify for the 'early-bird' bonus payment is fast approaching.**

* We are offering **$5,500** per lot for the first 800 lots. To sell at this price, your lot must be among the first 800 lots offered for sale. You must return your *Offer to Sell* form by **31 March 2013**.
* After the first 800 lots have been purchased, or after 5 pm on 31 March 2013 (whichever occurs first), the price will reduce to **$5,000** per lot.
* All offers to sell Heritage Estates lots close at 5 pm, **3 June 2013**.

**How to Participate**

To take advantage of this opportunity and sell your lot, please:

* Complete the *Offer to Sell* form which is attached; and
* Send it to the Foundation at the address given on the form (either by mail, fax or email).

Additional *Offer to Sell* forms may be downloaded from our website at www.fnpw.org.au/heritage-estates. Completing and sending the *Offer to Sell* form starts the purchase process. However, it does not place you or the Foundation under any obligation to sell/buy.

Once we receive your form, we will send you a confirmation letter. This letter will advise whether you have qualified for the higher ‘early bird’ sale price and will contain a Transfer Document for you to sign, and instructions about how to finalise the sale and receive the sale price.

It is possible that the available funding will be exhausted before the 3 June 2013 if a sufficient number of landowners take up the Offer. If this happens, we reserve the right to reject *Offer to Sell* forms notwithstanding that they may be received by us prior to the 3 June 2013.

**Due to the limited nature of this offer, we encourage you to consider selling your lot or lots. No offer will be available after the dates specified.**

**Project Update**

Many landowners have been quick to take advantage of the opportunity to sell their lots whilst funding is available. As at the date of this letter, over 390 Heritage Estates lots, including the lots to be donated by the Shoalhaven City Council, will be added to Jervis Bay National Park. This represents a participation rate of over 32% of the total lots in Heritage Estates in less than four months.

Please see the enclosed *Uptake Map* to view how the project has developed so far and what a huge effort has been made which will also benefit the environment.

Landholders who have sold their land have reported the following benefits:

* **Quick sale:** ability to find a willing buyer to sell their land to quickly at a time when local Real Estate Agents won't even list their land for sale.
* **Simple process:** no complex legal processes or paperwork and no need to incur expensive conveyancing costs.
* **Quick payment:** by direct deposit into bank account, or bank cheque. No need to take time off work or pay a conveyancing agent to do the settlement in person.
* **Potential tax concessions:** through claiming a capital loss on tax return- please note that you would need to obtain your own financial advice to discover if this would be applicable to you. The Foundation is unable to give any financial advice.
* **Experiencing closure:** knowing ongoing debt and stress will not be passed on to children or remain unresolved into the future.
* **Pride in doing something positive for the environment:** as the lots purchased will become part of Jervis Bay National Park. As part of the national park, they will be managed by the NSW Government for the conservation of important habitats and endangered and vulnerable native plants and animals.

Please read the additional information enclosed. If you are unsure about anything in this information package, or have any questions, please contact: Rubens Delfino, Project Manager on 1300 780 143 during normal business hours or email rdelfino@fnpw.org.au.

The project partners also encourage all landowners to obtain their own independent legal and/or financial advice if required, as the Foundation is unable to offer this advice to you.

[Original emphasis]

1. The letter enclosed a further copy of the Offer to Sell document.
2. A further proforma letter was sent to landowners on 14 May 2013. In this letter, the Foundation advised that more than 500 lots had been *“signed up”* in the Project, which was said to be at least 40% of the lots and over 60% of the total land area within the Heritage Estates. The letter also confirmed that steps were being taken to rezone the Heritage Estates land to E2–Environmental Conservation, which would prevent development altogether. In this letter, the author stated that *“all three tiers of government supported”* the prohibition on further development in the Heritage Estates. The recipients of this proforma letter were reminded that they had until 5.00 pm on 3 June 2013 to offer their lots for sale at $5,000 per lot.
3. On 31 May 2013, the Project was extended up to and including 30 December 2013. Landowners were advised of this extension by letter dated 4 July 2013.
4. On 6 May 2014, the applicants sought to reopen their case and adduce further evidence. The substance of that evidence was that the Council was now moving to implement its E2 zoning in respect of the land in the Heritage Estates. I acceded to the applicants’ application and admitted the further evidence which they sought to tender. That evidence established that, as at May 2014, the Council was moving to implement its proposed E2 zoning.

