Supreme Court
New South Wales
Court of Appeal

Case Title:	GrainCorp Operations Ltd v Liverpool Plains Shire Council
Medium Neutral Citation:	[2013] NSWCA 171
Hearing Date(s):	1 May 2013
Decision Date:	14 June 2013
Jurisdiction:	Court of Appeal
Before:	Beazley P at [1] Ward JA at [2] Sackville AJA at [126]
Decision:	1. Appeal allowed. 2. Set aside the decision and orders of Lloyd AJ made on 28 July 2012 and, in lieu, declare that the development consent granted by the Northern Joint Regional Planning Panel for the Liverpool Plains Shire Council to The MAC Services Group Ltd on 17 November 2011 for a Workforce Accommodation Facility is invalid and of no effect. 3. Order The Mac Services Group Ltd to pay the costs of the appellant in this Court and in the Court below. *[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]*
Catchwords:	ENVIRONMENT AND PLANNING – characterisation of development in

development application – construction of local environment plan – whether fly-in-fly-out temporary accommodation for migratory workers is classifiable as "residential buildings (other than dwelling-houses and units for aged persons)"

Legislation Cited:

Environmental Planning and Assessment Act 1979
Environmental Planning and Assessment Model Provisions 1980
Evidence Act 1995
Interpretation Act 1987
Land and Environment Court Act 1979
Parry Local Environmental Plan 1987
State Regional Planning Policy (Major Development) 2005

Cases Cited:

Abret v Wingecarribee Shire Council [2011] NSWCA 107; (2011) 180 LGERA 343
Attorney General v Coote [1817] 146 ER 433
Berry v Wollongong Council [2008] NSWLEC 210
CB Investments Pty Ltd v Colo Shire Council (1980) 41 LGRA 270
Chamwell Pty Ltd v Strathfield Municipal Council [2007] NSWLEC 114; (2007) 151 LGERA 400
Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation (1981) 147 CLR 297
Cranbrook School v Woollahra Municipal Council [2006] NSWCA 155; (2006) 66 NSWLR 379
Derring Lane Pty Ltd v Port Phillip City Council (No 2) [1999] VSC 269 108 LGERA 129
Egan v Hawkesbury City Council (1993) 79 LGERA 321
Hafta v Director-General of Social Security (1985) 6 FCR 444 at 449
House of Peace Pty Ltd Bankstown City Council [2000] NSWCA 44; (2000) 48 NSWLR 498
Minister v SZJGV [2009] HCA 40, 238 CLR 642
Newcastle City Council v Royal Newcastle Hospital (1957) 96 CLR 493
North Sydney Municipal Council v Sydney

	Serviced Apartments Pty Ltd (1990) 21 NSWLR 532 Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355 Residents Against Improper Development Inc v Chase Property Investments Pty Ltd [2006] NSWCA 323; (2006) 149 LGERA 360 Royal Agricultural Society NSW v Sydney City Council (1987) 61 LGRA 305 Shire of Perth v O'Keefe (1964) 110 CLR 529 State Chamber of Commerce and Industry v Commonwealth [1987] HCA 38; (1987) 163 CLR 329 Stoke on Trent Borough Council v Cheshire County Council [1915] 3 KB 699 Warehouse Group (Australia) Pty Ltd v Woolworths Ltd [2005] NSWCA 269; 141 LGERA 376 Woolworths Ltd v Pallas Newco Pty Limited [2004] NSWCA 422; (2004) 61 NSWLR 707
Texts Cited:	Longer Oxford Dictionary (2nd Edition, including the Oxford English Dictionary Additions Series (Volumes 1–3)) Macquarie Dictionary (Online Edition) The Macquarie Dictionary (Revised 3rd Edition) Oxford Dictionary of English (3rd Edition)
Category:	Principal judgment
Parties:	GrainCorp Operations Ltd (Appellant) Liverpool Plains Shire Council (First Respondent)(Submitting Appearance) The Mac Services Group (Second Respondent) Northern Joint Regional Planning Panel (Third Respondent)(Submitting Appearance)
Representation	
	Counsel: Ms S Duggan SC with M Seymour (Appellant) A Galasso SC with Ms A Hemmings (Second Respondent)
	Solicitors: Mills Oakley Lawyers (Appellant)

	Everingham Solomons Solicitors (First Respondent) Corrs Chambers Westgarth (Second Respondent) Department of Planning & Infrastructure (Third Respondent)
File number(s):	12/228147
Decision Under Appeal	
- Court / Tribunal:	Land and Environment Court of New South Wales
- Before:	Lloyd AJ
- Date of Decision:	28 June 2012
- Citation:	GrainCorp Operations Limited v Liverpool Plains Shire Council [2012] NSWLEC 143
- Court File Number(s)	11/41214

JUDGMENT

1 **BEAZLEY P**: I agree with Ward JA.

2 **WARD JA**: This is an appeal brought by GrainCorp Operations Pty Ltd ("GrainCorp") under s 58 of the *Land and Environment Court Act 1979* from the dismissal by the Land and Environment Court of an application by GrainCorp, under s 123 of the *Environmental Planning and Assessment Act* 1979, for a declaration as to the invalidity of a development consent granted to The Mac Services Group (MAC). The development consent was given on 17 November 2011 by the Northern Joint Regional Planning Panel, on behalf of the Liverpool Plains Shire Council. It permits the construction and operation of what was described in the development application as a "workforce accommodation facility" on land at Werris Creek.

3 The land in question is zoned 1(b) General Agriculture under the Parry Local Environmental Plan 1987 (PLEP). GrainCorp contends that the proposed development is for a purpose prohibited in that zone, namely for the purpose of "*residential buildings (other than dwelling-houses and units for aged persons)*" under Item 5 of the land use table contained in the PLEP, and that the consent was therefore beyond the power of the Council to approve.

4 GrainCorp seeks orders from this Court declaring the consent invalid. Both the Council and the Panel have entered submitting appearances in these proceedings.

5 The substantive issue on appeal is a narrow one of characterisation of the purpose of the proposed development having regard to the proper construction of the PLEP. There is also a challenge by MAC (which has filed a Notice of Contention) in respect of certain evidentiary rulings by the primary judge. For the reasons set out below, the appeal should be allowed and declaratory relief granted.

Background

- **Development application**

6 On 14 July 2011, MAC lodged a development application with the Council under s 78A of the *Environmental Planning and Assessment Act*. That application sought approval for a "Workforce Accommodation Facility for 1,500 occupants" on the land. The proposed development is to occupy approximately one third of a 200 acre site on the outskirts of Werris Creek (around 80.94 hectares). In effect, the development is intended to provide what is colloquially referred to as "fly in fly out" accommodation for workers in the mining industry in the Liverpool Plains area and surrounding regions. MAC, the owner of the site, provides workforce accommodation in the mining industry on what is described as "an international scale". The

manner in which it has done so in other areas (and proposes to do so at Werris Creek) is the subject of the evidence that MAC says was wrongly rejected by the primary judge.

7 Accompanying the application was a Statement of Environmental Effects that was prepared by a consulting firm on MAC's behalf and was certified by an Urban and Regional Planner. By way of background, the Statement notes that the development "is proposed to consist of up to 1,500 relocatable accommodation units and associated facilities to primarily house workers servicing the mining industry". Some accommodation is also to be provided on-site for MAC employees. The accommodation and facilities are described as being in a "self contained 'Village' style environment". (A caravan/tourist park, to be open to the public, is also proposed to be built on the site but nothing turns on this on the appeal.) I will describe in more detail shortly the features of the proposed workforce accommodation.

8 As the application was for a development with a capital investment value of more than $10 million, the development application was referred by the Council to the Panel for determination under clause 13B(1)(a) of the *State Regional Planning Policy (Major Development) 2005* (NSW). The Council recommended approval of the application.

9 The development application was considered by the Panel on 11 October 2011 and 17 November 2011. The Panel had the benefit of differing legal opinions as to the lawfulness or otherwise of the proposed use submitted on behalf of MAC and GrainCorp, respectively, as well as a letter from MAC describing the "temporary" nature and purpose of the development. The Panel determined to grant development consent subject to certain conditions.

10 GrainCorp then applied, by Summons filed on 20 December 2011, to have the development consent declared invalid and set aside. Its application was based on two grounds, only one of which is now pressed - that being

that the development is prohibited under the PLEP and was therefore beyond the power of the Council to grant.

11 MAC's position is that if the proposed development is for the purpose of "residential buildings (other than dwelling-houses and units for aged persons)", and thus prohibited by operation of clause 9 of the PLEP, then there is no other basis on which the validity of the development consent can be sustained under the PLEP.

- **Applicable provisions of the PLEP**

12 The table under clause 9 of the PLEP sets out, for each of the seven zones covered by the PLEP, the zone objectives and the purposes for which development within the zone may be carried out (whether without development consent, only with development consent, or with advertisement and development consent) or for which development in the zone is prohibited. The objectives of Zone 1(b) (the General Agriculture Zone) are as follows:

> (a) to enable the continuation of traditional forms of rural land use and occupation and encourage consolidation of existing undersized allotments and their conversion into productive commercial farmholdings,
>
> (b) to conserve prime crop and pasture land in units or holdings which may be efficiently used for forms of agriculture common in the locality,
>
> (c) to discourage fragmentation of landholdings into holdings which are inadequate to support commercial farming practices,
>
> (d) to enable other forms of development which are associated with rural activities and which require an isolated location, or which support tourism, and recreational activities to be accommodated in an environmentally acceptable manner,
>
> (e) to ensure that the type and intensity of development is appropriate, having regard to the characteristics of the land, the rural environment, and the cost of providing public services and amenities,

(f) to permit the development in an environmentally acceptable manner of mines and offensive and hazardous industries where required, and

(g) to permit the development of intensive commercial horticulture and specialised agriculture where fertile land and a reliable water supply are available.

13 The purposes for which development consent is, or is not, required, or for which development is prohibited, under the PLEP in respect of land within the 1(b) General Agriculture Zone, are as follows:

> **2 Without development consent**
>
> Agriculture (other than animal boarding, breeding or training establishments, pig keeping, feed lots or poultry farming establishments).
>
> **3 Only with development consent**
>
> Any purpose other than a purpose included in item 2, 4 or 5.
>
> **4 Advertised development—only with development consent**
>
> Aerodromes; animal boarding establishments; bulk stores; bus depots; car repair stations; child care centres; clubs; *cluster developments*; commercial premises; commercial veterinary establishments; educational establishments; forestry; garbage disposal areas; general stores; generating works; helipads; heliports; *hospitals*; *hotels*; industries (including light industries and offensive and hazardous industries, but not rural industries or home industries); institutions; intensive livestock keeping establishments; junk yards; liquid fuel depots; mines; *motels*; *multiple occupancy*; places of assembly; places of public worship; plant depots (machinery); professional consulting rooms; public buildings; racecourses; recreation establishments; recreation facilities; retail plant nurseries; roadside stalls; sawmills; service stations; taverns; timber yards; *tourist facilities*; transport terminals; *units for aged persons*; warehouses. (my emphasis)
>
> **5 Prohibited**
>
> Motor showrooms; *residential buildings (other than dwelling-houses and units for aged persons)*; shops (other than general stores). (my emphasis)

14 There is no definition in the PLEP of the composite term "residential buildings".

15 Clause 5 of the PLEP, headed "[I]nterpretation", includes some definitions which apply to terms used in the above land use table, including definitions of the terms "cluster development" and "tourist facility" (to which I will return in due course).

16 Clause 6(1)(a) then adopts, for the purposes of the PLEP, the definitions contained in the *Environmental Planning and Assessment Model Provisions 1980* (NSW), with some stated exceptions. Relevantly, the model provision definitions include terms encompassed in the exception to the prohibition on residential buildings contained in Item 5 of the land use table.

17 First, the term "dwelling-house" is defined in the model provisions as "a building containing 1 but not more than 1 dwelling" and "dwelling" is in turn defined as "a room or suite of rooms occupied or used or so constructed or adapted as to be capable of being occupied or used as a separate domicile".

18 Second, the term "units for aged persons" is defined as being "a residential flat building used to house aged persons as defined in the *Aged or Disabled Persons Homes Act 1954*, as amended, of the Parliament of the Commonwealth, erected or to be erected by an eligible organisation as defined in that Act, the Department of Housing or any other Department or instrumentality of the Crown". The term "residential flat building" is defined in the model provisions as "a building containing 2 or more dwellings" (and therefore again including the concept of domicile).

- **Proposed development at Werris Creek**

19 The proposed development comprises a number of "precincts", as shown in the architectural plans that were in evidence. Within a number of the precincts (see the plans from Blue 247ff) there are one-person rooms grouped together under a common roof in what are referred to as "pods".

The number of rooms per pod varies from between 3 or 4 rooms to up to 6 rooms. Each pod features "dedicated verandah and/or patio areas".

20 Each of the pod rooms consists of a bedroom with a small ensuite bathroom (in which there is a shower, toilet and hand-basin). There are no cooking or laundry facilities in the pod rooms but each of the individually numbered precincts containing the "pods" also contains a number of "recreational pavilions" and laundries.

21 In addition, the development contains a commercial kitchen and restaurant, with seating for up to 250 persons; a "crib" room, where occupants can prepare and eat their own meals; a TV room; a gymnasium; tennis courts; pool; and "dedicated green space" for outdoor recreation. Other areas included in the development can be seen by reference to the plan for the area designated as the Central Precinct (Blue 246), which includes a central facilities building, training facility and an area identified as maintenance.

22 According to the Statement of Environmental Effects, the development is best described as a facility "comprising multiple occupancies and accommodation to service the mining industry", although I note that development consent was not suggested as being justified by reference to multiple occupancy use.

23 MAC contends (and the primary judge found) that the purpose for which the development consent was sought fell within the "in nominate" [sic] category of the PLEP. Before the primary judge, MAC had also contended that the development was permissible as a "motel" but his Honour rejected this contention on the basis that the facility will not be available to travellers or the general public in the manner of a motel. There is no challenge to that finding.

24 The stated economic impact of the development includes the creation of demand for up to 150 permanent and casual positions, based on a ratio of

one staff member per ten rooms (something relied upon by MAC as indicating that the development is in the nature of a serviced facility and not a residential building).

25 The Statement of Environmental Effects does not address the arrangements under which it is proposed that workers will come to occupy rooms in the facility from time to time (such as the legal basis on which, and manner in which, workers will be allocated a room during their rostered work period or their period of occupation of any such room). That is, in part, the focus of the evidence that was not admitted by the primary judge and is the subject of MAC's Notice of Contention. It was, however, accepted in the course of submissions on the appeal that what is proposed is that mine workers will stay in a particular pod room for the consecutive days in which they are rostered to work at the mine (say, between 5 and 14) and then will (generally) leave the "village" at the conclusion of that rostered shift period before returning for their next shift.

26 Further, GrainCorp accepts that the manner in which MAC intends to operate the facility (or "village" as MAC describes it) is that the pod rooms will not be separately adapted to individual use; that workers will "generally" not be allowed to leave their personal effects in the rooms during breaks between work placements on the site; and that there is no reason to expect that when workers return to the village after a rostered off period they will be allocated the same room (or even a room in the same pod).

Primary Judgment

27 The question before Lloyd AJ (as it is before this Court) was whether the development consent impermissibly permits use for the purpose of "residential buildings (other than dwelling-houses and units for aged persons)" within the meaning of Item 5 in the land use table under clause 9 of the PLEP.

28 His Honour had regard to various authorities where similar words in other planning instruments had been considered (such as *North Sydney Municipal Council v Sydney Serviced Apartments Pty Ltd* (1990) 21 NSWLR 532) and to the Macquarie Dictionary (online edition) definitions of the words "residential", "residence" and "reside".

29 His Honour held that the term "residential" connoted "an element of permanence or residence for a considerable time, or having the character of a person's settled or usual abode" (at [27]). His Honour then considered the proposed workforce accommodation facility in light of that connotation of the word "residential". His Honour stated (at [28]) that the facility was intended to accommodate a "transient population"; that the facility did not have the physical characteristics of a residence; and that there was nothing to suggest that returning occupants would be allotted the same "unit" on a recurring basis. His Honour noted that the management had the right to allot individuals to any "unit" and that there was nothing to suggest a lease would be entered into with each individual occupant. His Honour then posed the rhetorical question as to whether any of the occupiers of this facility would call it his or her residence, suspecting that they would not and that they would regard their residences as being elsewhere.

30 His Honour was not satisfied that the proposed use of the buildings to be constructed as part of the development incorporated the concept of permanence necessary to bring the development within the prohibition on "residential buildings" and hence concluded that this use of the land was permissible (with consent) as an innominate use.

31 GrainCorp does not cavil with his Honour's description of the proposed facility as being intended to accommodate a "transient population", although (as I discuss shortly) there is a question as to whether the workforce population that will occupy the facility is properly described as transient. As I understand it, MAC accepts that individual mineworkers will come and go from the facility on a regular basis, in the course of their

employment contracts. Rather, the nub of MAC's argument is that occupation of the pod rooms by the workers is not on a continuous basis in rooms dedicated to their individual use.

32 Nor does GrainCorp take issue with his Honour's description of the facility as not having the physical characteristics of a residence (by which it appears that his Honour was referring to the fact that the rooms in the pods will comprise no more than a small room with ensuite bathroom and that there is a communal kitchen and restaurant as well as a retail area and management office), though GrainCorp contends that this does not take the development outside the concept of a residential building.

Notice of Contention

33 I turn first to the complaint raised by MAC's Notice of Contention as to the rejection by his Honour of certain evidence. That evidence comprised an affidavit sworn by Mr Peter McCann on 12 March 2012 and an affidavit by Mr Geoffrey Dearden sworn 14 May 2012 (both affidavits having been sworn after the development consent had been granted).

34 Mr McCann is the Executive General Manager, Finance, of MAC and a director of that company and its subsidiaries. Mr Dearden is the General Manager, Development at MAC and says he played a substantial role in the preparation and progression of MAC's development application for the Werris Creek accommodation facility.

35 Mr McCann's affidavit deposed, among other things, to the customer relationships MAC has developed with companies in the resources sector and to the contracts it enters into by which it provides temporary accommodation to its customers' employees. A current template Accommodation Service Agreement was attached to the affidavit. Mr McCann stated that, although MAC might agree to amend the commercial terms of the agreement with a potential customer, the nature of the services to be provided and the obligations of the customers ("and their

employees", to whom the contract refers as "Village Guests") does not change.

36 Among other things, Mr McCann stated that the typical contract is a "take or pay" contract, the term of which is generally one to five years, which is structured to accommodate a standard roster of mining employees (described as often in the nature of "fly in, fly out rosters of 14 days on, 7 days off; 5 days on, 5 days off; or 5 days on, 2 days off") and under which he said that the customer will contract with MAC to reserve a specific number of rooms at the village for use by the employees during the term of the contract. Mr McCann said that the customer will pay a room rate irrespective of whether the employee is occupying the room and that customers are not allocated specific rooms or areas of the village under the contract.

37 At [22], Mr McCann deposed that "[g]enerally, guests [i.e., the workers] leave the village and return "to their usual place of residence or elsewhere" when rostered off duty with the Customer" but he went on at [23] to refer to the possibility that a room may become "on hold" during the period in which a "guest" is not rostered on duty and not occupying the room (in which case the "guest's" belongings are permitted to remain in the room between rostered shifts), a practice said to be uncommon.

38 Mr McCann noted that MAC does not enter into any formal contract with the "guests" but contracts only with its customers. However, he said that "guests" are required to comply with the Village regulations, a boilerplate version of those being annexed to his affidavit. There is reference to a Code of Conduct with which "guests" are required to comply (including no smoking in the rooms; maintenance of the rooms in a clean and tidy condition; no excessive noise after 10pm; and compliance with MAC's "standard check-in/check-out procedure"). A description of the check-in procedure is provided. Mr McCann noted that "guests" will not have a choice as to room allocation and will usually not stay in the same room as in a previous shift. Children and pets are not permitted at MAC villages.

39 Mr Dearden's affidavit attaches material presented at what are described as community forums or community feedback/presentation forums as part of a consultative process conducted by MAC in June 2011.

40 Senior Counsel for MAC, Mr Galasso SC, contended that information as to the company's practices was informative as to the characterisation of the village (referring to the kind of evidence taken into account in *Woolworths Ltd v Pallas Newco Pty Limited* [2004] NSWCA 422; (2004) 61 NSWLR 707).

41 Mr Galasso submits that Lloyd AJ refused to read these affidavits on the basis of that material not being before the decision maker (referring to transcript at Black 12.50, 14.5, 15.35, 15.40, 15.45, 16.20 and 16.30) and that this was in error as his Honour was not limited to a consideration of the evidence before the primary decision maker.

42 Reference is made to *Woolworths Ltd v Pallas Newco*, where this Court held that the issue of characterisation that there arose involved a jurisdictional fact and was to be determined on the basis of the evidence before the Court. It is submitted by Mr Galasso that the rejected evidence was relevant as supporting the proposition that persons of a transient and temporary nature use the facility, namely that the persons who will occupy the proposed facility will not do so on the basis of any degree of permanency or domicile.

43 Ms Duggan SC, Senior Counsel appearing for GrainCorp, says that GrainCorp did not object to this material on the basis that it had not been before the consent authority. Rather, its objection was that the material was irrelevant and, even if relevant, should be rejected under s 135 of the *Evidence Act 1995* (NSW) because its probative value was low. The primary judge appears to have rejected the evidence on both grounds (Black 17R). (No reasons were given by Lloyd AJ at T [17.45] for the

rejection of the evidence of Mr Dearden but it seems likely to have been rejected on a similar basis.)

44 GrainCorp accepts that the intention of persons using premises may be relevant in the task of characterisation (referring to *CB Investments v Colo Shire Council* (1980) 41 LGRA 270 at 276) and it accepts that there were sufficient statements of MAC's future intentions (through the documents lodged with the development application) that it was properly accepted by the Court below (and is not challenged on appeal) that MAC has the intention of providing temporary accommodation to a workforce on the site. However, it is submitted that, even with those concessions made, the evidence said to have been wrongly rejected does not add anything to the consideration of the matter. I agree.

45 The evidence of Mr McCann goes no further than a description of MAC's practice of providing workforce accommodation in other locations and the practices and procedures there adopted and as to its intention to carry on a similar operation at Werris Creek. The evidence of Mr Dearden goes to the information MAC presented in community consultations before the development application was lodged. The evidence does not assist the Court in determining whether the purpose of the development was a prohibited use under the PLEP. It does not address what particular arrangements, if any, are the subject of any agreement with, or in contemplation by, mine operators in the Werris Creek area itself.

46 In my opinion, the rejected material is of little or no probative value and his Honour did not err in rejecting that material. In any event, I do not consider that the evidence bears significantly on the issue for consideration. Even had it been admitted, my conclusion as to the characterisation of this development would be the same. MAC's Notice of Contention therefore fails.

Meaning of "residential buildings" in Item 5 of the land use table for Zone 1(b) General Agriculture

47 In *Chamwell Pty Ltd v Strathfield Council* [2007] NSWLEC 114, Preston CJ at LEC noted the following propositions as relevant when characterising the proper purpose of a development.

48 First, that in planning law, use must be for a purpose (citing *Shire of Perth v O'Keefe* (1964) 110 CLR 529 at 534-535; 10 LGRA 147 at 150 and *Minister Administering Crown Lands Act v New South Wales Aboriginal Land Council (No 2)* (1993) 31 NSWLR 106 at 121; 80 LGERA 173 at 188). Second, that the purpose is the end to which land is seen to serve and describes the character which is imparted to the land at which the use is pursued (*Shire of Perth v O'Keefe* at 534; 150). Third, that in determining whether land is used for a particular purpose, an enquiry into how that purpose can be achieved is necessary (*Newcastle City Council v Royal Newcastle Hospital* (1957) 96 CLR 493 at 499-500; 4 LGRA 69 at 74). Fourth, that the use of land involves no more than the "physical acts by which the land is made to serve some purpose" (*Newcastle City Council* at 508; 81).

49 His Honour also noted that the nature of the use needs to be distinguished from the purpose of the use, since uses of different natures can still be seen to serve the same purpose (referring to *Shire of Perth v O'Keefe* at 534, 535; 150 and *Warringah Shire Council v Raffles* [1979] 2 NSWLR 299 at 301; (1978) 38 LGRA 306 at 308) and that the characterisation of the purpose of a use of land should be done at a level of generality which is necessary and sufficient to cover the individual activities, transactions or processes carried on, not in terms of the detailed activities, transactions or processes (referring to *Royal Agricultural Society (NSW) v Sydney City Council* (1987) 61 LGRA 305 at 310).

50 For present purposes, this requires consideration of how the facility is to operate in practice to determine the purpose of the uses of the proposed

workforce accommodation facility at a level of generality that covers the individual activities of the occupants or users of the facility.

51 For GrainCorp, it is submitted that if the development, or any part of it, is a prohibited development then the consent is invalid (*Pallas Newco*) and hence the question of dominant purpose does not arise (citing *Abret v Wingecarribee* [2011] NSWCA 107; 180 LGERA 343 at [61]).

52 Broadly, the position of GrainCorp is that the proposed development falls within the prohibition in Item 5 because the buildings are to be used for the purpose of human habitation and do not fall within either of the two exceptions provided for in Item 5 of the land use table.

53 For MAC, it is contended that the temporary or transient nature of the proposed use of the pods (or rooms within the pods) is such that there is not the necessary element of permanence or settled abode to bring the use of the buildings within the term "residential buildings". In that regard, as noted earlier, MAC emphasises the "transient" nature (or, perhaps more precisely, the discontinuity) of workers' occupation of the rooms at the facility (i.e., that workers will generally stay at the facility only for the period of their work shifts and are not allocated to the same room in the same pod each time they return to the facility). Mr Galasso accepts, however, that the purpose of the development is to be considered by reference to the buildings in the facility as a whole, not to the use to be made of individual rooms in the respective pods.

- **Does "residential building" comprise a broad genus?**

54 At the outset I note the submission by Ms Duggan to the effect that the composite phrase "residential buildings" comprises a broad genus encompassing all forms of human habitation in a building and that therefore the fact that the accommodation facility is for the purpose of human habitation is sufficient of itself to bring it within the prohibition (unless the present development falls within the two categories identified

as exceptions to the prohibition on residential buildings, namely, dwelling-houses and aged care units).

55 MAC, on the other hand, maintains that the prohibition on "residential buildings", properly construed, precludes only a species of residential building, namely one that is intended for use as a permanent or settled abode and that this concept involves more than the provision of "mere accommodation".

56 It is accepted by both parties that the identification of dwelling-houses as an exception to the prohibition in Item 5 must mean that a dwelling-house would otherwise fall within the definition of residential building. It is similarly accepted that the identification of units for aged persons (having regard to the model provision definition of that term) means that a residential flat building (i.e. a building of two or more "dwellings"), if it is not for the purpose of housing aged persons, would also fall within the definition of residential building.

57 His Honour made reference, at [13], to types of development listed in other items of the land use table for this zone in respect of which he considered there to be a "residential" component. His Honour considered that the construction put forward by GrainCorp (namely, that all forms of building suitable for human habitation are excluded, other than the two specified exceptions) would produce an illogical result. This was so because other items of the table expressly contemplated some forms of permissible development that would, on GrainCorp's construction, be prohibited under Item 5. In this regard, his Honour referred to cluster developments, hospitals, hotels, motels, multiple occupancy and tourist facilities as all having a residential component.

58 For GrainCorp, it is contended that this approach was incorrect and that the relevant question is not whether other identified uses (that are permissible with consent) have a residential component but, rather, what is the purpose of the proposed development (relying on the approach set out

by Preston CJ in LEC in *Chamwell* as explaining how purpose is to be ascertained). Reliance was placed on *Abret v Wingecarribee* for the proposition that there could be inconsistency between the identification of uses within different parts of the land use table.

59 As I read his Honour's reasons, what Lloyd AJ was addressing in [13] was GrainCorp's argument that "residential building" was a genus covering all residential buildings (and therefore that there could be only the two stated exceptions from the prohibition in respect of buildings having a component of residential use). Lloyd AJ was saying no more than that, as a matter of logic, "residential development" cannot have been intended to be a broad genus covering all buildings suitable for human habitation if there are types of permitted use in other parts of the table that would on their face fall within that genus. That is not inconsistent with the reasoning in *Abret v Wingecarribee.*

60 In *Abret*, the term "seniors housing" was defined in the relevant planning ordinance but was not included in the list of prohibited or permissible uses in the zone. It was argued that as the proposed development was for seniors' housing, it was permissible as an innominate use. Beazley JA (as her Honour then was) identified the subtext of the appellant's argument in that case as being that relevant definitions were self-contained (i.e., that "seniors housing" did not fall within any other defined use). The relevance of this was that part of the proposal for seniors' housing included what would otherwise have fallen within the prohibition on residential flat buildings in the zone. Her Honour said:

> The shortcoming in the appellant's argument as to the second alleged error is that it seeks to place each definition in the LEP in a silo and fails to appreciate that in given circumstances, the definitions may operate interdependently. That this is so is apparent from the definition of "seniors housing" itself, which is defined to mean "residential accommodation consisting of", relevantly for present purposes, a "group of self contained dwellings". "Dwelling" is separately defined, as is "dwelling-house"...

61 Item 4 includes several uses permitted with development consent that might be regarded as within the expression "residential buildings". Uses of this kind include "cluster developments", "hospitals", "hotels", "motels" and "tourist facilities". The inclusion of these uses within Item 4 makes it very difficult to accept GrainCorp's argument that "residential building" means **all** buildings suitable for human habitation. But the inclusion of these uses within Item 4 does not require "residential building" in Item 5 to be given a narrow interpretation.

62 Some uses identified in Item 4 are likely to be within the express exceptions to the prohibition on "residential buildings" in Item 5. For example, "cluster developments" are presumably within the exception for "dwelling-houses" in Item 5.

63 Other uses identified in Item 4 are to be understood as either outside the concept of a "residential development" or as of limited qualification to that expression. Hospital, for example, is defined as a building or place (other than an institution) used for the purpose of providing professional health services to people admitted as in-patients. This definition seizes upon the characteristics of the persons being accommodated and the particular purpose for which they are being accommodated. Hotel is defined to mean premises to which an hotelier's licence granted under the *Liquor Act* 1982 relates. The definition focuses upon the particular character of the building providing accommodation. Motel means a building, other than a hotel or residential flat building, substantially used for the overnight accommodation of travellers. This definition focuses upon a particular class of persons being accommodated and the distinctive kind of accommodation provided to them. Similarly, the reference in Item 4 to "tourist facilities" (defined to include both temporary and permanent accommodation) focuses on use by a particular class of persons, namely tourists.

64 If Lloyd AJ was suggesting that there was an inconsistency or illogicality in giving "residential buildings" its ordinary meaning, I do not agree. Item 5

contains a general prohibition on use for the purpose of residential buildings, subject to two express exceptions. Item 4 carves out some additional exceptions or qualifications to the prohibition, by permitting (with development consent) some uses that otherwise would or might be regarded as "residential buildings" but there is no occasion to read down the ordinary meaning of "residential building" by reference to uses permitted by Item 4.

65 In construing the prohibition on "residential buildings", his Honour referred to the zone objectives under the PLEP (with which the use must conform); the dictionary definitions of "residential" or related terms; other authorities in which a similar term has been considered; and the general features of the accommodation as well as its proposed use. I consider each in turn.

- **Zone objectives**

66 GrainCorp submits that a comparison between the zone objectives for the 1(b) General Agriculture Zone and the zone objectives for other zones under the PLEP, together with reference to the specified controls relating to buildings or dwellings within those zones, demonstrates that the intention of the PLEP is that there should not be high levels (or density) of non-agricultural (and particularly residential) use in the rural zones and that the residential uses expected or anticipated in this zone are those of a dwelling-house nature rather than of a commercial nature.

67 In particular, reference was made to the objectives relating to the three zones relating to agricultural or rural land (zone 1(a), 1(b) and 1(c)). It is submitted that in the first of those zones, the objectives indicate, in broad terms, a desire to continue traditional forms of agriculture (there being a similar prohibition in that zone on development for the purpose of residential buildings other than dwelling-houses and units for aged persons). In the second of those zones (in which the land in question falls), it is submitted that the general aim is again the conservation of the commercial farmland enterprises and that, to the extent that there are

other nominated uses, those are to be limited to the types of uses that are acceptable in general agricultural zone. As to zone 1(c) (which also includes reference to "residential buildings"), it is submitted that the emphasis is still on rural use, though more intensive rural residential development is there permitted.

68 The remaining zones are a forestry zone; a low density residential zone and a village zone (the zone objectives for which are not analogous to the rural/agricultural zones).

69 Reference was also made to the special provisions contained in the PLEP which set out specified controls for development within the three rural zones (see, for example, clauses 13-15). It is submitted that, when contrasted with the residential use permitted within the zones that are not primarily rural, the zone objectives in the rural zones are consistent with there being less intensity of residential use (i.e., less dwellings permitted per hectare).

70 A similar argument was put before the primary judge. At [14], his Honour stated his opinion that GrainCorp's reliance on the objectives of the zone was not conclusive of the question before the Court, referring to what was said by Beazley JA in *Abret* (when there rejecting a submission to the effect that a proposed development could not be the subject of consent because it was inconsistent with various objectives of a particular zone that would prohibit such development). Her Honour at [42] said, of the objectives of the zoning table in that case, that:

> ... [t]hey are not provisions of the LEP that control development. Rather, they set the framework in which the LEP operates. The objectives themselves are not necessarily consistent, but reflect the conflicting demands upon development within the particular Local Government Area.

71 Here, what GrainCorp submits (and says is not inconsistent with the reasoning in *Abret*) is that, in order to undertake a purposive construction

of the term "residential buildings" as used in the PLEP, it is relevant to take into account the zone objectives and that the fact that there may be inconsistency between those objectives does not weigh against GrainCorp's construction of the term.

72 That proposition is in itself not controversial. Indeed, his Honour accepted (at [15]) the principle that even if the proposed development were to be permissible as an innominate use, it would be a proscribed activity if it also fell within the description of any prohibited use (referring to *Egan v Hawkesbury City Council* (1993) 79 LGERA 321).

73 However, the difficulty in placing much weight on the differences between the residential use contemplated across the respective zones is that one of the objectives in the 1(b) zone, (f), refers to the development of mines and offensive and hazardous industries within the zone. MAC contends that the workforce accommodation facility, by permitting accommodation for mine workers, is consistent with this zone objective. I agree, though the fact that the provision of accommodation for miners would be consistent with objective (f) of the zone objectives says nothing as to whether the type of accommodation facility here contemplated is one that is permitted as an innominate use under Item 3 of the table or prohibited under Item 5 of the table.

74 Ultimately, I find little support one way or the other in the zone objectives as to the meaning of "residential buildings" in the context of this development.

- **Dictionary definitions**

75 As a general principle of statutory construction, where words are not defined they are to be given their ordinary meaning. While it is accepted that dictionaries are to be used with caution when engaging in statutory interpretation (*House of Peace v Bankstown City Council* (2000) [2000] NSWCA 44; (2000) 48 NSWLR 498 at [25]-[29]), both parties have

referred to dictionary definitions as an aid in construing the term "residential buildings", as did his Honour.

76 At [26], his Honour referred to the definitions in the *Macquarie Dictionary (Online Edition)* of the words "residential", "resident" and "reside" as follows:

> "residential" - of or relating to residence or residences; adapted or used for residence; (of a hotel etc) catering for guests who stay permanently or for extended periods.
>
> "residence" - the place, especially the house, in which one resides
>
> "reside" - to dwell permanently or for a considerable time

77 The *Macquarie Dictionary (Revised 3rd Edition)* (to which MAC referred in the course of argument on the appeal) defines "reside", arguably more broadly, as:

> to dwell permanently or for a considerable time; have one's *abode for a time*;
> [r]eside in a. to abide, lie, or *be present habitually* in. (my emphasis)

78 This definition of "reside" thus includes not only the concept of dwelling "permanently or for a considerable time", but also includes the notion of having one's abode in a place "for a time" and of an "habitual" presence.

79 It is instructive to compare these with other dictionary definitions. For example, among the definitions of "residential" contained in the *Longer Oxford Dictionary* (2nd Edition, including the Oxford English Dictionary Additions Series (Volumes 1–3)) is the following:

> Serving or used as a residence; in which one resides [giving as an example of the use of the word, that found in 1960 Times 21 Mar. 8/5 "Oxford, Cambridge and the other residential universities enjoy special prestige compared with the civic universities"]

80 There, the noun "residence" is defined, *inter alia*, as:

> The circumstance or fact of having one's permanent or usual abode in or at a certain place; the fact of residing or being resident.

and:

> The fact of living or staying regularly at or in some place for the discharge of special duties, or to comply with some regulation; also, the period during which such stay is required of one. Now freq. in phrase in residence. ...

and:

> The place where one resides; one's dwelling-place; the abode of a person (esp. one of some rank or distinction) [as opposed to of no fixed residence or no fixed abode].

81 "Reside" is there defined as including:

> To dwell permanently or for a considerable time, to have one's settled or usual abode, to live, in or at a particular place.

82 The *Oxford Dictionary of English* (3rd Edition) defines the adjective "residential" as "designed for people to live in: *private residential and nursing homes*; providing accommodation in addition to other services: *a residential sixth-form college*; occupied by private houses: *quieter traffic in residential areas*; concerning or relating to residence: *land has been diverted from residential use*".

83 What can be drawn from the above is that the appellation "residential" may in some contexts connote a degree of permanence but can also connote an habitual or usual abode, or even a place where one lives for a time or while performing a particular purpose or function, in which respect it would not be inapt to refer to the occupation of workers during the period that they are fulfilling work functions at the mines.

84 Moreover, reliance on a connotation of "permanence" begs the question of what degree of permanence is sufficient to bring a development within the connotation "residential building". As Sackville AJA pointed out in the course of argument on the appeal, permanence does not necessarily connote continuity of use.

- **Other authorities**

85 The principal authority to which his Honour referred was *North Sydney Municipal Council v Sydney Serviced Apartments Pty Ltd* . There, the issue was whether use, as serviced apartments, of a number of units in the Blues Point Tower was authorised by a development consent granted under the relevant planning ordinance, for a "residential flat building".

86 The applicable planning instrument provided that, in respect of land in a "living area" zone, as defined, the purposes for which buildings might be erected or used without consent were "dwelling-houses"; and the purposes for which buildings might be erected or used only with the consent of the relevant authority included "[r]esidential buildings" and various other places.

87 "Residential building" was defined as:

> 'Residential building" means a building, other than a dwelling-house, designed for use for human habitation together with such outbuildings as are ordinarily used therewith, a residential flat building, a hostel, an hotel designed primarily for residential purposes and a residential club, but does not include any building mentioned, whether by inclusion or exclusion, in the definitions of 'places of instruction' and 'institution'.

88 There was no definition of "residential flat building" in the ordinance. However, in regulations under the *Local Government Act 1919* (NSW), as

amended, the terms "flat" and "residential flat building" were both defined:

> "Flat" means a room or suite of rooms occupied or used or so constructed, designed, or adapted as to be capable of being occupied or used as a separate domicile.
>
> "Residential flat building" means a building containing two or more flats but does not include a row of two or more dwellings attached to each other such as are commonly known as semi-detached or terrace buildings.

89 In determining whether use of particular units as serviced apartments came within use as "a residential flat building" within the terms of the consent, the matter was approached on the basis that there was no distinction between the manner in which the company controlling the units in question used the building and the manner in which individual occupants, by arrangement with the company, did so.

90 The opposing submissions were, broadly, that the term "residential" indicated that the consent was limited to use for the purpose of a dwelling "permanently or for a considerable time" (and hence the use was in breach of the consent), on the one hand, and, on the other, that the phrase did not have any connotation as to the period of occupancy by a particular occupant (relying on the purpose of the ordinance under which the consent was given). Mahoney JA considered that the latter submission had substantial force, saying:

> ... As I have said, the Ordinance relevantly controlled the use to which land and buildings might be put. It did this, in general, by specifying particular kinds of buildings, places, works or industries; then, in respect of each zone, listing these in particular columns; and, by cl 26, providing that "the purposes for which" the relevant buildings might be used were those specified in that way in the relevant columns. It was the use "for" a particular purpose which, in general, was controlled by cl 26.
>
> Accordingly, in land zoned as the relevant land was, buildings in that zone could be used (as far as here is relevant) only for "the purposes" of a "residential building". The term "residential building" was defined to mean "a building, other than a dwelling-house, designed for use for human habitation ... a residential flat building ...". Therefore Mr Tobias' argument was, or suggested, that the use of a building as a "residential building" would be the use to

> which a building "designed for use for human habitation" would be put. That use would not be every use to which a building designed for use for human habitation could be put, for example, as a doctor's surgery; it would be limited to a use for which it was designated by reason of its being designed for use for human habitation.

91 His Honour expressed the matter as being nicely balanced but concluded that the meaning of the consent, though not determined by, was to be read consistently with, the use of language in the relevant definitions in the ordinance and that:

> ... *The definition of "residential building" requires nothing more than use for human habitation.* However, it includes within its terms descriptions of buildings or usages involving different kinds of human habitation. The kind of human habitation required to satisfy each of these will vary according to the nature of each of them and will, inter alia, require different degrees of permanency. Thus, a residential hotel may have a smaller degree of permanence than a residential club or a hostel. *It is, I think, not inconsistent with the thrust of the definition that there should be within it a kind or category of residential building which envisages a significant degree of permanency of habitation or occupancy.* (my emphasis)
>
> The description of a flat as a "dwelling" or a "domicile" carries with it the notion of that degree of permanency. ...
>
> I do not think that the use to which the company's units are put has that degree of permanence. The nature of the use envisaged by it does not. In some cases, the degree of occupancy in a particular letting or licence may be the same length as, for example, a short-term lease but the concept of the use envisaged by the company involves, as Mr Tobias' argument I think accepted, that the use might be only for one or two days at a time. I do not think that a use of this kind is use of the part of the building as a residential flat building in the relevant sense.

92 Ms Duggan emphasised that Mahoney JA was there indicating that the degree of permanency or occupancy that might be required for the various different types of building included in the definition of "residential building" in that instrument might vary, but that this depended on the instrument being construed.

93 There, it was found that a serviced apartment was not a residential flat because it did not have the necessary degree of permanency for it to be

described as a domicile or a dwelling. However, what was there being interpreted was not the term "residential building" but of a sub-set of that genus, namely, a "residential flat building".

94 GrainCorp submits that his Honour's consideration of the authorities that had since considered the *Blues Point Tower* case incorrectly assumed that the case was authority for the proposition that, to be within the concept of a residential building, it was necessary for there to be a high or significant degree of permanency or occupancy.

95 The other authorities considered by his Honour, briefly, were as follows. First, his Honour referred to the decision of Pain J in *Dooralong Residents' Action Group v Wyong Shire Council* [2011] NSWLEC 251; 186 LGERA 274. There, the question was whether use of the premises in question was for the permissible use as a hospital or the prohibited use of "housing for people with a disability", which was defined as including "residential accommodation". Pain J accepted that residential accommodation could be broadly defined and adopted the *Blues Point Tower* decision as "requiring a certain degree of permanency".

96 Her Honour did not consider that inpatient accommodation of up to six to ten months duration suggested sufficient permanency to satisfy the requirement of residential accommodation (at [110]), noting that the cabins in question were not capable of being used as separate domiciles. Further, (at [111]) her Honour noted that the definition required permanent occupancy and hence found that there was insufficient permanency in that case.

97 Second, his Honour referred to one of his earlier decisions (*KJD York Management v Sydney City Council* [2006] NSWLEC 218; 148 LGERA 117) in which development consent had been granted for the use of a building for the purposes of residential flat building and, again, some of those flats were being used for the purposes of serviced apartments. In that case, his Honour set out the definition of "residential flat building",

referred to the *Blues Point Tower* decision, and referred to the dictionary definition of "domicile" as a place of residence; abode; house or home; place of residence or ordinary habitation; dwelling-place; and "place where one has his home or permanent residence, to which, if absent, he has the intention of returning" (those definitions being found in the Macquarie Dictionary and Oxford English Dictionary respectively).

98 His Honour there said that the critical issue was a question of degree:

> ... use for residential units demands "a significant degree of permanency of habitation or occupancy", while use for serviced apartments indicates a significantly lesser degree of permanency of habitation or occupancy ...

distinguishing between a residential unit in which the owner may occupy and live in (or which may be leased out to a tenant for terms) and a serviced apartment being "a unit which is ordinarily hired out in a similar fashion to a hotel for short terms and which is serviced regularly by a manager". His Honour held that it was not a residential flat building; that the serviced apartments were something other than that which was approved; and therefore that the development was not permissible.

99 Third, his Honour referred to *Sydney City Council v Waldorf Apartments* [2008] NSWLEC 97; 158 LGERA 67, where Pain J again considered the question whether premises approved for use as "flats" were able to be used as serviced apartments. Not surprisingly, her Honour followed the above authorities and held that use as serviced apartments was prohibited. The definitions in the planning controls in that case were relevantly the same as those considered in *KJD*. Her Honour adopted that reasoning, namely that "capable of use as a separate domicile" when used as a definition for a "flat" in a "residential flat building" required that the flat be used for habitation for a duration suggesting permanency (rather than short term use suggested by serviced apartment use).

100 In the present case, his Honour concluded from the above line of authority that, as a matter of principle, a residential building must have a degree of permanence (and considered that this was consistent with the dictionary definitions of "residential" and "reside"). Nevertheless, those decisions turned on the construction of provisions in relation to different ordinances and, in a number of instances, on the distinction between use as a residential flat building and use as a building with serviced apartments. Insofar as the later authorities followed what was said in the *Blues Point Tower case*, it is relevant to note that there the Court of Appeal was construing a particular type of building (residential flat building) within a definition that contained various types of human habitation. Here, the reference to "residential buildings" appears not as a sub-set of a more general type of building but as a stand-alone term.

Conclusion as to meaning of "residential buildings" in the PLEP

101 The decisions on which his Honour placed reliance do not (nor was it suggested that they did) apply directly when considering the meaning of "residential buildings" in a different instrument. I accept that on one connotation of the adjective "residential", the composite term "residential buildings" could be read as meaning more than simply structures used for the purposes of human habitation; namely, that it carries with it the notion of a degree of permanence or settled or habitual abode. However, I also consider that on the ordinary meaning of "residential" it is sufficient that structures are used as the usual abode of people or as their abode "for a time" (in the sense of more than a fleeting stay) or even, in some of the older usages of the expression "in residence", for the purpose of abode for a stated function.

102 The legal basis on which one occupies such a building or part of such a building (i.e, whether as owner of the freehold or strata title; under a lease; or, as seems will be the case here, under a contractual or perhaps implied licence by reference to a contractual arrangement between the owner and one's employer) seems to be irrelevant to the question whether use of the

buildings is a residential use. Similarly, whether or not the individual rooms have all the facilities necessary for one to regard this as a settled or habitual abode (and there would be a question in any event as to what such facilities would be – since it is possible to postulate a form of accommodation in which one has a permanent "home" but which does not contain all the facilities that other undisputedly residential buildings might have, such as a separate laundry or internal bathroom or the like), the overall facility in this case clearly does.

103 I therefore approach the characterisation of the proposed use on the basis that it falls within the prohibition if it is use as a settled or habitual abode.

- **Purpose of the development**

104 Turning then to the proper characterisation to be put to the purpose of the facility as a whole, having regard to what is accepted to be its intended use (namely, the provision of accommodation and other facilities to mine workers during the period of their rostered shifts at nearby mines), does this facility fall within the concept of a residential building?

105 There are a number of features as to the intended manner of use that in my opinion are irrelevant.

106 First, the label attached in MAC's template contract and code of conduct to the occupant as a "guest" (and the somewhat self-serving statements contained in the material put to the Panel as to the temporary nature of the accommodation) do not provide support for the conclusion for which MAC contends. Whether or not a mineworker occupying a room in a pod is labelled a "guest" (or, for that matter, a "member of a transient population") is not to the point. Similarly, in *Abret*, use of the label "seniors' housing" did not determine the proper characterisation of the use ([85]).

107 Nor, in my opinion, does the fact that workers may be required to "check-in" and "check-out" through a reception facility or is required to comply with

a particular code of conduct while in occupation of the pod room to which they are allocated determine whether the intended use of the facility is "residential".

108 Second, whether the workers will occupy the facility under a licence (due to contractual arrangements reached between MAC and their employer) is irrelevant. The term "residential" is nowhere suggested to denote the legal basis on which the occupant is entitled to occupy the building in question.

109 Third, the physical characteristics of the pods (even assuming that they could properly be considered separately from the buildings as a whole), such as the lack of cooking facilities in the pods, do not point against a finding that this was a residential building. MAC certainly did not place weight on the lack of individual facilities of that kind in the pod rooms (or the existence of communal facilities) as supporting its construction of the prohibition in the land use table.

110 Fourth, whether or not proposed occupants of the facility would call it their "home" is (and was accepted by MAC to be) irrelevant; the relevant question being as to the purpose of the buildings to be constructed on the land, not the understanding or intention of the proposed occupants of those buildings (*CB Investments Pty Ltd)*.

111 Fifth, the usefulness of an "impressionistic" test of the kind suggested by Mr Galasso (namely whether, looking at the complex from the outside, one would consider it to be a residential building by the nature of its use) seems to me to be unhelpful. There seems to me to be nothing in the materials before this Court to suggest that looking at the facility from the street (assuming it is visible from the street) one would conclude it was inconsistent with a general notion of residential building as being a building in which one would have one's habitual or settled abode for a time.

112 The force of GrainCorp's argument is that the concept of "residential" is a broad one (as recognised by Jagot J in *Berry v Wollongong Council* [2008]

NSWLEC 210 at [49]) and there is nothing to suggest that one can only have one "residence" at the one time (though clearly one could only be in physical occupation of one residence at any particular time) (*Attorney General v Coote* (1817) 146 ER 433 at 435). There is no dispute that the proposed development contains buildings to be used for the purpose of inhabitation. It is a place where workers, during their rostered shifts at the nearby mines, may eat, drink, sleep and relax when not actually working at the mines. (see the meaning attributed to the term in *Stoke on Trent Borough Council v Cheshire County Council* [1915] 3 KB 699 at 706).

113 What is it, then, that takes this building or these buildings out of the concept of "residential"? Mr Galasso submits that the provision of "mere accommodation" is not sufficient to bring the development within the term "residential building" but, here, the facilities provided in the development include not simply a room with a bed and bathing facilities, but areas for cooking, laundry and recreation. It is not suggested that an occupant at the facility needs to go elsewhere to meet his or her daily living needs and hence it is not clear what else would be required for the place that provides those needs to be described as "residential".

114 The substance of MAC's argument (which was accepted by the primary judge) was that because workers will (generally) not remain at the facility when they are not rostered on at the mines (i.e., for the 10 or 5 or 2 days' off, depending on what the roster periods might be), will (generally) not be permitted to leave personal items in pod rooms when they leave at the end of a rostered shift, and have no assurance that they will return to the same room, their use of the facility does not satisfy the notion of a settled or usual abode.

115 This is the nub of the "transient" or "temporary" label that is used to gainsay the description of the facility as residential. However, it is not suggested that in the usual course a worker will stay at the facility for a short period and not return. Rather, it might be assumed that if the workforce is relatively stable workers will come and go on a regular basis

and will therefore, in aggregate, spend a not inconsiderable time at the facility. "Fly in fly out" is not synonymous with "fly by night", as I understand it.

116 Part of the difficulty with the "transience" argument (as opposed to as argument based on continuity) seems to be the assumption that one can only have one place of residence, yet Mr Galasso accepts that one might have a residence (or might reside) in two different places (such as, say, having both a country residence and a city residence, as was considered in *Derring Lane Pty Ltd v Port Phillip City Council (No 2)* [1999] VSC 269 108 LGERA 129). In *Derring Lane*, reference was made to the observation of Wilcox J in *Hafta v Director-General of Social Security* (1985) 6 FCR 444 at 449 that:

> There is a plethora of decisions, arising in various contexts but predominantly matrimonial causes and revenue cases, relating to the legal concept of residence. As a general concept residence includes two elements: physical presence in a particular place and *the intention to treat that place as home; at least for the time being, not necessarily for ever.* (my emphasis)

117 Mr Galasso nevertheless submits that there must still be the attribute of permanence, drawing a distinction between the situation considered in *Derring Lane* and use of the workforce accommodation facility on the basis that it is contended there is no (or not the same) notion of permanence in the latter.

118 However, if a worker is employed either indefinitely or on a contract for a settled period, then it is difficult to accept that there is not a sufficient notion of permanence or settled accommodation if that worker occupies the workforce accommodation facility each time he or she is rostered on duty at the mine.

119 Therefore, the submission that this is "temporary" (or transient) accommodation (i.e., that it will be for a period of, say, 5 or 14 days at a time, depending of the length of a rostered work shift), and not of sufficient

permanence to be for the building to be for "residential" purposes, depends on the significance to be placed on the discontinuity of occupation of particular rooms (i.e., that there is no expectation that workers will occupy the same room when they return from a work break for their next rostered work shift). In my opinion, that places undue focus on the individual worker's use of individual rooms within the facility, rather than the use made of the buildings within the facility in general.

120 It is submitted for GrainCorp, and I agree, that the purpose of the facility, in a planning sense, is to accommodate the residential needs of the mine workers and that it is immaterial whether or not the workers occupy the same rooms each time they stay at the facility.

121 Mr Galasso, in the course of argument on the appeal, appeared to accept that his argument was no more complicated than that it is intended that workers will stay in the facility during a shift and will then be required to move out when their shift finishes, although he later added to that the proposition that the worker will not necessarily use the same room each time he or she returns to the facility. In essence it is the latter which Mr Galasso submits identifies the temporary nature of the accommodation and the transient nature of the population that will use the facility.

122 I do not accept that those features detract from the residential character of the facility: namely, that it will provide accommodation and living facilities for mine workers for considerable periods of time, in aggregate, over their working life at the mine (however long or short that may be). The fact that workers will stay elsewhere (unless they are otherwise homeless or peripatetic) during the periods when they are not at the workforce accommodation facility does not mean that during the period they are in occupation at the facility it is not performing a residential function.

123 To the extent that his Honour considered that the term "residential building" connoted a degree of permanence or settled abode, I consider that the proposed workforce accommodation facility is intended to fulfil

such a purpose for the workers. It falls, therefore, within Item 5 of the land use table and is a prohibited use.

Conclusion

124 For the reasons set out above, the appeal should be allowed and the declaratory relief should be granted.

Orders

125 The following orders should be made:

1. Appeal allowed.
2. Set aside the decision and orders of Lloyd AJ made on 28 July 2012 and, in lieu, declare that the development consent granted by the Northern Joint Regional Planning Panel for the Liverpool Plains Shire Council to The MAC Services Group Ltd on 17 November 2011 for a Workforce Accommodation Facility is invalid and of no effect.
3. Order The Mac Services Group Ltd to pay the costs of the appellant in this Court and in the Court below.

126 **SACKVILLE AJA**: I agree with Ward JA.

****

I certify that the preceding 126 paragraphs are a true copy of the reasons for judgment herein of the Honourable Justice Ward and of the Court.

Date: 14 June 2013

Associate: