Supreme Court
New South Wales
Court of Appeal

Case Title:	**Warkworth Mining Limited v Bulga Milbrodale Progress Association Inc**
Medium Neutral Citation:	**[2014] NSWCA 105**
Hearing Date(s):	14, 15 and 16 August; 5 September 2013
Decision Date:	7 April 2014
Jurisdiction:	Court of Appeal
Before:	Bathurst CJ; Beazley P; Tobias AJA
Decision:	1. Appeal dismissed with costs; 2. Cross-appeal dismissed with costs; 3. Summons dismissed with costs. *[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 – major infrastructure development – *Environmental Planning and Assessment Act* 1979, Pt 3A ENVIRONMENT AND PLANNING – major infrastructure development – public interest – Ecologically Sustainable Development ADMINISTRATIVE LAW – appeal on a

application for a major infrastructure project by Warkworth Mining Limited (Warkworth) under Pt 3A of the *Environmental Planning and Assessment Act* 1979 (the EPA Act).

Bulga Milbrodale Progress Association Inc (the Association) brought an appeal from the Commission's decision in the Land and Environment Court's Class 1 jurisdiction, pursuant to the EPA Act, s 75L(3). Preston CJ of LEC re-exercised the statutory power of the Minister and disapproved the project application.

Warkworth brought an appeal from the decision of Preston CJ of LEC to this Court. The Minister also appealed the decision (by way of cross-appeal). Additionally, Warkworth brought proceedings in the alternative for orders in the nature of prerogative relief under s 69 of the *Supreme Court Act* 1970.

In this Court, Warkworth pressed 13 grounds, including contentions, inter alia:

(1) That Warkworth had been denied procedural fairness in respect of a number of factual matters relating to their application;

(2) That Preston CJ of LEC had erred in law by failing to give weight to the Director-General's report, and the recommendations contained therein, as a 'focal point' or 'fundamental element' in his determination as to whether to grant approval to the application;

(3) That Preston CJ of LEC had erred in law by failing to have regard to the *Mining Act* 1992, which was relevant legislation under the Court Act, s 39(4).

The Court dismissed the appeal.

Held by the Court (Bathurst CJ, Beazley P and Tobias AJA):

(i) A failure to afford a party procedural fairness will constitute an error of law, and is also a basis upon which an order in the nature of certiorari may be made under the *Supreme Court Act* 1970, s 69: [5], [39], [45]. Considered: *Goodwin v Commissioner of Police* [2012] NSWCA 379; *Roads & Traffic Authority of New South Wales v Peak* [2007] NSWCA 66 at [141]-[151]; *Clements v Independent Indigenous Advisory Committee* [2003] FCAFC 143; 131 FCR 28 at [8]; *Rana v Military Rehabilitation and Compensation Commission* [2011] FCAFC 80 at [24].

(ii) The requirement under the *Land and Environment Court Act* 1979, s 38(1), that proceedings brought in the Court's Class 1 jurisdiction are to be brought with as little formality as possible, does not abrogate the fundamental requirements of procedural fairness in those proceedings: [38].
Considered: *RTA v Peak* [2007] NSWCA 66 at [15] and [150].

(iii) If evidence is required to meet an issue, the party asserting the factual basis for the issue bears the responsibility for adducing the necessary evidence. The failure to adduce relevant evidence does not give rise to a failure to afford procedural fairness. Where evidence is by way of expert opinion, it is not sufficient to expect that the underlying basis of that opinion not otherwise adduced in the evidence would be revealed in cross-examination: [112].

(iv) When engaged in an exercise of balancing a number of relevant matters in the exercise of a statutory discretion, and in the absence of a statutory indication of the weight to be given to various considerations, a decision-maker is entitled to designate the weight given to a particular matter prior to undertaking the overall balancing exercise: [178].
Considered: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; 162 CLR 24.

(v) The description of a mandatory consideration as a 'focal point' or 'fundamental element' is used to emphasise that the relevant matter is a factor that must be placed at the forefront of the decision-maker's consideration. The language may be appropriate where limited factors or discrete requirements are specified in the legislation. While Section 75J(2) of the EPA Act made consideration of the Director-General's Environmental Assessment Report mandatory, it did not operate to require the report to be a 'fundamental element' or 'focal point' in the decision-maker's consideration. There was no requirement for prima facie effect to be given to the recommendations in the report, or for the decision-maker to articulate why those recommendations should not be followed: [217], [231].
Considered: *R v Hunt; Ex Parte Sean Investments Pty Ltd* [1979] HCA 32; 180 CLR 322; *Zhang v Canterbury City Council* [2001] NSWCA 167; 51 NSWLR 589; *James Hardie & Coy Pty Limited v Roberts* [1999] NSWCA 314; 47 NSWLR 425; *Evans v Marmont* (1997) 42 NSWLR 70; *Singh v the Minister for Immigration* [2001] FCA 389; *Walkerville v Adelaide Clinic Holdings* (1985) 38 SASR 161.

(vi) The circumstances of an administrative review from a primary decision maker to a tribunal is of a different nature to the statutory right of appeal for which s 75L(3) provides.
Distinguished: *Macedon Ranges Shire Council v Romsey Hotel* [2008] VSCA 45; 19 VR 422, distinguished.

(vii) A statutory requirement that regard be had to the public interest operates at a high level of generality. It is capable of embracing principles of Ecologically Sustainable Development notwithstanding that there is also a legislative provision that makes consideration of those principles necessary: [296], [299].
Considered: *Minister for Planning v Walker* [2008] NSWCA 224; 161 LGERA 423; *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133; 67 NSWLR 256; *O'Sullivan v Farrer* [1989] HCA 61; 168 CLR 210.

(viii) The *Mining Act* 1992 was not relevant legislation to which the Minister or the Land and Environment Court was required to have regard in determining whether to grant approval. The operative provisions of the *Mining Act* 1992 do not deal with the grant of development consent for mining activities. The requirement under s 65 that development consent be obtained prior to the grant of an authority is a legislative indication that questions of development consent and the grant of an authority are separate and distinct processes involving different mandatory and discretionary considerations: [321]-[322].
Legislation considered: *Mining Act* 1992, s 65

JUDGMENT

1 **THE COURT**:

INTRODUCTION

The proceedings

2 This is an appeal from an order made by Preston CJ of LEC on 15 April 2013, in which his Honour disapproved an application made by Warkworth Mining Limited (Warkworth) for a major infrastructure project approval under the *Environmental Planning and Assessment Act* 1979 (the EPA Act), Pt 3A to extend the existing Warkworth mine located in the Hunter Valley, a coal-rich region in the State.

3 The proceedings before his Honour were an appeal from the decision of the Minister's delegate, the Planning Assessment Commission (the Commission) brought in the Court's Class 1 jurisdiction: *Land and Environment Court Act* 1979 (the Court Act) Pt 3 Div 1, s 17; and the EPA Act, s 75L(3) (the LEC appeal). The LEC appeal was by way of rehearing and fresh or additional evidence could be tendered and was tendered in this case. In determining the LEC appeal, the Court was required to re-exercise the statutory power conferred upon the Minister in determining the application. In that regard, the Court had all the functions and discretions that the Minister had in respect of the application: the Court Act, s 39(2), s 39(3). However, one further matter should be noted for the record. Warkworth submitted that the jurisdiction conferred by the Court Act, s 39 was that it provided for a rehearing, but not by way of a de novo redetermination. Warkworth acknowledged that this argument was not available to it in this Court: *Alinta LGA Limited v Mine Subsidence Board* [2008] HCA 17.

4 The appeal to this Court is brought pursuant to the Court Act, s 57, which provides for an appeal on a question of law. To succeed on the appeal it is necessary for there to have been legal error in the manner in which a question was determined in the court below: *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* [2009] NSWCA 178 at [19]-[24]; *Roads & Traffic Authority of New South Wales v Peak* [2007] NSWCA 66 at [136]. It is not necessary, however, for the question of law to be

explicitly stated and decided; it is sufficient if a decision is such that resolution of a question of law is manifested by it: *Kostas v HIA Insurance Services Pty Limited* [2010] HCA 32; 241 CLR 390 at [23], [69], [78] and [91]. Errors with respect to relevant and irrelevant considerations constitute an error or a question of law for the purposes of s 57: *Director-General, Dept of Ageing, Disability and Home Care v Lambert* [2009] NSWCA 102; 74 NSWLR 523.

5 Failure to afford procedural fairness also constitutes an error of law: *Clements v Independent Indigenous Advisory Committee* [2003] FCAFC 143; 131 FCR 28 at [8]; *Rana v Military Rehabilitation and Compensation Commission* [2011] FCAFC 80 at [24]; *Goodwin v Commissioner of Police* [2012] NSWCA 379 at [19].

6 Warkworth has also brought proceedings pursuant to the *Supreme Court Act* 1970, s 69 for orders in the nature of prerogative relief, in the event that any of its grounds of appeal do not involve a question of law: *Director-General, Dept of Ageing, Disability and Home Care v Lambert* at [77], [96]. Warkworth submitted that relief was available pursuant to s 69 on the basis that the Court exceeded its jurisdiction in making the order disapproving Warkworth's application for major infrastructure project approval. Warkworth also submitted that a failure to afford procedural fairness is a ground to make an order in the nature of certiorari. It was accepted that it was appropriate for Warkworth to bring this application additional to its appeal: *Lowy v The Land and Environment Court of NSW & Ors* [2002] NSWCA 353; 123 LGERA 179; *Kirk v Industrial Relations Commission; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)* [2010] HCA 1; 239 CLR 531 at [55].

Warkworth's application for a major infrastructure project approval

7 Warkworth operates an open cut coalmine mine (the Warkworth mine) approximately 4 km northeast of the village of Bulga in the Hunter Valley. It is one of several coalmines in the area.

8 The Warkworth mine commenced operation in 1981. Its current operations are conducted pursuant to a development consent (the 2003 Development Consent) granted by the Minister for Planning in May 2003 under the EPA Act, Pt 4, s 80 (now repealed). That consent was subject to conditions, including conditions requiring the conservation of areas of native vegetation and landforms to the north, west and southwest of the mine, which were designated as non-disturbance areas and habitat management areas. There were also conditions relating to noise. In that regard, the background noise level for Bulga, including residences to the north of the Village, was assessed to be 33 dB(A). This assessment was based upon a 2002 Environmental Impact Statement, the findings in which were said to have been validated in another study conducted in 2008. The 2008 findings were contained in what became identified in the proceedings as the Global Acoustics Reports.

9 In 2010, Warkworth lodged the application for major infrastructure project approval to extend the mine spatially to the west and southwest (the Project). The application also sought an extension of the existing development consent to mine the underlying coal reserves until 2031. A reason for the application was to take advantage of improved coal prices which made it economic to mine areas which had previously been considered uneconomic, including parts of those areas that had been designated as non-disturbance areas and habitat management areas under the 2003 development consent.

10 Warkworth's existing mining lease extended over the disturbance area of the Project, but did not include the 20 m immediately below the surface. If approval were given to extend the mine over the proposed extension area, but to restrict Warkworth to underground mining only, 20.1 Mt of product coal would be yielded. By contrast, an open cut mine, as proposed by the Project, would produce a total of 105 Mt of product coal. Therefore, underground mining within the proposed extension area would only

produce a yield of 19 per cent of the potential coal product available through open cut mining (being 20.1 Mt divided by 105 Mt).

11 If approved, the extension of the mine would necessitate significant physical disturbance of the surrounding area including:

(a) The closure and excavation of Wallaby Scrub Road, a major local road, and the northern extension of the Great North Road, an historic road in the area;

(b) Clearing of approximately 766 ha of four types of endangered ecological communities (some of this clearing would have occurred under the existing 2003 consent);

(c) Removal of Saddleback Ridge, which separates the Warkworth mine from the village of Bulga;

(d) Emplacement of overburden from the Warkworth mine at the Mount Thorley mine which adjoined the Warkworth mine immediately to the south. (The Mount Thorley mine was in separate ownership, but both mines were managed as a single operation under a joint venture agreement between Warkworth and the owners of the Mount Thorley mine).

12 One of the significant vegetation communities most at risk, should the Project proceed, is the Warkworth Sands Woodland, a unique ecological community not found in any other region in the world, including in any other part of the Hunter Valley. The uniqueness of the Warkworth Sands Woodland derives from its propagation in Aeolian sand deposits which only occur in this area. To offset the significant biodiversity impacts, Warkworth nominated two biodiversity areas proximate to the site as offset areas, identified as the Southern and Northern Biodiversity Areas respectively. Other areas (the remote biodiversity offset areas) were nominated as strategic offsets, including for two essential Ironbark

communities, principally comprised of the Central Hunter Grey Box. The offset areas were also intended to serve as off sets for disrupted fauna habitat.

13 On 3 February 2012, the Commission, as delegate of the Minister, approved the Project (the Project Approval). The Project Approval permitted an extension of the northern and western pits of the existing mine in a westerly direction over 1271 ha and allowed mining for an additional 10 years to 2031. The approval was subject to conditions, including that Warkworth establish the nominated biodiversity offsets to compensate for the Project's impacts on biological diversity, including on endangered ecological communities. There were also conditions relating to noise.

14 If the Project is approved, Warkworth's mining operations would encroach more closely on Bulga from the present 4 km to approximately 2.8 km from the village. The Bulga Milbrodale Progress Association Inc (the Association) was the applicant in the LEC appeal before Preston CJ of LEC. The Association contended before his Honour that Warkworth's application for the Project should be refused because of its significant and unacceptable impacts on biological diversity, including on endangered ecological communities (EECs), that were not avoided, mitigated or otherwise compensated for by the terms imposed by the Minister's consent.

15 The Association also contended that there were unacceptable noise and dust emissions impacting upon the residents of Bulga and upon the surrounding countryside; adverse social impacts on the community of Bulga; and economic issues, including that the full environmental costs were not internalised by the Project. The Association contended that overall it was contrary to the public interest to grant approval to the Project.

16 Warkworth and the Minister accepted that there should be some variation to the conditions initially imposed so as to better address the potential

impacts of the Project that had been raised during the course of the proceedings before his Honour. They contended that the Project as modified would have acceptable impacts in terms of biological diversity, noise and dust, and in respect of social and economic factors. Overall, they submitted that in balancing the economic, social and environmental factors, the Project was acceptable.

17 Preston CJ of LEC determined that the application for the Project should be disapproved. His Honour's reasons, at [498], were as follows:

> "I have found, amongst other things, that the Project would have significant and unacceptable impacts on biological diversity, including on endangered ecological communities, noise impacts and social impacts; that the proposed conditions of approval are inadequate in terms of the performance criteria set and the mitigation strategies required to enable the Project to achieve satisfactory levels of impact on the environment, including the residents and community of Bulga; and that the proposed conditions of approval, including by combining the Warkworth mine with the Mount Thorley mine, are likely to make monitoring and enforcing of compliance difficult, thereby raising the possibility that the Project's impacts may be greater and more adverse than allowed by the conditions of approval."

18 His Honour accepted, at [499], that the economic impact and positive social impacts were substantial, but in balancing all relevant matters nonetheless determined that the preferable decision was that the Project be disapproved.

Issues on the appeal

19 The issues raised by the appeal to this Court and on the s 69 summons were as follows:

(1) Warkworth was denied procedural fairness:

(a) in respect of his Honour's finding, at [330]-[333], that background noise levels were set at levels that were too high: **ground 1**.

(b) In respect of his Honour's finding, at [206]-[207], that there was insufficient evidence to establish that the impacts on the relevant threatened fauna caused by the Project would be offset by the remote biodiversity areas: **ground 2**.

(c) In using a polycentric approach to reject or discount the weight of expert evidence, without raising his intention to do so with the parties or with the witnesses whose evidence was rejected: **ground 2A**.

(d) In applying the wrong test when deciding whether approval should be granted, in that by application of a polycentric approach, he departed from the balancing exercise required by the Act: **ground 6**. (This issue may be seen as allied to the argument raised by ground 2A.)

(e) In failing to deal with the question raised by Warkworth that the natural regeneration of the Warkworth Sands Woodland supported an inference that assisted regeneration would be successful and that the grasslands in the Northern and Southern Biodiversity Areas provided an offset for the loss of the Warkworth Sands Woodland that was to be cleared under the Project proposal: **ground 9**. It was also said that this constituted a constructive failure to exercise jurisdiction.

(2) His Honour erred in law:

(f) In failing to give weight to the Director-General's report and the reports, advices and recommendations contained therein as fundamental elements in his determination as to whether to grant approval to the application: **ground 2B**.

(g) In failing to consider or give weight to the public interest including in the Director-General's Report and in the Commission's conclusions: **ground 2C**.

(h) In failing to address the central aspect of Warkworth's case, namely, the significant economic benefits and positive impacts of the Project such that there was a failure to exercise jurisdiction and an erroneous application of the applicable legal standard. His Honour also failed to give adequate reasons for his conclusion that the Project should not be approved: **ground 3**.

(i) In failing to have regard to relevant legislation (as required by the Court Act, s 39(4)), namely, the *Mining Act* 1992 and the terms of the leases held by Warkworth over the disturbance area: **ground 5**.

(j) In deciding the proceedings (a) on the basis that s 75J of the EPA Act or the principles of Ecologically Sustainable Development required or permitted weight to be given to the fact that the Project did not avoid or mitigate impacts on Warkworth Sands Woodland or (b) on the basis that there were available measures to avoid or mitigate those impacts in the absence of evidence to establish that was so: **ground 7**.

(k) In holding, at [205], that only an offset of precisely the same ecological community that would be impacted by the Project could be considered in addressing the impacts of the Project: **ground 8**.

(3) His Honour failed to exercise jurisdiction:

(l) In failing to address Warkworth's submission that the evidence established that the Warkworth Sands Woodland would regenerate in the Southern and Northern Biodiversity Offset Areas: **ground 9**.

(m) In failing to consider whether the risks of the Warkworth Sands Woodland not regenerating would be mitigated by new condition 41A proposed by Warkworth during the hearing: **ground 10**. This ground was also advanced as a failure to take into account a relevant consideration, being the condition proposed and as a constructive failure to exercise jurisdiction.

20 All other grounds of appeal were abandoned.

21 By his cross-appeal, the Minister contended that his Honour erred in law by failing to give weight to the Director-General's report as a fundamental element in his determination, particularly with regard to the aspects of that report addressing the suitability of the biodiversity offsets package, the socio-economic benefits of the project, and the public interest (cross-appeal grounds 1 and 2). The Minister's cross-appeal raises the same issues as Warkworth's appeal ground 2B, and are considered together.

The legislation

The *Environmental Planning and Assessment Act*

22 Warkworth's application for the extension of the mine was made pursuant to the EPA Act, s 75J. Section 75J was contained in Pt 3A: "*Major infrastructure and other projects*". Section 75B(1) provided that Pt 3A applied to the carrying out of a development that is declared under the section to be a project to which the Part applies. Section 75B(2) provided that a major infrastructure or other development that, in the opinion of the

Minister, is of State or regional environmental planning significance, may be declared to be a project to which Pt 3A applied.

23 Section 75E provided for the making of an application for approval of a project under the Part.

24 Section 75F provided for the creation of environmental assessment requirements for an approval. When an application was made for approval of a project under Pt 3A, the Director-General was required by s 75(2) to prepare environmental assessment requirements for the project. These requirements were to be prepared having regard to any guidelines published on environmental assessment requirements published by the Minister: see s 75F(1). The Director-General was required to notify the applicant of the environmental assessment requirements that had been prepared. The requirements could be modified by notice to the applicant: s 75F(3).

25 Section 75F(4) required the Director-General, in preparing the environmental assessment requirements, to consult relevant public authorities and have regard to the need for the requirements to assess any key issues raised by those public authorities.

26 An applicant may be required to prepare an environmental assessment: s 75F(5); and may also be required to include in an environmental assessment a statement of the commitments the applicant is prepared to make for environmental management and mitigation measures on the site: s 75F(6). A statement of commitments was required in this case.

27 Section 75H provided that the applicant was to submit to the Director-General the environmental assessment required under s 75F(5). If the environmental assessment was accepted by the Director-General, the Director-General was required to make the environmental assessment publicly available for at least 30 days: s 75H(3). Any person may make a written submission to the Director-General in respect of the environmental

assessment: s 75H(4). Copies of the submissions were to be provided, relevantly, to the applicant and any other public authority that the Director-General considers appropriate: s 75H(5).

28 The Director-General could require the applicant to submit a response to the issues raised in the submissions and a preferred project report that outlined any proposed changes to the project to minimise its environmental impact, together with any revised statement of commitments: s 75H(6).

29 Section 75I provided for the Director-General to give a report on a project to the Minister. As this provision is important in Warkworth's case, it is appropriate to set out its terms in full:

> **"75I Director-General's environmental assessment report**
>
> (1) The Director-General is to give a report on a project to the Minister for the purposes of the Minister's consideration of the application for approval to carry out the project.
>
> (2) The Director-General's report is to include:
>
> (a) a copy of the proponent's environmental assessment and any preferred project report, and
> (b) any advice provided by public authorities on the project, and
> (c) a copy of any report of the Planning Assessment Commission in respect of the project, and
> (d) a copy of or reference to the provisions of any State Environmental Planning Policy that substantially govern the carrying out of the project, and
> (e) except in the case of a critical infrastructure project – a copy of or reference to the provisions of any environmental planning instrument that would (but for this Part) substantially govern the carrying out of the project and that have been taken into consideration in the environmental assessment of the project under this Division, and
> (f) any environmental assessment undertaken by the Director-General or other matter the Director-General considers appropriate, and
> (g) a statement relating to compliance with the environmental assessment requirements under this Division with respect to the project."

30 The Environmental Planning and Assessment Regulation 2000, cl 8B is also relevant and is conveniently referred to at this point. It provided:

> "**8B Matters for environmental assessment and Ministerial consideration**
>
> The Director-General's report under section 75I of the Act in relation to a project is to include the following matters (to the extent that those matters are not otherwise included in that report in accordance with the requirements of that section):
>
> (a) an assessment of the environmental impact of the project,
> (b) any aspect of the public interest that the Director-General considers relevant to the project,
> (c) the suitability of the site for the project,
> (d) copies of submissions received by the Director-General in connection with public consultation under section 75H or a summary of the issues raised in those submissions."

31 The giving of Approval for a project was governed by s 75J. That section provided, relevantly:

> "**75J Giving of approval by Minister to carry out project**
>
> (1) If:
>
> (a) the proponent makes an application for the approval of the Minister under this Part to carry out a project, and
> (b) the Director-General has given his or her report on the project to the Minister,
>
> the Minister may approve or disapprove of the carrying out of the project.
>
> (2) The Minister, when deciding whether or not to approve the carrying out of a project, is to consider:
>
> (a) the Director-General's report on the project and the reports, advice and recommendations (and the statement relating to compliance with environmental assessment requirements) contained in the report ...
>
> (3) In deciding whether or not to approve the carrying out of a project, the Minister may (but is not required to) take into account the provisions of any environmental planning instrument that would not (because of section 75R) apply to the project if approved. However, the regulations may preclude approval for the carrying out of a class of project

(other than a critical infrastructure project) that such an instrument would otherwise prohibit.

(4) A project may be approved under this Part with such modifications of the project or on such conditions as the Minister may determine.

(5) The conditions of approval for the carrying out of a project may require the proponent to comply with any obligations in a statement of commitments made by the proponent (including by entering into a planning agreement referred to in section 93F)."

32 Notwithstanding that Pt 3A has been repealed, s 75J continues to apply to applications for approval to carry out a project that was made, but not finally determined, before the repeal of the *Environmental Planning and Assessment Act*, Pt 3A: see Sch 6A(2) and (3) the *Environmental Planning and Assessment Amendment (Part 3A Repeal) Act* 2011, Sch 1, 1.7[2].

The *Land and Environment Court Act*

33 The Court Act, Pt 3, Div 4 makes provision, inter alia, for the conduct of Class 1 proceedings in the Court. Relevant to this matter are the provisions of s 38 and s 39. Those sections provide as follows:

"**38 Procedure**

(1) Proceedings in Class 1 ... of the Court's jurisdiction shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and of every other relevant enactment and as the proper consideration of the matters before the Court permit.

(2) In proceedings in Class 1 ... of the Court's jurisdiction, the Court is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate and as the proper consideration of the matters before the Court permits.

(3) Subject to the rules, and without limiting the generality of subsection (2), the Court may, in relation to proceedings in Class 1 ... of the Court's jurisdiction, obtain the assistance of any person having professional or other qualifications relevant to any issue arising for determination in the

proceedings and may receive in evidence the certificate of any such person ...

39 Powers of Court on appeals

...

(2) In addition to any other functions and discretions that the Court has apart from this subsection, the Court shall, for the purposes of hearing and disposing of an appeal, have all the functions and discretions which the person or body whose decision is the subject of the appeal had in respect of the matter the subject of the appeal.

(3) An appeal in respect of such a decision shall be by way of rehearing, and fresh evidence or evidence in addition to, or in substitution for, the evidence given on the making of the decision may be given on the appeal.

(4) In making its decision in respect of an appeal, the Court shall have regard to this or any other relevant Act, any instrument made under any such Act, the circumstances of the case and the public interest.

(5) The decision of the Court upon an appeal shall, for the purposes of this or any other Act or instrument, be deemed, where appropriate, to be the final decision of the person or body whose decision is the subject of the appeal and shall be given effect to accordingly.

...

(7) The functions of the Court under this section are in addition to and not in derogation from any other functions of the Court ..."

Legal principles relating to procedural fairness

34 Warkworth contended that it was denied procedural fairness in a number of respects. Each of the matters raised will be dealt with in relation to the particular ground of appeal under which the contention is made. It is useful, however, to first state the principles relating to procedural fairness, a concept which has application in a wide range of circumstances. As the authorities indicate, it is sometimes not difficult to determine that a particular circumstance requires procedural fairness to be accorded. The difficult question, more often, is in determining what is required in the particular circumstance to satisfy the obligation and whether those requirements have been satisfied in the given case. It is in this sense that

Gleeson CJ in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] HCA 6; 214 CLR 1 commented, at [37], in respect of procedural fairness that:

> "Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice."

35 Insofar as procedural fairness relates to the issues raised in the grounds of appeal, the statement of Mason J in *Kioa v West* [1985] HCA 81; 159 CLR 550 at 587 is of particular relevance. As his Honour stated:

> "... recent decisions illustrate the importance which the law attaches to the need to bring to a person's attention the critical issue or factor on which the administrative decision is likely to turn so that he may have an opportunity of dealing with it." (citations omitted)

36 This passage was endorsed by McHugh and Gummow JJ in *Ex Parte Lam*, at [81]. See also *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; 228 CLR 152 at [32].

37 On the same question, Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action,* 5th ed (2013) (Thomson Reuters) at 527 have said:

> "A fair hearing presumes that the parties to it are fully informed of, and able to respond to, the relevant issues. That is not possible if disclosure is inadequate. Inadequate disclosure can also reduce the accountability, acceptability and quality of decision-making."

38 Whilst the preceding comments were made in reference to administrative decision-making, procedural fairness is also "*an essential characteristic of judicial proceedings*": *RCB v The Honourable Justice Forrest* [2012] HCA 47; 247 CLR 304 at [42]. However, as the High Court there observed, "*its content is dependent upon the nature of the proceedings and the persons claiming its benefit*". In this regard, the requirement under the Court Act, s 38(1), that proceedings in the Court's Class 1 jurisdiction are to be

brought with as little formality as possible, does not abrogate the fundamental requirements of procedural fairness in those proceedings: see *RTA v Peak* [2007] NSWCA 66 at [15] and [150].

39 A failure to afford a party procedural fairness will constitute an error of law: see *Clements v Independent Indigenous Advisory Committee* at [8] per Gray ACJ and North J. Where the relevant failure to afford procedural fairness is a failure to consider a substantial claim that has been advanced by a party, there will also be a constructive failure to exercise jurisdiction: *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; 77 ALJR 1088, per Gleeson CJ at [24], Kirby J at [87] and Callinan J at [95]. Construing the legal limits of a court's powers to determine whether it has exceeded its jurisdiction in a particular case will involve, at least implicitly, a question of law within the meaning of the Court Act, s 57(1): see *RTA v Peak* at [15] and [141]-[151]; *Kostas v HIA Insurance Services* at [23]-[25] per French CJ, [69] per Hayne, Heydon, Crennan and Kiefel JJ.

40 There will be procedural unfairness where information is used by a decision maker in a way that could not reasonably be expected by one party and that party is not given an opportunity to respond to that use: see *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* [2001] HCA 22; 206 CLR 57 at [142] per McHugh J and *Muin v Refugee Review Tribunal* [2002] HCA 30; 190 ALR 601 at [128]-[134] per McHugh J.

41 Another aspect of procedural fairness was argued in the present case, namely, that where a court determines a matter on a basis that was not in issue or argued in the proceedings, there will have been a denial of procedural fairness: see *Stead v State Government Insurance Commission* [1986] HCA 54; 161 CLR 141. This is a basic requirement of a fair trial. See also *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* in the context of administrative decision-making.

42 That general principle is, however, subject to an important qualification, stated at the practical level, by asking, "*Would further information possibly have made any difference* [*to the decision*]*?*": *Stead v State Government Insurance Commission* at 145; *Re Minister for Immigration and Multicultural Affairs; ex parte Applicant S154/2002* (2003) 77 ALJR 1909 at [28]. An appellate court will not order a new trial where the inevitable result would be that the same order would be made on a retrial. Or, as McHugh J observed in *Muin v Refugee Review Tribunal*, stating the obverse of this principle, an appellate court should not refuse relief unless it is confident that the breach could not have affected the outcome of the case.

43 In *Ucar v Nylex Industrial Products Ltd* [2007] VSCA 181, Redlich JA, at [75], identified a further circumstance where relief would be refused, namely, where there is an incontrovertible fact or point of law which provides a discrete basis for the decision which cannot be affected by the procedural unfairness.

44 The *Stead v State Government Insurance Commission* line of authority deals with the circumstances in which a new trial will be ordered. The same principles apply in respect of this Court's power to remit matters where an error of law has been identified on an appeal under s 57 (or, for that matter, under s 56): *RTA v Damjanovic* [2006] NSWCA 166 at [122]; *Castle Constructions Pty Ltd v North Sydney Council* [2007] NSWCA 164 at [123]. We would comment in passing that it is not necessary for the purposes of this matter to decide whether the less stringent test stated in *Damjanovic & Sons Pty Ltd v Commonwealth* [1968] HCA 42; 117 CLR 390 should be applied.

45 A failure to afford procedural fairness is also a basis upon which an order in the nature of certiorari may be made under the *Supreme Court Act*, s 69: see *Clements v Independent Indigenous Advisory Committee* at [8]; *Roads & Traffic Authority of New South Wales v Peak* at [141]-[151];

Rana v Military Rehabilitation and Compensation Commission at [24]; *Goodwin v Commissioner of Police* at [19].

GROUND 1: The background noise issue

46 One of the issues in contention in the proceedings was the nature and acceptability of the noise impacts of the Project. For the purposes of determining the appropriate noise level for the Project, the New South Wales Industrial Noise Policy (the INP) was used. The INP outlines processes:

> "... to help strike a feasible and reasonable balance between the establishment and operation of industrial activities and the protection of the community from noise levels that are intrusive or unpleasant."

47 Intrusive noise criteria were specified in the Project Approval. Dr Parnell, the Minister's noise expert, explained in his affidavit that intrusive noise criteria are in the INP:

> "... to ensure that one single industry does not use all of the noise headroom available for that land use which would have the effect of restricting any other industry being able to be established in the noise catchment."

48 The intrusive noise criteria is set relative to the background noise level. However, Mr Parnell stated that a protocol existed whereby the intrusive noise criteria is set by reference to the predicted noise levels at the receiver. The receiver is the property at which noise is "*received*".

49 There is an accepted method for assessing the long term background noise level so as to ascertain a "*rating background level*". In brief, this involves first, a calculation of the background level for each day, evening and night over all days for a specified period and, secondly, determining the rating background level, which is the median assessment background level over all days for the period. The base measure is a 15 minute period. His Honour explained, at [299], that this method:

> "... is designed to ensure that the criterion for intrusive noise will be achieved for at least 90% of the time periods over which annoyance reactions may occur (taken to be periods of 15 minutes) (INP, 3.1.1, p 22)."

50 The background noise level for the Project had been assessed at 33dB(A). This was applied to the whole Bulga area. A conventional noise augmentation of 5 dB(A) was applied so as to give a Project Specific Noise Level (PSNL) of 38 dB(A). This calculation was made in accordance with the methodology contained in the INP. There was no issue with the adoption of a 5 dB(A) load or augmentation for determining the PSNL. Rather the issue related to the adoption of a background noise level of 33 dB(A) for the whole of Bulga.

51 His Honour expressed concern about the adoption of this level for the whole of Bulga because the evidence established that some properties in Bulga had a lower background noise level than 33 dB(A). His Honour held, at [330]-[331], that, on the measurement evidence, there were differences in the noise levels experienced by some residences to the north of Bulga village, which only experienced a background noise level of 30 dB(A). His Honour further considered, at [332], that the variation in the noise levels in one part of the Bulga area raised doubts as to the reliability of the adopted background noise levels for the other parts of the area.

52 His Honour concluded, therefore, at [327], that the PSNL was set too high for parts of Bulga. This became important during the hearing because the availability of remedial measures by way of acquisition of affected properties or mitigation of noise impacts were dependent upon the extent to which the intrusive noise criteria set for the properties in Bulga exceeded the PSNL. Properties with background noise levels below 33 dB(A) could therefore experience significant increases in noise levels without gaining entitlement to any remedial measures.

53 A second issue was that the intrusive noise criteria was set by reference to the predicted level, even when that level exceeded the PSNL. This approach meant that the criteria was based on what the mine was capable of achieving, rather than an assessment of what noise levels were acceptable. His Honour regarded this approach to be inconsistent with the approach required by the INP.

The noise conditions in the approval

54 The conditions imposed in respect of noise in the Project Approval are relevant to the determination of this ground. The Committee accepted that there would be substantial noise impacts if the Project was approved. It was considered, therefore, that it would be appropriate to require improved control over noise generating activity by the imposition of controls, including the acquisition of properties and retro-fitting and maintenance of noise attenuation equipment. To this end, three conditions were imposed.

55 Condition 1 required Warkworth to acquire specified properties upon receipt of a written request from an owner, in accordance with procedures prescribed in the Project Approval. Nineteen properties were identified as being affected by noise impacts to which Condition 1 applied. (The first five properties were also entitled to acquisition because of air quality impacts.) The properties, being those numbered 77, 102, D, E, F, 81, 87, 97, 144, 146, 147, 148, 149, 150, 153, 189, 190, 192 and J, were generally located to the north west and west of the mine. These properties were set out in Table 1, which did not require proof that there had been any breach or exceedence of the conditions.

56 Condition 2 required Warkworth, upon written request from the owners of the properties specified in Table 1 and Table 2 to implement additional noise mitigation measures such as double-glazing and insulation. Thirty eight properties were specified in Table 2 and were located further to the north than the properties identified in Table 1 and also to the west and north-east of the mine. The properties specified in Table 2 were 117, 118,

126, 25, 27, 29, 34, 42, 50, 53, 55, 56, 67, 58, 59, 60, 62, 63, 64, 65, 66, 68, 69, 71, 72, 73, 82, 125, 128, 152, 181, 183, 184, 185, 186, 187, 188, 191. The first three properties were also entitled to mitigation measures for air quality impacts.

57 Condition 3 required Warkworth to ensure that the noise generated at the Mount Thorley-Warkworth mine complex did not exceed the criteria in Table 3 at any residence on privately-owned land or on more than 25 per cent of any privately-owned land. (There was excepted from this requirement the noise at affected land specified in Table 1.)

58 Table 3 specified the location, land and the day, evening and night noise criteria. There are six locations specified including Bulga, Warkworth and Mount Thorley. So as to understand how Condition 3 operates, it is convenient to set out that part of the Table that applies to Bulga, which is located west of the mine. It is to be noted that different noise criteria apply for different properties within Bulga. This is also the case for the other locations.

Location	*Land*	*Day* ($L_{aeq(15min)}$)	*Evening* ($L_{aeq(15min)}$)	*Night* ($L_{aeq(15min)}$)	*Night* ($L_{aeq(15min)}$)
Bulga	65, 68	42	42	42	48
	25, 27, 29, 34, 42, 50, 53, 55, 56, 57, 58, 59, 60, 62, 63, 64, 66, 69, 71, 72, 73, 82	41	41	41	48
	17, 19, 24, 30, 31, 35, 36, 39, 40, 43, 44, 46, 47, 48, 49, 52, 74	40	40	40	48
	13, 16, 18, 20, 21, 22, 23, 26, 32, 33, 27, 41, 45, 54, 61, 89	39	39	39	48
	67, 70	37	37	37	48

	8, 10	36	36	36	48
	1, 2, 3, 4, 5, 6, 7, 9	35	35	35	48
	All other privately owed land	38	38	38	48

59 There was an additional provision for acquisition of houses if Warkworth exceeded the noise criteria in Table 4, which was 43 dB(A) for most properties around the mine, for sustained periods as specified. This was in addition to the rights specified in Condition 1.

The pleaded case

60 The Association pleaded, at para (75) of its statement of facts and contentions, that the Project will have a significant social impact on the health and well-being of the residents of Bulga, contrary to the public interest. Paragraph (a) of the particular contended that current noise impacts as a result of existing mining activities carried out under the 2003 development consent were currently having a substantial negative impact on the health and well-being of the residents. Further particulars were pleaded in support of this allegation. However, none dealt with background noise levels.

61 At para (76) of its statement of facts and contentions, the Association pleaded, relevantly, that noise conditions and mitigation strategies could not adequately mitigate the harm that will be caused by the Project and were contrary to the public interest. Again, the particulars pleaded in support of this contention did not raise background noise levels.

The evidence

62 Two noise experts were called. Warkworth called Mr Ishac and, as already stated, the Minister called Mr Parnell. The Association did not call a noise expert. However, a number of residents gave evidence of the impact of the noise from the existing mine. In brief, the residents' evidence

was that there were differences in noise levels and noise characteristics at different receivers from those at or near the monitoring stations.

63 Mr Ishac had prepared the noise section of Warkworth's Environmental Assessment (Annexure G to the Environmental Assessment). In his expert report prepared for the proceedings, Mr Ishac stated that the application of the INP policy would set noise intrusiveness for Bulga residences, as determined through monitoring, at 38 dB(A), comprising the background level of 33 dB(A), plus 5 dB(A).

64 In Annexure G to the Environmental Assessment, Mr Ishac had stated that the noise limits for the 2003 Consent under which Warkworth was currently operating were determined by a comprehensive background noise survey undertaken at six representative monitoring locations around the mine, as part of an Environmental Impact Statement carried out in 2002. He stated that background noise levels recorded continuously throughout most of 2008 suggested that the data obtained in 2002 remained representative of the current environment. He said that those levels were observed not to have changed during field survey work undertaken in October 2009.

65 Mr Ishac was cross-examined but was not asked about his assessment of background noise levels or why he had chosen a background level of 33 dB(A) as being appropriate for the whole of Bulga.

66 Mr Parnell was the noise specialist in the Major Projects Assessment division at the Department of Planning and Infrastructure. He was involved in the preparation of the conditions for the Project together with other officers in the Department. In his affidavit dated 7 September 2012, Mr Parnell explained in para (20) of his affidavit that he considered that the background level of 33 dB(a) for Bulga calculated in the 2002 Environmental Impact Statement remained valid. He explained that the PSNL for this project was thus assessed at 38 dB(A), being the background noise level of 33 dB(A) plus the conventional 5 dB(A).

67 Mr Parnell stated that in his experience with the Environmental Protection Authority and in assessing projects for the Department, there was an established practice to follow certain protocols in setting the intrusive noise criteria for a project depending upon the relationship between predicted noise levels and the PSNL. Thus:

> "21 ...
>
> (a) If the predicted noise levels at a receiver are less than the PSNL: Set criteria for the receiver at predicted level with a minimum level of 35 dB(A).
>
> (b) If the predicted noise levels at a receiver are the same as the PSNL: Set criteria at the PSNL. For Bulga, this would be 38 dB(A) at night.
>
> (c) If the predicted noise levels at a receiver are 1-2 dB above the PSNL: Set criteria at the predicted level, provided reasonable and feasible mitigation measures have been implemented. For Bulga this would be 39-40 dB(A) at night.
>
> (d) If the predicted noise levels at a receiver are 3-5 dB above the PSNL: Set criteria at predicted level but assign treatment rights (the right to obtain mitigation measures on request) to the property. For Bulga this would be 41-43 dB(A) at night.
>
> (e) If the predicted noise levels at a receiver are greater than 5 dB above the PSNL: Assign acquisition rights to the property. For Bulga this would be greater than 43 dB(A) at night."

68 Mr Parnell said that this approach was reflected in Conditions 1-3 of Sch 3 of the Project Approval: the criteria were set in Condition 3 and the acquisition and mitigation rights were provided for in Conditions 1 and 2 respectively.

69 A single example will suffice to explain the interrelationship between Tables 2 and 3 in Conditions 2 and 3 respectively: see [56] and [57] above. In Table 3, the 22 houses in the second segment (being the houses commencing with No 25) had a predicted noise level of 41 dB(A), being 3 dB(A) above the PSNL. The approach taken by the Department as noted by Mr Parnell in para (21)(d) meant that those houses were

entitled to additional noise amelioration measures on request, and so were listed in Table 2: see [56] above. By contrast, the 16 houses in the third segment of Table 3 (being the houses commencing with No 13) had a predicted noise level of 39 dB(A), that is, 1 dB(A) above the PSNL. These houses had no entitlement to additional mitigation measures because of the approach specified by Mr Parnell at para (21)(c). Accordingly, they were not listed in Table 2 of the conditions.

70 There was provision for the acquisition of houses if Warkworth exceeded the predicted level for sustained periods as specified. This was in addition to the rights specified in Condition 1 which did not require proof that there had been any breach or exceeding of the conditions. Mr Parnell was not cross-examined on these matters, nor did his Honour suggest to Mr Parnell that the background noise assessment of 33 dB(A) was incorrect or that it was inappropriate to adopt that level for residences in Bulga, including those residences to the north.

The parties' submissions before the trial judge

71 Warkworth contended that it was no part of the Association's case, including up to the point of final oral submissions, that there was any issue about background noise. It contended that the focus of the Association's submissions was that the noise assessments for the Project had taken no account of low frequency noise and, on the lay evidence, that the noise impacts actually experienced were unacceptable. The Association does not dispute this.

72 However, his Honour raised a question during the course of the Minister's oral submissions which, Warkworth contends, eventually resulted in it being denied procedural fairness. The relevant exchange commenced when counsel for the Minister directed his Honour's attention to the 2003 Environmental Impact Statement prepared for the purposes of the 2003 consent, in which the background noise level was determined to be 33 dB(A).

73 In the 2003 Environmental Impact Statement, a background ambient noise survey was carried out by reference to six representative sites identified as N1-N6. Bulga village was designated as N6 and had a background noise level of 33 dB(A). His Honour observed that the site designated as N5 had a background noise level of 30 dB(A). N5 was a site to the north of the village.

74 It was at that point that his Honour asked:

> "So why do we adopt a one-size-fits-all approach to seeing noise conditions? Why wouldn't one say, 'Well, if the background for those people in the N5 location is 30, we start from saying the criteria should be 30 plus,' and then do the 5 dB(A) and do all the things that are done?"

75 His Honour continued:

> "See, if we set it too high and we then start putting 5 dBa on and then you start putting further on to get your – you know, for acquisition and severe exceedence, et cetera, it's all so high that the people will be experiencing noise which may be intrusive yet it never triggers any of the conditions. Yes, that's the problem. So it's important, if we're going to be genuine about fixing the criteria, we fit it at the appropriate level to start with. You see, what I'm concerned about is that there seems to be, from the oral evidence of the locals – and I know it's subjective and it hasn't had any readings – but there does seem to be variability between – some people experience it at some locations at certain times and others don't."

76 His Honour acknowledged, as had been stated in the evidence, that some individuals are more sensitive to sound than others. However, his Honour's concern was that there were in reality different background noise levels in the wider area, causing him to remark:

> "If that be right, I'm just trying to work out why one wouldn't start from trying to fix, as your base level, the background for different areas, then do all the adjustments that conditions suggest as appropriate."

77 The Association took this up in its oral reply, in particular refuting a submission by Warkworth that noise impacts were capable of mitigation by the imposition of appropriate conditions. Counsel for the Association contended that this had "*been exposed as incorrect*" in his Honour's questioning of Mr Parnell, such that the noise impact justified a refusal of the Project. The focus of the Association was upon the variability in background noise levels in different parts of Bulga, some of which were lower than 33 dB(A) but some of which were higher as the evidence revealed. The import of the submission was that there were houses in Bulga, in the area identified in the evidence as N5, where the noise level would double the existing background noise level, and that many residences would be subjected to 10 or 11 dB(A) above their site specific background noise levels before any mitigation or acquisition condition was triggered.

78 Warkworth, in responding to this submission, did not assert that it was "*not a submission that is available on the evidence*". Rather, its complaint was that the appropriate background noise level that ought to be adopted had not been raised as a live issue in the case. It submitted that if it was to be an issue, Warkworth would need to investigate what the proper background levels were and what the basis was for the February and October 2009 figures, and adduce evidence to establish why 33 dB(A) was appropriate.

79 His Honour questioned why evidence was necessary when there was evidence before the Court of variable background noise levels in different parts of Bulga. His Honour also pointed out that he was not bound by the 33 dB(A) chosen by the Department as the appropriate background noise level.

80 Nonetheless, his Honour considered that it was appropriate to allow the tender of data to support Mr Ishac's evidence that the 2002 survey figures remained representative of the position in 2009. At that point, Senior Counsel for Warkworth commented, "*that is what we are seeking*". In the

course of that exchange, Senior Counsel for Warkworth had indicated that Warkworth wanted to investigate the 2009 Global Acoustics Report. That Report related to the continuous monitoring that was carried out in compliance with the 2003 consent conditions. Reference was also made to fieldwork conducted in 2009.

81 The Association then made what became the essential contention on this issue, namely, that it was not a question of the accuracy of the readings at different points in time. Rather, their argument was that the background level had been set too high.

82 After the exchange about the tender of further evidence, counsel for the Association again adverted to Mr Parnell's evidence, submitting that he "*simply made a mistake, that he didn't recognise that there was a difference between the varying levels within Bulga*". The submission continued:

> "So Mr Parnell did his own investigation, as I understand from his evidence, and he found that the 2002 background levels remained the same.
>
> So [Warkworth's] point doesn't actually fix up the essential problem which is it's the department who are setting the level too high and they've done it through Mr Parnell, who did his own assessment and found on his own evidence that the 2002 assessment was correct, remained valid in 2012."

83 Counsel for the Association objected to the further evidence. He pointed out that there was no point in his cross-examining Mr Parnell on his first affidavit, as his evidence went to the methodology applied in recommending the background noise level and the conditions that ought to be imposed. The Association had not challenged that methodology.

84 His Honour permitted the tender of the Global Acoustics Reports for the first, second, third and fourth quarters of 2008 and the annual summary for 2008 and submissions were made by the parties in respect of those reports. Following the tender of the reports, there was discussion between

his Honour and the parties as to the information contained in them, including discussion about the inconclusive nature of the background noise levels recorded in 2008 in the area north of Bulga village. Warkworth did not seek to recall its expert, Mr Ishac, notwithstanding that he had referred to the Global Acoustics Reports in his evidence and, it must be inferred, had the expertise to give evidence as to their interpretation.

85 On the next sitting day, the Minister sought to read a further affidavit of Mr Parnell. His Honour refused to admit the new affidavit evidence. The reason why the new affidavit was prepared, the content of the affidavit and his Honour's reasons for rejecting it are relevant to the question whether Warkworth was denied procedural fairness.

86 The Minister, in seeking to read the further evidence, submitted that the affidavit was necessary to meet the Association's submission that, contrary to Mr Parnell's statement in para (20) of his original affidavit, a background noise level of 33 dB(A) for the entire area was not appropriate, because of the lower background noise level for residences in the area identified as N5. Counsel for the Minister pointed out that Mr Parnell had not been cross-examined on whether his assessment of the background noise level was therefore wrong. Counsel for the Minister explained that the intent of Mr Parnell's affidavit was to give the evidence he would have given had he been cross-examined on that issue.

87 The contents of the proposed affidavit may be summarised as follows. Mr Parnell said that for the purposes of assessing the Project, he had been concerned about whether the background level for the whole village area, including the sites represented by N5 and N6, was representative of background noise levels in the area affected by the mine. He recalled raising that concern with Mr Ishac and being shown documentation, including some Global Acoustics Reports. He also said that he would have been most interested in the data relating to, inter alia, the property at 367 Wambo Road, which was a little to the north of the houses within N5 and of Bulga village.

88 Mr Parnell further stated in his affidavit that on the basis of what he was shown, he was satisfied that 33 dB(A) was a representative background noise level for the Bulga village area. Mr Parnell also stated that for the purposes of making his assessment, he visited the area to satisfy himself that the chosen background noise level of 33 dB(A) was representative of the background noise area in Bulga, including at N5. His visit included 367 Wambo Road and a number of other sites that he was advised by compliance officers would assist him to get a general sense of noise conditions in the Bulga village area. In his oral evidence, Mr Parnell said that whilst he had visited these sites, he had not taken any formal measurements.

89 A review of the oral submissions of counsel for the Association indicates that there was one possible reference to which the Minister's submission may have been directed, making it necessary on the Minister's case to adduce further evidence from Mr Parnell. Warkworth had submitted that if the Project was not approved, the noise from the mine would continue under conditions less favourable to local residents than would be the case if the Proposal was approved, and that the noise impacts of the Proposal were capable of mitigation by the imposition of appropriate conditions. Counsel for the Association in turn submitted that Warkworth's assertions had "*been exposed as being incorrect in this case*". The balance of the submissions, however, focused, as already indicated, upon the variability throughout Bulga of different background noise levels.

90 As his Honour did not give formal reasons (and was not required to do so) for rejecting Mr Parnell's proposed second affidavit, the terms of the exchange between his Honour and counsel are, therefore, important, given the procedural fairness challenge which is now made. It is apparent from the exchanges with counsel that his Honour was not concerned with Mr Parnell's opinion as to why 33 dB(A) was an appropriate representative background noise level to adopt. His Honour was required to make his own determination on that question and accordingly, his Honour was

concerned with the raw data contained in the Global Acoustics Report. There was no challenge to that data.

91 His Honour questioned the relevance of the further affidavit, noting that in his previous affidavit variable noise levels of 30 and 33 dB(A) were referred to and that those readings were also contained in the Global Acoustics Reports that had just been tendered. His Honour then pointed out that Mr Parnell's second affidavit only contained a statement of his opinion, although he noted that Mr Parnell set up the methodology for that opinion in para (21) of his first affidavit, which his Honour said was helpful. The exchange continued:

> "HIS HONOUR: But why do I need to get what Mr Parnell thought it should be, 33 or 30 or anything else?
>
> MITCHELMORE: Yes. Your Honour, it was simply a concern by reason of the submission that was made on the last occasion that Mr Parnell had made a mistake.
>
> HIS HONOUR: Just test the hypothesis. Let's assume that be right. So what, to me? At the end of the day I've got to come back and say what level would I put in as the appropriate condition.
>
> MITCHELMORE: Yes.
>
> HIS HONOUR: I've obviously got that Mr Parnell thought it was 33.
>
> MITCHELMORE: Yes.
>
> HIS HONOUR: There is data which suggests that north of the village it had a lower background. Should I therefore adjust it? Mr Williams, I would imagine, based upon that other material, would say no, you don't because it was up and down a bit, so 33 is as good a figure as anything.
>
> MITCHELMORE: Yes.
>
> HIS HONOUR: I'm just not sure that it's really needed in the circumstances and just because there's a submission made that it changes it.
>
> MITCHELMORE: Yes."

92 The affidavit evidence, as already indicated, was not permitted to be adduced.

The primary judge's reasons on the noise issue

93 At [327] ff, his Honour stated that the noise criteria and mitigation strategies adopted for the purposes of the Project Approval differed from the approach required by the Industrial Noise Policy. He identified five points of distinction. The first two are presently relevant. First, his Honour noted that for many residences, a higher background noise level had been used than was supported by the measurement evidence: see [51] above. Secondly, the project specific noise levels were not the lower of the intrusive criterion and the amenity criterion as required by the Industrial Noise Policy but had been increased to equate with the predicted noise levels for the Project on the basis that this was the best that could be achieved: see [53] above.

94 At [331], his Honour observed that the data in the 2002 Noise and Vibration Study report prepared for Warkworth as part of its application for the 2003 approval showed that the area to the north of Bulga (N5) had a background noise level of 30 dB(A), not 33 dB(A). His Honour considered, based on the data in that report, that a number of residences to the north of the village, namely, numbers 25, 27, 29, 34 and 42, would have a background level of 30 or 31 dB(A) and an intrusive level of 35 or 36 dB(A). His Honour found therefore that "*the evidence establishes that the background noise level for some residences to the north of Bulga village is 30 dB(A) rather than 33 dB(A)*".

95 His Honour considered, at [332], that this variation in one part of Bulga "*raises doubts as to the reliability of the adopted background noise levels for other parts of that area*". He stated that the six monitoring stations used for the purposes of the 2002 Environmental Impact Statement were not distributed evenly over the area likely to be affected by the Project. His Honour also noted the residents' evidence that there were differences in noise levels and characteristics of the noise at different receivers to those at or near the monitoring stations.

96 His Honour remarked, at [333], that the adoption of "*too high background noise levels*" would have an effect of increasing the project specific noise levels but would also result in the application of less noise mitigation strategies. His Honour examined this further at [334] ff. In particular, he noted that the criteria for setting noise mitigation and acquisition criteria by reference to the predicted noise level above the PSNL was based upon an approach adopted by the 2004 Commission of Enquiry under the then s 119(1) of the EPA Act.

97 His Honour continued, at [335]:

> "The justification provided in these proceedings for regarding predicted exceedences of 1-2 dB(A) as minor, and setting the noise limits to permit higher levels of noise, was that measurement, and perception, of noise, are difficult, and that there should be latitude given that these are conditions that need to be enforced (Williams subs T 8/11/12, p 227.20). Indeed, the reality is that the Project cannot achieve, by controlling noise at the source or the transmission of noise, the project-specific noise levels that would be derived by application of the INP. The noise limits proposed in the conditions have therefore been increased beyond what would be the project-specific noise levels to match the predicted noise levels of the Project."

98 His Honour, having dealt with the two considerations, namely, that the background levels were set too high and the noise criteria was based on what was achievable rather than what was acceptable, concluded, at [347]:

> "In my view, the case has not been made for setting the noise limits for the Project at the levels proposed in the approval conditions above the project-specific noise levels recommended by the INP. Furthermore, even if the project-specific noise levels recommended in the INP were to be applied in the approval conditions, the Project would be unable to comply with these limits, triggering far more extensive noise mitigation at receivers and acquisition of receivers' properties, which would itself lead to unacceptable impacts."

99 His Honour's final conclusion on noise impact was at [385], where he stated:

> "At the noise levels proposed in the approval conditions, the noise impacts of the Project on the residents of Bulga, including the impact of the noise source on receivers, taking account of annoying noise characteristics and the effect of meteorological conditions, are likely to be significant, intrusive and reduce amenity. The noise mitigation strategies proposed in the approval conditions are not likely to reduce noise levels to the project-specific noise levels recommended by the INP or to levels that have acceptable impacts on the residents. The significant residual impacts are unacceptable, taking into account social and economic factors. Further, the extensive noise control at receivers, being mitigation treatment and acquisition of properties in Bulga, is likely to cause social impacts. The combining of noise criteria for the Warkworth and Mount Thorley mines in the proposed approval conditions is of doubtful legal validity but in any event is likely to be difficult to monitor or enforce compliance. Hence, no confident conclusion can be drawn that the noise impacts of the Project will be acceptable."

The alleged errors

100 Warkworth contended that his Honour erred in three respects in reaching this conclusion. First, it contended that it was denied procedural fairness by his Honour allowing the Association to argue that account should be taken of the differential background noise levels in Bulga and in his Honour deciding that point. It contended that not only was it taken by surprise, but that, in adopting that approach, his Honour had effectively rejected the unchallenged assessments of the only experts called on the basis that the experts had mistakenly overlooked or had discounted data in the 2002 Environmental Impact Statement.

101 Secondly, it was contended that procedural fairness was denied in the rejection of Mr Parnell's further affidavit as, contrary to his Honour's view, it was not only the content of the raw data that was important. The interpretation of that data was also important. The question of how to extrapolate the data to particular residences was said to be a matter of expert opinion. Warkworth contended, therefore, that the tender of further data was not sufficient to overcome this denial of procedural fairness. Warkworth submitted that had Mr Parnell's affidavit been admitted, his Honour would have reached a different conclusion on this issue.

102 Thirdly, Warkworth submitted that his Honour failed to give reasons for rejecting the information to be derived from the data in the Global Acoustics Report, which indicated that the background noise levels in Bulga mostly exceeded 33 dB(A). By way of example, it was contended that:

> "For one month (August) the monthly level was 32. For two months (May and July) it was 33. For the remaining 6 months it was above 33: 40 in January, 37 in September, 36 in February and October, 35 in April and 34 in September."

103 In its oral submissions on the appeal, Warkworth referred in some detail to the background noise level readings recorded in the Global Acoustic Reports. Emphasis was placed upon the readings taken in the first quarter of 2008 in respect of 367 Wambo Road. That property was to the north of the area N5. The average readings in that period were 31 dB(A) for day and 33 dB(A) for night. However, the readings for the third quarter were 37 dB(A) for day and 31 dB(A) for night. The readings for the fourth quarter were 28 dB(A) for day and 42 dB(A) for night.

104 It was submitted that this evidence was significant, as it supported the adoption of a background noise level of 33 dB(A) and further demonstrated that many properties in Bulga would benefit from the adoption of that background noise level and not, as his Honour appeared to have found, that many or most properties in Bulga would be in a worse position. It was contended that his Honour never appeared to consider this possibility.

105 Although Warkworth alleged error in the three ways stated above, the essential complaint was that it was not given the opportunity to have Mr Parnell give evidence, as an expert, that 33 dB(A) remained the appropriate rating background level notwithstanding that there were much lower readings of 30-31 dB(A) for parts of Bulga. An aspect of that submission was that the data in the Global Acoustics Reports required interpretation by an expert, including an explanation of the fluctuations in

noise levels that were recorded. Warkworth contended that his Honour's rejection of Mr Parnell's proposed evidence in his second affidavit deprived it of the opportunity of having it explained to his Honour why, notwithstanding those fluctuations in noise levels, some of which were below 33 dB(A), a background reading of 33 dB(A) was appropriate.

Consideration

106 For the purposes of the resolution of this issue, we accept that although Warkworth was not the proponent of Mr Parnell's evidence, it had an interest in the proposed evidence in his second affidavit being admitted into evidence. However, it is important to note that when the question of adducing further evidence arose, the only evidence that Warkworth sought to adduce was the Global Acoustics Reports. It did not raise any argument before his Honour that Mr Parnell's second affidavit should have been admitted. Nor did it contend before his Honour that the Global Acoustic Reports required expert interpretation. Nor did it seek to call its own expert.

107 The Global Acoustic Reports contained readings taken at specific locations at different times. In short, they comprised raw data. An explanation of the data was given to his Honour during the course of submissions. It was not suggested by counsel that there was any impediment in being able to do so. It is also relevant to note that Mr Parnell had not referred to the Global Acoustic Reports in his first affidavit and there had not been any challenge to his evidence on the basis that he had not had regard to relevant material.

108 In the proposed second affidavit, Mr Parnell said that he believed he was shown the Global Acoustic Reports for the purposes of carrying out his assessment of the Warkworth's Environmental Assessment. He did not seek to explain any aspect of the material that he believed he had seen, other than to say he would have been most interested in quarterly monitoring graphs for 367 Wambo Road and for Bulga village. As the

Court understands this aspect of his proposed evidence, Mr Parnell was stating that those two places were, or may have been, significant for the purposes of his assessment of the appropriate background noise level for the area. Mr Parnell then stated his conclusion, namely, that he was satisfied that the rating background level of 33 dB(A) was a representative number for the Bulga village area. This was no different in substance from his evidence in para (20) of his first affidavit, in which he stated, "*I considered that calculation* [*33 dB(A)*] *of the* [*background rating level*] *to still represent valid background levels*".

109 There was no expansion or explanation by Mr Parnell in his second affidavit as to why he considered that 33 dB(A) was an appropriate rating background level for the purposes of setting the intrusive noise level for the area, beyond the matters to which reference has been made. In our opinion, without otherwise seeking to explain why he had reached that conclusion, the second affidavit would not have added anything to his first affidavit or his oral evidence.

110 The difficulty with the argument advanced by Warkworth is that Mr Parnell's proposed second affidavit did not deal with the point that Warkworth contended was a necessary matter of expert evidence, in particular, why 33 dB(A) was the representative level for the whole area and how to extrapolate the data in the Global Acoustics Report to particular residences. A further complaint was that the experts had not been cross-examined on why 33 dB(A) was not the appropriate background level. However, it cannot be assumed that there would have been cross-examination on that point. The flaw that his Honour saw in the adoption of that background noise level had clearly emerged in questioning by his Honour. The Association was apparently content to rely on the evidence given in answer to his Honour's questions. It was entitled to do so.

111 At the time of the attempted reliance on Mr Parnell's second affidavit, Warkworth and the Minister knew precisely what matter had been put in

issue. Yet Mr Parnell did not explain in his affidavit why 33 dB(A) was the representative level for the whole area nor how, as a matter of expertise, the raw data was to be extrapolated to particular sites. Mr Parnell's second affidavit evidence only stated a conclusion that 33 dB(A) was an appropriate representative level. Its admissibility on that basis alone may have been questionable: see *Dasreef Pty Ltd v Hawchar* [2011] HCA 21; 243 CLR 588 at [42] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ and [128]-[130] per Heydon J.

112 The essential point, however, is that if evidence is required to meet an issue, the party asserting the factual basis for the issue raised bears the responsibility for adducing the necessary evidence. It is not sufficient to expect that the underlying basis of an opinion would be revealed in cross-examination. Nor was the Association's failure to cross-examine the experts productive of procedural unfairness. The parties were given an opportunity to adduce evidence on the issue. A party's failure to adduce relevant evidence does not give rise to a failure to afford procedural fairness. Warkworth's contention that his Honour had made it clear that no request to adduce further evidence would be entertained must be rejected. His Honour admitted the Global Acoustics report. Mr Parnell's second affidavit was not permitted because it did not respond to the issue, not because of any pre-determined view that no further evidence would be admitted.

113 In any event, in circumstances where Warkworth contends that Mr Parnell's evidence was fundamental, it could have sought to call him to explain how and why he had arrived at his opinion. Alternatively, it could have called its own expert. It did not seek to do either. In our opinion, Warkworth has not made out that it was denied procedural fairness in the first and second ways it which it alleged error.

114 The third error of which Warkworth complained was that his Honour failed to give reasons for rejecting the information contained in the Global Acoustic Reports. Warkworth also contended that his Honour could not

have referred to the reports because there was no reference to them in his Honour's reasons. Warkworth submitted that the reports demonstrated that the background noise level for Bulga mostly exceeded 33 dB(A), so that most properties in Bulga would have benefited from an adoption of this level, rather than being disadvantaged by it.

115 The Association submitted that contrary to Warkworth's assertion, the raw data in the Global Acoustics Reports indicated that the readings taken in 2008 were inconclusive as to whether a background noise level of 33 dB(A) for the entire Bulga village including houses to the north remained valid. Thus:

> "The [first quarter] Report ... identified the average background levels for a location north of Bulga village to be 31 db(A) (day) ... there was no record provided in [the second quarter]; the [third quarter] Report ... identified the average background levels to be 37 dB(A); the [fourth quarter] Report ... showed the average background level to be 28 dB(A)."

116 The Association submitted that as the material was inconclusive it was not necessary for his Honour to refer specifically to it in his reasons. The matter about which there was no contest was that there were in fact differential noise impacts in different parts of the Village and its surrounds.

117 In our opinion, it cannot be assumed that his Honour did not have reference to the data in the Global Acoustics Reports: *Turner v Minister for Immigration and Ethnic Affairs* (1981) 35 ALR 388 at 392. The foundation of his finding was that because there were different background noise levels at different receivers in the area, some of which were lower than 33 dBA, there was no warrant for setting that level as the appropriate background noise level. That foundation could only have come from that material. It must also be remembered that his Honour's factual finding was that the noise levels set for the residences north of Bulga village were too high and that raised for his Honour a concern as to whether 33 dB(A) was an appropriate level generally for the area affected by the proposed mining activities.

118 The question whether the level had been set too high was one of five reasons that his Honour gave for finding that the noise conditions differed significantly from the approach required by the INP. If, contrary to our view, there was a failure to afford procedural fairness, a different result would not have ensued, had his Honour allowed this point to be raised. A significant problem, as his Honour found at [335]: see [97] above, was that the noise limits in the proposed conditions had been increased to match the predicted noise levels.

119 Ground 1 of the appeal is rejected.

GROUND 2: Impacts on threatened fauna

120 One of the matters that called for consideration in relation to the approval of the Project was its impact on biological diversity. This included the impact on fauna and flora, including endangered ecological communities (EECs). The EECs most at risk from the Project were the Warkworth Sands Woodland and Central Hunter-Grey Box-Ironbark Woodland. Other affected EECs were the Central Hunter Ironbark-Spotted Gum-Grey Box Forest and the Hunter Lowland Redgum Forest.

121 Insofar as the impacts related to fauna, the Association, in its statement of facts and contentions at paras (70)(b) and (c), alleged the project would involve clearing approximately 760.3 ha of EECs and the habitat for threatened fauna species. The trial judge referred to this, at [123], noting that in addition to significant impacts on the EECs, there were also significant impacts on "*key habitats of fauna species*".

122 Statements as to the impact on fauna were contained in the 2010 Environmental Assessment prepared by an ecologist, Dr Robertson, for Warkworth in support of its application for approval. The report of Travis Peake, of Umwelt Environmental Consultants, who had been engaged by the Department of Planning to review Dr Robertson's ecological

assessment, was also in evidence. The significance of the intended clearing of the vegetation communities on fauna had also been addressed in the Director-General's 2011 Environmental Assessment Report.

123 The issue was the subject of expert evidence before his Honour given by Dr Robertson and by Mr Bell, a vegetation scientist with extensive experience in the assessment of vegetation communities in the Hunter region and the Central Coast. The experts each prepared a report and also prepared a joint report. They gave evidence simultaneously in the proceedings before his Honour.

124 Overall, the evidence established that approval of the Project would involve clearing of land resulting in the loss of 106.7 ha of Warkworth Sands Woodland, 627.5 ha of Central Hunter-Grey Box-Ironbark Woodland and 30.5 ha of Central Hunter-Ironbark Spotted Gum-Grey Box Forest. His Honour considered that the loss of these EECs would be likely to impact on wildlife corridors and key habitats of fauna species.

125 Mr Peake's evidence, as recorded by his Honour at [144], was that there was a risk that some threatened woodland birds would be significantly impacted by the Project. Such birds included the speckled warbler, the brown tree-creeper and grey crowned babbler, whose habitat was the Warkworth Sands Woodland.

126 In its final submissions before his Honour, the Association had made passing reference to fauna when dealing with the biodiversity impact of the Project. However, Warkworth submitted that it was not done in a way that made it apparent that the offsets package was in issue insofar as it related to fauna.

127 The Association had submitted at trial that a significant factor weighing against the Project being in the public interest was the substantial loss of Warkworth Sands Woodland and the loss of the other EECs in circumstances where it had not been satisfactorily demonstrated that the

loss could be adequately mitigated either by offsetting or by restoration techniques. The Association drew attention to the fact that the loss of the forest area was not being offset at all and that in any event it was unclear why offsets located so remotely from the development area were considered to be acceptable.

128 His Honour indicated his understanding from Dr Robertson's evidence that the remote offsets were "*for other values*", that is, these other areas provided habitat for birds and animals and were thus "*biodiversity offsets*". Counsel for the Association did not cavil with the benefits that the remote offsets would bring, but submitted that they were not located in the same biodiversity area as the existing communities which would be lost. Counsel referred to Mr Bell's evidence that the chosen locations had very different ecological characteristics from the areas that would be lost if the Project proceeded.

129 His Honour concluded, relevantly to the present ground of appeal, that the Project would be likely to have significant impacts on key habitats of fauna species. His Honour considered that these impacts were of such magnitude as to require the consideration of the methods proposed to avoid, mitigate, and offset the impacts in order to determine the acceptability of the Project.

130 His Honour concluded, at [202], that the offsets package "*did not adequately compensate for the Project's significant impacts on the affected EECs*". In particular, his Honour considered, for reasons articulated in the following paragraphs of his reasons, that the direct offsets would not provide sufficient, measurable conservation gain "*for the particular components of biological diversity impacted by the Project*", particularly in respect of the affected EECs.

131 There were seven considerations that underlay his Honour's conclusion. One was his finding that there was insufficient evidence to establish that

the remote biodiversity areas provided any conservation gain for threatened fauna. His Honour dealt with this matter as follows:

> "206 Secondly, the conservation value of the remote biodiversity areas lies in their providing habitat for threatened fauna that might be impacted by the clearing and mining of habitats of those fauna in the disturbance area. In this sense, the offsets relate to the same specific components of biological diversity being impacted by the Project. However, there is insufficient evidence to establish that the impacts on the relevant threatened fauna caused by the Project will be offset by the management and permanent protection of the remote biodiversity areas. For example, the evidence does not establish that the viability or numbers of the populations of the relevant threatened fauna in the remote biodiversity areas would improve to an extent equal to or greater than the reduction in viability or numbers of individuals in the population of the relevant threatened fauna in the disturbance area or adjoining lands. Principle 9 for the use of biodiversity offsets is that offsets should be based on a reliable, quantitative assessment of the impacts of a project on a component of biological diversity (such as on a particular threatened species of fauna) and the conservation gain to that component of biological diversity (such as the same threatened species of fauna) from the offset. The methodology must be based on the best available science, be reliable and used for calculating both the loss from the Project and the gain from the offset (principle 9 of the Principles for the Use of Biodiversity Offsets in NSW: TB vol 7, p 4118).
>
> 207 The evidence before the Court concerning the loss in biodiversity from the Project on threatened fauna and any gain in biodiversity from the remote biodiversity areas did not involve such a reliable quantitative assessment, but rather involved assertions at a generalised level of the presence or absence of the threatened fauna concerned or their habitat."

132 Warkworth submitted that it was denied procedural fairness in that his Honour's finding went beyond the matters in issue between the parties at the hearing and was beyond the scope of the conclusions of the experts: see *Farah Constructions Pty Ltd v Say Dee Pty Ltd* [2007] HCA 22; 330 CLR 89 at [132]-[133]. Warkworth further argued that his Honour's finding was erroneous because it had been made without regard to a relevant consideration, namely, Mr Peake's uncontested conclusion that the overall

offset package provided adequate habitat and connectivity for the range of threatened fauna species likely to be impacted by the Project.

133 The Association contended that his Honour's finding at [206]-[207] was based in part on the evidence of both Mr Bell and Dr Robertson. Although Mr Bell had not addressed the impacts of the Project on the particular species of the regent honeyeater and the swift parrot because that was outside his area of expertise, he nonetheless had commented in his report on the appropriateness of the survey work in respect of the Warkworth Sands Woodland EEC that had been carried out in the proposed remote offset areas. In particular, Mr Bell disagreed with Mr Peake's conclusion that "*the work completed within and presented for the offset properties* [*was*] *'fit for purpose'*".

134 Mr Bell's view was contained in s 4.6 of his report:

> Offset properties cannot be proposed and accepted as appropriate and viable if they have not had an equal amount of survey effort expended within them. [Mr Peake's report] stated that Cumberland Ecology undertook a single day of survey on each of the offset properties. Such a timeframe is inadequate to fully assess the diversity and distribution of vegetation communities (apart from any fauna issues) in those landscapes."

The reference to "*Cumberland Ecology*" was a reference to Dr Robertson and his survey work.

135 Mr Bell considered that:

> "Properties proposed as offsets should have an equivalent amount of survey effort undertaken within them as is spent on development properties. If they do not, there is no guarantee that what is claimed to be present there, actually is present, and the value of that offset will quickly fall. Based on my reading of documents presented by [Warkworth] few if any of the proposed offset properties had substantial ecological work completed within them prior to approval for the Project being given."

136 The Association submitted that this evidence, although directed to the Warkworth Sands Woodland EECs, was also applicable to survey work relating to fauna.

137 Dr Robertson did not disagree with Mr Bell's observations. Importantly, in their joint report, Mr Bell and Dr Robertson accepted that only limited survey work had been done and that the appropriateness of the remote offsets was "*contingent on confirmation of habitat and community mapping*". That had not been done at the time of the hearing.

138 The Association further submitted that even if his Honour erred in considering the adequacy of the offsets in so far as they related to fauna, the error was not a vitiating error as it was only one of several considerations that had led his Honour to his overall conclusion on the biodiversity impacts of the Project.

139 Warkworth sought to refute this argument with the following propositions. First, it contended that it was necessary for the Association to demonstrate that if this point had been resolved by his Honour in Warkworth's favour, the result could not have been different: see *Stead v State Government Insurance Commission*. Secondly, it contended that in a polycentric decision making process as undertaken by his Honour, a conclusion on one factor is capable of influencing a conclusion on another. Finally, Warkworth submitted that if his Honour's reasoning process was to take this matter into account as one of a number of matters, it was not possible to determine the weight his Honour gave to it.

140 In our opinion, this ground of appeal should be rejected. His Honour's finding, at [202], was directed particularly to the affected EECs. Not only did his Honour say so, but six of the seven reasons he gave to support that conclusion related to the inadequacy of the offsets insofar as they related to the vegetation communities of the EECs. Only his second reason, being the matter under challenge in this ground of appeal, related to some other aspect of biodiversity, namely, the conservation of fauna.

141 The pre-eminence of the impact on the ecological communities in his Honour's consideration of the offsets package is even more apparent in his observation, at [226], where he stated:

> "Mr Bell's analysis is supported by the earlier ecological assessments of Dr Robertson and Mr Peake and the more recent Biodiversity Offset Strategy that would classify the 72.5 ha that Dr Robertson now seeks to classify as WSW EEC as CHGBIW, based essentially on the floristic and other criteria for the CHGBIW EEC compared with those for WSW EEC. I do not accept the evidence of Dr Robertson and Dr Clements that the vegetation in the 72.5 ha should now be classified as WSW EEC."

142 Further, in his Honour's overall conclusion in which he balanced relevant matters and finally disapproved of the Project, his focus was, relevantly, on the ecological communities. Thus, at [498], his Honour stated:

> "I have found, amongst other things, that the Project would have significant and unacceptable impacts on biological diversity, including on endangered ecological communities, noise impacts and social impacts; that the proposed conditions of approval are inadequate ..."

143 But in any event, we consider that the Association's case sufficiently raised the issue. Although the 'pleading' contained in the Association's Statement of Facts and Contentions only referred to the impacts on fauna, the real issue at all times was the adequacy of the proposed offsets. Although counsel, in his final oral submissions, stated that the Association "*did not cavil*" with the advantages the proposed offsets would bring, that was not an acceptance of their adequacy. Immediately after making that comment, counsel directed his Honour's attention to the fact that the remote biodiversity areas proposed had very different ecological characteristics from the land affected by the Project. That was a complaint about the adequacy of the offsets. Warkworth did not protest at that time that this submission fell outside the particularisation of the case or outside the evidence.

144 When his Honour dealt with the matter, at [206], he did so in accordance with the task he was undertaking of making a fresh determination of the application. In circumstances where the impacts on fauna were in issue, Warkworth's failure to adduce evidence to demonstrate that the offsets proposed were adequate lays at its own feet. Importantly and correctly, there is no challenge to his Honour's evaluation of the proposed offsets as they related to fauna by reference to Principle 9 of the Principles for the Use of Biodiversity Offsets in New South Wales.

145 Nor do we agree that there was no evidence to support his Honour's reasons. Although Mr Peake's conclusion that the overall offset package provided adequate habitat connectivity for the range of threatened fauna species was not directly challenged: see [132] above, the experts' agreement as to the insufficiency of survey work in relation to the EECs was appropriately extrapolated to its adequacy in respect of fauna, whose habitats are to be found, inter alia, within the vegetation of the EECs. Mr Peake had also referred to the inadequacy of the survey work carried out in two of the offset areas, namely the Seven Oaks and Putty Biodiversity Offset Areas.

146 Ground 2 of the appeal is rejected.

Grounds 2A and 6: Polycentricity

147 The trial judge, at [31], identified the nature of the decision-making process under s 75J as involving the resolution of a polycentric problem. His Honour explained this as involving:

> "... a complex network of relationships, with interacting points of influence. Each decision made communicates itself to other centres of decision, changing the conditions, so that a new basis must be found for the next decision."

148 His Honour said that a polycentric approach was appropriate in respect of the exercise of the power under s 75J because it required "*consideration,*

weighting and balancing of the environmental, social and economic impacts of the Project". His Honour, continued at [36], that the process he was undertaking under s 75J involved the following steps:

> "... first, identification of the relevant matters needing to be considered; secondly, fact finding for each relevant matter; thirdly, determining how much weight each relevant matter is to receive, and fourthly, balancing the weighted matters to arrive at a managerial decision."

149 His Honour had observed at [34] that the resolution of a polycentric problem made "*classic forms of adjudication out of place and instead resolution by exercise of managerial authority, a form of executive action, more appropriate*". His Honour also explained, at [35], by reference to the academic literature, the circumstances in which the exercise of managerial authority was appropriate as compared with an adjudicative process in the resolution of a polycentric problem. An adjudicative process might be more relevant, for example, where there was a single criterion or where criteria could be objectively weighted and choices were not interdependent.

150 His Honour considered that the decision the Minister must make under s 75J to approve or reject a project was an example where the appropriate approach was the exercise of managerial authority. As his Honour stated:

> "The criteria to be considered [by the Minister] are numerous, cannot be objectively weighted, and are interdependent. The decision-maker must not only determine what are the relevant matters to be considered in deciding whether or not to approve the carrying out of the project, but also **subjectively determine the weight to be given to each matter.** Eisenberg suggests that where this is the case, an optimal solution can normally be arrived at by vesting a single decision-maker with managerial authority; that is, authority not only to select and apply relevant criteria, but also to determine how much weight each criterion is to receive, and to change those weights as new objectives and criteria may require." (Emphasis added)

(Eisenberg was one of the academic commentators to whom his Honour made reference.)

The Minister's position on polycentricity

151 Before turning to Warkworth's argument under ground 2A, reference should briefly be made to the Minister's position on the issue of polycentricity. The Minister submitted that adjudication is not necessarily an inappropriate method of determining a polycentric problem. He emphasised in particular that identifying a problem as polycentric does not excuse the decision-maker from having regard to those matters essential to the exercise of their discretion, nor does it preclude a review of their decision: see Enid Campbell and Matthew Groves, 'Polycentricity in Administrative Decision-Making' in Matthew Groves (ed), *Law and Government in Australia* (2005, Federation Press) at 228.

152 This submission should be accepted. But in any event, there was no suggestion, nor could there be, that his Honour's decision was not reviewable or non-justiciable. There is, as already noted, a statutory right of appeal on a question of law. Nor do we understand that, by characterising his decision as 'managerial', his Honour was making any such suggestion. As discussed below, at [173], the characterisation by his Honour of his task as polycentric may be put to one side.

Ground 2A

153 Warkworth submitted that it was denied procedural fairness in the respects described below, as his Honour adopted a polycentric approach without raising his intention to do so at any stage in the proceedings.

154 First, it contended that whilst a determination under s 75J may be complex, it did not involve a polycentric problem. Rather, it was essentially a binary one, requiring the balancing of the public interest in the Project in the form of the employment and other economic benefits flowing from it against any negative impacts on the public interest and on the environment in the immediately surrounding area.

155 Secondly, Warkworth contended his Honour failed to apply a polycentric approach as properly understood in an administrative law sense. On Warkworth's submission, a polycentric approach required the decision maker to balance the Association's locally-based claims against the interests of persons who were not represented in the proceedings, or who had not played any part in the decision making process, such as persons who would derive employment from the Project: see M J Beazley, *The Scope of Judicial Review* (The Joint Seminar on Legality of Administrative Behaviours and Types of Adjudication, Xian, People's Republic of China, 11-13 April 2006). Warkworth submitted that his Honour erroneously used the concept to conclude that the weight to be assigned to relevant matters was a subjective matter for him to decide: see at [35], [39]-[42].

156 Thirdly, Warkworth submitted that had his Honour foreshadowed his intention to use the concept of polycentricity to justify determining for himself the weight to be assigned to various matters, it and the Minister may have wished to argue that the weight given to matters by the Director-General in his report and by the Commission had pre-eminence. A connected argument was raised in respect of ground 2B, and this submission will be considered in that context.

157 Fourthly, and this was Warkworth's principal contention on this ground of appeal, Warkworth submitted that his Honour, without notice of his intention to do so, used a polycentric approach to reject the evidence of the economic experts, Professor Bennett and Mr Gillespie. In particular, Warkworth complained that his Honour had not indicated to Professor Bennett and Mr Gillespie that he considered their evidence based on choice modelling to be deficient, in that choice modelling only changed one variable at a time while holding all other variables constant and did not take account of the complexity of the factors required to be balanced.

158 Finally, Warkworth submitted that his Honour had sequentially decided each issue conclusively against approval of the Project prior to undertaking the statutorily required balancing exercise of weighing the impacts of the Project against the public interest: see at [202] and [255], dealing with the offsets package; [264], [328], [340] and [385] dealing with noise impacts; and [403] dealing with air quality. Warkworth contended that his Honour's approach was legally impermissible and constituted a failure to exercise jurisdiction. This was the matter raised in ground 6.

The economic evidence

159 The significant issue raised by ground 2A related to the manner in which his Honour dealt with the economic evidence. Relevantly, Warkworth had relied upon a Benefit Cost Analysis prepared by Gillespie Economics in support of its application for approval of the Project. At the hearing before his Honour, Warkworth called Mr Gillespie, the principal of Gillespie Economics, and Professor Bennett of the Australian National University and the principal of the consultancy group Environmental and Resource Economics, as expert witnesses. The Association's economic expert was Mr Campbell, an economist specialising in environmental economics.

160 The primary judge dealt with economic issues at Part 6 of his judgment, generally from [446] ff, and specifically with the Benefit Cost Analysis at [464] ff. His Honour observed, at [464], that the Benefit Cost Analysis incorporated a non-market valuation survey (Choice Modelling). The survey provided for estimates of monetary values to be given for the main intangible environmental, cultural and social impacts of the proposal. All experts accepted that Benefit Cost Analysis and Choice Modelling was a useful tool in determining the value of certain impacts, although it was agreed that the Benefit Costs Analysis prepared by Gillespie Economics was deficient in that the most appropriate scope for the Analysis was national, rather than a New South Wales perspective as had been adopted in the Analysis.

161 The area of disagreement amongst the experts related to whether all relevant costs and benefits had been included in the analysis, and how the non-market impacts had been assessed. His Honour addressed the evidence relating to these matters at [466] ff and concluded, at [469], that whilst there was value in Choice Modelling and the Benefit Cost Analysis, there were a number of deficiencies in the Choice Modelling Survey and the Benefit Cost Analysis undertaken for the Project that lessened their usefulness.

162 His Honour particularised the deficiencies at [470] ff: They were as follows:

(i) The distribution of the Choice Modelling survey was too limited and should have extended to the Australian community. This was a matter about which the experts agreed.

(ii) There were deficiencies in the information provided to survey respondents such that they were not able to make informed and meaningful choices. In particular, some of the information was inaccurate and uninformative.

(iii) The values attributed to each of the choices in the survey, which ranged from $0 to $625, were inadequate and failed to ask respondents to the survey what they were prepared to pay.

(iv) Not all matters relevant to the approval authority's task were included in the survey. In particular, matters relevant to biodiversity and ecological integrity, including the EECs, noise and dust, and social impacts, were not included in the Choice Modelling survey.

(v) Certain non-market impacts had not been considered. In particular, there were no estimates in the Benefit Cost Analysis of the impacts of noise and dust, nor of the impacts of the Project on amenity values and ecosystem services.

(vi) Given the polycentric nature of the issues that needed to be considered, the Choice Modelling survey was inadequate in identifying each issue sequentially without the capacity for respondents to take account of the repercussions of their choices made on the other issues.

(vii) The approach in the Benefit Cost Analysis and Choice Modelling provided weighted factors by reference to fixed dollar amounts without providing any open ended options. This had the effect of limiting the Court to the economists' assigned value and supplanting the Court's function of applying the appropriate weight to relevant matters on the facts found by the Court.

(viii) Benefit Cost Analysis and Choice Modelling were only concerned with the aggregation of costs and benefits and did not include considerations of equity or distributive justice.

163 In respect of this last consideration, his Honour was of the opinion, at [495], that the failure to adequately consider inter-generational and intra-generational equity limited the utility of the Benefit Cost Analysis and Choice Modelling for the purposes of evaluating, weighting and balancing the relevant matters to be considered in determining the application.

164 In his Honour's conclusion, at [496], he referred to the inadequacy of the Benefit Cost Analysis in the resolution of polycentric problems, in that such analysis attempted to objectively weight criteria and assumed that choices were not interdependent. His Honour concluded that these limitations meant, relevantly, that the Benefit Cost Analysis was:

> "... of limited value in deciding whether [his Honour could] reach a state of satisfaction as to the nature and extent of impacts in considering each and all of the relevant matters, the weight [his Honour] should assign to each matter, and the balancing of the matters, to determine whether the Project should be approved or disapproved."

Consideration

165 Warkworth's principle challenge under this ground of appeal was his Honour's alleged use of a polycentric approach to reject the evidence of Professor Bennett and Mr Gillespie: see above at [162(vi)] and [164]. However, his Honour did not reject that evidence, but rather considered that their evidence was of limited value: see at [496]. In coming to that conclusion, his Honour reviewed the economic evidence in some detail. He found the evidence of Mr Gillespie and Professor Bennett, insofar as it was based on Choice Modelling, to be inadequate in the various ways particularised: see [162] above. His Honour's finding that the Modelling failed to take account of the polycentric problem that called for resolution has to be considered in the context of the role that finding played in the overall discounting of the evidence of Mr Gillespie and Professor Bennett, and having regard to the function that his Honour was performing.

166 The finding that the evidence did not make appropriate allowance for the polycentric nature of the decision making process was only one of eight considerations whereby his Honour found that the economic evidence was inadequate. The other inadequacies, either independently or in combination, were sufficient for his Honour to discount the value of the conclusions that could be reached by virtue of the Choice Modelling. The survey upon which the Choice Modelling was based was inadequate in its coverage and in the information provided. Some information was simply inaccurate and other information was uninformative in its indiscriminate references. For example, there was no attempt in the survey to treat vastly different EECs differently: see at [472].

167 The Benefit Cost Analysis and Choice Modelling methods had their own inherent shortcomings. His Honour recorded the experts' agreement that these methods were not a practical tool to measure all non-market impacts: see at [482]. In particular, they did not deal with what his Honour referred to as "*equity or distributive justice*". Whilst the Benefit Cost

Analysis dealt with the benefits to certain entities, his Honour considered that it did not have adequate regard to those upon whom there would be a burden. Thus, while it considered the benefits to entities such as Warkworth and its shareholders by way of profit; the New South Wales government by way of royalties and State taxes; the Commonwealth government by way of company and income taxes; local councils in their receipt of contributions to community infrastructure; and employees and contractors by way of remuneration and payment for services, there was inadequate reward for those who lived in Bulga and the broader population, who would suffer, for example, from a reduction in the natural environment: see [487]-[489]. These were all matters that, in his Honour's view, severely minimised the value of the evidence adduced from the Benefit Cost Analysis and Choice Modelling that had been carried out.

168 Warkworth submitted that had his Honour raised the question of polycentric problems solving as being relevant to his decision making task, its experts would have responded to it. Warkworth's complaint was that as his Honour did not raise this with the experts, the Court did not know with precision what the experts would have said. Warkworth did not contend, however, that it would have undertaken a different modelling exercise had his Honour raised with its experts that the Choice Modelling survey that had been undertaken was inadequate to deal with the polycentric nature of the issue. In the result, Warkworth's submission was that, "*it would be very difficult to say ... that it wouldn't have made a difference*".

169 This leads to a further reason why we consider that this particular challenge raised under ground 2A should be rejected. The parties were engaged in adversarial litigation before his Honour. A judge is entitled to accept, reject, or determine the adequacy of evidence as part of that process. Evidence is either persuasive or not. It is incumbent upon parties to adduce such evidence as they consider adequate to make out their respective claims. His Honour, in a detailed analysis, found the evidence wanting. Given that the sufficiency and cogency of the Benefit Cost Analysis and Choice Modelling was disputed at the hearing, and

further, that the interdependence of various impacts was intrinsic to the exercise his Honour was undertaking, there was no failure to afford procedural fairness in the manner alleged in ground 2A of the appeal.

170 Even if his Honour should have raised with the experts the inadequacy of the Choice Modelling survey for their comment because of its failure to address the polycentric nature of the issues in contention, it could not be said that his Honour's failure to do so may have led to a different result: see *Stead v State Government Insurance Commission*. The other reasons his Honour gave for rejecting the Benefit Cost Analysis and the Choice Modelling were such that it could not be said that there may have been a different result. There was no challenge, and Warkworth accepted that there could not be any challenge, to any of the other criticisms that his Honour made of the Benefit Cost Analysis and Choice Modelling that had been carried out. The challenge was confined to his Honour's comments about the inadequacy of the Benefit Cost Analysis and Choice Modelling when applied to a polycentric problem. Accordingly, we would reject this aspect of Warkworth's argument.

171 The parties did not seek before this Court to expound in any depth upon the proper use of the concept of polycentricity in administrative law and, it must be said, as Warkworth's submissions acknowledged, that although his Honour spent some time expounding upon the theoretical bases for the resolution of a polycentric problem, for the most part he used the concept as a catchphrase to describe the multifaceted nature of the issues that had to be determined. It is preferable, therefore, to deal with Warkworth's challenges under this ground of appeal by reference to what his Honour did and to ascertain whether he erred in law in the ways alleged. We have already dealt with Warkworth's fourth argument. Three other arguments were raised.

172 First, Warkworth complained that his Honour was not concerned with a polycentric problem but a binary one. His Honour described the task he was undertaking at [497], namely, to balance all the relevant matters in

determining whether the preferable decision was to approve or disapprove the Project. It was not suggested that this was an incorrect description of the final aspect of his Honour's task. In essence this required his Honour to balance the public interest in approving or disapproving the project, having regard to the competing economic and other benefits and the potential negative impacts the Project would have if approved. There is therefore no substance in this challenge.

173 The second challenge may also be put to one side, for the reasons already explained, namely that whilst his Honour used the terminology of polycentricity, it is preferable to have regard to his Honour's reasons to determine whether error of law has been established. It must be said that in circumstances where Warkworth asserted that the determination to be made under s 75J did not involve a polycentric problem, the error of law in not applying a true polycentric approach is not apparent.

174 Warkworth complained, thirdly, that his Honour erred in determining that the weight to be assigned to relevant matters was a subjective one for him to decide is essentially a complaint that his Honour was required to give primary weight to the Director-General's report. This is the complaint made under ground 2B and is dealt with under that ground.

Ground 6

175 The challenge raised in ground 6 was Warkworth's contention that his Honour, having identified the decision-making process as involving a polycentric problem, with issues being interdependent, then determined each of the issues relating to offset packages, noise impacts and air quality, in a way that was adverse to the approval of the Project prior to undertaking a consideration and weighting of all relevant matters. The consequence, on this submission, was that the question of approval had in effect been determined by these matters without there being a proper balancing of all matters in determining whether it was in the public interest that the Project be approved or not. Warkworth submitted that his

Honour's approach was legally impermissible and constituted a failure to exercise jurisdiction.

176 The particular paragraphs of his Honour's reasons subject of this particular challenge are [202] and [255] dealing with the offsets package: see ground 6(a); [264], [328], [340] and [385] dealing with noise impacts: see ground 6(b); and [403] dealing with giving with air quality: see ground 6(c).

177 His Honour's reasons in respect of the offsets passage commences relevantly at [203]. His Honour observed that five of the remote biodiversity areas did not include any of the affected EECs. His Honour considered, at [205], that the consequence of this was that these biodiversity areas did not offset, that is compensate for, the impacts of the Project on those EECs. His Honour then concluded, at [255], that the offsets package would not adequately compensate for the significant impacts that the Project would have on the extant EECs in the disturbance area.

178 Warkworth contended that there was error in making this finding in advance of a considering and weighting of all other relevant matters. The adequacy of the offsets was a relevant consideration. His Honour was entitled to designate the weight he gave to that matter at this point in his judgment. It would have made no sense for his Honour to have considered everything in relation to that issue other than whether the offset package adequately compensated for the significant impacts that the Project would have on the EECs. His Honour's reasons ineluctably led to a conclusion that they did not. That was a finding he was entitled to make and a conclusion that then had to be balanced in the overall decision making process. His Honour said as much at [255]. That did not result in his Honour having, in effect, pre-determined the matter by the time he reached the final balancing exercise: see judgment, Pt 7. He was required to and did deal with the other matters, including the economic impact, which his Honour observed, at [499], was substantial.

179 The same may be said about his Honour's reasoning in respect of noise impacts and air quality where his Honour took the same approach, namely, identifying the impacts of the Project, evaluating the shortcomings of measures proposed to ameliorate the problems and why the imposition of conditions could not sufficiently deal with the impacts. His Honour was required to come to a view about these matters and he did.

180 The matter might be tested in this way. Would there have been a complaint in respect of his Honour's reasoning if he had reached his conclusion about the unacceptability of noise impacts, considered that the biodiversity offsets were marginally acceptable and that the air quality impacts could be ameliorated by conditions, and then considered the economic impacts and finally came to his conclusion as to whether to approve the Project. We would suggest not. It was the significance of the weight his Honour saw fit to attach to the various factors that told against the Project which is really at the heart of this complaint. Subject to ground 2B, weight was a matter for his Honour.

GROUND 2B; cross-appeal grounds 1 and 2: The Director-General's Environmental Assessment Report

181 The Director-General's environmental assessment report must be considered in determining whether to approve a Pt 3A development application: s 75J(2)(a). It is one of only three mandatory considerations required by the subsection and the only one relevant to this Project. Warkworth contended that the Minister, through his delegate the Commission, gave the requisite weight to the Report, but that his Honour failed to do so. The Minister, who separately supports this ground of appeal in his cross-appeal, submitted that a failure to give the required weight to the Director-General's report is a question of law amenable to appeal under s 57: see *Hunter Development Brokerage Pty Ltd v Cessnock City Council (No 2)* [2006] NSWCA 292 at [44]-[55]. This may be accepted as correct on the basis explained by Mason J in *Minister for*

Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40; 162 CLR 24, discussed below at [194].

182 The essential question raised by this ground of appeal is what is encompassed by that statutory requirement. There was no question, of course, that the Director-General's report had to be considered. Section 75J(2)(e) required that: see generally *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; 206 CLR 323. However, Warkworth and the Minister contended that s 75J(2)(a) required that weight be given to the Report as a fundamental element or focal point in the decision making process: see *Zhang v Canterbury City Council* [2001] NSWCA 167; 51 NSWLR 589.

183 In support of this submission, Warkworth emphasised the central role, as prescribed by statute, that the Director-General played in the assessment process. The legislation is set out in full at [29]-[31] above. However, in summary and as is relevant to this ground of appeal, the process was as follows. The Director-General prepared environmental assessment requirements for the Project: the EPA Act, s 75F(2). For the purposes of preparing those requirements, the Director-General was to consult with relevant public authorities and have regard to the need for the environmental assessment requirements to assess any key issues raised by those public authorities: s 75F(4). A proponent of an application could be required to prepare its own environmental assessment: s 75F(5); and to make a statement of the commitments it would make in respect of environmental management and mitigation measures: s 75F(6).

184 As part of the assessment process, the Director-General could require a proponent to submit a revised environmental assessment to address matters that were considered not to be adequately addressed in the initial assessment: s 75H(2). The Director-General was then required to arrange for the public exhibition of the proposal: s 75H(3); and forward any submissions made in response to the public exhibition, relevantly, to the proponent of the Project and any other public authority that the

Director-General considered appropriate: s 75H(5). The Director-General could then require the proponent to submit a response to the issues raised in submissions and a preferred project report outlining proposed changes to the project to minimise its environmental impact: s 75H(6). If the proposed changes were significant, the Director-General could require the proponent to make a preferred project report available to the public: s 75H(7).

185 Once these processes were completed, the Director-General was required to prepare an environmental assessment report: s 75I(1). The report was required to include the documents specified in s 75I(2): see at [29] above. Warkworth submitted that s 75I(2)(b) and (f) are particularly relevant. The provisions required that there be included in the report any advice provided by public authorities, any environmental assessment undertaken by the Director-General, or other matter that the Director-General considered appropriate. Warkworth submitted that the requirement for those documents to be included in the Director-General's environmental assessment report underscores the role played by State Government agencies in the assessment process in providing specialist and technical advice and analysis to assist the Minister in the decision-making process, having regard to the interests of the State as a whole. It also submitted that the 120 day time period in which the Minister was required to make a decision before there is a deemed refusal, giving rise to a merits review, also indicates that the Director-General is to be the primary source of material for the decision-making process. Reference was made to *Barrick Australia Ltd v Williams* [2009] NSWCA 275; 74 NSWLR 733 at [18]-[19].

186 In addition to the requirements of s 75I(2), the Environmental Planning and Assessment Regulation, cl 8B specifies further matters and documentation that are to be included in the Director-General's Report, namely, an assessment of the environmental impact of the project; any aspect of the public interest that the Director-General considers relevant to the project; the suitability of the site for the project; and copies of submissions

received by the Director-General in connection with public consultation under s 75H or a summary of the issues raised in those submissions.

187 In this case, the Minister's delegate required the Director-General to undertake a further environmental assessment. The Minister or the Minister's delegate was to consider the Director-General's Report and to approve or disapprove the carrying out of the project: s 75J(1) and (2); subject to such modifications and conditions, if any, as determined by the Minister or delegate: s 75J(4) and (5).

188 The Minister submitted that the level of control exercised by the Director-General over the decision-making process was consistent with the intention of Pt 3A to provide a streamlined means of assessing and approving major infrastructure projects or other developments considered by the Minister to be of State or regional environmental planning significance. The work involved in marshalling the necessary information for inclusion in the report may be significant and the material to be included could be voluminous, as was borne out in the present case. By way of example, Warkworth's environmental assessment comprised five volumes of material and, in response to the public exhibition, submissions were received from seven public authorities, 19 special interest groups and 83 members of the public. Warkworth was required to submit a response to the submissions and a preferred project report which, in this case, contained further materials prepared by its expert.

189 The Minister submitted, therefore, that the Director-General's report serves the important function of recording, for the benefit of the Minister, the process of review, consultation and assessment facilitated by the Director-General and engaged in by the proponent, the community and other public authorities. Secondly, the report records the Department's assessment of these matters. To this end, there are legislative prescriptions as to the content of the Director-General's report: s 75I(2) and the Environmental Planning and Assessment Regulation, cl 8B. These are set out at [29]-[30]

above and include any aspect of the public interest that the Director-General considers relevant to the project.

190 According to the Minister, the status of the Director-General's environmental assessment report as a fundamental element or focal point in the Minister's determination reflected the centrality of the Director-General's role in framing, facilitating and undertaking the process of review and consultation in the assessment under Pt 3A. The Minister submitted that the Court, on an appeal in Class 1 of the Court's jurisdiction, was in no different position from the Minister.

Fundamental or focal consideration

191 The Minister accepted that the question whether his Honour gave the requisite weight to the Director-General's report was an evaluative process involving an examination of his Honour's reasons: *Anderson v Director General of the Department of Environmental and Climate Change* [2008] NSWCA 337; 163 LGERA 400; *Turner v Minister for Immigration and Ethnic Affairs* at 392.

192 As has already been indicated, s 75J(2) required that, in determining whether to approve the Project, consideration be given to the Director-General's report. The question in issue is what that requirement entails.

193 Warkworth and the Minister relied upon the comments of Spigelman CJ (Beazley and Meagher JJA agreeing) in *Zhang v Canterbury City Council* that the statutory provision being considered in that case was a "*fundamental element*" in the decision making process. That language derived from the observations of Mason J in *R v Hunt; Ex Parte Sean Investments Pty Ltd* [1979] HCA 32; 180 CLR 322.

194 Before dealing with those authorities, reference should be made to the analysis undertaken by Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend*. Mason J, at 39 ff, after observing that the failure of a decision-

maker to take into account a relevant consideration was an example of an "*abuse of discretion entitling a party with sufficient standing to seek judicial review of ultra vires administrative action*", summarised the propositions that had emerged from the decided cases. Insofar as those considerations are relevant to this matter, they are as follows.

195 First, the ground of failure to take into account a relevant consideration is only made out if there has been a failure to take into account a matter the decision-maker is bound to take into account. Secondly, the matters that a decision-maker is bound to consider is determined by the construction of the statute conferring the discretion. If the statute expressly specifies that certain matters must be taken into account, it is a question of construction as to whether those matters are exhaustive or merely inclusive. Thirdly, not every failure to take into account a matter that a decision maker is bound to consider will impugn a decision. A matter may be insignificant in the sense that it could not have materially affected the decision.

196 Finally, and of particular relevance to this ground, in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision-maker to accord such weight to those considerations as the decision-maker considers appropriate. However, a Court may set aside an administrative decision where the decision-maker fails to give adequate weight to a relevant factor of great importance. Mason J observed that the court's intervention in such circumstances was because the decision was manifestly unreasonable in the sense discussed in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 230, 233-234. See also *Minister for Immigration v Li* [2013] HCA 13 at [63], [67], [68] and [76], where observations were made as to reasonableness in administrative decision-making.

197 Mason J also observed, at 42, that where a decision is made by a Minister of the Crown:

> "... due allowance may have to be made for the taking into account of broader policy considerations which may be relevant to the exercise of a ministerial discretion."

198 Mason J, in the course of this analysis, referred to the observations of Brennan J in *R v Toohey; Ex parte Meneling Station P/L* [1982] HCA 69; 158 CLR 327, in which Brennan J commented upon the approach a Minister should take in relation to a recommendation made, in that case, by the Aboriginal Land Commissioner. Brennan J stated, at 362:

> "The Minister's recommendation is not a mere affirmation or rejection of the recommendation made by the Commissioner. The Minister, having regard to the Commissioner's recommendation that it would be right for the Crown to grant the land in satisfaction of the traditional owners' needs and entitlement, must decide whether other factors warrant refusing the grant recommended, and in reaching his decision the Minister is bound to have regard also to the Commissioner's comments upon the matters referred to in pars.(a) to (d) of s.50(3)."

199 In *R v Hunt; Ex Parte Sean Investments Pty Ltd*, Mason J introduced into the field of relevant considerations the notion of something being a "*fundamental*" or "*focal*" consideration. A nursing home proprietor had applied for approval for an increase in fees charged for care in a nursing home it conducted. Under s 40AA(7) of the *National Health Act* 1953 (Cth), the Permanent Head of the relevant Department, in determining an application for a fees increase, was to "*have regard to costs necessarily incurred in providing nursing home care in the nursing home*". A question arose as to the meaning and proper application of the phrase "*costs necessarily incurred*".

200 The Minister had determined that rent payable was not a cost "*necessarily incurred*" within the meaning of s 40AA(7). In making the determination in that case, the Permanent Head had refused the application because the rent was "*higher than normally paid under leasehold arrangements in the State*". This interpretation was rejected, the High Court holding that the distinction was between costs that had to be incurred, such as rent and costs voluntarily incurred. Mason J observed, at 328, that the words "*costs*

necessarily incurred in providing nursing home care in the nursing home" meant costs which the proprietor incurred, and was obliged to incur, in the provision of the nursing home.

201 Rent was such a cost. The fact that the rent was higher than normally paid in the State was not of itself a determination that the cost was unnecessarily incurred. Rent may be higher than average but still be necessarily incurred because the premises were not available except on the basis of the rent being charged. Mason J observed, at 330, that it may be different if the lessor was an associated entity of a nursing home proprietor, but again, that would depend upon all the circumstances. However, if the higher rent was paid merely to benefit the landlord, the whole of the rent may not be a cost "*necessarily incurred*".

202 Relevant to the question in issue here, Mason J said, at 329:

> "When sub-s. (7) directs the Permanent Head to 'have regard to' the costs, it requires him to take those costs into account and to give weight to them as a **fundamental element** in making his determination ... First, they are the only matter explicitly mentioned as a matter to be taken into account. Secondly, the scheme of the provisions is that, once the premises of the proprietor are approved as a nursing home, he is bound by the conditions of approval not to exceed the scale of fees fixed by the Permanent Head in relation to the nursing home. In many cases it is to be expected that the scale of fees will be fixed by ascertaining the costs necessarily incurred and adding to them a profit factor. In the very nature of things, the costs necessarily incurred by the proprietor in providing nursing home care in the nursing home are a fundamental matter for consideration." (emphasis added)

203 Mason J went on to point out that the provision did not require that the nursing home fees be fixed exclusively by reference to the costs necessarily incurred and a profit factor. Regard could be had to other matters. His Honour noted that the function of the Permanent Head under the legislation was to determine a scale of fees for a particular nursing home. For that reason, s 40AA(7) directed that regard shall be had to the costs incurred in providing the care in the particular nursing home.

204 It is apparent from the context in which the language of "*fundamental element*" was used in this passage that it was intended to emphasise the requirement to consider a statutorily prescribed matter, in that case, "*costs necessarily incurred*". It was one of the prescriptive matters upon which a determination was to be made. It was not for the decision-maker to apply some different standard or to ignore a cost necessarily incurred in the running of the nursing home, albeit that the decision-maker was entitled to take other considerations into account.

205 *Zhang v Canterbury City Council* concerned the refusal of a development application by Canterbury City Council. The relevant planning legislation was the EPA Act, s 79C(1), which provided that in determining a development application, the consent authority "*is to take into consideration*", inter alia, the provisions of any development control plan that applied to the land.

206 The development application was for the use of premises as a brothel. The premises were close to other commercial properties and a church. No parking was provided on site but there was a nearby public car park. Under the relevant planning laws, brothels were permitted with consent. The application was refused on the basis that it did not satisfy the standards in the local development control plan in relation to access, locational requirements and parking.

207 The relevant control plan was Development Control Plan No 23 (DCP 23), the purpose of which was to "*set objectives and standards for Brothel development within the City*" (at [5]). One of the standards set was a minimum distance of 200 m from, inter alia, a place of worship. This was subject to a provision that if there were circumstances whereby it was not relevant to comply with the standard, an applicant was required to provide a written submission detailing why the standard should be varied. Zhang's application for development consent did not satisfy the distance criterion, nor was a written submission made as to why the standard should be varied.

208 Zhang appealed to the Land and Environment Court from the Council's refusal of the application. The appeal, which was by way of merits review under s 97 of the EPA Act, was allowed, as the Commissioner did not consider that the proposal conflicted with the general objectives of DCP 23. The Commissioner stated that it was not sufficient to refuse the application merely because of its presence near a church, or the knowledge of its presence among those using the church. It was also relevant, in the Commissioner's determination, that the entrances to the brothel and the church respectively were not in view of each other and the church was oriented away from the proposed brothel premises.

209 An appeal under s 56 of the Court Act to a single judge of the Land and Environment Court, Talbot J, was allowed. The test applied by Talbot J was whether the Commissioner had given "*proper, genuine and realistic consideration to the provisions of the DCP*".

210 On appeal to this Court, Spigelman CJ noted, at [60], that a development control plan was a relevant consideration for a decision maker's determination pursuant to s 79C. As his Honour observed, that section required the decision maker "*to take into consideration*" the relevant DCP: see at [61] and [63]. The Chief Justice then stated:

> "70 In order to 'take into consideration' the particular provisions of DCP 23, the Commissioner was under an obligation to consider the fact that the DCP established a standard that a brothel should not be 'located adjoining or within 200 metres walking distance of any place of worship' etc and that that standard was designed to serve the objective of ensuring that 'Brothels are located at a reasonable distance from ... sensitive land uses'. The statute required the Commissioner to consider that standard in conducting the evaluation under s79C(1).
>
> 71 The statutory power in s 80 of the Act to 'determine a development application' by granting or refusing consent does not confer an unfettered discretion. It is subject to the obligation to 'take into consideration' the matters identified in s79C(1). This obligation is of a similar character to that

which has been found to be imposed by a statutory obligation to 'have regard to' identified matters."

211 After referring to the authorities which we next discuss, his Honour continued:

> "75 The consent authority has a wide ranging discretion - one of the matters required to be taken into account is 'the public interest' - but the discretion is not at large and is not unfettered. DCP 23 had to be considered as a 'fundamental element' in or a 'focal point' of the decision making process. A provision so directly pertinent to the application for consent before the Council as was cl 4.0 of DCP 23 was entitled to significant weight in the decision making process but was not, of course, determinative."

212 His Honour concluded:

> "76 In my opinion, the Commissioner did not 'take into consideration' the standard contained in cl 4.0 of DCP 23. Rather, he substituted for the statutory requirement a different approach. The Commissioner posed the 'issue' for his determination to be: 'The appropriateness of the location taking into account the proximity to the adjoining church, local schools and hotel'. He resolved this issue on the basis that adverse impact upon land affected by the presence of a brothel had to be demonstrated in the legal proceedings before him. This approach could only be supported if the discretion was entirely at large, that is, that there were no 'standards' of any character which the decision maker had to take into account. By adopting this approach, the Commissioner, in my opinion, proceeded on an impermissible basis.
>
> 77 There was a relevant and applicable 'standard' which he was obliged to 'take into consideration'. It ought to have served as a focal point for, or constituted a fundamental element in, his deliberations. The evidence, or rather the absence thereof, about actual effects, was not entitled to determinative weight, without regard to the presumptive 'standard' in this way."

213 What is apparent in Spigelman CJ's use of the phrases "*fundamental element*" and "*focal point*" is that the Commissioner had asked himself the wrong question or alternatively failed to take into account a relevant consideration. Section 79C required the decision-maker to consider the DCP. The terms of the DCP, including the specific planning controls it

imposed, were therefore central to the decision-making process. The DCP could not be ignored. At the practical level, the decision-maker was required, at the least, to ask the question: what does the DCP provide insofar as the location of brothels is concerned? The Commissioner was not required to refuse the application because the standard specified in the DCP had not been observed. However, unless that question was asked, or unless the answer was already known, it would logically follow that consideration would not have been given to the DCP standard on the location of brothels, namely, a distance of 200 m from a place of worship.

214 Something more would usually be required than merely ascertaining what the mandatory considerations are that must be taken into account. A decision-maker may need to consider why it may be appropriate to not apply the subject matter of the mandatory consideration, such as a specified standard, or whether, in the particular application under consideration, the standard might be ameliorated by the imposition of conditions. Reasons may be advanced by an applicant as to why the subject matter of the mandatory consideration ought not to apply at all. These will also have to be considered. Much will depend upon the subject matter of the mandatory consideration and the nature and extent of the application under consideration.

215 Both *Sean Investments Pty Ltd* and *Zhang v Canterbury City Council* are properly understood as involving the failure of a decision-maker to consider the mandatory consideration specified by the legislation. The relevant legislation in each case prescribed a particular standard or discrete matter that had to be considered. It was not open to the decision-maker to ignore the prescribed standard or matter or to subvert those mandatory considerations, for example, by the application of some other standard, or no standard at all, unless consideration had been given to the statutory prescription. Nor would a mere perfunctory acknowledgement of the existence of the mandatory consideration suffice. However, other considerations, on the facts of the particular case, may be relevant and may result in a different outcome than if the standard had been applied

independently. It is for that reason that Spigelman CJ said that the mandatory consideration was not determinative of the outcome.

216 In their respective contexts, the use of the language of "*fundamental element*" or "*focal point*" in *Sean Investments Pty Ltd* and *Zhang v Canterbury City Council* was understandable. That language emphasised that, in those cases, the relevant mandatory consideration was not a subsidiary consideration. Rather, it was a factor that had to be placed at the forefront of the decision-maker's consideration. In *Sean Investments Pty Ltd*, it was unsurprising that Mason J said that rent, being a cost of conducting a nursing home, was fundamental. Any increase in nursing home fees that ignored costs would have failed to apply the statute and would have been unreasonable in the sense explained in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. Importantly, in *Zhang*, an applicant had to provide a written submission as to why the standard should be varied. The legislation itself thus contained a clear indication that the standard was to be given substantial weight, or as Spigelman CJ said, it was to be the "*focal point*" of the Commissioner's consideration of the application. In that sense, it was appropriate and necessary to give the DCP the prima facie effect that the Minister was seeking to attribute to the Director-General's report in the present case. However, for the reasons we explain, the Director-General's report should not be given the same effect.

217 There have been a number of other decisions where the terminology of "*fundamental element*" or "*focal point*" has been used. In *James Hardie & Coy Pty Limited v Roberts* [1999] NSWCA 314; 47 NSWLR 425, at [89], it was said that the phrase "*have regard to*" in the *Law Reform (Miscellaneous Provisions) Act* 1946, s 5(1)(c) required the other tortfeasor's responsibility for the damage to be taken into account and given weight to "*as a fundamental element*" in making the finding by the court of what was the just and equitable contribution recoverable from that other tortfeasor. That was an acceptable use of language given the statutory context which required regard to be had to the other tortfeasor's

responsibility for the damage as a single discrete consideration specified by the section.

218 In *Walkerville v Adelaide Clinic Holdings* (1985) 38 SASR 161, the Court held that it was necessary to treat a mandatory consideration as a "*focal point*" in the determination of a development application under the South Australian planning laws. The observations of King CJ as to what that involved is of some assistance. His Honour observed that the Development Plan was the "*focal point*" of the planning regime instituted by the planning legislation. His Honour stated, at 187, that the mandate "*to have regard to*" the provisions of the Development Plan required the planning authority to give the plan the weight due to it as a focal point.

219 His Honour then had regard to the nature and content of the Development Plan. In particular, his Honour observed that the Plan contained planning objectives and principles. It did not contain legal mandates. Accordingly, notwithstanding the importance of the Development Plan, there was a discretion, ultimately unfettered, for the planning authority to take other considerations into account and to make decisions that were not in conformity with the Development Plan.

220 Importantly for present purposes, his Honour explained that the planning authority, having given proper consideration and due weight to the provisions of the Development Plan, was entitled to depart from it in the exercise of its discretion, but "*may do so only upon grounds which are properly related to the planning objectives of the* [*legislation*]".

221 In *Singh v the Minister for Immigration* [2001] FCA 389, Sackville J (as his Honour then was), at [54], observed that the phrase "*have regard to*" was capable of different meanings depending on its context, with one possible meaning being that weight must be given to a specified matter "*as a fundamental element*" in making a determination. His Honour observed, however, that the phrase can simply mean to give consideration to something: see *Shorter Oxford Dictionary*. In *Singh*, the relevant section

of the *Migration Act* 1958 (Cth) required the Minister to have regard, not only to one or two specific matters, but to "*all of the information in the application*" for a visa. His Honour observed that the information may range over a wide field, take many different forms, and be of varying significance. This was different from the standard under consideration in *Sean Investments,* which, as Sackville J observed, required the decision-maker to have regard to one matter only, a fact that Mason J considered to be important in construing the provision.

222 The requirement to treat a particular provision as a focal point or as fundamental was discussed in a different statutory context in *Evans v Marmont* (1997) 42 NSWLR 70. That case was concerned with the operation of the *De Facto Relationships Act* 1984, s 20 which provided that a Court may make an order adjusting the interests of partners in property as "*seems just and equitable*" having regard to the considerations specified in s 20(a) and (b). Those paragraphs directed the court to consider the financial and non-financial contributions to property and the contributions made to the welfare of the other partner and to their children, or children accepted by either partner as members of the household, in determining what property adjustment seemed just and equitable.

223 The appellant had argued that the overriding test was to do what was "*just and equitable*", and that paras (a) and (b) were:

> "... nothing more than factors of potential relevance to the justice and equity of the case which are to take their place alongside, and be given no more weight than, any other factors which might bear on the justice and equity of the case" (at 78)

224 Gleeson CJ and McLelland CJ in Eq rejected this argument, stating, at 79-80:

> "[P]ar (a) and par (b) prescribe the **focal points** by reference to which the discretionary judgment as to what seems just and equitable must be made. They are not merely two matters, or groups of matters, which take their place amongst any other relevant considerations. It is by having regard to those matters that

> the court may adjust property interests in a just and equitable manner." (emphasis added)

225 *Evans v Marmont* involved the construction of a statute that specifically defined a limited number of considerations that could be taken into account in determining the order to be made. Gleeson CJ and McClelland CJ in Eq considered that there was nothing in s 20 that *entitled* a court to take into account factors outside those referred to in paras (a) or (b). Meagher JA agreed with that approach. Mason P accepted that the matters specified in paras (a) and (b) were "*fundamental*" matters, but did not agree that they were the only matters that could be taken into account in the exercise of the court's discretion. Priestley JA was of a similar view to Mason P. There was no discussion in that case as to what was meant by "*fundamental*" or "*focal*". The real matter in issue was whether other factors could be taken into account. It is difficult to see that *Evans v Marmont* assists in the resolution of the question which is raised in the present case.

226 These cases do no state an inflexible legal rule of construction as to the weight to be accorded to all statutory provisions which require a particular matter to be considered or taken into account by a decision-maker. The result in each case was dependant upon the terms of the legislation and the particular circumstances in which the legislation was applied.

227 As we have indicated, the argument as advanced in this Court was that the mandatory consideration prescribed by s 75J(2)(a) required the decision-maker, in effect, to give primary importance to the report, including the recommendation of the Director-General contained in the report. As we have indicated, the Minister submitted that the Director-General's report "*was entitled to prima facie weight; that it was a more significant factor than other merely relevant factors*".

228 The foundation for this argument was the observation of Mason J in *Peko-Wallsend*, that in the absence of a statutory indication of the weight to be

given to various matters, weight was generally a matter for the decision-maker. Warkworth submitted that in this case, the legislature had provided a statutory indication that the Director-General's report, including the recommendations made therein, had primacy or was a fundamental consideration or focal point, because it was one of only three matters designated by the legislature as necessary to be considered. The Minister eschewed any suggestion that it was sufficient for a decision maker, whether that be the Minister or his delegate, or the court on appeal, to give "*real and genuine consideration*" to the Director-General's report: see, for example, *A v Pelekanakis* (1999) 91 FCR 70; *Wen v Minister for Immigration and Multicultural Affairs* [2000] FCA 320.

229 The Minister accepted that there were various ways in which the Minister or his delegate, or the court on the Class 1 appeal, might approach the task. However, the essence of the argument was that the decision-maker was required to consider the Director-General's report and would need to articulate why the recommendations made and, in particular, the final recommendation as to approval, should not be adopted.

230 We do not agree that the legislation operates in the way contended by Warkworth and the Minister. In the first place, there is no statutory requirement that the report contain a recommendation as to approval, even though in the way that the executive arm of government operates that would be expected. More importantly, however, there is much more in the Director-General's report for a given proposal than the Director-General's recommendation. There will be a vast body of material including technical and expert reports, sometimes presenting contrasting views and submissions from opponents and supporters of the proposal. That material must be considered by the Minister as required by the legislation. The Minister is not bound to implement the Department's recommendation. The decision-maker still retains ultimate discretion: see *Walkerville*. The Director-General's report must be considered, but to say that the Department's view must be given prima facie weight by the Minister would serve to place a constraint on the Minister's decision-making task beyond

what is required by the legislation and constitute an unauthorised interference with Ministerial responsibility.

231 This distinguishes the present mandatory consideration from those in the statutory schemes that involved single factors or limited discrete matters that had to be considered in the decision-making process, as considered in the authorities discussed above.

232 There is another reason why Warkworth's and the Minister's arguments should not be accepted. As noted at [3] above, the court, pursuant to s 39(2) has "*all the functions and discretions*" of the Minister or delegate in determining whether to approve the Project. "*Functions*" is defined in the Court Act to include "*duties*". Because the Director-General's report is one of the matters that must be considered, it is an appropriate use of language to say that the court has a duty to do so. That would include having regard to any recommendation made in the report as well as considering the contents of the report. The 120 day time period in the Environmental Planning and Assessment Regulation, cl 8E(2) specifies the outer limits of time for the performance of that duty before the default deemed refusal provision applies.

233 The court, in certain respects, is in a different position from the Minister when undertaking the decision-making process on a Class 1 appeal. The hearing before the court will be predicated upon the Minister or delegate having either accepted or rejected the Director-General's recommendation. In this case, it was predicated upon the Minister's delegate having accepted the recommendation. Unlike the Minister, whose primary source of material, it may be accepted, is the Director-General's report, there is likely to be material before the court additional to that before the Minister or the Minister's delegate. Further, notwithstanding the terms of s 38 of the Court Act, an appeal to the court is conventionally conducted in an adversarial or quasi-adversarial context. Thus, expert and other evidence invariably will be challenged by cross-examination. There may be also be questioning by the judge, as there was in this case.

234 For those reasons, the court may emphasise factors in its reasons for its determination that were not found or not given the same weight in the Director-General's report. The court's judgment will reflect what occurs in the proceedings before it. In this regard, it could not be contended (as was in fact suggested here) that a decision would be infected by error because the Director-General's recommendation was not set out in the judgment. This is particularly so when the recommendation is stated at a high level of generality as it was here, namely, that:

> "On balance, the Department believes that the project's benefits would outweigh its residual impacts that it is in the public interest and should be approved, subject to stringent conditions."

235 The obligation on the Minister or delegate, and the court, to consider the Director-General's report, must have the same content. It is an obligation to consider. The report is important for the various reasons submitted by Warkworth and the Minister. It is not insignificant in the sense explained in *Peko-Wallsend*. But the acceptance of the recommendation, if any, in the report is dependent upon a myriad of factors, including, in the case of the Minister, policy considerations that may point in a different direction to the recommendation made by the Director-General and, in the case of the court, the cogency of evidence and expert opinions tested by cross-examination, or where matters take on a different emphasis in the context of other evidence that is adduced.

The trial judge's consideration of the Director-General's report

236 The question for determination, therefore, is whether the primary judge in this matter considered the Director-General's report in the manner required by s 75J(2).

237 His Honour noted, at [47], that pursuant to s 75J the Director-General's report was a mandatory relevant consideration. At [52], his Honour stated that the relevant matters that the Minister was bound to take into account

in determining whether to approve or disapprove the Project were not only the matters expressly specified in s 75J, but also those matters which, by implication from the subject-matter, scope and purpose of the EPA Act, are required to be considered: see *Peko-Wallsend* at 40.

238 His Honour, at [65], summarised the matters he was required to take into account. In brief, they were the matters specified in s 75J (relevantly, the Director-General's report); matters arising from the objects of the Act; matters specified in s 39(4) of the Court Act, and the public interest. No challenge was made to these matters being relevant considerations that his Honour was bound to take into account. His Honour then, at [66], identified the task for the decision-maker, including the Court. The task was twofold. First, the decision-maker was to identify the potential impacts of the Project, both positive and negative. His Honour observed that the Director-General's environmental assessment report assessed each potential and actual impact. His Honour then referred to the conclusion in the report that "*those impacts could be adequately mitigated, managed, offset and/or compensated*". His Honour made a number of observations in the following paragraphs in respect of the impacts, observing, for example, that each of the impacts had to be assessed having regard to the evidence before the Court.

239 It was not disputed that these were relevant matters. The error, according to Warkworth and the Minister, was in his Honour's statement at [70], that:

> "Having considered each of the likely impacts, the task then is to determine the weight to be given to each factor, as an exercise of managerial authority ... and to balance the factors in favour of and against granting approval. That assessment requires consideration of any conditions that might be imposed to mitigate or ameliorate any impacts."

240 These statements were the culmination of his Honour's consideration of the decision-making task he was undertaking, which had commenced at [31]. It was in the course of that consideration that his Honour stated that what was involved in the matter before him was the resolution of

polycentric problems which required the exercise of managerial authority. His Honour had also noted, at [40], that in the absence of any statutory indication of the weight to be given to the various relevant considerations, it was generally for the decision-maker to determine questions of weight. As a general statement this is unexceptional: see *Peko-Wallsend*. His Honour's statement, at [70], will only indicate error if the Director-General's report was required to be the focal point of fundamental element in his Honour's decision-making process.

241 The Minister contended that his Honour discussed the Director-General's report in broadly descriptive terms and that although he set out, for example, some of the Directors-General's discussion on the social and economic impacts of the proposal, he failed to refer to certain important aspects of the report. In particular, the Minister contended that his Honour did not refer to the following matters:

> "a. the discussion in the report on the question of the need for the Extension Project, which identified society's heavy reliance on coal to meet its basic energy needs, and that, accordingly, the 'ultimate need for the project is driven by both domestic and international markets to meet current and future energy needs' ...; or
>
> b. the provision of additional detail, in the addendum provided to the PAC in January 2012 and consideration of the strategic context and justification for the Extension Project, which addressed ...:
>
> i. coal mining supplying 92% of the electricity for the State, and providing essential support to major industry, including aluminium smelters in the Hunter Valley and the steelworks at Port Kembla;
>
> ii. the coal mining industry in NSW generating around 80% of the State's mining income and 25% of its export revenue;
>
> iii. coal being the largest export in revenue terms from NSW;
>
> iv. the future of the NSW coal industry being tied to global energy demand, predicted to increase by up to 60% over the next 25 years;

v. the likelihood that the Hunter Valley would contribute 40%-60% of the additional coal output to meet that increase in demand; and

vi. further development of coal extraction in the area between Singleton and Muswellbrook (the location of the Extension Project) being likely to focus on continued expansion of mining operations."

242 The Minister also submitted that his Honour did not refer to the conclusion in the Director-General's report that, with the recommended conditions in place, the socio-economic benefits of the Project would far exceed its costs. The Minister submitted that at the very least, his Honour was required to accord this conclusion significant weight in his determination.

243 The Minister's submission must be put in the context of what was and was not stated in the Director-General's report. Whilst the Director-General's report states that the Department "*recognises that society is currently heavily reliant on coal*" and specifies the matters set out in the Minister's submission, there was no discussion of how or the extent to which approval of the Project would impact upon these figures. For example, the report did not state that there were insufficient coal resources presently available to meet the demand referred to in these figures. Nor did it state the anticipated percentage increase that the coal mined from the Project would add to the state's mining income or export revenue if the Project was approved. Rather, the statements in the Report described the existing position. The primary judge's consideration of the various impacts, positive and negative, was premised upon the existing position.

244 To the extent that it was alleged there was additional material in the Addendum report, an examination of that material indicates that there was a degree of replication of the factual material. For example, the addendum noted that the coal mining industry provides 92 per cent of the State's electricity, 80 per cent of the State's mining income and 25 per cent of its revenue income. This information, with insignificant differences, was all contained in the original report.

245 Whilst these were important matters, sight cannot be lost of what they represented. They were statements in percentage terms of data that appeared in the report and with which his Honour dealt at [446]. In particular, his Honour dealt with the increase in revenue to the local, State and national economy and the increase in job numbers. The question in issue in the proceedings was the extent to which the economic analyses advanced to support the economic and other benefits were reliable. Much of that material was not in the Director-General's report, but was the subject of expert evidence before his Honour. In any event, his Honour stated, at [499], that "*the economic benefits and positive social impacts in the broader area and region* [*were*] *substantial*". This reflected the Director-General's conclusion that "*the* [*P*]*roject would provide major economic and social benefits for the Hunter region and to NSW*".

246 Further, although his Honour did not expressly refer to the fact that society was heavily reliant on coal, or to the percentages stated in the report, it should not be assumed that his Honour did not have regard to them. These matters were background facts placing the Project in the context of the coal mining industry generally and within its state and regional context. Much of the information is general knowledge in the community. It would also be wrong to conclude, as indicated, that his Honour did not have regard to the general propositions in the report when he dealt with the detailed data contained in the same sections of the report.

247 The Minister next complained that not only did his Honour not refer to the matters outlined above, but that he did not return to the facts identified at [446]. It is difficult to ascertain the precise flaw which the Minister contends infected his Honour's decision, other than the complaint that underpins this ground, that his Honour failed to give these matters "*substantial weight*" or "*prima facie weight*". We do not accept this aspect of the Minister's argument. The material was before his Honour and he referred to it. His specific references to data indicated that he understood that this was important economic information that formed part of the basis for the Director-General's recommendation.

248 In short, it is apparent from his Honour's reasons that he engaged in "*an active intellectual process*" when considering the material presented to him, including the Director-General's report: *Tickner v Chapman* (1995) 57 FCR 451 at 462. The complaint made was that his Honour failed to make that report a focal point of, or focal element, in his determination. For the reasons given, it was necessary for him to do so.

249 The next challenge to his Honour's reasoning was in relation to the manner in which he dealt with the impact on biodiversity and, in particular, on the EECs. Much of that is discussed elsewhere in these reasons. However, there is one particular complaint that provides a convenient basis upon which to consider this matter as is relevant to this ground of the appeal and the cross-appeal. The Minister contended that, in dismissing the biodiversity offset areas as being sufficient because they were inconsistent with the principle that required "*like-for-like*" offsetting areas, his Honour overlooked:

> "a. that part of the independent review prepared for the Department, Mr Travis Peake considered each of the Ironbark EECs offsets to be generally appropriate;
>
> b. Mr Peake's statement, in the addendum to his report, that it was difficult to offset the cleared Ironbark EECs with existing like-for-like communities or derived grasslands;
>
> c. the reference in the Director-General's report to OEH's acceptance that 'while like-for-like Ironbark offsets are available in the region, they generally comprise small patches spread across multiple landowners, which would make acquisition and management for conservation purposes problematic';
>
> d. the reference to OEH's preparedness to accept offsets in other areas with similar vegetation communities but not necessarily like-for-like' (Director-General's report at 41 ...), although it required 'an enhanced offset package' to compensate for the move away from the 'like for like' principle and the principle of proximity;
>
> e. the conclusion in the joint report of the biodiversity experts that the Ironbark EEC offset sites were strategically linked

to national parks and nature reserves and to conservation initiatives such as the Great Eastern Ranges initiative;

f. the reporting of OEH having sought a recommendation that a further 750 ha of offset areas 'be added to the total offset package, and that the offsets be preserved in perpetuity', which the Department and WML accepted and which was incorporated into the conditions of approval recommended for the Extension Project."

250 His Honour dealt with the offsets package, and in particular each of the biodiversity areas, at [154] ff. His Honour noted that the Southern Biodiversity Area incorporated some of the lands previously designated under the 2003 Development Consent as non-disturbance areas. To that extent, the Southern Biodiversity Area could not be considered a means of avoidance of the impacts of the Project. His Honour also found, at [162], that the Project reversed some of the avoidance measures required by the 2003 development consent, including the conservation and permanent protection from mining of the Central Hunter-Grey Box-Ironbark Woodland EEC.

251 At [185], his Honour referred to the proposed direct offsets comprising seven areas of existing vegetation communities that would be conserved in perpetuity. One of those seven areas was, as noted by his Honour, an additional biodiversity area of 750 ha required by Condition 31 in the Commission's approval of the Project. His Honour noted that Warkworth proposed to satisfy that condition by setting aside an area called Rockery Glades. Accordingly, the contention that his Honour made no reference to the matter in para (f) is incorrect.

252 The assessment by Mr Peake, to which the Minister's submission at para (a) above refers, was contained in section 3.8.5 of Mr Peake's "*Review of Ecological Assessments for Warkworth Extension EA and HVO South Modification Projects*". That section was entitled, "*Review of Overall Strategic Value of Proposed Biodiversity Offset Areas*". It was a summary of the value of the offsets on Warkworth Sands Woodland, Central Hunter Grey Box-Ironbark Woodland EEC; Central Hunter Ironbark-Spotted Gum-

Grey Box Forest EEC; Hunter Lowland Redgum Forest EEC; Derived Native and Exotic Grassland; Central Hunter Grey Box-Ironbark Woodland Derived Grassland; Warkworth Sands Grassland; additional vegetation communities; threatened flora species and endangered flora populations; and threatened fauna species, endangered fauna populations and fauna habitat. Mr Peake had considered each of those matters in sections 3.8.1.2 to 3.8.4 of his Review. A number of matters need be noted about those sections of his report and the comments in 3.8.5.

253 First, it is not correct to say that Mr Peake stated that each of the Ironbark EECs' offsets was generally appropriate. In each case, his assessment of each of the biodiversity areas was as to its "*overall*" appropriateness. There was no reference in the summary to the appropriateness of the offset areas to each of the impacts referred to in the preceding sections of the report.

254 Secondly, Mr Peake expressed reservations about the appropriateness of some of the biodiversity areas. The Putty biodiversity area was stated to be of "*limited value to this project*". The Seven Oaks biodiversity area was stated to be only of "*some value*". Although the Goulburn River biodiversity area was stated to be "*overall an appropriate biodiversity area*" the statement was qualified. Mr Peake stated that "*on balance*", this biodiversity area was "*valuable*", after noting that it "*does not support similar vegetation types*".

255 Thirdly, Mr Peake's assessment of the appropriateness of the biodiversity offsets in respect of each the two Ironbark communities was guarded. In this regard, his opinion, under subheading 3.8.1.3, "*Central Hunter Grey Box – Ironbark Woodland EEC*", was directed not only to the specific offset areas but what those areas provided in terms of vegetation type and the physical area required to constitute an appropriate offset. This section of his report ran over two pages and should be read in full to complement these reasons and to ensure that the extracts to which we refer are

understood in the context in which they appear. However, relevantly to the issue under consideration, Mr Peake made the following statements:

> "Given the sizeable scale of impacts on CHGBIW, and the dissimilarity of vegetation at Goulburn River BOA to CHGBIW, the use of Goulburn River BOA to offset CHGBIW (without further direct offsetting) is not supported.
>
> ...
>
> Within the post-mined rehabilitation area of 2312 hectares, RTCA proposes to include the re-establishment of 780.6 hectares of vegetation that is 'predominantly comprised of CHGBIW, with some smaller areas comprised of CHISGGBF' (Cumberland Ecology 2011b, p. 12). **In accordance with the uncertainties surrounding the rehabilitation of areas to functioning ecological communities that are characteristic of existing communities, particularly threatened communities, this has been discounted by 50 per cent in terms of its contribution to offsetting ratios**. This means that it will contribute about 390.3 hectares towards the offsetting of these EECs. This is consistent with recent trends in this area and would be contingent on RTCA committing to rigorous performance criteria and draft completion criteria for the rehabilitation of these communities as proposed in Section 6.1.3.
>
> In order to achieve a long-term 4:1 offset for the impact on 658 hectares of CHGBIW and CHISGGBF, a total area of 2632 hectares is required. Factoring in the 494.9 hectares of upfront offsetting, plus the 217.3 hectares of regeneration of CHGBIW, and the discounted 390.3 hectares of rehabilitation (totalling 1102.5 hectares), a further 1529.5 hectares is required. If this comprised suitable rehabilitation (discounted by 50 per cent) then 3059 hectares of rehabilitation that is 'characteristic' of CHGBIW would be required. This is not possible given the total area available for rehabilitation. **Therefore it is recommended that RTCA would need to provide alternative arrangements to meet this overall long-term offset requirement**.
>
> The Goulburn River BOA covers an area of 1562 hectares and supports a range of vegetation types, including the TSC listed White Box – Yellow Box – Blakely's Red Gum Woodland EEC and the EPBC listed White Box – Yellow Box – Blakely's Red Gum Woodland and Derived Native Grasslands CEEC. None of the communities present could be regarded as being ecologically similar to those that are to be impacted by the proposed project. Notwithstanding this, the Goulburn River BOA could contribute towards meeting the overall offsetting requirements for the project once a reasonable base of the same or similar vegetation community offsetting has been established." (emphasis added)

256 The Minister's statement at para (b) of this submission refers to Mr Peake's addendum report, prepared following responses by Warkworth to his initial report. The Minister's reference appears to be to the comment of Mr Peake under subheading 2.3.1.2 that:

> "... it is agreed that it would be challenging to offset the entire additional 1529.5 hectares recommended for these communities with either existing CHGBIW or derived grasslands".

257 Warkworth makes a similar complaint about his Honour's failure to refer to the addendum report. However, to the extent that the Minister and Warkworth rely upon an absence of reference to this comment by his Honour, Mr Peake's statement itself must be taken in context and his Honour's reasons must be read as a whole. In response to Mr Peake's report, Warkworth had made a further proposal, including that additional land be made available. Mr Peake was critical of many aspects of Warkworth's response. It was in the context of those criticisms that Mr Peake made the observation upon which the Minister relies.

258 In section 2.3.2, Mr Peake summarised the information contained in Warkworth's additional proposals. He noted that Warkworth proposed three areas as additional offset areas primarily for Central Hunter-Grey Box-Ironbark Woodland, although he recognised that they would provide a range of other ecological and landscape benefits. However, as Mr Peake observed, the areas proposed could be subject to future underground mining and Warkworth had not ruled out open cut mining or other forms of significant disturbance. Mr Peake also commented that Warkworth did not propose the term over which the areas would be offset, that is, either temporarily or in perpetuity. Mr Peake accepted that the areas proposed would be valuable additions to the biodiversity offset packages, but noted the ambiguities in the information presented.

259 It is clear that his Honour recognised that the provision of like-for-like communities or derived grasslands would be difficult. His Honour considered, however, at [205], that it was essential that for an offset

package to be acceptable, the like-for-like principle be implemented. We do not accept, therefore, that his Honour overlooked the import of what Mr Peake said in the addendum to his report and accordingly we reject both Warkworth's submission and the submission contained in para (b) of the Minister's submission.

260 His Honour did not make express reference to the matters referred to in (c), (d) and (e) of the Minister's submission. Paragraphs (c) and (d) need to be considered in context. His Honour well understood that the Director-General had accepted that the Project should be approved notwithstanding that the Biodiversity Offset Areas did not conform with the like-for-like offset principle. To require the judge, on appeal, to refer to every reference to that matter in the report demonstrates the unattractiveness of the Minister's proposition.

261 It is also important to understand how the matter was dealt with before the primary judge. The Minister made no specific reference to that part of the Director-General's report in his closing submissions before his Honour. However, reference was made to the concern expressed by the Office of Environment and Heritage about whether the offset areas proposed adequately compensated for the impact on the Ironbark communities. The Minister outlined Warkworth's responses to the Office of Environment and Heritage in correspondence, including its offer of additional strategic offset properties to meet this concern.

262 His Honour dealt with the issue raised by these submissions at [205]. It was his view that it was "*not appropriate to trade offsets across different ecological communities*". In circumstances where an issue is expressly dealt with in the reasons, a failure to record in the reasons the submission dealing with the issue does not mean that the matter was overlooked. We would reject the complaint made in paras (c) and (d).

263 Insofar as the Minister's complaint relates to para (e), it should be put to one side. The ground of appeal was that his Honour had erred in law in

failing to consider and give weight as a fundamental element to the Director-General's report. The joint report was prepared for the hearing before his Honour and so was not part of the Director-General's report.

264 Warkworth also raised specific matters which it contended demonstrated that his Honour failed to have regard to the Director-General's report as a fundamental element or focal point in the decision-making process. As we have rejected that as being the correct approach, it is strictly not necessary to address the specific matters raised. However, for completeness, we will refer to them briefly.

265 One matter raised was his Honour's approach to environmental offsets. That has been dealt with in these reasons in some detail and nothing needs to be added. Another matter was his Honour's approach to the public interest. That has also been dealt with. The remaining issue was the "*whole of complex*" approach to noise conditions.

266 Warkworth submitted that his Honour's failure to treat the Director-General's report as fundamental led him to erroneously reject the proposal to impose noise conditions on a "*whole of complex*" basis, that is, on noise generated by both the Warkworth mine and the adjoining Mt Thorley complex. The decision to impose noise conditions on this basis was made by the Department of Planning and Infrastructure because of its view that Warkworth and Mt Thorley were managed as a single complex and that all noise emissions from both sites should be treated as related to the Project. Warkworth contended that his Honour erred by speculating about the difficulty in ensuring compliance despite the clear view adopted by the Department, and in the absence of any contrary expert evidence.

267 His Honour dealt with this issue in detail at [367]-[[374], including by reference to Warkworth's submission. Amongst other things, he noted that to "*whole of complex*" approach was inconsistent with the INP. His Honour gave reasons why the "*whole of complex*" approach was not acceptable, including that it would give rise to difficulties of enforcement and that there

was a possibility that there was no power under the legislation to adopt that approach. His Honour's reasons were supported by reference to case law. No error of law (other than the alleged error we have rejected) has been identified in respect of this aspect of his Honour's reasons.

268 We would make a similar observation in relation to the public interest. His Honour could not have failed to understand that the Director-General considered the project to be in the public interest. The public interest was a mandatory consideration for the Director-General. As already indicated, a failure to include in a lengthy judgment a reference to the short statement in the Report that the Director-General had concluded that the project was in the public interest cannot constitute a failure at law to consider that conclusion, when the matters that were the focus of evidence and argument before his Honour were addressed in detail and all related to the overall question of whether approval was in the public interest.

269 Ground 2B of the appeal is rejected.

GROUND 2C: Public interest considerations

270 In ground 2C, Warkworth contended that his Honour erred in failing to consider or give proper weight to the public interest. In particular, it contended that his Honour was required to consider and give weight to the aspects of the public interest referred to in the Director-General's Assessment Requirements as relevant to the Project. The Minister did not support this ground of appeal.

271 Warkworth also contended that his Honour erred in failing to consider or give weight to the public interest as reflected in the decision of the Minister, as determined by the Commission, as the Minister's delegate.

272 Finally, Warkworth contended that his Honour erred in failing to identify how the public interest conclusions that the Minister, through his delegate the Commission, reached were necessarily wrong and in the absence of

identifying such error, erred in making a different determination from that of the Minister.

273 In oral submissions, Warkworth accepted that in order to succeed on this ground, it had to establish that his Honour disregarded the Commission's reasons. This was a significant dilution of the argument as articulated in the grounds of appeal and the written submissions. In oral argument, Warkworth relied upon *Macedon Ranges Shire Council v Romsey Hotel* [2008] VSCA 45; 19 VR 422, especially at [53], as the authority most favourable to its case.

274 In *Macedon Ranges Shire Council v Romsey Hotel*, the Victorian Court of Appeal considered that the Victorian Commission for Gambling Regulation ought to have appeared and supported its decision. The Commission was a statutory party to review proceedings brought in the Victorian Civil and Administrative Tribunal and had statutory duties to provide information to the Tribunal. It had not provided all the material to the Tribunal. This was of significance in circumstances where the Council, who was the applicant in the Tribunal, significantly changed its position before the Tribunal and had abandoned an objection made before the Commission. The result was that there were aspects of the Commission's decision making that were not before the Tribunal.

275 In that context, the Court held, at [29], that the Commission, as the primary decision maker, had an obligation to assist the Tribunal in the review of the primary decision. The Court held that the original decision maker had a unique contribution to make because it had experience and expertise that was not possessed either by the Tribunal or by any adversary appearing in the review proceedings. The Court further stated, at [53], in the paragraph relied upon by Warkworth:

> "Although the review proceeding was a hearing de novo, the commission's reasons should have been given considerable weight. As we noted earlier, the commission has the administrative responsibility for the Gambling Regulation Act. It has both

> specialist expertise and unique experience in dealing with the issues which arise under the Act. So much was acknowledged by Morris J in Branbeau. Again, although it was for the Tribunal to decide what was the 'correct or preferable' decision on the proprietor's application, the tribunal could not properly discharge its 'review' function without evaluating the central element of the commission's reasoning and – if that element was to be disregarded in considering the 'net detriment' test – explaining why it was to be so disregarded. As the tribunal's reasons contained neither that evaluation nor that explanation, the commission was given no guidance as to why its approach was said to be erroneous."

276 In our opinion, the circumstances of an administrative review from a primary decision maker to a tribunal is of a different nature to the statutory right of appeal for which s 75L(3) provides. In the first place, the Minister or delegate is not a statutory party to the appeal and has no statutory obligations to provide material to the Court for the purposes of the appeal. The proceeding before the Court was an essentially adversarial contest between parties affected by the decision. In this case, the Minister was a party to and actively participated in the proceedings as a protagonist in his own cause, supporting the decision that had been made by his delegate. It must also be said that it is difficult to see that this ground covers matters that have not already been dealt with in ground 2B, or which arise under ground 3.

277 Ground 2C of the appeal is rejected.

GROUND 3: Failure to determine the public interest

278 In ground 3, compendiously identified as a failure to determine the public interest, Warkworth contended that his Honour failed to make findings on the positive aspects of the Project, which was a central feature of its case for approval. Warkworth submitted that there had thereby been a failure to exercise jurisdiction, an erroneous application of the legal standard for deciding its application and a failure by his Honour to discharge his duty to give adequate reasons.

279 Subject to the matters raised in the grounds of appeal already discussed, Warkworth acknowledged that his Honour, at [36] and [66], correctly identified the task that he was required to undertake. At [36], his Honour had observed that the decision making process under s 75J required the identification of the relevant matters that need to be considered, fact finding in respect of each relevant matter, a determination of the weight to be given to each such matter and balancing the weighted matters so as to arrive at a managerial decision.

280 His Honour, at [66], observed that in considering a development such as this, the decision maker, including the Court on appeal, was required to identify the potential impacts, both positive and negative, that should be considered. His Honour then identified the impacts that were required to be considered, including an assessment of the costs and benefits of the project as a whole. In his judgment at "*Part 6: Economic Issues*", his Honour dealt with the parties' competing positions on economic matters: see at [446]-[449]. As Warkworth contends that his Honour failed to deal with one of its central arguments, it is necessary first to consider the evidence and the matters his Honour dealt with in this part of the report insofar as is relevant to the arguments advanced to this Court.

281 Warkworth's economic experts, Mr Gillespie and Professor Bennett, stated in their original joint report that the total net production benefits generated by the Project were estimated in the Project Benefit Cost Analysis at $1,971 million, distributed amongst a range of stakeholders including, Warkworth shareholders, the New South Wales Government via royalties estimated at $254 million and the Commonwealth Government in the form of company taxes paid by Warkworth, estimated at $515 million. The net production benefits to Australians were estimated to be $1,146 million. This was later revised downwards to more accurately reflect the number of Warkworth's Australian shareholders as compared to its overseas shareholders.

282 Warkworth submitted that although there was a contest amongst the experts as to the appropriateness of the Benefit Cost Analysis undertaken by Mr Gillespie and Professor Bennett, there was no challenge to their evidence of the net production benefits of the Project, once the adjustment had been made for the percentage of overseas shareholders. Warkworth also submitted that there had not been any contest on the evidence that the Project would result in an increase of at least 150 jobs from current levels and a continuation of total employment of about 1,200 jobs from 2021, when the 2003 Development Consent expired, until 2033, being the proposed date of expiry of the Project. It was submitted, however, that his Honour had not made any ultimate finding as to what benefit was involved in the proposed extraction of coal should the Project be approved or as to the scale of the direct employment benefit.

283 The Association responded to this ground of appeal by pointing to the following factors.

284 First, in reply to the submission that it had not challenged Warkworth's economic analysis as to the benefits of the Project, referred to above, the Association pointed to its evidence and its submissions at first instance, which directly challenged aspects of the analysis.

285 Secondly, the Association pointed to his Honour's summation, at [446]-[448], of the competing positions of the parties on economic issues. In particular, at [446], his Honour referred to the value of the unmined coal resource of approximately $14 billion during the proposed 21 years of the Project, or $32 billion for the total resource. His Honour also referred to the projected increase in employment which sufficiently reflected the figure of 150 jobs referred to in Warkworth's evidence: see [282] above. His Honour noted that employment would fluctuate between 860 and 1,220 full time employees, with an average of 1,000.

286 At [447], his Honour referred to the figures advanced by Warkworth in its closing submissions as to the significant positive economic aspects of the

project, including a stimulus of about $16 billion to the Hunter economy, using the Input/Output model and an uncontested net production benefit of over $1 billion using the Benefit Cost Analysis. His Honour also referred to the value attributed in the Benefit Cost Analysis to the creation of additional jobs in the sum of $286 million. At [448], his Honour dealt with the net production benefit to Australia of the project of approximately $1.15 billion.

287 Thirdly, the Association pointed out that [450]-[496] of his Honour's judgment dealt with the resolution of the economic issues between the parties. This part of his Honour's reasoning was introduced by a summation, at [450]-[453], in which his Honour pointed to the limitations of the Input/Output analysis and the deficiencies of the Benefit Cost Analysis and the Choice Modelling Survey. Although his Honour did not expressly state his preference for the evidence of a particular expert, it is clear from his Honour's reasoning that he accepted the expert evidence of Mr Campbell in preference to the expert evidence of Mr Gillespie and Dr Bennett.

288 In relation to the point made in the preceding paragraph, it is useful to refer briefly to some of the criticisms Mr Campbell made of the Choice Modelling Survey to understand the nature of its inadequacies, as his Honour found. Thus, looking at the employment benefits for which Warkworth contended, Mr Campbell considered that the Choice Modelling Survey had failed to adequately explain to respondents that mining in Australia was capital intensive and employed relatively small numbers of skilled workers. He said that in recent history, mining companies had sought employees from overseas due to a shortage of skilled industry labour in Australia. New jobs in the mining industry, which attracted high wages, often came at the expense of jobs in other industries and pushed up the cost of employment in other industries. These matters had not been taken into account in Warkworth's economic analysis.

289 Fourthly, the Association pointed to his Honour's reference in the judgment at [445] to the positive impacts of the Project, particularly in the form of continuing employment, and the reference, at [499], to the substantial economic benefits and positive social impacts of the Project in the broader area and region.

290 Warkworth's submission sought to establish that his Honour had failed to consider its case because he had not made findings in respect of the dollar value of the economic benefit if the Project was approved and the number of jobs likely to be generated. Whilst his Honour was required to consider these matters, there was no statutory imperative for him to make findings in the prescriptive way argued by Warkworth and it is unlikely that he could have done so on the evidence before him. Warkworth had advanced figures predicated upon certain assumptions derived from a methodology that his Honour found to be inadequate. That did not mean that his Honour could or did ignore the substantial benefits the Project would bring. He made an express finding that there were such substantial benefits. In our opinion, this aspect of ground 3 should be rejected.

291 Nor did his Honour fail to give reasons in accordance with the principles stated in *Segal v Waverley Council* [2005] NSWCA 310; 64 NSWLR 177. As was stated there by Tobias JA, Beazley and Basten JJA agreeing, the court is bound to address the principal issues in contention between the parties. For the reasons explained above, his Honour satisfied that obligation. We would also reject Warkworth's argument that his Honour's finding, at [499], of "*substantial economic benefit*" was a "*bald, conclusionary statement*": *Pollard v RRR Corporation Pty Ltd* [2009] NSWCA 110 at [64]. His Honour's statement, at [499], was the conclusion reached after a detailed consideration of the economic evidence presented to him: see *Mitchell v Cullingral Pty Ltd* [2012] NSWCA 389; *Ceva Logistics (Australia) Pty Ltd v Redbro Investments Pty Ltd* [2013] NSWCA 46 at [150].

292 Warkworth also contended that his Honour took an erroneous view of the public interest or indeed, failed to properly address what was involved in the public interest other than for his comments, at [63]-[65], that the public interest included "*the principles of* [*ecologically sustainable development*] *and community responses to adverse affects on amenity*". As we understand this argument, it is that these matters were irrelevant considerations in the determination of the public interest, although they may have been relevant considerations for other aspects of the decision-making process. Warkworth submitted, alternatively, that by confining his consideration of the public interest to these matters, his Honour's consideration was too narrowly focused so as not to amount to a proper consideration of the public interest at all. It is necessary to look at both aspects of this argument.

293 Warkworth submitted that community responses were not part of the public interest for the purposes of the decision-making process but rather a mandatory consideration under the legislative scheme. Community responses are a mandatory consideration in that the Environmental Planning and Assessment Regulation, cl 8B(d) requires a summary of submissions received during public consultation to be included in the Director-General's report, which must be considered by the Minister under s 75J(2). Warkworth submitted that although one of the objects of the EPA was increased opportunity for public involvement and participation: see s 5(c), that did not convert community responses to the Project into an aspect of the public interest.

294 Warkworth made a similar submission in respect of ecologically sustainable development. The Environmental Planning and Assessment Regulation, cl 8B(d) required environmental impacts to be considered in the Director-General's report, and thus were a mandatory consideration under s 75J(2). Warkworth submitted that although ecologically sustainable development was a mandatory consideration, that was because of the requirements of reg 8B(d), rather than it being an aspect of the public interest.

295 Warkworth submitted that this view was supported by a proper reading of *Minister for Planning v Walker* [2008] NSWCA 224; 161 LGERA 423. In that case, Hodgson JA endorsed statements made in a number of first instance authorities that consideration of the public interest embraced Ecologically Sustainable Development: see *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133; 67 NSWLR 256 and cases cited therein. In *Telstra*, Preston CJ of LEC said:

> "[121] The principles of ecologically sustainable development are to be applied when decisions are being made under any legislative enactment or instrument which adopts the principles: *Murrumbidgee Ground-Water Preservation Association v Minister for Natural Resources* [2004] NSWLEC 122 at [178]; *Bentley v BGP Properties Pty Ltd* (at 243 [57]).
>
> [122] The *Environmental Planning and Assessment Act* is one such legislative enactment. It expressly states that one of the objects of the *Environmental Planning and Assessment Act* is to encourage ecologically sustainable development: s 5(a)(vii)."

296 In our opinion, Warkworth's reading of *Minister for Planning v Walker* is not correct. Rather, it is authority for the proposition that where it is necessary to consider the environmental impact of a project, the public interest embraced Ecologically Sustainable Development. Likewise, we consider that community responses to the project were relevant to the public interest. As his Honour pointed out, at [430], the evidence of the community responses was relevant to a consideration of noise impacts, air quality, visual impacts and more generally, the social impacts on the community. All of those factors were aspects of the overall public interest.

297 Warkworth also complained that it was an error for his Honour to confine his consideration of community responses to adverse effects, as Warkworth alleged his Honour had done when he stated, at [65], that public interest included:

> "... community responses to adverse effects on amenity where those responses reflect more than an unjustified fear or concern and where based on logically probative evidence."

298 Warkworth contended that his Honour should have, but failed, to have regard to the wider public interest issues that arise in decision-making under Pt 3A and in particular to state and regional socio-economic issues. It also contended that his Honour had failed to embark upon or express any evaluation of the public interest.

299 A requirement that regard be had to the public interest operates at a high level of generality. What is involved in the determination of the public interest in a given statutory context was explained in *O'Sullivan v Farrer* [1989] HCA 61; 168 CLR 210 at 216 where the High Court stated:

> "[T]he expression 'in the public interest', when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view'." (citation omitted)

See also *McKinnon v Secretary, Department of Treasury* [2006] HCA 45; 228 CLR 423 at [55]; *Osland v Secretary to Department of Justice* [2008] HCA 37; 234 CLR 275 at [57] per Kirby J and [137] per Hayne J; *Osland v Secretary to Department of Justice [No 2]* [2010] HCA 24; 241 CLR 320 at [13] per French CJ, Gummow and Bell JJ; *Water Conservation and Irrigation Commission (NSW) v Browning* [1947] HCA 21; 74 CLR 492 at 505. As observed in *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36; 246 CLR 379 (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) at [42], the range of matters relevant to the public interest is very wide.

300 In order to understand whether his Honour erred in the manner alleged, it is necessary to have regard to the structure of his Honours judgment. It was divided into seven sections: an introduction, a statement of the nature

of the judicial task he was undertaking, sections dealing with the impacts on biological diversity, noise and dust impacts, social impacts, economic issues and the final section in which his Honour balanced relevant matters and came to his determination.

301 Each of those matters was relevant to the public interest. Some of the matters involved a focus on local issues. Noise and dust impacts is an example. Other matters, such as biological impacts and economic issues, involved wider regional, state and national issues. The determination as to whether the Project was in the public interest required an overall assessment of these relevant matters. That was the balancing exercise that his Honour undertook in the end. The evaluation of the public interest was an integral part of that assessment.

302 A failure to include a statement as to whether the Project was in the public interest in each section of the judgment was not required and, if made, may well have led to a skewing of the balancing task his Honour was required to undertake.

303 It follows that we would reject this aspect of Warkworth's challenge and reject ground 3 of the appeal.

GROUND 5: Failure to consider relevant legislation: The *Mining Act*

304 Warkworth complained in ground 5 that his Honour erred by failing to have regard to the *Mining Act* 1992 which, it contended, was relevant legislation within the Court Act, s 39(4). It also contended that his Honour was required to but did not have regard to the terms of the leases held by Warkworth.

305 Section 39(4) of the Court Act requires the court, in a Class 1 appeal, to have regard, inter alia, to the Court Act itself and "*any other relevant Act*". There are no criteria specified in the Court Act to identify or determine what is a "*relevant Act*" for the purposes of that section. His Honour

stated, by way of an inclusive reference, that he was required to have regard to the EPA Act, the *National Parks and Wildlife Act* 1974 and the *Threatened Species Conservation Act* 1995. His Honour neither identified nor otherwise referred to the *Mining Act* in his reasons.

306 Before turning to the provisions of the *Mining Act* to determine whether it is legislation to which the court was to have pursuant to s 39(4), it should be noted that the land subject of the Project application is zoned Rural 1(a) under the Singleton Local Environmental Plan 1996. Mining is permissible with development consent in this zone. Mining is also permissible with development consent on the Project site under State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007.

307 It should also be observed that there was no requirement on the Minister in determining whether to approve the Project to have regard to "*other relevant legislation*". That is a requirement on the court imposed by the Court Act. It would be expected, of course, that the Minister would have regard to relevant legislation and that there would be discussion of such legislation in the Director-General's report. In this regard, the Director-General stated in his report that the Commission, in determining the application for approval, should consider the objects of the EPA Act and that the objects of the EPA Act most relevant to the Commission's decision as to whether or not to approve the Project were those stated in s 5(a)(i), (ii), (iii), (vi) and (vii). The Director-General did not direct the Minister's attention to the *Mining Act.*

308 Against that background, attention needs to be given to the provisions of the *Mining Act* to determine whether it is relevant legislation. The discussion below of the provisions of the Act is an overview only in order to assess its relevance to the approval of the Project.

309 The Act, by reference to its long title is "[*a*]*n Act to make provision with respect to prospecting for and mining minerals*", as well as to provide for the repeal of other legislation.

310 The objects of the *Mining Act* are contained in Pt 1, s 3A, which provides:

> "**3A Objects**
>
> The objects of this Act are to encourage and facilitate the discovery and development of mineral resources in New South Wales, having regard to the need to encourage ecologically sustainable development, and in particular:
>
> (a) to recognise and foster the significant social and economic benefits to New South Wales that result from the efficient development of mineral resources, and
> (b) to provide an integrated framework for the effective regulation of authorisations for prospecting and mining operations, and
> (c) to provide a framework for compensation to landholders for loss or damage resulting from such operations, and
> (d) to ensure an appropriate return to the State from mineral resources, and
> (e) to require the payment of security to provide for the rehabilitation of mine sites, and
> (f) to ensure effective rehabilitation of disturbed land and water, and
> (g) to ensure mineral resources are identified and developed in ways that minimise impacts on the environment."

311 Part 2 of the Act deals with prospecting and mining generally. Section 5 provides that a person must not prospect for or mine any publicly owned mineral on any land otherwise than in accordance with an authority in force in respect of that mineral on that land. An "*authority*" is defined in the Dictionary to the Act as an exploration licence, an assessment lease (for prospecting) and a mining lease. Coal falls within the definition of "*mineral*". Section 9 deals with mining privately owned coal and provides that a person must not prospect for or mine privately owned coal on any land otherwise than in accordance with an authority for coal in force in respect of the land. Penalties are provided for contravention.

312 Parts 3, 4 and 5 of the Act deal with exploration licences, assessment leases and mining leases respectively.

313 Part 5, Div 3 provides for the granting of mining leases. Power to grant a mining lease is vested in the Minister: s 63. Section 65 provides that the Minister must not grant a mining lease until development consent, if required, has been granted. As already indicated, at [306], development consent was required for the Project. Section 68 provides that a mining lease may be granted over land of any title or tenure. Section 70 imposes statutory conditions on a mining lease, including, pursuant to s 70(1)(a), a condition that the holder of the lease will not suspend mining operations in the mining area otherwise than in accordance with the written consent of the Minister. Section 70(2) provides for other conditions that may be imposed on a mining lease. Those conditions include conditions relating to mining or mining operations: conditions relating to the transporting of any mineral or other thing for the purpose of mining; conditions relating to the treatment or preparation for sale of any mineral; and conditions relating to the disposal or retention of material discarded from mining operations or from the treatment or preparation for sale of any mineral.

314 Section 71 provides for the term of a mining lease and s 72 prescribes particulars which must be included in the lease. Pursuant to s 73, the holder of a mining lease is entitled to mine for approved minerals and carry out any mining purpose on the leasehold area (in accordance with any conditions in the lease). A mining lease may be amended by the Minister so as to allow a lease holder to comply with a condition relating to expenditure instead of a condition relation to labour: s 79.

315 Part 6 of the *Mining Act* deals with the consolidation of mining leases and Pt 7 governs the renewal, transfer and cancellation of exploration licences, assessment leases and mining leases. Part 8 deals with "*Authorities generally*". Its provisions are wide ranging, covering matters such as the minimum age of a person who may be granted an authority, the consequences of the death of an applicant, the resolution of disputes

relating to applications, access arrangements for prospecting titles, arbitration procedures to deal with disputes between the holder of a prospecting title and a landholder, the maintenance of records and registration details, the keeping of a register of colliery holdings and matters such as right of way and rights of access to water. Part 9 deals with mineral claims and makes provision, inter alia, for the gazettal of land as a mineral claims district. Part 10 governs opal prospecting licences. Part 10A deals with access management plans for small-scale titles.

316 Part 11 deals with protection of the environment. Section 237, which is in Div 1 of Pt 11, requires the Minister, in deciding whether or not to grant, relevantly, a mining lease, to take into account the need to conserve and protect (a) flora, fauna, fish, fisheries and scenic attractions and (b) the features of Aboriginal, architectural, archaeological, historical or geological interest.

317 Part 11, Div 2 requires the Minister or mining registrar to include in a mining lease conditions relating to the matters specified in s 237, if considered appropriate. Conditions may also be imposed relating to the rehabilitation of areas damaged by mining. Division 3 provides for directions that may be given in respect of environmental matters and rehabilitation. Other directions may also be given, including a direction for the suspension of mining operations. Division 6 provides for the audit of mining operations, including management practices, systems and plant for the purposes of providing information, amongst other things, on compliance with obligations under the mining lease or other related legal requirements under the *Mining Act*, or any other law.

318 Warkworth contended that the *Mining Act* was relevant legislation for the purposes of s 39(4), being the primary legislative instrument together with the Mining Regulations, that regulates the exploitation of such resources and determines the benefit by way of royalties that accrues to the State as a result of such exploitation. Warkworth pointed out that it was a condition of its existing mining lease that Warkworth extract as large a percentage of

coal in the subject area as was practicable. If the Project was approved, there would be a substantial uplift in coal production including from its existing mine: see [10].

319 The effect of Warkworth's submission, therefore, was that in combination, the *Mining Act* and the existing lease were relevant considerations because it was necessary for the Minister and the Court to be aware, not only of the manner in which mining in the State was promoted, facilitated and controlled, but also of the impact that approval would have on Warkworth's obligations under its existing leases. In other words, approval of the Project would better facilitate Warkworth's lease obligation, imposed pursuant to the statutory permission in s 70(2), to extract as large a percentage of coal in the subject area as is practicable.

320 The Association submitted that the *Mining Act* was not relevant legislation to which his Honour was required to have regard. On the Association's submission, the *Mining Act* is not concerned with the prospective grant of leases during the development application stage. Rather, the Act regulates the grant of mining leases which, by operation of s 65, cannot be made unless and until development consent has been granted.

321 The Act's operative provisions, stated in general terms, are directed to applications and grants of authorities, that is, exploration licences, assessment leases and mining leases. They also address the conditions, both mandatory and discretionary, which may be imposed, and the various exigencies that arise once authorities are in place. The operative provisions of the Act do not deal with the grant of development consent for mining activities.

322 The requirement that development consent be obtained prior to the grant of an authority is a clear legislative indication that questions of development consent and the grant of an authority are separate and distinct processes involving different mandatory and discretionary considerations. There is of course an overlap in the considerations that

relate to grant of development consent and to the grant of a lease. Environmental considerations are one particular area of overlap. However, as stated, the processes are distinct. One significant difference in the processes is that, under the EPA Act, Pt 3A, there is public participation, whereas consultation under the *Mining Act* in respect of the grant of a mining lease is limited to relevant government agencies, the Director of Planning and the local councils for the land the subject of the proposed lease: the *Mining Act*, Sch 1.

323 In our opinion, the objects of the *Mining Act* support the statutory structure of the operative part of the Act, that is, as legislation directed to the means by which mining may be facilitated and undertaken. This is so notwithstanding that those objects make reference to matters that are also relevant objects under the EPA Act. The overlap in the objects of the two Acts led the Association to submit that his Honour had, in effect, had regard to the objects of the *Mining Act.* The Association submitted that that phrase "*economic use and development*" in EPA Act included mining operations and that each Act required the relevant decision-maker to balance environmental concerns with the promotion and facilitation of the economic use of land: see EPA Act, s 5(a)(ii); *Mining Act*, s 3A.

324 Before concluding on this ground, it must be observed that before his Honour, Warkworth's submission as to the relevance of the *Mining* Act was confined to the objects of the Act. Thus, even if the *Mining Act* was relevant legislation for the purposes of s 39(4), there is, as the Association submitted, sufficient overlap in the objects of the *Mining Act* and of the EPA Act that a failure to have regard to the *Mining Act* would not have vitiated the decision.

325 Ground 5 of the appeal is rejected.

GROUND 7: Measures of avoidance: an irrelevant consideration

326 Ground 7 was directed to the consequences of his Honour's finding that Warkworth had not proposed any strategies to avoid the significant ecological impacts, particularly on the EEC, that the Project would be likely to have. His Honour's particular concern, at [146], was in respect of the Warkworth Sands Woodland and Central Hunter-Grey Box-Ironbark Woodland and key habitats of fauna species. His Honour considered that the impact was of such magnitude as to require consideration of the measures proposed to avoid, mitigate and offset the impacts to determine the acceptability of the Project.

327 His Honour stated, at [147], that, in order of priority of action, the strategies for managing the adverse impacts of a project on biological diversity were avoidance, mitigation and offsets. His Honour noted that avoidance and mitigation measures should be the primary strategies for managing potential adverse impacts, because such measures directly reduce the scale and intensity of those impacts by a given project. These views were based upon the *Principles for the Use of Biodiversity Offsets in New South Wales*. No challenge was made to the appropriateness of applying those principles.

328 His Honour noted, at [150], that if all reasonable avoidance and mitigation measures have been implemented and there were still residual impacts, offsets could be considered. He observed that offsets do not reduce the likely impact of a project but rather compensate for the residual impacts. However, as the Project was for open cut mining, no avoidance measures had been proposed within the "*envelope of the disturbance area*" and the Project, if approved, would have the effect of reversing some of the avoidance measures that had been put in place by the 2003 Development Consent: see judgment at [162].

329 His Honour noted, at [165], that Warkworth had rejected the recommended avoidance measures relating to Warkworth Sands Woodland in favour of the provision of regeneration elsewhere and had also argued that the avoidance measure of not clearing west of Wallaby Scrub Road could not

be justified from an economic efficiency perspective. The recommended avoidance measure, as suggested by Mr Peake, was to excise from the mining areas proposed under the Project all Warkworth Sands Woodland occurrences beyond the mining area approved under the 2003 development consent.

330 His Honour observed, at [168], that the exploitation of the mineral resources had no inherent priority over other land uses, including nature conservation. He stated that there had to be an assessment of the different and often competing environmental, social and economic factors to determine what was the preferable decision as to the use of the land. His Honour accepted that the economic analysis advanced by Warkworth was able to assist in the decision-making process, but was neither a substitute for it, nor determinative of it. His Honour continued:

> "The question of whether there can be avoidance of impacts on components on biological diversity, including on the WSW EEC, is part of a fact finding and consideration of the relevant matters regarding environmental impacts of the Project, which occur earlier in the process of decision-making, and should not be answered by the later tasks of weighing and balancing all of the relevant matters (environmental, social and economic) to be considered by the Court as decision-maker in arriving at the preferable decision."

331 His Honour concluded, therefore, at [169], that:

> "Accordingly, available measures to avoid significant impacts of the Project on EECs and habitats of fauna are not proposed to be undertaken by Warkworth. The consequence is that there would be no reduction in the scale and intensity of these impacts."

332 Warkworth submitted that the logical result of his Honour's approach was that the Project, which was for open cut mining, could not proceed. Warkworth also articulated this argument in the following way, namely:

> "... his Honour could not have approved the Project imposing a condition preventing the clearance of [Warkworth Sands Woodland] because that would have been approve a significantly different project"

333 Discussed in terms of relevant error, Warkworth submitted that his Honour took into account an irrelevant consideration and adopted an erroneous view of what was required in assessing the public interest. In this regard, Warkworth submitted that his Honour should have begun from the position that the Director-General and the Commission had regarded it as in the public interest that the Project proceed.

334 The question whether his Honour should have taken, as his starting point, the view of the Director-General and the PAC that the Project was in the public interest, has been considered above in relation to ground 2B. We do not agree, however, that His Honour, by having regard to avoidance measures, took into account an irrelevant consideration. It was a relevant consideration to ascertain the measures, if any, that Warkworth proposed to avoid an undeniable impact.

335 Warkworth further submitted that his Honour erred by confining his consideration to avoidance measures and by doing so, in effect pre-empted the ultimate outcome. We do not agree that his Honour did so. When it is understood that avoidance measures were available but rejected by Warkworth, it was factually correct to state that "*the consequence is that there would be no reduction in the scale and intensity of these impacts*". His Honour later considered the offsets proposed by Warkworth to determine whether they adequately addressed the adverse impacts on biological diversity if the Project was approved.

336 Ground 7 of the appeal is rejected.

GROUND 8: Erroneous view of EEC offset measures

337 As noted above, Warkworth proposed an offsets package rather than, as has been noted, any avoidance or mitigation measures. Its offsets package included five remote biodiversity areas. None of those areas included the affected EECs and accordingly, on his Honour's view, at

[205], these proposed areas did not offset, that is, compensate for, the impact of the loss of the affected EECs.

338 As the ecological communities in the proposed remote biodiversity offsets areas were different from those in the disturbance area, there was no like-for-like offsetting in accordance with principle 10 of the *Principles for the Use of Biodiversity Offsets in New South Wales*. Accordingly, the majority of the remote areas proposed by Warkworth as offsets for the endangered EECs did not achieve the fundamental objective of improving or maintaining the viability of those EECs. In his Honour's view, "*[i]t is not appropriate to trade offsets across different ecological communities*". Rather, "*[w]here a project impacts on a specific ecological community, any offset must relate to that same ecological community which is impacted*".

339 Warkworth acknowledged that there were two possible constructions of his Honour's reasoning in these paragraphs, but contended that either construction contained errors. The first possible construction was that an offset could not be taken into account unless it contained the same EEC communities as the Project would impact. Warkworth submitted that if that was his Honour's reasoning, it was erroneous as a matter of law, as it involved an unduly confined concept of the public interest. Alternatively, Warkworth submitted that his Honour may have meant that the remote offsets could not be considered as offsets for Central Hunter-Grey Box-Ironbark Woodland or Central Hunter Ironbark-Spotted Gum-Grey Box Forest. Warkworth submitted that if that was his Honour's meaning, that would be contrary to the agreed position of Mr Bell and Dr Robinson, but acknowledged it was in conformity with Mr Peake's opinion. It submitted, nonetheless, that his Honour ignored its submission that the remote offsets had ecological benefits because of their strategic values.

340 Neither of these matters constitutes an error of law. On the first approach, the question of what is in the public interest requires an evaluation of relevant matters in the context of the various subject matters under consideration. As already noted, Warkworth did not suggest that his

Honour erred in having regard to the use of the *Principles for the Use of Biodiversity Offsets in New South Wales*. It was for his Honour to determine their appropriateness and importance in the decision making process. On the second approach, his Honour made a finding of fact that was available on the evidence. In short, he rejected Warkworth's submission as to the ecological benefits of the remote offsets.

341 Ground 8 of the appeal is rejected.

GROUND 9: Failure to consider natural regeneration

342 The evidence before his Honour was that that there was no pristine pre-European Warkworth Sands Woodland in existence and that all existing Warkworth Sands Woodland in the Disturbance Area had resulted from regeneration after clearance. Approval of the Project would result in the clearance of 103 ha of Warkworth Sands Woodland. Condition 33 of the Minister's approval required Warkworth to restore at least 38.6 ha of Warkworth Sands Woodland in the Southern Biodiversity Offset Area and 195.8 ha in the Northern Biodiversity Offset Area.

343 Ground 9 related to the question of the potential for regeneration of Warkworth Sands Woodland in the Northern and Southern Biodiversity Areas. These areas comprised in part Warkworth Sands grassland, that is, areas where Warkworth Sands Woodland had previously been cleared. Warkworth contended before his Honour that on the evidence, the Court could be confident that there would be regeneration. However, his Honour concluded, at [251], that the areas of Warkworth Sands grassland and derived grassland in these two biodiversity areas did not provide long-term offsets that improved or maintained the viability of the EECs impacted by the Project.

344 Warkworth submitted that in coming to this conclusion, his Honour failed to deal with its submission that the evidence of demonstrated natural regeneration of Warkworth Sands Woodlands in the area gave confidence

that assisted regeneration in the two biodiversity areas would be successful. Warkworth accepted in oral submissions that his Honour dealt generally with the issue of regeneration, but nonetheless maintained that he failed to accord it the merited importance, given that a central plank in its case was that Warkworth Sands Woodlands had a high capacity for regeneration. Warkworth also complained that his Honour did not refer to the fact that there had been natural regeneration in areas where Warkworth Sands Woodland had been cleared, for example for grazing, once the grazing had ceased.

345 The evidence relating to the capacity of Warkworth Sands Woodland to regenerate was as follows. First, the experts, Dr Clements and Dr Robertson, gave evidence that Warkworth Sands Woodland had a high capacity to regenerate. They had not been cross-examined on that evidence. However, it should be noted that Dr Bell's view was that the areas nominated by Dr Clements and Dr Robertson were dominated by other species, particularly Eucalyptus creba.

346 Secondly, in his report, Mr Peake had stated that aerial photographs dating back to the 1950s demonstrate that Warkworth Sands Woodland had been cleared and "*regenerated in a patchwork across the site*". However, he had also observed that the "*floristic and structural composition of the community in response to these changes* [*was*] *not well-known*".

347 Thirdly, aerial photographs of the Northern Biodiversity Offset Area, taken in 1963, 1994, 2000 and 2012, were in evidence. The aerial photographs demonstrated that over the period from 1963 to 2012 there had been an increase in the density of Warkworth Sands Woodland in the Northern Biodiversity Offset Area. There also appeared to be an increase in density from 1994 to 2012, but the extent of the increased density could not be gauged with any degree of accuracy from the photographic evidence. From our assessment of the photographic evidence, keeping in mind the limitations of such evidence, there would not appear to have been a

substantial increase in density: see *Blacktown City Council v Hocking* [2008] NSWCA 144.

348 Fourthly, Warkworth informed this Court that his Honour and the parties and witnesses had also had a view of an area of high quality Warkworth Sands Woodland, which, Warkworth contended of itself demonstrated that the Woodland was capable of regeneration. Although a court is entitled pursuant to the *Evidence Act*, s 54 to draw any reasonable inference from what is seen on a view, his Honour did not do so. It is not possible, therefore, for this Court to speculate what his Honour may have seen or what inferences might have reasonably been drawn from what was observed.

349 Also relevant to this issue was Warkworth's proposal to contribute $500,000 to a five year research project by the University of New England relating to the regeneration of Warkworth Sands Woodland. Condition 38 of the Project Approval required Warkworth to continue that funding. Dr Robertson and Dr Clements considered that the research project was "*highly likely to be successful*". Mr Peake described the research as comprehensive and highly valuable to the understanding of the restoration ecology of Warkworth Sands Woodland. Mr Peake noted that the data was preliminary, being based on only three years of monitoring and approximately two years of revegetation trials, but considered that early indications suggested that there was a high likelihood that Warkworth Sands Woodland could be re-established so long as adequate resources and an adequate monitoring program was provided. He stated:

> "In short, the [University of New England] work does much to instill a reasonable degree of confidence in the recoverability of [Warkworth Sands Woodland] over the long term."

350 His Honour did not accept Dr Clements' and Dr Robertson's opinion that the Warkworth Sands Woodland had a high capacity to regenerate as he considered, at [244], that:

> "Their opinions are also affected by the belief ... that any vegetation community that regenerates on aeolian sands must be [Warkworth Sands Woodland] EEC."

351 In this regard, his Honour had earlier found, at [224], that:

> "Occurrence of aeolian sands substrate is a necessary condition but it is not sufficient for a vegetation community to be classified as [Warkworth Sands Woodland] EEC; the vegetation community must also satisfy the floristic and other criteria in the Scientific Committee's Final Determination listing [Warkworth Sands Woodland] as an EEC."

As Mr Peake had observed, this had not been established: see above at [346].

352 Nor did his Honour accept the optimistic views of Dr Clements and Dr Robertson and of Mr Peake in relation to the research program. In his Honour's view, the research program had not progressed sufficiently to demonstrate that restoration could be completely successful. In his Honour's view, the most that could be derived from the research evidence was that 62 per cent of planting in 2009 and 2010 had survived. His Honour did not accept that this meant that a fully functioning ecological community of Warkworth Sands Woodland had been established.

353 His Honour considered, at [240], that:

> "... there is a real risk and uncertainty that the derived grassland communities in the Northern and Southern Biodiversity Areas which Warkworth proposes to rehabilitate will become mature EECs."

354 His Honour's reasons, from [241]-[249], which included reference to the evidence of Dr Clements and Dr Robertson, explained why he had come to this conclusion.

355 In coming to his conclusion, which was replicated in his finding at [251], his Honour was dealing with Warkworth's submission that there should be a high degree of confidence that the Woodland would be re-established. His

Honour clearly did not have that confidence, for the reasons he gave. As the reasons for judgment demonstrate, there was evidence to support his Honour's views. In particular, his Honour did not accept that there was a demonstrated natural regeneration of Warkworth Sands Woodland, not least because he was not satisfied that the floristic and other criteria necessary to identify Warkworth Sands Woodland had been identified in the regenerated areas. Indeed, as his Honour found, at [241]:

> "There is no current example of a recognised area of [Warkworth Sands Woodland] EEC which has been created by rehabilitation from derived grassland."

356 There was some debate in the argument before this Court as to whether his Honour had dealt with the submission that Warkworth Sands Woodland had a high capacity to regenerate, or if he had only looked at questions of rehabilitation and restoration. However, it is apparent, both from Warkworth's submissions to his Honour and from the judgment, that these terms, and in particular the terms rehabilitation and regeneration, had been used interchangeably in the proceedings. This is particularly apparent from Warkworth's submission to his Honour to which we have referred at [343] above. Warkworth accepted that on this reading of his Honour's judgment, it could be said that he sufficiently dealt with its submission.

357 Ground 9 of the appeal is rejected.

GROUND 10: Condition 41A

358 During the course of the hearing before his Honour, Warkworth proposed an additional condition of approval, Condition 41A, which would prohibit clearing an area of approximately 67 ha west of Wallaby Scrub Road of Warkworth Sands Woodland until Warkworth demonstrated to the satisfaction of the Director-General that Warkworth Sands Woodland can be regenerated in these two biodiversity areas.

359 Warkworth, in ground 10 of the appeal, contended that his Honour failed to consider the effect of Condition 41A. The condition was proposed to address a concern that the Warkworth Sands Woodland would not regenerate in the grasslands in the biodiversity offset areas. The intention was to retain a 67 ha area of Warkworth Sands Woodland west of Wallaby Scrub Road, over half of which Warkworth was permitted to clear under the 2003 Development Consent, until it had demonstrated to the satisfaction of the Director-General that the Woodland could be re-established in the Northern and Southern Biodiversity Areas. Warkworth's complaint was that there was a constructive failure to exercise jurisdiction: see *Dranichnikov v Minister for Immigration and Multicultural and Indigenous Affairs*.

360 Condition 41A was proposed by Warkworth to complement the suite of conditions that had been imposed in respect of the Warkworth Sands Woodland. It is relevant to this ground of appeal to understand those conditions and how Condition 41A was intended to operate in conjunction with them. (Warkworth proposed other changes to the conditions that are not presently relevant. The numbering used in the following discussion reflects the numbering of the conditions as were proposed to Preston CJ of LEC.)

361 Condition 36 required Warkworth to have in place conservation agreements in respect of the Northern and Southern Biodiversity Areas or to have sufficient control of the land to enable conservation agreements to be entered into. Condition 37 required Warkworth to have a recovery plan, or to provide sufficient funding for the preparation of a recovery plan, for the Warkworth Sands Woodland by a specified date. Condition 38 required Warkworth to provide at least $500,000 of funding to support the ongoing implementation of the University of New England's Warkworth Sands Woodland research program, as previously mentioned. Condition 40 specified that Warkworth was to ensure that the project did not cause any more than negligible environmental consequences to the Warkworth Sands Woodland adjacent to the approved mining pit.

362 Condition 39 required Warkworth to contribute funding to a University of New England research project. Its terms were as follows:

> "39. The Proponent shall:
>
> (a) provide at least $500,000 of funding to support the ongoing implementation of the existing Warkworth Sands Woodland Research Program being undertaken by the University of New England; and
>
> (b) ensure that the findings of this research program are published in a suitable scientific publication."

363 The proposed Condition 41A provided:

> "41A. Prior to clearing any Warkworth Sands Woodland west of Wallaby Scrub Road, the Proponent will demonstrate to the satisfaction of the Director-General that Warkworth Sands Woodland can be re-established on Warkworth Sands Derived Grassland areas or augmented within the Southern Biodiversity Area and/or the Northern Biodiversity Area using the following process and criteria:
>
> (a) the proponent will establish relevant reference sites to compare and track the progress and inherent ecosystem function of re-establishment areas described below in (b). These reference sites will:
>
> i. take into account historical disturbance, topography, substrate and biodiversity targets ie species richness and complexity and will be representative of the [Warkworth Sands Woodland] that is to be disturbed.
>
> ii. be chosen by a suitably qualified ecologist and in consultation with the Director-General
>
> (b) Undertake augmentation or re-establishment of Warkworth Sands Woodland within six 1 ha plots for a period of at least 4 years:
>
> i. Augmentation – 3 plots demonstrating an increase in remnant community quality through the re-establishment of woodland adjoining an established remnant plot, and
>
> ii. Re-establishment – 3 plots demonstrating an expansion of a Warkworth Sands Woodland vegetation within the derived grassland community.

(c) The plots referred to in (b) are to involve the implementation of restorative strategies that may be replicated on a large scale to ensure that the offsetting commitments of the Proponent in respect of Warkworth Sands Woodland can be met.

(d) In determining whether or not the Director-General is satisfied that the plots referred to in (b) are on a successful trajectory towards a functional and self-sustainable ecosystem, the criteria described in table 15A are to be considered and applied in accordance with pages 70 to 76 of Appendix B in the Proposed Warkworth Extension Preferred Project Report September 2011 and the Director-General is to take into account the reference sites in (a).

Table 15A. Description of the performance criteria

Performance indicators are quantified by the range of values obtained from replicated reference sites

Hierarchy of ecosystem succession	*Aspect or ecosystem component*	*Ecological performance targets*
Landform establishment and stability	Landform function	Landform is functional and performing as it was designed to do
	Active erosion	Areas of active erosion are limited
Growth medium development	Soil chemical, physical properties and amelioration	Soil properties are suitable for the establishment and maintenance of selected vegetation species
Ecosystem establishment	Vegetation diversity	Vegetation contains a density of species comparable/on a trajectory to that of the Warkworth Sands Woodland remnant vegetation
	Ecosystem composition	The vegetation is comprised by a range of growth forms comparable/on a trajectory to that of the Warkworth Sands Woodland remnant vegetation

..."

364 The importance of proposed Condition 41A was that Warkworth had approval to clear 38 ha out of a total area of 68 ha in this locality under the

2003 Development Consent, but was agreeing to forego its rights under that approval until it had satisfied Condition 41A. Warkworth submitted that Condition 41A was consistent with Dr Bell's evidence that approval for clearing of 105 ha of Warkworth Sands Woodland should be reviewed "*until such time that it can be satisfactorily demonstrated that re-establishment of this community can be achieved*".

365 Warkworth submitted that his Honour failed to refer to proposed Condition 41A as part of his consideration of the prospects of the grassland becoming Warkworth Sands Woodland. In particular, Warkworth submitted that his Honour failed to appreciate that Condition 41A was intended to meet the problem of a time-lag between the clearance of the Woodland and it being demonstrated that rehabilitation would be successful. It contended that this particular problem was met by the requirement in Condition 41A that the Warkworth Sands Woodland in the area west of Wallaby Scrub Road not be cleared until the Director-General was satisfied of the prospects of successfully restoring the Warkworth Sands Woodland EEC.

366 It is important to keep in mind that Warkworth's contention was that his Honour did not deal with its argument. His Honour referred to proposed Condition 41A at [195] in that part of his judgment dealing with Warkworth's proposed offsets package and in the context of the requirements of Condition 39. His Honour noted that there was an element of overlap between Condition 39 and Condition 41A (although the judgment refers to Condition 38, it would appear to be a typographical error). His Honour continued (assuming his reference was to Condition 39):

> "... The process and criteria required by Condition 41A would entail preparing and implementing a research program such as would be required under Condition 38. Put another way, if Warkworth demonstrates to the satisfaction of the Director-General of Planning that WSW EEC can be re-established on Warkworth Sands grassland under Condition 41A, the objective of Condition 38 would have been satisfied."

367 In the section of the judgment under the subheading, "*Risk and uncertainty that derived grasslands would not become EECs*", his Honour found, at [241], that there was a real risk and uncertainty that the proposed Northern and Southern Biodiversity Areas would be rehabilitated to create the intended EECs. He said there was no current example of a recognised area of Warkworth Sands Woodland EEC that had been created by rehabilitation from derived grassland. In this regard, the research program of the University of New England in the Northern Biodiversity Area was not sufficiently advanced to demonstrate that restoration would be completely successful.

368 His Honour noted, at [243], that Mr Bell had found no example in the scientific literature of successfully restored EECs in New South Wales and, as previously noted, his Honour did not accept Dr Robertson's and Dr Clement's opinion that the University of New England's research project was "*highly likely to be successful*".

369 His Honour referred to Mr Bell's evidence that the biodiversity areas should not be accepted as offsets until a successful restoration project had been achieved and independently assessed to confirm that a mature example of Warkworth Sands Woodland EEC had been created. In particular, his Honour noted the scientific view (referred to by Mr Bell) that accrued biodiversity values should be demonstrated before they are used to offset biodiversity losses. His Honour also referred to principle 8 of the Principles for the Use of Biodiversity Offsets, noting, at [248], that:

> "Offsets should minimise ecological risks from timelags and that the feasibility of the offset action should be demonstrated prior to the approval of the impact".

370 His Honour therefore concluded that the areas of Warkworth Sands grassland and derived grassland in the Northern and Southern Biodiversity Areas did not provide long-term offsets that improved or maintained the viability of the EECs that would be impacted by the Project.

371 That led to his Honour's consideration as to whether the other compensatory measures offered sufficient conservation benefits. His Honour found that they did not and again observed that the process and criteria required by proposed Condition 41A would entail preparing and implementing a research program such as Warkworth was required to fund under proposed Condition 39.

372 Warkworth contended that, notwithstanding these references to Condition 41A, his Honour appears not to have appreciated that it was a condition that prevented Warkworth from clearing Warkworth Sands Woodland west of Wallaby Scrub Road unless re-establishment was demonstrated. His Honour thereby failed, on Warkworth's submission, to address a key component of a central issue in the case. Warkworth contended that this constituted a constructive failure to exercise jurisdiction and a denial of procedural fairness. Warkworth submitted that its case based on Condition 41A ought logically to have been dealt with by his Honour as part of his consideration, at [240]-[251], of the "*risk and uncertainty that derived grasslands would not become EECs*". Warkworth also contended that his Honour failed to give proper, genuine and realistic consideration to Condition 41A and its submissions about it: see *Kahn v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291 (per Gummow J), referred to in *Resource Pacific Pty Ltd v Wilkinson* [2013] NSWCA 33 at [9].

373 His Honour did not in express terms refer to Warkworth's contention that Condition 41A was intended to ameliorate the time-lag inherent in the establishment of the Warkworth Sands Woodland in the Biodiversity Offset Areas. Nor did he directly state that under Condition 41A there was to be no clearing of the area west of Wallaby Scrub Road until it could be established that Warkworth Sands Woodland could be re-established on derived grassland areas. However, the absence of express references must be considered having regard to the requirements of Condition 41A and his Honour's consideration of those requirements.

374 Condition 41A did not have the effect of impeding or delaying the implementation of the Project. Rather it meant that a section of other Woodland in the area west of Wallaby Scrub Road could not be removed until the Director General was satisfied that the Woodland "*can*" be restored. However, it would appear from para (d) of Condition 41A, which refers to the Director-General's satisfaction that the plots to be planted were "*on a successful trajectory*", that it was sufficient for the Director-General to be satisfied at an early stage of the process that the Woodland "*can be re-established or augmented*" in the biodiversity offset areas.

375 In essence, Condition 41A involved a four year process, whereby Warkworth was to undertake a project directed to the augmentation or re-establishment of Warkworth Sands Woodland on six 1 ha plots. The short term nature of the process was, in effect, the nub of his Honour's concern, as is apparent from his remarks, at [246], that:

> "The timeframe required for certainty of success of rehabilitation is not short (likely to be several decades) and will be much longer than the timeframe over which the [Warkworth Sands Woodland] EEC would be impacted by the Project."

376 It cannot be assumed that in coming to this conclusion, his Honour did not have regard to the terms of Condition 41A. What is clear is that his Honour did not consider that Condition 41A provided an adequate compensatory or ameliorative solution to the impact of the Project on the Warkworth Sands Woodland. Indeed, in his Honour's view, Condition 41A effectively replicated condition 39 and therefore did not add any additional protection to what was already contemplated in the approval conditions.

377 Warkworth's contention, that consideration of its submission, had there been any, would have been expected in the section entitled "*Risk and uncertainty that derived grasslands would not become EECs*" at [240]-[251], is also rejected. That was a possible place in the judgment for discussion of Warkworth's submission, but certainly not the only one.

Indeed, for the reasons given in the preceding paragraph, Condition 41A was appropriately considered by his Honour in the sections to which we have referred, including in the section dealing with whether satisfactory ameliorative measures were proposed.

378 The Court makes the following orders:

1. Appeal dismissed with costs;

2. Cross-appeal dismissed with costs;

3. Summons dismissed with costs.

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I certify that the preceding 378 paragraphs are a true copy of the reasons for judgment herein of the Court.

Date: 7.4.14

Associate: