31

CIV 2445 of 2015

IN THE SUPREME COURT OF WESTERN AUSTRALIA
HELD AT PERTH

IN THE MATTER of an application for Judicial Review

BETWEEN

SAVE BEELIAR WETLANDS (Inc.) First Applicant

and

CAROLE DE BARRE Second Applicant

and

THE HON. ALBERT JACOB, MINISTER FOR ENVIRONMENT
First Respondent

and

THE ENVIRONMENTAL PROTECTION AUTHORITY Second Respondent

and

THE COMMISSION OF MAIN ROADS Third Respondent

and

THE ATTORNEY GENERAL OF WESTERN AUSTRALIA Intervenor

WRITTEN SUBMISSIONS ON BEHALF OF THE APPLICANTS

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Prepared by:
Castledine Gregory
Unit C4/118 Railway Street
WEST PERTH WA 6005

Telephone: 9486 7665
Facsimile: 9486 7663
Ref:

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GROUND 1

What the Second Respondent Should Have Done

1. Once the Second Respondent determined under s.39A[1] to assess the Proposal s.44 required it to assess the Proposal and to recommend to the First Respondent whether or not it should be implemented and if so, whether implementation should be allowed with or without conditions.

2. It is a necessary precondition to a recommendation that the Proposal may be implemented that the Second Respondent has formed a concluded view that the Proposal is "environmentally acceptable".

3. That follows necessarily from the Act's long title[2], the statutory objects of the Act (s.4A), the statutory objects of the Second Respondent (s.15), its expertise in environmental matters and independence (ss.7(2) & 8) and the terms of s.44(2)(a) all of which combine to have the effect that the Second Respondent must perform its functions and exercise its powers under s.44 for the purpose of protecting the environment.[3]

4. Therefore, for the Second Respondent to recommend that a proposal may be implemented which it has determined would, if implemented, be environmentally unacceptable would be to exceed its statutory powers. Accordingly, the Second Respondent was required to form a view as to the Proposal's environmental acceptability prior to determining whether or not to recommend that implementation be allowed.

5. Such an approach is consistent with the applicable Administrative Procedures.[4]

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[1] All references to sections are to sections of the *Environmental Protection Act* 1986 (WA).
[2] "An Act to provide for an Environmental Protection Authority, for the prevention, control and abatement of pollution and environmental harm, for the conservation, preservation, protection, enhancement and management of the environment and for matters incidental to or connected with the foregoing."
[3] See *Coastal Waters* (1996) 90 LGERA 136, 140 (Malcom CJ) and 150-151 (Rowland J); *Re Minister for the Environment; Ex parte Elwood* [2007] WASCA 137; (2007) 154 LGERA 366, 394 [100]; *Wilderness Society v Minister for Environment* [2013] WASC 307; (2013) 45 WAR 471, 511, [197]-[198].
[4] The *Environmental Impact Assessment (Part IV Division 1) Administrative Procedures* 2002: Annexure NJA9 to the Arrowsmith affidavit. See sections 2 (second introductory paragraph), 5.1.1, heading to section 5.2, 5.3.1, 5.4.1, 6.3.5(i), 9.5.1(d). The *Environmental Impact Assessment*

6. In order to form a view whether or not the Proposal is environmentally acceptable, it was necessary for the Second Respondent, to assess the impact that the Proposal, if it were implemented, was likely to have on the environment.[5]

7. That task required the Second Respondent to identify, understand and evaluate the characteristics of those elements of the environment upon which the Proposal will, if implemented, impact and to do so both in the present (at the time of the assessment) and in the theoretical future (if the Proposal is implemented).[6]

8. Having done so, the Second Respondent was then required to form a view whether the impacts of the Proposal on the environment were environmentally acceptable.

9. The effect of s.44(2)(b) is that there are only three possible options – that the environmental impacts are (1) acceptable *per se*; (2) acceptable provided that certain conditions or procedures are carried out; or (3) unacceptable regardless of what conditions or procedures are imposed: s.44(2)(b) requires the Second Respondent to recommend "whether or not the proposal may be implemented" and to recommend conditions or procedures to which implementation should be subject but only "if it recommends that implementation be allowed".

10. What will make a proposal incapable of being made environmentally acceptable by the imposition of conditions will depend on the circumstances. But it must follow that where a proposal will have what the Second Respondent determines to be a significant impact on what it determines to be an environmental asset of

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Administrative Procedures 2010 (Annexure ANJ10) did not apply at any time to the Proposal – see "Transition". The transition provision of the *Environmental Impact Assessment (Part IV Divisions 1 and 2) Administrative Procedures* 2012 (Annexure ANJ11) states that it will apply to "proposals being assessed to the extent that it is appropriate and practicable" and, where it is not appropriate and practicable, the "administrative procedures applying at the time the decision was made on the level of assessment for the proposal will apply ..."

[5] That enquiry was to occur in circumstances where the Proposal, being a "significant proposal", is by definition likely to have a significant impact on the environment.

