

# Living in the Grid of Nominated Properties

Legislation and Section 149 Notations in North Lake Macquarie

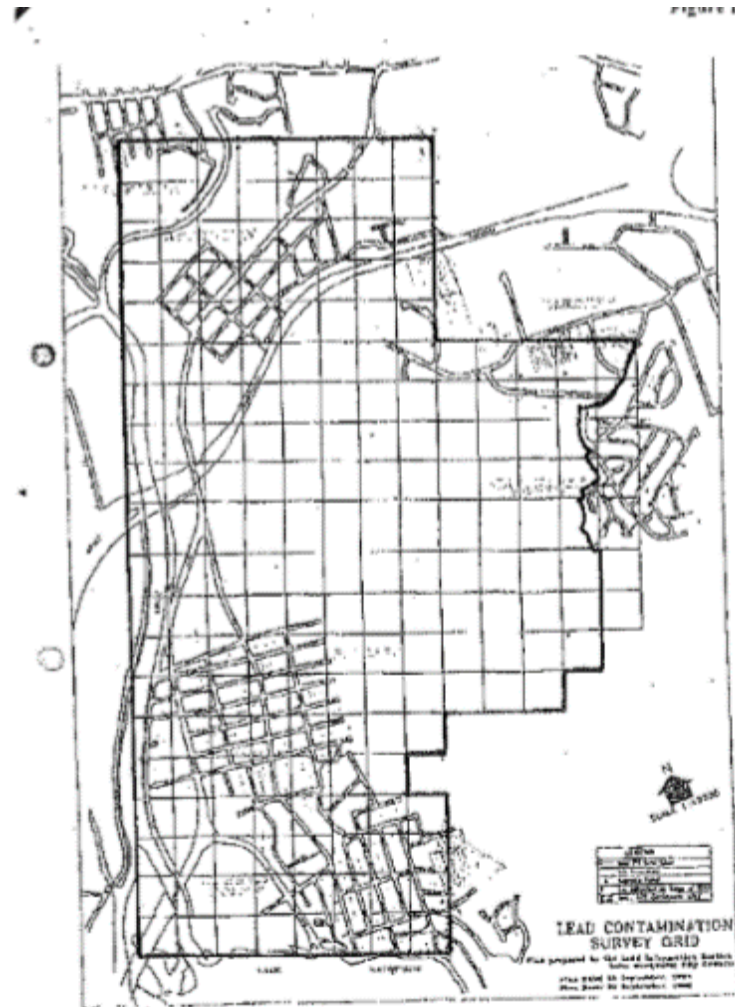
# Why is it important to address the Concerns of residents in Boolaroo, Speers Point and Argenton separately to the Greater North Lake Macquarie Community?

- There is no doubt that the issue of lead contamination affects the broader NLM community – most recently Marmong foreshore
- Yet up until now the financial and social burden has been primarily experienced by the residents of Boolaroo, Argenton and Speers Point – the residents within the grid
- These residents, in particular long-term residents, have been stigmatised for over two decades and it is vital to address their concerns as separate to the broader NLM area

# 1990s - The Start of Testing

- In May 1991 Hunter Area Health Service commenced investigations into child resident blood lead levels in Boolaroo and Argenton,
- In 1992 the level of lead in soil surrounding the smelter was assessed via collection of 202 soil samples covering an area approximately 2 km north, south and east of the lead smelter
- Around the same time, the Public Health Unit reported elevated blood lead levels in children living in North Lake Macquarie associated with high soil lead levels in properties around the smelter.

# Lead Contamination Survey Grid



# Pasminco Upgrade Approved

- In February 1995, the then Minister for Urban Affairs and Planning granted development consent to Pasminco for a Total Improvement Plan involving upgrades to the existing plant operations to increase production and improve environmental technology and controls
- The 1995 consent included conditions (no. 42, 43 and 44) which required remediation work within the area nominated in the consent (the grid) and a LAS was to be prepared
- Around the same time Council placed notations on the 149 certifications to advice of potential lead contamination
- The community was told at the time that the notations would be lifted on the LAS was implemented
- The 149 notations had an immediate impact on property prices

# Actual Map Of Nominated Properties

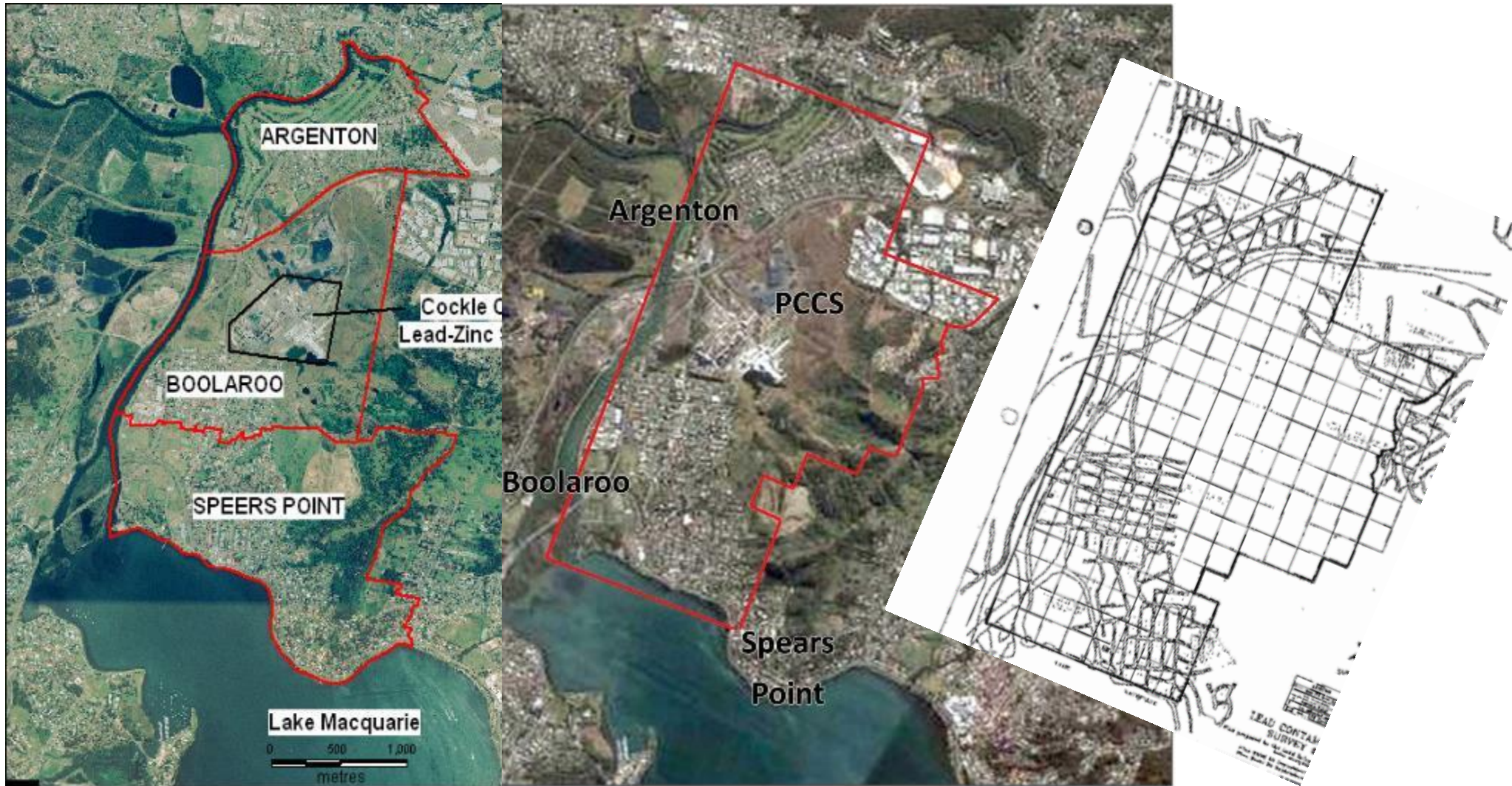
- The LAS grid is a rectangular shape around the smelter and was made in the 1990's with regard to local wind patterns, smelter location and the Munibung Hill ridge line
- In my opinion, the real division started when the lines were drawn and the Grid of Affected Properties was delineated. When the properties on one side of the road or hill, lost significant value overnight but the properties on the other side didn't, or when one neighbor received thousands of dollars remediation work but others didn't, was when the real division within the community ignited



# The Survey Grid v the Nominated Grid



# Suburbs of Boolaroo, Speers Point and Argenton





# Warner's Bay was not included in the Nominated Grid of Properties



# EPA identified the site as contaminated

- In 2002 the EPA declared the smelter site a remediation site under Section 21 of the CLM Act
- In July 2003 a Remediation Order was issued by the EPA to Pasminco which required that a Remedial Action Plan (RAP) was prepared. One of the things in this order (Point 10(m)) was that the community based LAS was maintained. They note it was a requirement of Conditions 42 and 44 of the 1995 DA.
- The remediation order still applies

# Smelter Closes and LAS still not prepared

- The smelter closed in 2003 and in 2004 the DEC requested Pasminco develop a strategy to address the reduction of lead exposure from dust deposition on the properties nominated in the 1995 consent.
- This included approximately 2500 residential properties
- A draft Lead Abatement Strategy (LAS) was prepared in 2005 which was consequently reviewed following feedback from State Government agencies and stakeholders.
- Revisions of the LAS are dated 24 August 2006 and November 2006

# Ferrier Hodgins Applies to Remediate

- In 2003 Ferrier Hodgins, on behalf of Pasminco, sought approval to undertake remediation of the site
- Conditions of Consent 42, 43 and 44 from the 1995 consent had not been met (the LAS) and in my opinion the 1995 DA could have be deemed null and void
- Ferrier Hodgins argued against the inclusion of the LAS as a condition of consent and in their own submission report they claimed there was no off site concerns

# Remediation Approved

- In response to Pasminco's attempts to avoid the LAS forming part of the Conditions of Consent for remediation of the site, the Director General (page 31 of the DGs assessment report) said the LAS was fundamental to the approval and states:
  - *the Department considers that the Proponent has certain responsibilities for dealing with the legacy of dust lead soil contamination in residential properties around the smelter site; and*
  - *“The Department believes that the adoption of the proposed approach will ensure compliance with the relevant conditions of the 1995 consent”*
- Condition 1.6 of the Approval reads *“the Proponent shall develop and implement A Lead Management Program at nominated properties (as identified in conditions 42, 43, and 44 and Figure 1 of the 1995 consent (DA NO 29/94) to the satisfaction of the DEC for an agreed period of time during the remediation of the site and shall include but not necessarily be limited to .....”*
- The 1995 consent was to be surrendered once the LAS was complete

# LAS Approved but a Section 96 modification is sought

- In 2009 Ferrier Hodgins sought to amend Condition 1.6 from “nominated properties” to “potentially affected properties” that were to be subjected to eligibility requirements (the eligibility requirements were determined by Ferrier Hodgins) and to attach a Deed of Agreement to the LAS
- Ferrier Hodgins proposed the condition should read *“the Proponent shall implement a Lead Amendment Strategy at Potentially Affected Properties in accordance with the document titles ‘Lead Abatement Strategy July 2010 Implementation Document’ (2010 LAS Document) and the document titled ‘Lead Abatement Strategy Deed’ (Deed), to the satisfaction of the DECCW, during the remediation of the site pursuant to this approval”*
- However, the 2007 approval was granted provided the key issues of the 1995 consent were adopted.
- In my opinion, a change to the nominated properties is a fundamental change to the 1995 consent and is therefore in breach of consent condition 1.6 of the current 2007 approval and the key issues were not met
- The S96 application was eventually withdrawn after much public outcry

# LAS Implemented

- The LAS applies to all residential properties within the grid however, Ferrier Hodgins “elected” which properties were included based on eligibility requirements
- The basis of the LAS was an assumption that all properties within the nominated area would be included
- Residents were forced to sign a deed if they wanted to be included despite the Section 96 application being withdrawn, therefore they had no legal grounds to force this upon landowners
- What concerns me most is that the working of the deed meant that properties owners were being asked to indemnify Pasminco from future responsibility not only within their own property but from all future liability
- Less than half of the 2500 properties within the grid were deemed eligible for inclusion and many of those chose not to be included because they refused to sign the deed

# Previously Owned Pasminco Houses Excluded

- Properties that were previously owned by Pasminco were excluded from participating in the LAS through a Clause (37) in the contract of sale for these properties
- However, the clause only indemnified Pasminco from the date of sale and not before, and the LAS formed part of the 1995 DA
- In my opinion, whether or not the actual LAS document was approved after the date of sale, the clause in the contract is null and void because the LAS was part of the 1995 DA, which should still be a legal and binding document because the objectives of the LAS have not been satisfactorily achieved



# What are the future implications?

- Technically speaking, Ferrier Hodgins could rely upon the clause in the sale contracts and the Deeds signed by landowners to avoid future remediation of these properties if the LAS is revisited
- As I understand, a deed is enforceable in a court of law and has more grounds to enforce than a breach of contract. Clause 37, which Pasminco relied upon to exclude properties owned by Pasminco from the LAS, isn't bound by a deed, and I believe any remediation orders dated prior to entering into the sale of contract were valid. This included the 1995 consent and as such, the LAS
- I am unsure where the people who signed the Deed of Agreement and entered into the LAS stand in regard to future claims as they accepted future responsibility for contaminants on their properties and agreed to indemnify Pasminco "from any other matters connected to PCCS"
- I believe the deed may be deemed invalid as it didn't form part of the approved LAS or 1995 Consent. I also believe subjecting properties to eligibility criteria was another breach of the 1995 Consent and approved LAS.

# Environmental Planning and Assessment Act 1979?

- The EP&A Act 1979 is like the holy grail of development
- Part 2 Division 1 Section 7 states that the Minister is charged with the responsibility of promoting and co-ordinating environmental planning and assessment for the purpose of carrying out the objects of the EPA & A Act which includes the following functions:
  - to advise councils upon all matters concerning the principles of environmental planning and assessment and the implementation thereof in environmental planning instruments
  - to monitor progress and performance in environmental planning and assessment, and to initiate the taking of remedial action where necessary

Therefore, if things are working, its ultimately the responsibility of the minister to exercise his power under the Act and make it right

# EP&A Act Ctd

- Under *Section 145A* of the *Act* advice may be sought from the Minister and I believe that advice should be sought regarding the Section 149 notations and whether they are consistent with the definition of contaminated land

- Which under *Section 145A* of the *Act* is defined as:

*“Contaminated Land means land in, on or under which any substance is present at a concentration above the concentrations at which the substance is normally present in, on or under (respectively) land in the same locality, being a presence that presents a risk of harm to human health or any other aspect of the environment”*

- Does the classification of individual properties as ***potentially contaminated*** imply that council suspects concentrations of substances above the concentrations found in other properties in Boolaroo or the surrounding locality?
- Or is this against background levels in uncontaminated localities and if yes, what are the background levels that have been used as a measure?

# Contaminated Land Management Act

- The meaning of contaminated land is the same as in the EP&A Act
- The general object of this Act is to establish a process for investigating and (where appropriate) remediating land that the EPA considers to be significantly contaminated and one particular object is to set out the role of the EPA in the assessment of contamination and the supervision of the investigation and management of contaminated sites
- The EPA is the regulatory arm of the Office of Environment and Heritage (OEH) and under the Contaminated Lands Management (CLM) Act the EPA regulates contaminated sites that pose a significant risk of harm
- As the regulatory arm of contaminated sites I believe that the EPA is in a position to advise council on their legal and statutory obligations, and where necessary, issue policies or guidelines to guide developers and council

# CLM Act Ctd

- The Pasminco and Incitec sites are subject to Remediation Orders by the EPA and fall under the scope of the CLM Act
- However, land within the grid, is not considered significantly contaminated under the CLM Act and Council is obliged to address contaminated land under SEPP 55

# CLM Act Ctd

- Its important to point out that under Section 6 (1) of the CLM Act a person is responsible for contamination of land -whether or not the contamination is significant contamination
- And under Part 6 (6) a person who is responsible for contamination continues to be responsible for that contamination under this Act whether or not the person has entered a contract or other arrangement that provides for some other person to be responsible for the contamination or for any harm caused by the contamination
- Therefore Pasminco/Ferrier Hodgins remain responsible for the contamination regardless of the Clause in the contract of sale and the LAS Deed that attempted to indemnify them

# SEPP 55 -

- This Policy aims to promote the remediation of contaminated land for the purpose of reducing the risk of harm to human health or any other aspect of the environment;
  - by specifying when consent is required, and when it is not required, for a remediation work, and
  - by specifying certain considerations that are relevant in rezoning land and in determining development applications in general and development applications for consent to carry out a remediation work in particular, and
  - by requiring that a remediation work meet certain standards and notification requirements
- Under this SEPP a consent authority must not consent to the carrying out of any development on land unless
  - *It has considered whether the land is contaminated*
  - *If the land is contaminated, it is satisfied that the land is suitable in its contaminated state (or will be suitable after remediation) for the purposes for which the development is proposed to be carried out; and*
  - *If the land requires remediation to be made suitable for the purpose for which development is proposed to be carried out, it is satisfied that the land will be remediated before the land is used for that purpose*

# SEPP 55 Ctd

- The requirement is to consider whether land is contaminated and if the land is suitable, ***in its contaminated state***, for the purpose to be carried out, and to ensure that any remediation necessary is carried out before the land is used for the proposed development purposes
- It is only when a change of use is proposed that Council is obliged to request the preparation of a Preliminary Site Investigation. The provisions of *SEPP 55* do not enforce council to request a Preliminary Site Investigation report
- the preparation of costly reports, as required by Councils, is unnecessary unless Council consider the future risk to people or potential harm warrants a more detailed assessment, or they believe that mitigation is unable to lower the risk to an acceptable level of harm.



- In the case of lead contamination in Boolaroo, the same mitigation measures have been scientifically proven, promoted and accepted by council for over twenty years. Therefore the requirement by Council to provide a professional report to tell them what they already know and expect, is an utterly frivolous and unnecessary waste of money
- Nowhere in the provisions of *SEPP 55* does it enforce on council to refuse to even consider or accept a DA unless accompanied by a Preliminary Site Investigation report.
- To expect this is financially onerous and unfair particular when *Clause 15 of the SEPP 55* allows for any remediation work that is ancillary to other development to be made part of the subject of the development application
- In other words, they are making remediation works a condition of approval, rather than a condition of consent

# Section 149 Certificates

- In accordance with the CLM Act, SEPP 55 and the EP&A Act, Council have an obligation to advise potential purchasers or landowners of contamination or potential contamination and consider the risks to public health or the environment, as a result of contaminated land on or adjacent to the site when assessing development
- The Section 149 notations identify land within the grid as being “potentially contaminated”

- Yet the problem is the wording of the notations which implies development may be restricted, rather than simply stating there is a possibility of contamination as a result of lead dust or slag from the former operations of Pasminco
- This notation applies to all properties within the grid, regardless of whether remediation has occurred and is as follows; *“Council has adopted a policy that may restrict development of Contaminated or Potentially Contaminated land. This policy is implemented when zoning, development, or land use changes are proposed. Consideration of Council’s adopted Policy located in DCP No. 1 (section 2.1.13 Contaminated Land), and the application of provisions under relevant State legislation is recommended”*
- If remediation has occurred a further notation is applied, however, the initial wording *“Council has adopted a policy that may restrict development of Contaminated or Potentially Contaminated land”* still applies

# Unfair Controls

- Other areas within North Lake Macquarie, such as land within the East Munibung Hill Precinct is not subject to the same 149 notations despite recognition by council that the land is potentially contaminated
- The East Munibung Hill DCP states that *“there is potential of contamination within the study area due to previous land use activities and the former lead smelter on the north western side of the Munibung Hill at Boolaroo”*

# This extends to the DCP requirements

- Concerned by the wording of the 149 certificate and possible restrictions, potential purchasers refer to the DCP and find that if they wish to submit a DA for development within the grid that it must be accompanied by:
  - a Detailed Site Investigation Report,
  - a Remedial Action Plan (RAP) – assuming lead is found ;
  - and if approved, an accredited site auditor to validate the actions required in the RAP have been completed before construction occurs.

The actual wording is:

- *“Earth works should not commence on land within the LAS area unless testing confirms that lead in-soil levels are below the health based investigation level of 300 parts per million (ppm) for residential use (higher lead levels are applicable for commercial and industrial developments). This confirmation can only be in the form of a suitably qualified environmental consultants report”*
- as the DCP requirements specifically refer to the grid, its probably a good time to draw attention to a report by Dalton et al in 2006.

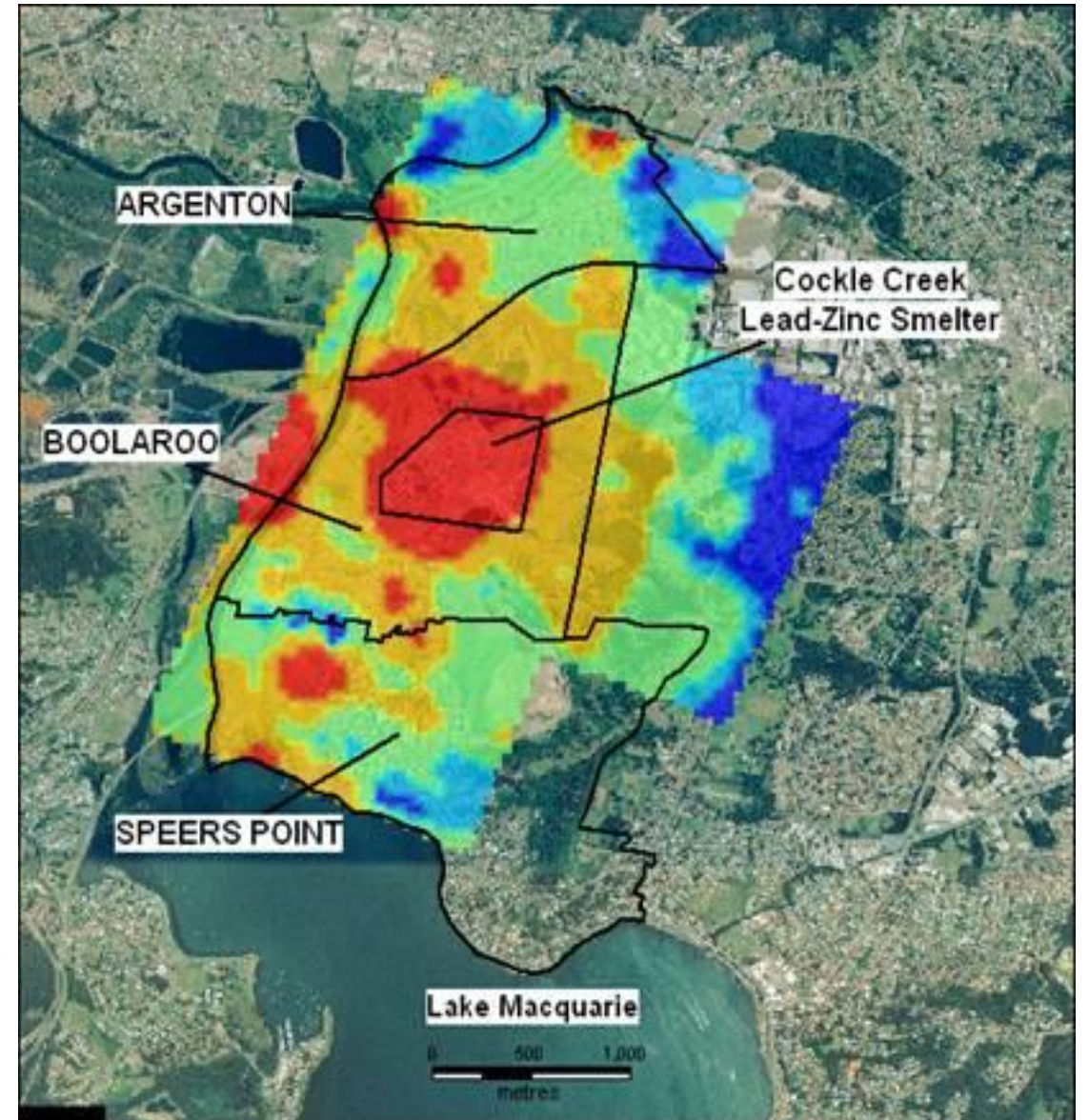
# Dalton et al 2006

- This study determined patterns of childhood lead exposure between 1991 and 2002.
- The only available soil lead data was collected in 1992. The residential soil lead concentrations used in the analysis are those collected from this single survey
- The grid, which forms the basis of the 149 notations, has not been amended or looked into since it was defined in the early 90s

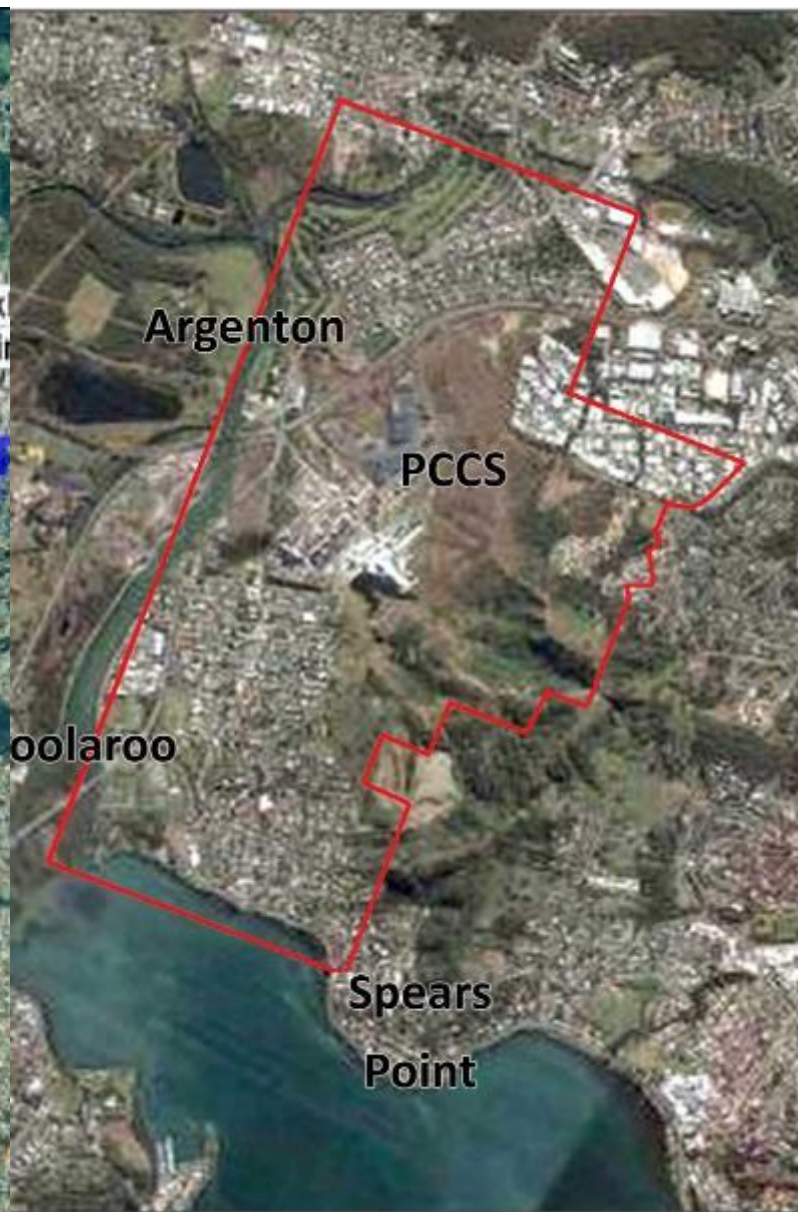
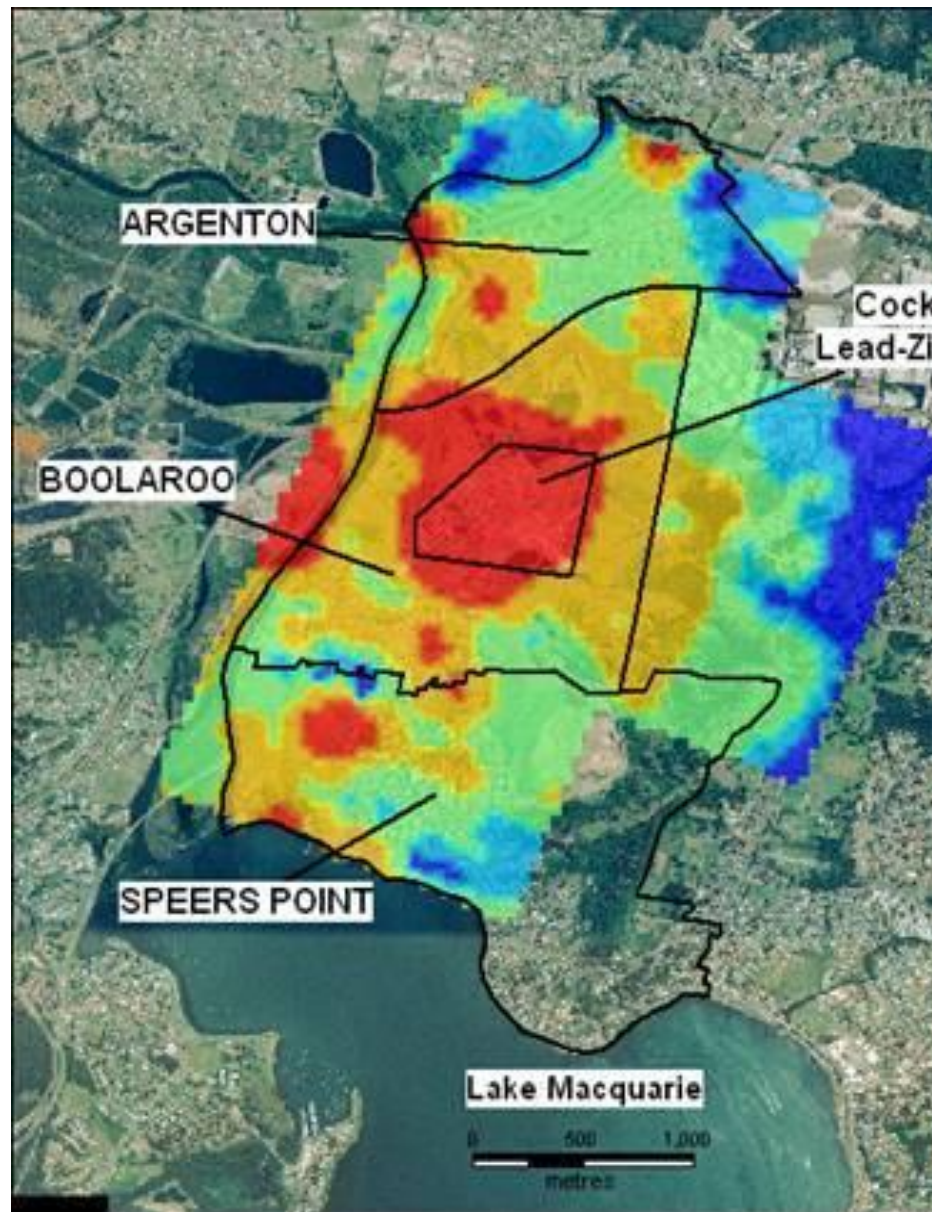
Gridded and imaged 1992 soil lead data highlighted where soil lead levels were greater than 1000 ppm

But this is shown over the suburb boundaries, not the LAS boundary and its when you look at the mapping in the Dalton et al report against the nominated grid that you should start to wonder why it has never been amended

Remember that the grid is the basis of the 149 notations



As you can see some areas with values greater than 300ppm and even greater than 1000ppm were excluded from the grid while areas with less than 300ppm were included

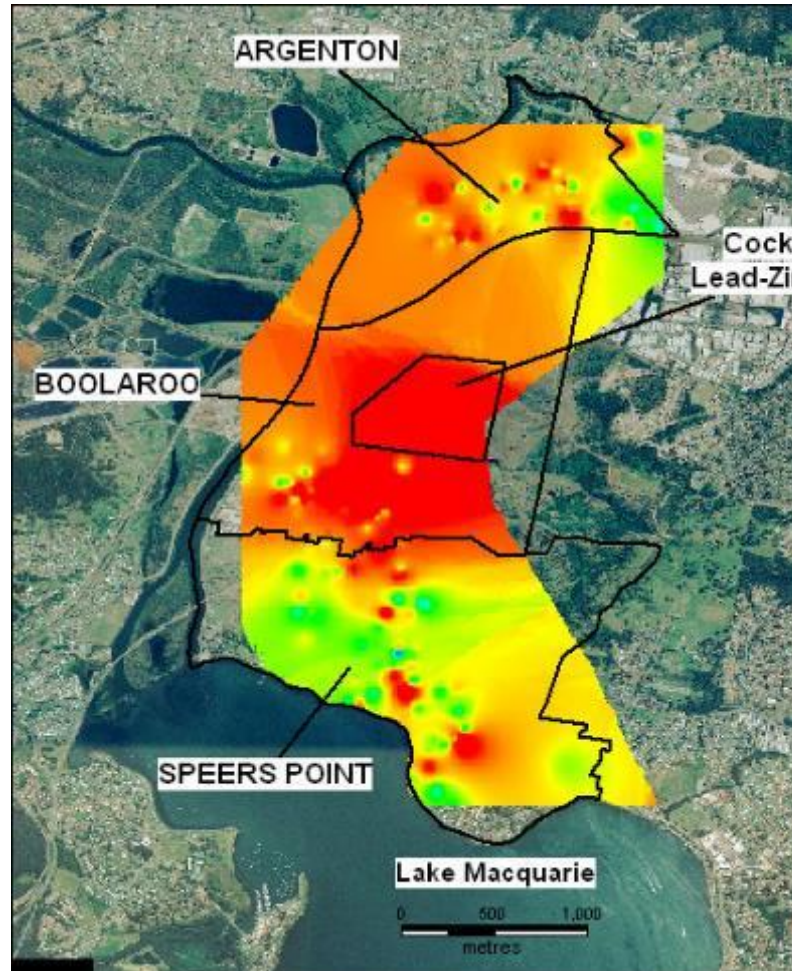




# Gridded and imaged 1992 blood lead levels

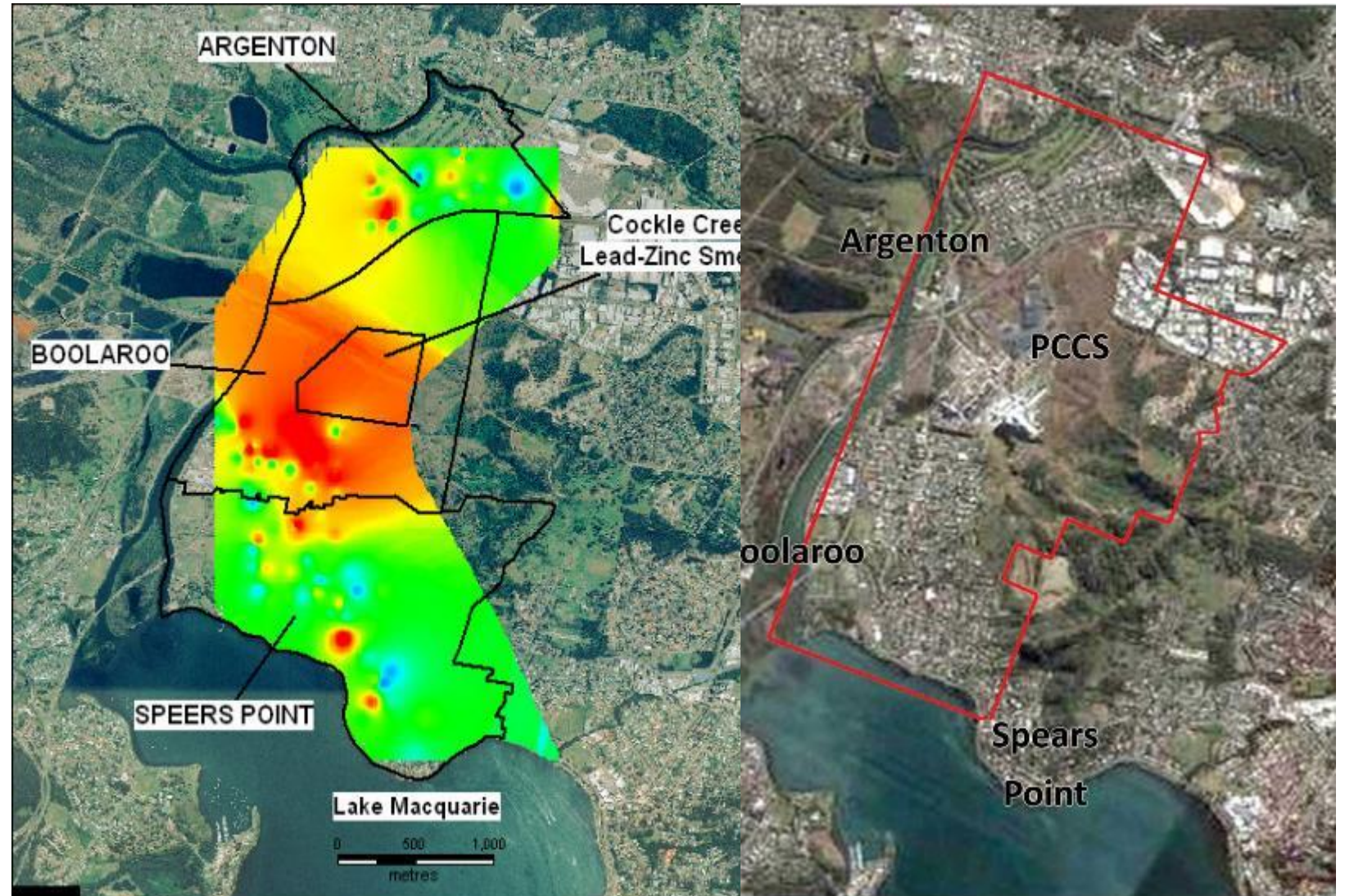
Is gets even more interesting when you look at the rest of the figures in the Dalton report

Navy BLL < 5.5  $\mu\text{g}/\text{dL}$ ,  
Turquoise: 5.5  $\mu\text{g}/\text{dL}$  – < 7.5  $\mu\text{g}/\text{dL}$ ,  
Green: 7.5  $\mu\text{g}/\text{dL}$  – < 10  $\mu\text{g}/\text{dL}$ ,  
Yellow: 10  $\mu\text{g}/\text{dL}$  – < 15  $\mu\text{g}/\text{dL}$ ,  
Red:  $\geq 15 \mu\text{g}/\text{dL}$



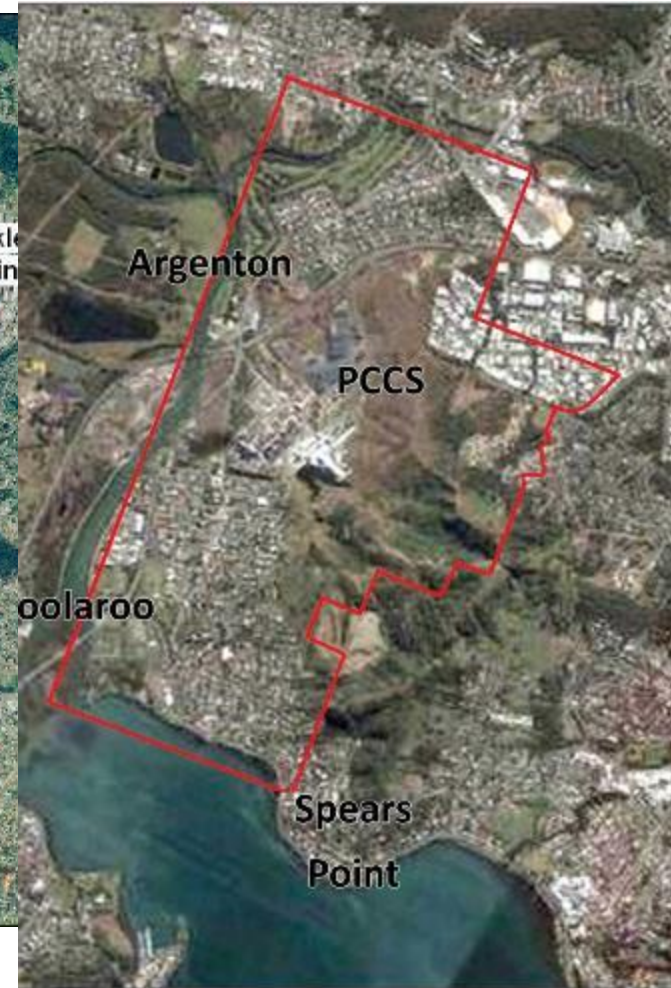
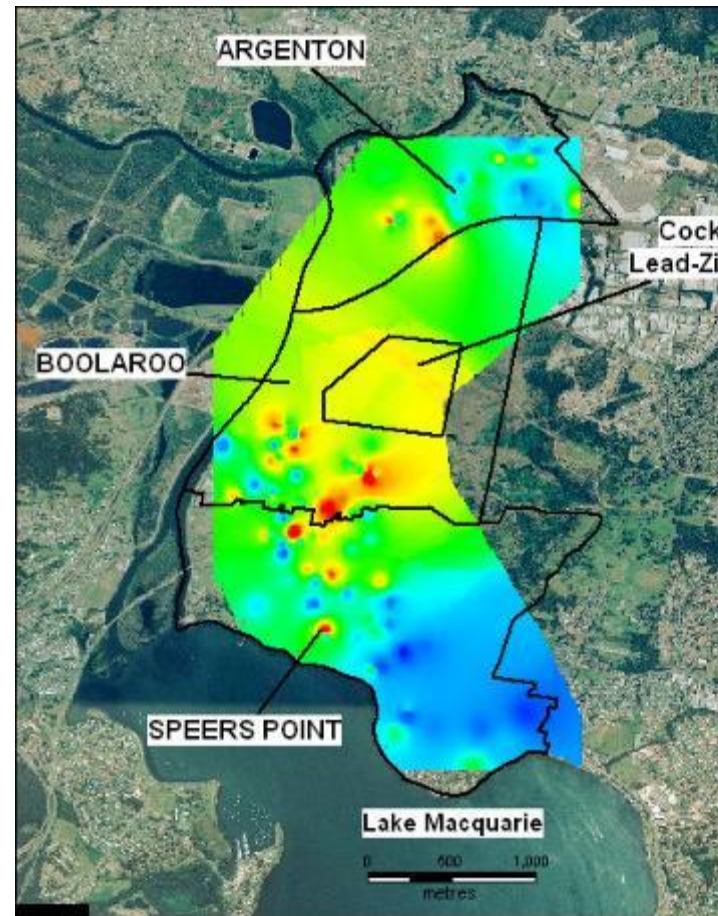
# Gridded and imaged 1996 blood lead levels

Navy: BLL < 5.5  $\mu\text{g}/\text{dL}$   
Turquoise: 5.5  $\mu\text{g}/\text{dL}$  – < 7.5  $\mu\text{g}/\text{dL}$ ,  
Green: 7.5  $\mu\text{g}/\text{dL}$  – < 10  $\mu\text{g}/\text{dL}$ ,  
Yellow: 10  $\mu\text{g}/\text{dL}$  – < 15  $\mu\text{g}/\text{dL}$ ,  
Red:  $\geq 15$   $\mu\text{g}/\text{dL}$



# Gridded and imaged 2002 blood lead levels

Navy: BLL < 5.5  $\mu\text{g}/\text{dL}$ ,  
Turquoise: 5.5  $\mu\text{g}/\text{dL}$  – < 7.5  $\mu\text{g}/\text{dL}$ ,  
Green: 7.5  $\mu\text{g}/\text{dL}$  – < 10  $\mu\text{g}/\text{dL}$ , Yellow:  
10  $\mu\text{g}/\text{dL}$  – < 15  $\mu\text{g}/\text{dL}$ , Red:  $\geq 15$   $\mu\text{g}/\text{dL}$



# Back to Section 149 Certificates and Development Control Plans

- Councils DCPS requirements and the wording of the 149 notations result in unfair expenses on the applicant particularly when;
  - the polluter remains legally responsible for contamination in accordance with the Contaminated Land Management Act;
  - *SEPP 55* does not actually require council to enforce remediation to facilitate development or state that development cannot occur unless the soil levels are below 300ppm.
- Where there is inconsistency between a SEPP and a DCP, it is a general presumption that a SEPP prevails over the DCP in accordance with *Section 36 (1) (a)* of the *EP&A Act*. As such, Council has a legal requirement to ensure the requirements outlined within *SEPP 55* prevail over those within DCP, even where the provisions within the DCP are more onerous than those within the SEPP – which is the case in LM

# LEP v DCP

- A Local Environmental Plan or LEP defines the zoning of land within an LGA and, amongst other things, outlines the objectives for each zone and what development is permissible etc.
- An LEP holds greater weight than a DCP and a council can vary a DCP at their discretion, unlike an LEP
- When the land zoning land identifies the land as generally suitable for a particular purpose, such as 2(1) residential, weight must be given to that zoning and planning decisions must generally reflect an assumption that, in some form, development which is consistent with the zoning will be permitted, such as building a house on 2(1) land

- In other words, when a proposed development doesn't change the existing land use and is permissible development under the zoning, then greater emphasis should be placed on the facilitation of permissible development, rather than using the requirements of a DCP to hinder that development
- Landowners should not be expected to remediate land prior to commencement of earthworks and any contamination reports should be expected as a condition of consent rather than development approval
- This method avoids the upfront burden of frivolous costs that are ancillary to the development (and usually permissible without consent) and hence achievable through the imposition of consent conditions.

# Council's DCP and the EP&A Act

- It is my view that Councils DCP requirements do not comply with the principle purpose of a DCP as outlined within *Section 74BA* of the *Environmental Planning and Assessment (EP&A) Act 1979* as:
  - It does not give effect to the aims of *LEP 2014* or *SEPP 55*;
  - it does not facilitate development that is permissible under *LEP 2014*; and
  - it does not achieve the objectives of the zone within *LEP 2014*
- I believe the wording on the Section 149 notations and DCP requirements are a significant hindrance to development and growth within Boolaroo and Argenton.
- I understand that Council is concerned about future litigation and their legal obligations so they are unlikely to amend anything without formal support and advice from the EPA

# The EPA's Role in Planning Controls

- As the regulatory arm of contaminated sites I believe that the EPA is in a position to advise council on their legal and statutory obligations, and where necessary, issue policies or guidelines to guide developers and council.
- As such, I believe that any advice provided by the LEWG to the EPA would be invaluable as the LEWG comprises council and EPA representatives, as well as industry, soil, health and research professionals that are considered experts in regard to lead contamination
- For this reason, I put a number of questions to the LEWG that I would like addressed – these were in the email I sent a few months ago – and hopefully this presentation expanded on why I think these questions are important



# Conclusion

- I want to be clear that in my opinion:
  - the objectives of the LAS have not been achieved
  - Condition 1.6 of the consent has not been complied with
  - Councils requirements hinders the orderly and economic use and development of land – this is against the objectives of *Section 5* of the *Act*
- When considering how to handle the problem of contamination in NLC the deemed risks should not be limited to health concerns but also include the future social and financial burden if Pasminco's legacy of contamination is not appropriately addressed once and for all
- Just because something is there doesn't necessarily mean it presents a health risk