# The Funding Agreement

1. The recitals in the Funding Agreement are in the following terms:

A. The Department is undertaking the Caring for our Country Program (**Program**) to achieve a real and beneficial difference to Australia’s environment.

B. The Program’s Objective is to achieve an environment that is healthy, better protected, well-managed, and resilient and provides essential ecosystem services in a changing climate.

C. The Recipient has been approved to receive funding from the Department to carry out the Project on the terms and conditions set out in this Agreement. In particular, the Department is providing the Funds to the Recipient to assist with the acquisition of Heritage Estates for inclusion in the National Reserve System.

D. In consideration of the Department providing the Funds to the Recipient, the Recipient has agreed to perform the Project in accordance with the terms and conditions of this Agreement.

E. The Department acknowledges that the Recipient will be engaging the Foundation for National Parks and Wildlife (**the Foundation**) to perform the Project and will subcontract the performance of its obligations under this Agreement to the Foundation.

1. Under cl 4.1 of the Funding Agreement, OEH is required to perform the Project (as defined in that Agreement). The description of the Project for the purposes of that Agreement is found in Sch 2 to the Agreement. In cl 1.2(b) of Sch 2, the Project is described as providing funding to the OEH to support the Foundation in acquiring land in Heritage Estates through a fixed price voluntary tender process. Land is to be acquired for inclusion in the Jervis Bay National Park. OEH is also required to secure all properties owned by the Council within the Heritage Estates for inclusion within the Jervis Bay National Park.
2. Elsewhere in Sch 2, the Project activities are described as a voluntary fixed-price tender process. The Schedule also includes a clause specifying that the Foundation will contribute $60,000 (exclusive of GST) and that it would provide periodical reports.
3. Schedule 3 to the Funding Agreement is a milestone schedule setting out a timetable for various milestones under the Funding Agreement.
4. Annexure A to the Funding Agreement contains a number of provisions regulating the business of the Steering Committee.
5. Clause 4.2 specifies that OEH must submit a draft Project Plan for the approval of the Department. That Plan must be developed in consultation with the Steering Committee. The draft Project Plan must meet the requirements of subcll (b)–(f) of cl 4.2. Clause 4.3 required that the Project be performed within the Project budget (the maximum amount of funds payable by the Department under the Agreement was to be $5,493,400 (exclusive of GST) or the lesser amount required to complete the Project in accordance with the Funding Agreement).
6. The Funding Agreement contemplated that those who took up the Foundation’s offer to sell their lots would transfer the fee simple in those lots to the Minister administering the *National Parks and Wildlife Act 1974* (NSW). Clause 6.2(c) of the Funding Agreement provided that:

Funds provided under this Agreement:

…

(c) Must not be used for the purpose of acquiring land under the Land Acquisition (Just Terms Compensation) Act 1991 (NSW) except where the acquisition is voluntary and acquisition process under that Act is only used to discharge any competing interests on the title to the land.

1. Clause 6.5(d)(ii) provided that the OEH must:

…

(d) Not provide the Funds to the Foundation until:

…

(ii) The Shoalhaven City Council has:

(A) Agreed in writing to rezone Heritage Estates as an environmental protection zone 2 (**E2**) under the Shoalhaven Local Environmental Plan (LEP); and

(B) Agreed in writing to transfer the Council properties and Council roads to the [OEH]

# The valuation Evidence

1. The applicants called as a witness Mr KM Rayner, a Certified Practising Valuer, who provided valuations of the applicants’ land. The respondents relied upon the expert report of Mr Austin who is also a Certified Practising Valuer. The two valuers conferred prior to the hearing and prepared a Joint Report dated 11 October 2013.
2. For present purposes, it is not necessary to discuss the evidence given by the valuers in any detail.
3. The Joint Report recorded that, after the EPBC Act decision was made, the market values of the lots in the Heritage Estates were nominal. Mr Rayner assessed them at figures ranging between $100 and $600 per lot while Mr Austin assessed each allotment as having a value of $500. The valuers also agreed that the possibility that the land would be rezoned so as to permit the construction of dwelling houses thereon ought not to be taken into account in valuing the land. Rezoning was nothing more than a possibility and ought not to be regarded as fairly within the basket of attributes both real and potential enjoyed by the land.

# Consideration

## General

1. Section 51(xxxi) of *The* *Constitution* provides:

**51 Legislative powers of the Parliament**

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

…

(xxxi) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;

1. Chapter 2 of the EPBC Act provides a basis for the Minister to decide whether an action that has, will have or is likely to have a significant impact on certain aspects of the environment should proceed. Section 18 provides that a person must not take an action that has an impact on listed threatened species. Section 18A provides that persons who do so commit an offence.
2. Section 26 of the EPBC Act requires that actions taken on Commonwealth land or which affect Commonwealth land and which will have or are likely to have a significant impact on the environment must not be taken without the approval of the Minister. Section 27A provides that a person who takes such actions without approval commits an offence.
3. Section 68 of the EPBC Act provides that actions which might be regarded as *“controlled actions”* should be referred to the Minister for his consideration.
4. Other sections in the EPBC Act regulate the process by which controlled actions are to be assessed.
5. Section 130(1) of the EPBC Act requires the Minister to decide whether or not to approve, for the purposes of each controlling provision for a controlled action, the taking of the action. Other subsections in s 130 regulate the timing and other procedural matters associated with such an approval.
6. Here, on 9 May 2007, the Council referred its proposal to rezone the land in the Heritage Estates to the Minister thus engaging the relevant provisions of the EPBC Act. After that referral was made, the Minister was required to decide whether or not the proposed rezoning was a controlled action and, if it was, whether it should be approved.

## Issues 1 and 2 – The Constitutional Questions

1. Section 51(xxxi) is a Constitutional guarantee which limits the power of the Commonwealth. In order to understand how that guarantee might have relevance in the present case, it is necessary to identify with precision the property which the applicants are said to have lost and who might be said to have acquired it.
2. In the ASC, the applicants allege that the property acquired is *“… all value, enjoyment and reasonable use”* of the various allotments in the Heritage Estates. In this way, the applicants seek to argue their Constitutional case even in respect of allotments which have not actually been acquired by the State. The applicants also rely upon the valuation evidence which unequivocally supported the proposition that, whatever value the allotments in the Heritage Estates had prior to the EPBC Act decision, after that decision was made those lots had only nominal value.
3. The applicants submitted that the EPBC Act decision effectively conferred control over the Heritage Estates upon the Commonwealth. They then invoked various statements made by the High Court in *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, *ICM Agriculture v Commonwealth* (2009) 240 CLR 140 and *Spencer v Commonwealth* (2010) 241 CLR 118.
4. The applicants submitted that the subject matter of an alleged acquisition for the purposes of s 51(xxxi) of *The Constitution* may be any financial or measurable advantage and is not confined to a benefit of a real and proprietary nature. They also submitted that the benefit does not have to be obtained or acquired by the Commonwealth itself. In addition, they contended that there was no requirement that there be an asportation of property in any physical sense. The benefit or advantage that is relevant, according to the applicants, includes every right of property whether in personalty or realty, corporeal or incorporeal and anomalous or innominate rights of property and every economic or financial advantage that may accrue to the Commonwealth whether in gross or as benefitting it as a landowner itself.
5. Here, so it was submitted by the applicants, the Commonwealth benefitted from the EPBC Act decision because its land and the habitat corridor relating to it was thereby protected. The Commonwealth was likely to receive annual income from tourism as a result. The applicants also alleged that the State obtained the land itself and other financial advantages (such as biobanking credits). It was also submitted that the Commonwealth land and the NRS benefitted by what was, in character, the imposition of a negative easement or restrictive covenant on the land.
6. Before addressing the relevant principles, it is necessary to say a little more about the facts.
7. One way in which the applicants put their Constitutional case was that, from about September 2009, the respondents entered into an informal arrangement the essential features of which were that the Commonwealth, acting in concert with the other respondents, conceived and implemented a device for circumventing the Constitutional guarantee by making the EPBC Act decision, forcing the Council to proceed with the E2 zoning and providing funds in the manner which it did to acquire the lots in the Heritage Estates. The essence of this allegation was that, from about September 2009, there was a plan in place to which each of the respondents had decided to adhere and that all steps subsequently taken were taken in furtherance of and execution of that plan. Acceptance of the applicants’ case in this regard requires the Court to conclude that all of the relevant steps taken after September 2009 were linked.
8. At [42]–[97] above, I have set out the actions of the respondents which were undertaken from about mid 2007 which I consider are relevant to the claims made by the applicants in this proceeding.
9. There is no evidence to support the notion that, in September 2009 or, indeed, at some later point in time, the respondents devised the plan to which I have referred and thereafter executed that plan as a device to circumvent the Constitutional guarantee.
10. The applicants were unable to point to any occasion when such an arrangement was made. Furthermore, the applicants were unable to identify when the alleged arrangement was made.
11. In addition, when appropriate consideration is given to the evidence, it is quite clear that the actions taken by the respondents from time to time in and after 2009 were the result of a developing situation relevantly instigated by the Council’s referral to the Minister of its proposal to rezone the land in the Heritage Estates, a referral which it was bound to make. As at May 2007, there had been a long history of attempts on the part of the landowners in the Heritage Estates to persuade the State and the Council to rezone their land.
12. The EPBC Act decision was made after due consultation and compliance with the relevant statutory provisions. The actions taken subsequently to assist the landowners to unlock some value for their land were taken as a result of the Council’s *Caring for Our Country* application which, on the evidence, was not made for any reason other than in order to assist the landowners. The mechanisms chosen for making available Commonwealth funds were legitimate and orthodox and undertaken in compliance with the Commonwealth’s obligations to disburse Commonwealth funds in accordance with the relevant governing statutory provisions.
13. It is no doubt true that the Commonwealth took precautions to ensure that it did not breach the Constitutional guarantee. However, this is hardly a matter for which it can be legitimately criticised.
14. To my mind, the evidence did not support the applicants’ contention that an informal arrangement was made by the respondents designed to deprive the applicants of all value in their land and to avoid the Constitutional guarantee. I reject their contention that such an arrangement was made.
15. I now turn to consider whether, as a matter of principle, the making of the EPBC Act decision constituted an acquisition other than on just terms in contravention of the Constitutional guarantee.
16. In *JT International SA v Commonwealth* (2012) 250 CLR 1, the High Court confirmed that the acquisition of which s 51(xxxi) speaks must be of an interest or benefit of a proprietary nature (at 33–34 [42] per French CJ; at 62 [147] per Gummow J; at 67–68 [169] per Hayne and Bell JJ; at 99 [277] per Crennan J; and at 128 [357] per Kiefel J).
17. As the Chief Justice said, *“acquisition”* involves receipt of something seen from the perspective of the acquirer. Acquisition is therefore not made out by mere extinguishment of rights. That which must be acquired by the Commonwealth must be a benefit of a proprietary character by reason of the operation of Commonwealth legislation.
18. These essential propositions are supported by the many High Court authorities relied upon by the Commonwealth and the Minister (see, for example, *Commonwealth of Australia v Tasmania* (1983) 158 CLR 1 at 145–146 per Mason J; at 181–182 per Murphy J; and at 247–248 per Brennan J). They were not really challenged by the applicants. Rather, they sought to pick up certain statements in earlier High Court cases and apply them to the facts of this case in ways that were not apt.
19. As Griffiths J said in *Esposito No 1* (at [32]):

An acquisition of property was not made out by a mere restriction on or extinguishment of a right of property, nor by an adverse impact on the “general economic and commercial position occupied by traders”.

1. Here, the applicants point to the EPBC Act decision and to its economic impact insofar as the value of their lots is concerned. They claim that the interest which has been acquired in contravention of the Constitutional guarantee is the amount by which the value of their land was reduced by reason of the EPBC Act decision. They then point to a catalogue of so-called benefits or advantages derived by the respondents as a result of the EPBC Act decision and argue that there has been an acquisition of the relevant kind.
2. The applicants’ arguments are misconceived.
3. Immediately before the EPBC Act decision, the land in the Heritage Estates was unable to be developed by the construction of dwelling houses on that land. Indeed, the prohibition on the construction of dwelling houses on that land had been in place since 1964. All of the applicants should be taken as having understood when they acquired their lots that, as matters then stood, they could not build a house on the land which they had acquired. While it is true that, by 2007, the Council had taken steps to rezone the land in order to permit the construction of dwelling houses on that land, its rezoning proposal had to pass through a number of processes including consideration by the Minister under the EPBC Act. The EPBC Act decision did not alter the zoning of the land in the Heritage Estates. The effect of that decision was to destroy any hope or expectation which the landowners might have had as at mid 2007 and afterwards that their land might be rezoned. The decision did not impose new constraints or restrictions upon the use of the land. All that it did was to remove from consideration, at least into the foreseeable future, the potential for the land to be rezoned so as to permit the construction of dwelling houses thereon.
4. The EPBC Act decision did not result in an acquisition of an interest or a benefit of a proprietary nature by anyone. It did not effect an acquisition in contravention of the Constitutional guarantee. There was no relevant diminution in or extinguishment of any property and the so-called potential for the land to be developed was not an interest capable of acquisition in the manner relied upon by the applicants. This is not a case where one of the respondents has acquired the substance of a proprietary interest by depriving the applicants of the reality of their proprietorship of the land (as to which, see *Bank of New South Wales v Commonwealth* at 349 per Dixon J and *Newcrest Mining (WA) Ltd v Commonwealth* at 633–634 per Gummow J).
5. There was no impairment or contravention of the Constitutional guarantee provided to the applicants by s 51(xxxi) of *The Constitution.*

## Issue 3 – Just Terms Offered in any Event

1. *“Just terms”* connotes fairness rather than compensation. Here, according to Mr Austin, the value of the applicants’ land as at 12 March 2009 (immediately before the EPBC Act decision was made) ranged from $2,500 to $5,000. Had the Commonwealth contravened or impaired the Constitutional guarantee, it seems to me that the price offered to the applicants by the Foundation constituted *“just terms”* within the meaning of s 51(xxxi) of *The Constitution*.

## Issues 4 and 5 – Judicial Review

1. As submitted by the Commonwealth and the Minister, the matters raised by the applicants in pars 6, 6A and 6B of the ASC seem to come down to five matters, namely:
2. An allegation that the EPBC Act decision involved an acquisition of property engaging s 51(xxxi) of *The Constitution;*
3. A collateral attack on the Minister’s characterisation of the activities to be undertaken by the Council as described in its referral as *“controlled action”*;
4. Allegations that the provision of funding by the Commonwealth under the Funding Agreement was made in breach of relevant Commonwealth legislation;
5. An allegation that, in making the EPBC Act decision, the Minister failed to have regard to the Stubbs report and the views of the landowners and thus failed to take account of relevant considerations; and
6. An allegation that the Minister failed to have regard to a report prepared by Ms Gabrielle Kibbleof the NSW Department of Planning and the COI report of Mr Cleland.
7. Each of the above matters is said to justify the making of a declaration that the EPBC Act decision is invalid.
8. As to [141(a)], I have already concluded that the EPBC Act decision did not contravene the Constitutional guarantee in s 51(xxxi) of *The Constitution.*
9. As to [141(b)], the *“controlled action”* involved more than a rezoning. Public infrastructure works were to be constructed on the land. The actions proposed by the Council were correctly characterised as controlled action.
10. As to [141(c)], no serious attempt was made by the applicants to justify this allegation. There was no evidence or argument which supported it.
11. As to [141(d)], the Minister was not required to have regard to particular pieces of evidence as a result of being obliged to consider economic and social matters pursuant to s 136(1)(b) of the EPBC Act. In any event, the evidence establishes beyond any argument that the Minister did consider the Stubbs report and the views of landowners which had been clearly and repeatedly put before him prior to the making of the EPBC Act decision.
12. As to [141(e)], the Minister had before him and considered the COI report of Mr Cleland, although he was not obliged to do so. Although it appears that he did not consider the 1994 report of Ms Kibble, he was not obliged to do so.
13. The respondents also submitted that the Court should refuse relief by way of judicial review, were it otherwise minded to grant such relief, by reason of the applicants’ delay. This submission has considerable force and I would have accepted it had I otherwise been minded to grant any relief.

## Unjust Enrichment

1. Only one of the applicants (Mr Talarico) has accepted the Foundation’s offer to purchase land in the Heritage Estates.
2. In the ASC (par 4), it is suggested that the respondents have expropriated the land of those landowners who have transferred their property to the State without full compensation. In particular, the State is said to have acquired the land at an undervalue and without compensating any of the owners for the cost of maintaining their lots.
3. This claim is wholly unreal.
4. First, it was common ground between the valuers and amongst the parties that, after the EPBC Act decision, the lots in the Heritage Estates had only a nominal value. For this reason, transferring those lots three years later (in 2012) for $5,000 each did not constitute a sale or transfer at an undervalue.
5. Second, it is impossible to discern any real benefit obtained by any of the respondents other than the State. It is the State which has acquired those lots which have actually been transferred.
6. Third, the so-called benefits derived by the respondents have not resulted from the kinds of vitiating factors which the High Court has said must exist before the remedy can be invoked (see, for example, *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at 515–517 [29]–[30] per French CJ, Crennan and Kiefel JJ).
7. This claim must also be rejected.

# Conclusions

1. The causes of action relied upon by the applicants have not been made out. Their Application must be dismissed with costs. There will be orders accordingly.

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| I certify that the preceding one hundred and fifty-six (156) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Foster. |

Associate:

Dated: 24 December 2014