[6] Section 44(1)(a) uses the language of "environmental factors" but the language is interchangeable – see Environmental Assessment Guideline No. 8, June 2013, p5 (Annexure NJA3); Environmental Assessment Guideline No. 9, June 2013, p5 (Annexure NJA4).

very considerable significance, it is obliged to ask itself whether the proposal is unacceptable regardless of what conditions might be imposed.

11. To put the matter rhetorically, if significant impacts on a matter of very considerable environmental significance does not require consideration as to whether a proposal is inherently environmentally unacceptable, then the third option is, in reality, illusory.

12. That is the position taken by the Second Respondent in three documents published by it.

13. Position Statement No. 9 *Environmental Offsets,* dated January 2006 (**Policy Statement**)[7] defines (at Section 4, p14) 'critical assets' as those which "represent the most important environmental assets in the State that must be fully protected and conserved for ... the [Second Respondent] to comply with its general principles for ... decision making." It goes on to say that:

> Therefore, when the issue is before the [Second Respondent], there is a presumption against recommending approval for proposals that are likely to have significant adverse impacts to 'critical assets'. The [Second Respondent] does not consider it appropriate to validate or endorse the use of environmental offsets where projects are predicted to have significant adverse impacts to the following..."[8]

14. The Policy Statement then identifies certain environmental elements as "critical assets" including native vegetation of different types, Conservation Category Wetlands (**CCWs**) and wetlands that are the subject of an Environmental Protection Policy, certain types of reserve, including land reserved under the Bush Forever regime and regional reserves.

15. Significantly, at p17 the Position Statement notes the distinction between the role of the Second Respondent and that of the First Respondent, which was expressed in *Coastal Waters Alliance of WA v EPA*[9], the effect of which is that, when faced with a proposal that will cause significant impacts to critical assets:

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[7] Annexure NJA5 to the Arrowsmith affidavit.
[8] See also Section 1.1 (4th para); Section 1.2 (penultimate and final para); Figure 2 on p20.
[9] (1996) 90 LGERA 136, 146, 150-151.

(a) there is a presumption that the Second Respondent will recommend that the proposal not be implemented; and

(b) it will recommend that, if the Minister determines to allow it to be implemented, that should only occur if the Minister is satisfied (1) that all steps have been taken to mitigate impacts; and (2) that there is a suitable offsets package for the significant, residual adverse impacts.

16. Two other documents also express the same presumption.

17. Guidance for the Assessment of Environmental Factors No 19 *Environmental Offsets – Biodiversity,* dated September 2008[10] **(Guidance Document)** states that it "should be read in conjunction with" the Position Statement[11] and states that the Position Statement "forms the basis for this Guidance Statement".[12]

(a) Section 3.1 of the Guidance Document is headed "Determining when it's appropriate to apply offsets" and in the following paragraphs it states, amongst other things, that the Second Respondent will "adopt a presumption against recommending approval of proposals ... where significant adverse environmental impacts affect 'critical assets'."[13]

(b) Section 3.2 of the Guidance Document is headed "Formulating an environmental offsets package" and is concerned with situations "where the application of offsets is considered appropriate".[14]

18. In short, the Guidance Document clearly requires a two-step process – first, is it appropriate for offsets to be used to, and secondly, can adequate offsets be provided.

19. Environmental Protection Bulletin No. 1 *Environmental Offsets – Biodiversity,* dated September 2008 **(Bulletin No. 1)**[15] refers in its final paragraph to both the Position Statement and the Guidance Statement as a source for "more detailed

[10] Annexure NJA6 to the Arrowsmith affidavit.
[11] In section 1 "Purpose".
[12] Section 2 "The Issue".
[13] It also states that "a proposal ... that has significant impacts on a 'high' value asset may be found to be environmentally unacceptable whether or not a comprehensive offsets package is proposed."
[14] First sentence, second paragraph.
[15] Annexure NJA7 to the Arrowsmith affidavit.

information about offsets". It too states that "the EPA adopts a presumption against recommending approval of proposed projects where significant adverse environmental impacts affect 'critical assets'."[16]

20. However, it is submitted that even absent a specific presumption expressed within such documents, the presumption so identified must arise due to the terms of s.44(2)(b) for the reasons set out above in paragraphs [1] to [11]. That is, regardless of the publication of the documents, the Second Respondent was required to ask itself whether offsets were appropriate given the significant residual impacts to significant environmental assets.

21. Indeed, such an approach was taken by the Second Respondent in 2003 when it held that it would be extremely difficult to make the road environmentally acceptable because of likely significant impacts on significant assets.[17]

22. For the reasons that follow, it is submitted that the Second Respondent failed to do so and, further or in the alternative, failed to give proper, genuine and realistic consideration to the Position Statement, Guidance Document and Bulletin No. 1.

What the Second Respondent Did

23. Report 1489 provides cogent evidence that the Second Respondent (1) determined that several "environmental factors" were "critical assets"; (2) determined that the Proposal, if implemented, would have a significant impact on several of them; but (3) failed to ask whether it was appropriate to apply offsets.

24. At section 5.6 of Report 1489[18], the Second Respondent plainly describes several elements of the environment which the Proposal will impact upon as "critical assets" and in fact refers to the Position Statement. However, in what follows, it does not refer at all to the consequences of such a finding but, instead, merely mentions the obligation to avoid and minimise impacts.

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[16] Page 2, under the heading "When should offsets be considered".
[17] Bulletin 1088: Annexure ABF1 to the Fandry affidavit. Note that it was published before the common usage of "critical assets" in Position Statement No.9 (2006).
[18] Annexure ABF50 to the Arrowsmith affidavit.

25. The final sentence of that paragraph states that "the residual impacts [i.e. those left after avoidance and minimisation] are considered to be significant due to the importance of these assets."

26. That statement might be said to suggest that the Second Respondent has determined that there are no "significant" impacts on critical assets. However, such an inference is contrary to very clear determinations elsewhere in the Report.

    (a) At the top of p25 where, having identified several measures to avoid and minimise measures (that were not before it when it published Bulletin 1088), it says that despite such measures "there will still be significant residual impacts to[19] flora and vegetation";

    (b) At p27, it says:

    > The most significant direct impact on wetland communities is through the Roe Swamp CCW[20]. This is because of the location and scale of the road (5.6ha) leading to the severance of a wetland complex which supports intact and diverse communities, rated as very good to excellent condition.

    (c) At p28, it says that the "unavoidable loss of 6.8ha of wetlands comprising 5.8ha or CCWs, and 1ha of EPP wetlands[21] ... is considered to be a significant residual impact of the proposal and hence would require an environmental offset."

    (d) At p28, it also says that the loss of 5.4ha of Beeliar Regional Park[22] and 7ha of Bush Forever Site 244[23] respectively "is considered to be a significant residual impact of the proposal and hence would require an environmental offset."

    (e) At 29, it say that "...there still remains a significant residual impact to[24] the EPA's key environmental factor of flora and vegetation, and

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[19] Emphasis added.
[20] As noted above a CCW (Conservation Category Wetland) is a "critical asset".
[21] EPP wetlands are "critical assets" under the heading "Wetlands" at p16 of the Position Statement.
[22] Regional parks are critical assets under the heading "Public Conservation Reserve System" at p14 of the Position Statement.
[23] Bush Forever reserves are critical assets under the heading "Native Vegetation" at p14 of the Position Statement.
[24] Emphasis added.

hence an environmental offset is necessary to counterbalance the impacts from this proposal (emphasis added)."

(f) At p32, it says that "(t)he Proposal will result in the disturbance of 112ha of fauna habitat, which the EPA considers is significant in the Perth metropolitan area. ..."[25]

(g) At p35 (last two para's), it says

"... while it is unlikely that the proposal will directly impact on the conservation status of individual species, it will probably indirectly impact on rich and diverse assemblages ...

... though the fragmentation of the existing north-south ecological linkage ..."

(h) At p36, it states that "...there still remains a significant residual impact to the EPA's key environmental factor of terrestrial fauna through habitat fragmentation and loss of Black Cockatoo foraging habitat, and hence an environmental offset is necessary."

27. Such findings are to be contrasted with other findings regarding other critical assets:

(a) The impacts on wetland and migratory birds[26] is described as "likely to be minor": at p34;

(b) The impacts on the Southern Brown Bandicoot[27], as a "Priority 5 species" is described as "likely to be highly localised": at 33;

(c) The impacts on the Perth Lined Lerista (skink)[28], a "Priority 3 species" was described as "minimal": at 33;

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[25] Native vegetation which "comprises the whole or part of or is necessary for the maintenance of, a significant habitat for fauna indigenous to Western Australia" is a critical asset under the heading "Native Vegetation" on p14 of the Position Statement.
[26] Migratory birds protected under an international agreement are Declared Threatened Fauna which is a critical asset under the heading "Biodiversity" on page 15 of the Position Statement.
[27] Fauna listed on the Priority Species List are a critical asset under the heading "Biodiversity" on p16 of the Position Statement.
[28] Fauna listed on the Priority Species List are a critical asset under the heading "Biodiversity" on p16 of the Position Statement.

28. The position taken by the Second Respondent in Report 1489 can also be illuminated by its response to its report to the Appeals Convenor concerning various appeal grounds[29]:

    (a) On page 13 of the report, it states that it "does accept that there is a significant residual impact on the wetlands..."

    (b) On page 16, it acknowledges that the Commonwealth Department of the Environment considers any proposed clearing of more than 1ha of habitat for Carnaby's Cockatoo to be a "significant impact". In the present case, "approximately 78ha" of foraging habitat is to be cleared.[30]

    (c) On page 27, it acknowledges that "there are permanent losses of flora, vegetation, fauna and wetland values ... which are significant".[31]

29. Having found that there were significant impacts on "critical assets", it was necessary for the Second Respondent to ask whether or not those findings rendered the Proposal environmentally unacceptable *per se* – i.e. whether it was appropriate for the impacts to be offset.

30. However, rather than do so, the Second Respondent found that offsets were "necessary" or "required" as a result of the significant residual impacts.

31. That is plain from the use of the word "hence" to join the premise (the significant residual impacts) with the conclusion (the use of offsets) in the passages at pages 28 (twice), 29 and 36. "Hence", at least in this context, means "therefore" or "for this reason" and by its use, the Second Respondent makes plain that one follows another and there is no room for a third option, being that the Proposal is inherently environmentally unacceptable.

32. It may be inferred that the Second Respondent was led into error by its consideration of environmental offsets as an "environmental factor". That

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[29] Annexure ELB8 to the Bramwell affidavit.
[30] Page 33 of Report 1489: Annexure ABF 50 to the Fandry affidavit.
[31] The Second Respondent then agrees that offsets "do not make unacceptable impacts acceptable" but it, again, fails to identify or address the question of appropriateness, limiting its comments to adequacy."

approach appears to have been guided by *Environmental Assessment Guideline for Environmental factors and objectives*, dated June 2013 (EAG8)[32], which for the first time adopted such an approach.[33]

33. EAG8 provides that the objective for Offsets as an Integrating Factor is "to counterbalance any significant residual impacts or uncertainty through the application of offsets."

34. Such an approach is apt to mislead because it directs immediate attention to the adequacy of a possible offset package (section 3.2 of the Guidance Document) rather than first asking whether it is appropriate to apply offsets at all (section 3.1 of the Guidance Document).

35. It may also be inferred that the Second Respondent was led into error by EAG9, which was also published in June 2013. That document proceeds on the basis that a proposal that will have an unacceptable impact on the environment will be identified at the "level of assessment" stage: compare figures 8 and 9 and associated text. Thus, it appears to make no provision for a proposal assessed under a PER to be found environmentally unacceptable.

36. Such an approach may have its origins in the reduction in the number and type of assessments provided by the 2010 and 2012 Administrative Procedures, each of which provide for only two types of assessment, compared with the five types in the 2002 Administrative Procedures. The result appears to be a much greater reliance on the decision made by the Second Respondent which sets the level of assessment.

37. Of course, the decision to set the level of assessment at a PER was made in 2009, before the 2010 Administrative Procedures introduced such a regime and to apply such an approach in 2013 to a proposal approved in 2009 under the 2002 Administrative Procedures may have led the Second Respondent into error.

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[32] Annexure NJA3 of the Arrowsmith affidavit.

[33] Compare the various versions of the EPA document titled Guide to EIA Environmental Principles, Factors and Objectives dated October 2004 (Annexure NJA2A to the Arrowsmith affidavit), 22 June 2009 (Annexure NJA2B to the Arrowsmith affidavit) and 19 November 2010 (Annexure NJA2C to the Arrowsmith affidavit).

38. Regardless of its source, it is submitted that the Second Respondent failed to ask itself whether offsets were capable of making the Proposal environmentally acceptable and therefore committed jurisdictional error.

Failure to Take Into Account a Relevant Consideration

39. Whether something is a mandatory relevant consideration is a matter of statutory construction, having regard to the subject matter, scope and purpose of the legislation.[34] In this case, it is submitted that the relevant statutory provisions are as follows:

    (a) The purpose of the Act (s.4A) and the Second Respondent (s.15) is to protect the environment;

    (b) The functions of the Second Respondent include to (1) conduct environmental impact assessments: s.16(a); and (2) to establish and develop criteria for the assessment of the extent of environmental change, pollution and environmental harm: s.16(n).

    (c) The powers of the Second Respondent include to (1) advise the Minister on any matter relating to this Act or on any proposals ... that may be referred to it with regard to environmental matters: s.17(3)(b); (2) consider and make proposals as to the policy[35] to be followed in the State with regard to environmental matters: s.17(3)(d).

    (d) Sections 38, 39A and 44 provides for the referral of proposals that will likely, if implemented, have a significant impact on the environment, for the Second Respondent to assess such proposals and to report to the First Respondent as to whether they may be implemented.

40. Amongst other things, each document seeks to explain the position to be taken by the Second Respondent if, in carrying out an environmental impact assessment, certain criteria are met. In doing so, they both inform the public as to

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[34] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24, 39-40; *A v Corruption and Crime Commissioner* [2013] WASCA 288, [88]-[89].

[35] The term "policy" is not defined but it is to be contrasted with the language of s.16(f) which provides the Second Respondent with a function to "prepare, and seek approval for, environmental protection policies".

what the Second Respondent's policy is and guide the exercise of the Second Respondent's functions and powers in carrying out assessments. It can therefore properly be said that each document was published pursuant to, amongst other things, the Second Respondent's functions under s.16(n) and 17(3)(d).[36]

41. Further, the facts and circumstances of the Proposal are such as to directly bring the application of the presumption contained within the three documents into question.

42. There is very considerable authority to the effect that a strict and unyielding application of policy, such that the merits of the application or proposal is not properly considered is unlawful.[37]

43. It is submitted, that it would be an absurd result if strict application of policy was unlawful but an administrative decision maker was not required to "have regard to" documents which it has published pursuant to its statutory functions and which describes its policy position in the event that certain criteria are satisfied and which, in fact, are satisfied.

44. While there are divergent authorities on the question of what is required to satisfy the duty to take into account relevant considerations, the preponderance of authority is now such as to require a decision maker to give 'proper, genuine and realistic consideration' to those matters which it is required to consider.[38] Such an obligation has also been described as a duty of "active intellectual engagement".[39]

45. The Applicants acknowledge that a simple failure to refer to a document is, of itself, insufficient to make out this ground, but the "nature of the reasoning process" evident in a written report or reasons may allow an inference to be drawn

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[36] That is not to deny that those documents also fulfil the Second Respondent's functions and powers under one or both of s16(k) and 17(3)(g) of the Act (see paragraphs [15] and [19] and annexure NJA1 of the Arrowsmith affidavit) but there is no need for exclusivity in this regard.
[37] *Rendell v Release on Licence Board* (1987) 10 NSWLR 499, 503-4; *Falc Pty Ltd v State Planning Commission* (1991) 5 WAR 522, 526-7 & 529 (per Nicholson J), 533-534 (per Ipp J
[38] *A v Corruption and Crime Commissioner* [2013] WASCA 288, [92]; *Re Shire of Carnavon; ex parte Humphrey* [2005] WASCA 182. See also *Falc Pty Ltd v State Planning Commission* (1991) 5 WAR 522.
[39] See, *Carnegies Realty Pty Ltd v Director of Liquor Licensing* [2015] WASC 208, [67] citing *Mentink v Minister for Home Affairs* [2013] FCAFC 113, [44].

that proper consideration has not been given.[40] Alternatively, there may otherwise be "credible evidence" that allows the Court to shift what might otherwise be an assumption that all relevant considerations have been taken into account.[41]

46. It is submitted that the use of the word "hence" in the passages at pages 28, 29 and 36 (see paragraphs [26] & [31] above) provides "credible evidence" that the Second Respondent failed to give the three documents, and the presumption that they describe, proper consideration. To repeat, the Second Respondent concluded that there was a significant environmental impact and that "hence", offsets were necessary/ required – there is no room in those sentences for consideration of the three documents and the presumption contained therein.

47. It has also been held that where written reasons are required, a "failure to deal with an issue of importance may support a conclusion that the issue was not in fact considered".[42]

48. The necessity for reasons is set out below. Report 1489 mentions the Position Statement but it does so without mentioning the presumption contained within it. It is also entirely silent on the Guidance Document and Bulletin No.1. Had the Second Respondent addressed the presumption – that is, had it asked whether it was appropriate for offsets to be applied – its answer may have been "dispositive".[43] On that basis, the silence in the Report raises a strong inference that those documents were overlooked.

Inadequate Reasons

49. This ground is in the alternative to the ground that the Second Respondent failed to ask the correct question or failed to take into account a mandatory relevant consideration.

50. Section 44(1) of the Act requires the Second Respondent to provide a report to the Minister "on the outcome of its assessment". Section 44(2) requires that the

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[40] See, e.g., *Carnegies Realty Pty Ltd v Director of Liquor Licensing* [2015] WASC 208, [67].
[41] *Australian Leisure And Hospitality Group Pty Ltd* v *Director Of Liquor Licensing* [2012] WASC 463, [49].
[42] *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227, (2013) 45 WAR 446, [64]; *Applicant WAEE v MIMIA* [2003] FCAFC 184; (2003) 75 ALD 630, [47].
[43] *Applicant WAEE v MIMIA* [2003] FCAFC 184; (2003) 75 ALD 630, [47].

report "must set out" what the Second Respondent considers to be the key environmental factors identified in the course of the assessment" and its "recommendations" as to whether the proposal may be implemented. Section 44(3) requires the Minister to cause that report to be published.

51. There is therefore no express requirement for the Second Respondent to provide written reasons for its recommendations and there is no right at common law for an administrative decision maker to provide reasons.[44]

52. However, "special circumstances", including statutory provisions by which an inference may be drawn, may be such as to take the situation beyond the general rule. Deane J in *Osmond* said that "the courts should be less reluctant that they would have been in times past to discern in statutory provisions a legislative intent" that the decision maker should give reasons.[45]

53. Such an inference is more commonly drawn where there is a statutory right of appeal on a question of law. Otherwise, it is said, such a right would be illusory as a potential appellant would not be able to identify possible grounds of appeal.[46]

54. There is conflicting authority as to whether to distinguish between such appeals and those to another administrative decision maker. In *Campbelltown CC v Vegan*[47] Handley JA insisted that they was no reason to differentiate[48] but Basten JA insisted that there was a proper basis for an ongoing distinction, referring to the decision of Priestley JA in the NSW Court of Appeal's decision in *Osmond.*[49] In that case, Priestley JA said that a right of rehearing means that the merits of the case will be determined afresh by someone else so that the absence of reasons in the first instance "will be immaterial".

55. In the present case, s.100(1)(d) provides a right of appeal on the merits but its terms are, it is submitted, sufficient to distinguish the present case from the remarks of Priestley JA.

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[44] *Public Service Board of NSW v Osmond* (1986) 159 CLR 656.
[45] At 676.
[46] *Hancock v Executive Director of Public Health* [2008] WASC 224, [63].
[47] (2006) 67 NSWLR 284; (2006) 67 NSWLR 372,
[48] At 376.
[49] [1984] 3 NSWLR 447, 485.

56. Section 100(1)(d) of the Act provides that any "decision maker, responsible authority, proponent or other person that disagrees with ... the content of, or any recommendation in, the report prepared under [s.]44 in respect of a proposal... may lodge an appeal in writing setting out the grounds of appeal".

57. That right of appeal relies upon the obligation in s.44(3) on the First Respondent to publish the report and to provide it to each decision making authority, to the proponent and to the person who referred the proposal (if not the proponent).

58. It is significant that s.100(1)(d) provides a right to appeal about the "content of or any recommendation in" the report. The distinction between content and recommendations must be given due regard - recommendations are the conclusions reached and thus, the "content" is the reasoning by which those recommendations have been reached. If that is so, the right of appeal would be rendered nugatory unless the report contains adequate reasoning.

59. Further, the Minister's powers in s.101(1)(d) are not to remake the decision but are, rather, limited to the power to remit the proposal to the Second Respondent for further assessment or reassessment or to vary the Second Respondent's recommendations.

60. In that way, the Second Respondent remains the principal decision maker and, significantly, it is vital for both potential appellants as well as the First Respondent to understand the basis on which the recommendations were reached.

61. For these reasons, the Court should infer an obligation on the Second Respondent to provide adequate reasons in any report published under s.44(1) & (2).

62. Reasons must allow interested parties, and any appellate body, to understand why the decision was made in the way that it was.[50] In the present case, that means that the Second Respondent must give reasons which allow a potential appellant to (1) understand why it made the recommendations that it did; and (2) to enunciate grounds of appeal which challenge the process as well as the result and for the Minister on appeal to determine whether the assessment needs to be

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[50] *Hancock v Executive Director of Public Health* [2008] WASC 224, [67] to [69].

redone or whether the conditions adequately reflect the recommendations as informed by the "content".

63. In the present case, that requires an explanation as to why the Second Respondent departed from its own policy to recommend against implementation of proposals that will have significant impacts on critical assets.

64. Report 1489 contains no express reference to the issue in any form and given the express findings as to significant impacts on critical assets (described above at [25]), it is submitted that the cryptic statement quoted above at [24] is insufficient to discharge the Second Respondent's statutory duty to explain the basis on which it determined to recommend to the First Respondent that the Proposal may be implemented.

Ground Three

65. A purported, but misconceived and inadequate, attempt by an administrative decision maker to determine a matter in accordance with the applicable statute may constitute a constructive failure to exercise its jurisdiction.[51]

66. A constructive failure to exercise jurisdiction arises when a decision maker misunderstands the nature of its jurisdiction and, in consequence, applies a wrong test, misconceives its duty, fails to apply itself to the real question to be decided or misunderstands the nature of the opinion it is to form.[52]

67. As set out above, the Second Respondent was, once the Proposal was referred to it and it had determined to assess it, under a statutory duty to assess the Proposal and recommend to the Minister whether it may be implemented or not and, if so, on what conditions and procedures.

68. As also set out above, the Second Respondent on several occasions stated in Report 1489 that offsets were "necessary" or "required" due to the Proposal's

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[51] *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227, [66]
[52] *Oshlack v Rous Water* [2013] NSWCA 169, [165] citing *Re Minister for Immigration and Multicultural Affairs: Ex parte Yusuf* [2001] HCA 30; (2001) 206 CLR 323, 339 [41] per Gaudron J.

residual significant impacts on wetlands,[53] the foraging habitat for black cockatoos[54] and fragmentation.[55]

69. Consistent with those findings, the Second Respondent purported to condition its recommendation that the Proposal may be implemented – i.e. implementation must not proceed unless the proponent provides suitable offsets.[56]

70. Condition 12-2 is plainly aimed at addressing the lack of an identified suitable offset at the time of the Second Respondent's decision.[57] The relevant passage of the Report[58] makes plain that the intention of condition 12-2 is to allow the proponent to identify a suitable offset after approval is granted[59] provided that such identification occurs prior to the commencement of construction. It is said that this "will ensure that any land proposed for acquisition and management is considered appropriate to be used as an offset..."[60]

71. In doing so, the Second Respondent purported to exercise its statutory duty – it purports to say, in effect, that the Proposal will be environmentally acceptable if the identified offsets are provided.

72. But the condition actually imposed (condition 12-2) is one that provides the CEO with a discretion to agree that construction may commence notwithstanding that, at the time the discretion is exercised, no suitable offsets have been identified.

73. Such discretion is inconsistent with the Second Respondent's determination that offsets are "necessary" and "required" to counterbalance the significant residual impact[61] because the condition empowers the CEO to authorise construction to commence in circumstances where (1) the CEO can have no confidence that suitable offsets will ever be identified; and (2) where the Second Respondent

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[53] Page 28 of Report 1489.
[54] Page 36 of Report 1489.
[55] As above.
[56] Page 41 (top) for black cockatoos, page 42 (penultimate paragraph) for wetlands and page 44 (second paragraph) for fragmentation.
[57] First paragraph of page 41 of Report 1489 (Section 5.6 Offsets).
[58] 1st paragraph on p41
[59] Notwithstanding that that is contrary to the Position Statement, Guidance Document and Bulletin No. 1.
[60] Emphasis added.
[61] And also with the language of the first paragraph on p41.

knew, when it made its decision, that there was a real risk that no suitable offsets would ever be identified.[62]

74. Condition 12-2 is concerned only with identification of land with suitable attributes as described in condition 12-4. It requires no "implementation" (which is the province of condition 12-3), much less acquisition, which is covered by condition 12-5 which in fact requires no more than full funding for acquisition.

75. It matters not whether the term "construction" encompasses the felling of native vegetation and the filling of wetlands or whether it is limited to the building of the road. In either case, if the CEO exercises the discretion to allow construction to commence, the environmental impact will have been suffered before the identification of offsets considered necessary to counterbalance that impact.

76. Neither does it matter whether "construction" in the context of condition 12-2 means the Proposal as a whole or the impacts to the particular environmental values which are to be offset because in this case the two are largely interchangeable – for example, the project area is largely conterminous with the extent of black cockatoo foraging habitat.[63]

77. And it strains credibility to suggest that the CEO might exercise the discretion so as to allow construction to commence in an area with no environmental impacts (limited as they are) prior to the identification of suitable offsets but then insist construction cease before the relevant impacts are incurred should the necessary impacts remain unidentified at that stage.

78. That the Second Respondent recommended that the CEO be provided with a discretion to allow construction to commence without offsets being identified in circumstances where it also purported to say that such offsets were necessary to make the Proposal environmentally acceptable demonstrates that, in fact, it never

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[62] That is for three reasons. First, at the time of the decision, four years had passed since the Proposal's referral and yet no offsets were available to the proponent. Secondly, the Third Respondent is a sophisticated entity which regularly provides offsets and has an understanding of its offset obligations. Thirdly, the proponent advised the Second Respondent in its meeting of 18 July 2013 that there were "limited offset options" but wished for the Second Respondent to determine the matter regardless: see Minutes of BPA Meeting No. 1054 of 18 July 2013 – Annexure ABF47 of the Fandry affidavit.

[63] See Figure 8 of the Briefing Note dated 18 July 2013" ABF45 of the Fandry affidavit (page 2231 of Volume 1 of 3).

reached a conclusion about the environmental acceptability of the Proposal at all. Such a failure constitutes a constructive failure to exercise its jurisdiction.

Ground Two

79. The Applicants don't seek to pursue Ground 2(a).

80. As to Ground 2(b), the Applicants submit that in considering only the impacts of the Proposal on the key environmental factors in isolation, the Second Respondent failed to ask itself whether the Proposal as a whole was environmentally acceptable.

81. In doing so, the Applicants accept that it was necessary for the Second Respondent to consider the impact of the Proposal on the key environmental factors: construed in accordance with the principles set out above in relation to Ground 1, s.44(2)(a) requires that the Second Respondent consider the Proposal's impact on those factors which it considers "key".

82. But the Applicants submit that to do no more than that is insufficient. Specifically, it is submitted that the Second Respondent's statutory duty was to assess the Proposal's total impact on the environment and determine whether it is environmentally acceptable. Such an assessment requires the Second Respondent to consider, at least, the accumulative impacts of the Proposal - the total impact on key environmental factors when considered together.

83. Such an approach, it is submitted, is both required by the proper construction of the Act and by the 2002 Administrative Procedures.

84. As to the construction of the Act:

    (a) the purposes of the Second Respondent and the Act itself are for the protection of the environment: paragraph [3] above.

(b) Part IV of the Act deals with the referral, assessment and implementation of proposals that are likely, if implemented, to have a significant effect on the environment.[64]

(c) The task of the Second Respondent in carrying out its assessment is to determine whether or not a proposal is environmentally acceptable.

(d) The term "environment" is defined very broadly.[65]

85. In those circumstances, it is submitted that the obligation in s.44(2)(a) to "set out what [the Second Respondent] considers to be the key environmental factors" ought not to be construed as limiting the scope of the Second Respondent's assessment of the Proposal's impacts to only those suffered by those key environmental factors in isolation of one another.

86. Rather, a broader construction should be given to s.44(2), by which the identification of key environmental factors provides a guide or focus to the assessment, rather than a constraint on its scope.

87. A broad construction is consistent with decisions concerned with an understanding of the scope of environmental impact assessment in other statutory contexts (noting that although similar terms are in use, there are different statutory provisions at play). [66]

88. In *Queensland Conservation Council Inc v Minister for the Environment and Heritage*[67], Kiefel J (as Her Honour then was) was concerned with whether the Federal Minister, in assessing "all adverse impacts ... the action ... is likely to have", was obliged to consider the "indirect" environmental impacts of the construction of a proposed, including the impacts on the Great Barrier Reef from the growing of cotton using water captured by the dam. Having referred to

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[64] Re Minister for the Environment: Ex parte Elwood [2007] WASCA 137; (2007) 154 LGERA 366,
[65] See sections 3 and 3A(2). See also *Coastal Waters Alliance v EPA* (1996) 90 LGERA 136, 147-150.
[66] But see *Gray v Minister for Planning* [2006] NSWLEC 720; (2006) 152 LGERA 258, 287 [99].
[67] [2003] FCA 1463. Upheld on appeal: *Minister for the Environment and Heritage* v *Queensland Conservation Council Inc* [2004] FCAFC 190; (2004) 139 FCR 24; (2004) 134 LGERA 272.

passages from *Kivi*[68] and *Tasmania Conservation Trust*[69] her Honour said that the passages "strongly suggest that the question whether there are likely to be significant effects upon the environment requires a wide consideration of the consequences which will follow if a proposed activity proceeds.[70] Later her Honour said that a "wide" scope of enquiry is "consistent with the high public policy apparent from the objects of the Act. No narrow approach should be taken to the interpretation of legislation having objects of this kind."[71]

89. The "high public policy", the resulting broad approach to statutory construction and the obligation to protect the "environment" rather than parts of it, required the Second Respondent to ask itself whether the Proposal was environmentally acceptable having regard to the total impacts.

90. Such an approach is also provided for in the 2002 Administrative Procedures.

91. Section 6 of that document sets out the "form and content of environmental scoping documents and environmental review documents" and it distinguishes between (1) an assessment of the impacts on the key elements; and (2) the final, ultimate, question of environmental acceptability – clause 6.3.5 states that the public environmental review document should include:

    (a) "identification of the key issues ..." – clause 6.3.5(d);

    (b) "discussion of the impacts of the proposal ... and commitments to ameliorate those impacts to the most practical extent possible" – clause 6.3.5(e); and

    (c) "presenting a case as to why the EPA should find the proposal environmentally acceptable ..." – clause 6.3.5(i)

92. Section 9.5 describes what the Second Respondent's report to the Minister "will normally include" and distinguishes between:

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[68] *Kivi v Forestry Commission (NSW)* (1982) 47 LGRA 38, 47.
[69] *Tasmanian Conservation Trust Inc v Minister for Resources* (1995) 55 FCR 516, 541; 85 LGERA 296, 324
[70] At [31].
[71] At [40].

(a) A description of each relevant environmental issues/ factors: clause 9.5(c); and

(b) An assessment of the environmental acceptability of the proposal: clause 9.5(d).

93. Similarly, of the 2012 Assessment Procedures (to the extent that they are relevant), clause 4(3), which is headed "Principles of EIA for the EPA", provides that the Second Respondent is to ensure "the total[72] and cumulative effects of using or altering environmental assets receive due consideration".[73]

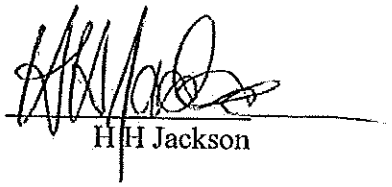
94. The Second Respondent appears to have taken a broad *in toto* approach to the question of environmental acceptability in Bulletin 1088, when it said that the "overall impacts" of construction of the Roe 8 highway would lead to the "ecological values of the area as a whole being diminished in the long term".

95. In contrast, the Second Respondent in Report 1489 did not ask itself whether the Proposal's impact on the environment as a whole was acceptable but, rather, it limited its consideration to the Proposal's impact on different parts of the environment.

96. That the answer *may* be the same regardless of the question asked is not the point – the questions are different and having failed to ask itself the correct question, the Second Respondent committed jurisdictional error.

Conclusion

97. The appellant submits that the above grounds provide a proper basis for the Court to quash the Commission's decision and for the Application to be remitted to the Commission for its reconsideration.



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[72] Emphasis added

[73] Although it is acknowledged that, in contrast, the combination of clause 10.2.4(i) and 5(4) suggests that environmental acceptability will be demonstrated by meeting the objectives for the environmental factors.