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THE SUPREME COURT OF

WESTERN AUSTRALIA

CIV 2445 of 2015

SAVE BEELIAR WETLANDS (INC)

and

CAROLE DE BARRE

and

THE HONOURABLE ALBERT JACOB MLA

and

THE ENVIROMENTAL PROTECTION
AUTHORITY OF WESTERN AUSTRALIA

and

THE COMMISSIONER OF MAIN ROADS WA

MARTIN CJ

TRANSCRIPT OF PROCEEDINGS

AT PERTH ON MONDAY, 30 NOVEMBER 2015, AT 10.30 AM

MR H.H. JACKSON appeared for the applicants.

MR G.T.W. TANNIN SC, with him MR C.S. BYDDER, appeared for the respondents.

THE ASSOCIATE: In the Supreme Court of Western Australia, CIV2445 of 2015: Save Beeliar Wetlands Incorporated v The Honourable Albert Jacob MLA; Minister for the Environment.

MARTIN CJ: Sit down, please. Mr Jackson.

JACKSON, MR: May it please the court, I appear on behalf of the applicants.

MARTIN CJ: Thank you, Mr Jackson. Mr Tannin.

TANNIN, MR: May it please the court, with MR BYDDER, I appear for the first respondent, the second respondent and the intervener. I should point out that the intervention was on the basis of meeting the arguments of bias. They are not present - - -

MARTIN CJ: Yes.

TANNIN, MR: - - - but I should also point out there's a housekeeping matter that this matter was listed for two days principally to deal with those issues. And accordingly, I - we've conferred and we don't the second day will be necessary at all.

MARTIN CJ: Good. Well, that's comforting. Good.

TANNIN, MR: And I - should I also add finally that the third respondent is here, but only in an abiding capacity.

MARTIN CJ: Yes. Thank you, Mr Tannin. Mr Jackson.

JACKSON, MR: May it please the court. This is an application for judicial review. One of the matters that my learned friend hasn't - - -

MARTIN CJ: Just one moment, Mr Jackson. Thanks, Mr Jackson.

JACKSON, MR: The issue of standing also doesn't arise for the reasons that are set out in the - - -

MARTIN CJ: Yes. Mr Tannin, you concede that one party has standing and there's no need to decide the issue with respect to the other - - -

TANNIN, MR: Yes. And I took the liberty of just explaining why and - our written submissions, that I've just simply relied upon those submissions.

MARTIN CJ: Yes. Thank you, Mr Tannin. Yes, Mr Jackson.

JACKSON, MR: May it please the court, the court should have an amended application dated 12 November - - -

MARTIN CJ: Yes.

JACKSON, MR: - - - and should have affidavits of Ms Arrowsmith, Bramwell and Fandry in those - - -

MARTIN CJ: Yes.

JACKSON, MR: - - - three folders, and - - -

MARTIN CJ: Just make sure I've got those. Yes.

JACKSON, MR: - - - written submissions.

MARTIN CJ: Yes. Thank you. Yes. And so the affidavits that have been tendered by consent are those of Fandry, Arrowsmith and Bramwell?

JACKSON, MR: They are. And I presume at some stage my friend will read those. But - - -

MARTIN CJ: Yes. Mr Tannin, is it convenient for them to be tendered and taken as read now?

TANNIN, MR: Yes. It is.

MARTIN CJ: Yes. All right. Well, those three affidavits will be taken as evidence in the proceedings and taken as read.

JACKSON, MR: Please the court.

MARTIN CJ: And there's another document I see, Mr Jackson, that referred to the map. Do you have that, Mr Tannin or do I already have that or - just while we're setting the database for the argument.

JACKSON, MR: Are we dealing with - what - one map or two - yes.

TANNIN, MR: There are two maps. The first is the one marked 4 in the agreed tender list.

MARTIN CJ: Yes.

TANNIN, MR: And it's way too big, but I provide it to your Honour just to - for illustrative purposes.

MARTIN CJ: Yes.

TANNIN, MR: And I just ask Mr Usher help me.

MARTIN CJ: Yes.

TANNIN, MR: While he does that, I will give you a second map which is a drawing of - - -

MARTIN CJ: Thanks. Can I have a look at that.

TANNIN, MR: - - - depicting the building of the local.
So - - -

MARTIN CJ: Yes. All right. Thank you. Well, that's - actually, it's an aerial photograph with plans overlain, I think, is the first one.

TANNIN, MR: Yes.

MARTIN CJ: And the other one, perhaps we could refer to as a schematic map.

TANNIN, MR: Yes.

MARTIN CJ: Yes. All right. Mr Jackson, you're happy for both of those to be received?

JACKSON, MR: I am, your Honour. I don't propose to take the court to those documents in any great detail - - -

MARTIN CJ: All right.

JACKSON, MR: - - - if at all. But the second point - the second schematic map was produced at my request, but in fact it sounds that communications have been skewed. What I was after was an overlay on this - on the aerial photo
- - -

MARTIN CJ: I see.

JACKSON, MR: - - - that produced the construction footprint.

MARTIN CJ: Right.

JACKSON, MR: So you can see that there's a difference between where the road lies and the construction footprint. It's not large, but it is there.

JACKSON, MR: Ground 1(a) is that - it - that the second respondent - which I will call, for convenience, the EPA
- - -

MARTIN CJ: Yes.

JACKSON, MR: - - - failed to ask itself the correct question. If you can skip to the bottom of that paragraph, it did not ask itself whether - when it should have done so, whether and on what basis an offsets package was capable of making the proposal environmentally acceptable.

MARTIN CJ: Yes.

JACKSON, MR: And ground 1(a) - as I will develop them in a moment - the submissions are that that arises as a matter of statutory construction and an understanding as to the nature of the task of the EPA.

MARTIN CJ: Yes.

JACKSON, MR: I took you to - I skipped three lines there, your Honour, because - - -

MARTIN CJ: Yes.

JACKSON, MR: - - - with the benefit of my learned friend's submissions, it has become clear that those three lines aren't necessary. And I seek leave to amend those so that the ground will read:

It failed to ask itself the correct question in that it did not ask itself -

MARTIN CJ: All right. In that - so we take out from "found" to "but"?

JACKSON, MR: To "but". That's right.

MARTIN CJ: All right. Any objection, Mr Tannin?

TANNIN, MR: No, sir.

MARTIN CJ: All right. The ground will be amended accordingly.

JACKSON, MR: Please the court.

MARTIN CJ: Yes.

JACKSON, MR: The second ground is closely related to the first ground - sorry, ground 1(b) is closely related to the first - to ground 1(a), but what it does is rely on policy documents. And it says that the policy documents were mandatory, relevant considerations. They required, in effect, the same question to be asked. That is, were offsets appropriate? And then those policy documents provided a presumption.

MARTIN CJ: So ground 1(a) advances that proposition solely by reference to the proper construction of the Act? Whereas ground - - -

JACKSON, MR: And an understanding of the nature of the task - - -

MARTIN CJ: Right.

JACKSON, MR: - - - that's to be undertaken.

MARTIN CJ: Whereas ground 1(b) advances what is, in essentially, the same proposition but by reference to documents previously published by the EPA.

JACKSON, MR: Under the heading of mandatory, relevant considerations. Yes.

MARTIN CJ: Yes. All right.

JACKSON, MR: So if I can turn then to 1(a), the issue can be briefly stated. The applicants submit that before EPA looks to the adequacy of offsets, it has to ask itself whether offsets are appropriate. That creates a linear form of thinking or a two-step thinking whereas the State says the EPA can identify the assets that will be impacted, identify the impact, assess those impacts and assess the - how those impacts might be addressed altogether. And - - -

MARTIN CJ: Sorry. What's the - I'm struggling with the distinction. So you're saying that there has to be, first and separately and discreetly posed, the question of whether the proposal can proceed on any basis, or - - -

JACKSON, MR: No. Well, before a decision is made to consider whether offsets can be imposed as a condition - - -

MARTIN CJ: Yes.

JACKSON, MR: - - - to make the proposal acceptable or to allow it to be implemented, there needs to be a preliminary

question asked; which is: is it appropriate in the circumstances to impose those offsets? Because offsets
- - -

MARTIN CJ: Well, to impose those offsets or any offsets?

JACKSON, MR: Any offsets.

MARTIN CJ: Any offsets.

JACKSON, MR: Any offsets indeed. So that's your preliminary question. And - - -

MARTIN CJ: But it has to be separately and discreetly asked. It can't be subsumed into - - -

JACKSON, MR: No. It can't because - - -

MARTIN CJ: - - - the question of what - and why is that?

JACKSON, MR: Because once you start asking the question about adequacy, any proposal can be made acceptable because offsets are positive beneficial impacts on the environment that occur away from the proposal.

MARTIN CJ: Yes.

JACKSON, MR: And they're different to other types of conditions which the EPA can impose. So if we look at section 44, section 44 says that the assessment report - after the EPA assesses a proposal, it's to prepare a report on the outcome of its assessment. And that assessment report must set out what the EPA considers to be the key environmental factors. And then (b):

The authority's recommendations as to whether the proposal may be implemented and if it recommends the implementation be allowed, the conditions and procedures, if any, to which implementation should be subject.

Now, that creates three options for the EPA. (1) the proposal can be implemented, (2) it can be implemented without the need for conditions and (3) it can be implemented, but only if certain conditions are imposed, and it's therefore necessary to understand what is meant, in that context, by conditions and that requires an understanding of the statutory context, and that involves an acknowledgement of the purposes of the Act, environmental protection purposes of the EPA, the role of

EPA as the independent statutory authority with environmental expertise and the division of the roles between the EPA and the Minister between sections 44 and 45 as described in the Coastal Waters case.

In that context, the conditions need to be - the conditions are understood, or must be understood, the concept of conditioning must be understood as addressing the environmental impacts of the proposal. That creates two types of conditions. The first is those that seek to avoid the impact of the proposal, or mitigate the impact of the proposal, or - and the examples are obvious; a bridge over a sensitive area, for example, to avoid or to increase the length of the proposed bridge.

The second type of condition is one which seeks to offset the adverse impacts of the proposal on the environment by the generation of beneficial impact somewhere else and that somewhere else is important. If I can take the court to a couple of these policy documents just for purposes of understanding what an offset is, volume 2 of the three folders. My folder, sir, has got a series of plastic tabs.

MARTIN CJ: Yes. So does mine.

JACKSON, MR: If you go to tab 7 - - -

MARTIN CJ: I have two tab 7s.

JACKSON, MR: I beg your pardon. Go to the first one.

MARTIN CJ: Yes.

JACKSON, MR: Under Ms Arrowsmith's affidavit.

MARTIN CJ: Yes.

JACKSON, MR: And if you go to page - - -

MARTIN CJ: So this is Environmental Protection Bulletin 1.

JACKSON, MR: Yes it is, sir. Yes.

MARTIN CJ: Thank you.

JACKSON, MR: If you go to page 127 of the bundle or 1 of that document - - -

MARTIN CJ: Yes.

JACKSON, MR: - - - "What are environmental offsets?"

MARTIN CJ: Yes.

JACKSON, MR:

Environmental offsets are a package of activities undertaken to counter adverse environmental impacts arising from a development. Offsets are the last line of defence, considered after all steps have been taken to minimise impacts resulting from a development. Offsets are to ensure that any adverse impacts from development are counterbalanced by an environmental gain somewhere else.

MARTIN CJ: Yes.

JACKSON, MR: And if I can then take you to - back a couple of tabs to the position statement, which is tab 5. At page 79 of that bundle, sir, in the glossary - - -

MARTIN CJ: Yes.

JACKSON, MR: - - - it says:

Environmental offsets -

Down the bottom, the last paragraph. Definition of environmental offset:

...commonly referred to environmentally beneficial activities undertaken to counterbalance an adverse environmental impact aspiring to achieve no net environmental loss or a net environmental benefit outcome.

This position statement discusses offsets in terms of (1) direct offsets and (2) contributing offsets.

MARTIN CJ: Yes.

JACKSON, MR: And if I can then take you to page 74 of that document, down the bottom of that page. Have you got that at page 21 of that document?

MARTIN CJ: Yes.

JACKSON, MR: It says:

Various types of offset activities are as follows.
Direct offsets: these ameliorative actions would

generally occur away from the impact site and are designed to counterbalance the adverse environmental impact with the aim of achieving no environmental difference.

and it then talks about restoration - I will bring you back to this policy under ground 1(b) but for the minute, I'm just trying to clarify what we mean when we talk about offsets.

MARTIN CJ: And there are different types of offset described there, including restoration - - -

JACKSON, MR: There are different - - -

MARTIN CJ: - - - rehabilitation - - -

JACKSON, MR: - - - types of offsets yes, sir, but you will see - you can understand here:

Restoration: the goal of improving an existing ecosystem to near pre-impact condition.

(2):

Rehabilitation: improving and reinstating some of the functions of an existing high-value but impacted ecosystem.

Reestablishment is:

...re-establishing a functioning ecosystem.

Sequestration is concerned with pollution. What I will call the brown rather than the green.

MARTIN CJ: Yes.

JACKSON, MR:

...offsetting pollutant emissions.

Last one:

Acquiring land for conservation -

and that's the one that - - -

MARTIN CJ: Most relevant here.

JACKSON, MR: Most relevant here.

MARTIN CJ: And that's the one - and it refers to:

...purchasing and transferring land in the conservation of State.

but that would have to be land that would be under threat of development, wouldn't it? Because otherwise there would be no net gain.

JACKSON, MR: Well, yes and no. We come to that because, for example, condition 12.4(4) allows the rehabilitation of land but isn't necessarily - there's no obligation to make it prone to development, but there is, under the guidelines, an obligation to protect it from development.

MARTIN CJ: Yes, but - I mean, put it simplistically. Let's say there's 100 acres of land that's not - if the development proceeds there's 100 acres of land that's not going to be available as foraging ground for the Carnaby's black cockatoo, for example.

JACKSON, MR: Indeed.

MARTIN CJ: Now, simply acquiring another 100 acres that is foraging ground for Carnaby's black cockatoo is not going to offset the loss of the first 100 acres unless the acquisition of that land would result in it not being available for development that would otherwise proceed, because if that other land is not capable of being developed because of its environmental quality, then there's no net gain. Simply because you have acquired it you have not actually done anything.

JACKSON, MR: I'm not - I don't disagree with you, but that goes to adequacy.

MARTIN CJ: That goes to the adequacy. So your point is a more fundamental one.

JACKSON, MR: It is.

MARTIN CJ: Right.

JACKSON, MR: It's because once you start looking at adequacy everything is possible. You simply just buy more land, for example, if you're dealing with the acquisition of land.

MARTIN CJ: But it would have to be land that would otherwise be developed, wouldn't it? Otherwise buying it doesn't achieve anything.

JACKSON, MR: Well, no. It would have to be - under the policies it would have to be land that was capable of being protected from development.

MARTIN CJ: Yes, which has to be land that was otherwise capable of being developed, because if it's already - if it's inherently incapable of being developed because of it's environmental qualities, then - simply, land that can't ever be developed being acquired by somebody does nothing.

JACKSON, MR: Well, as I say, that goes to adequacy.

MARTIN CJ: That goes to the question of adequacy.

JACKSON, MR: And I'm now skipping ahead to ground 1(b), but the final - - -

MARTIN CJ: No. Well, don't let me take you off the track.

JACKSON, MR: No. The final paragraph there under - on page 75, your Honour, goes some way to dealing with that:

In some situations where adverse impacts to low, medium or high value environmental assets occurs, the environmental benefits of acquiring a critical asset for conservation may greatly outweigh the overall environmental loss, in which case, conservation through a combination of land acquisition and so on may be considered a viable offsets package. It must be noted that this expectation does not extend to adverse impacts to critical assets because in fact, adverse impacts to one critical asset should not be offset by conservation of another critical asset.

MARTIN CJ: Yes.

JACKSON, MR: As I say, that goes to the policy issue because that's fundamentally about adequacy.

MARTIN CJ: Yes.

JACKSON, MR: But the point of the first ground, your Honour, is that offsets aren't tied to time and place. They're not tied to the time and place of the proposal - of the impacts of the proposal. They can be provided somewhere else and indeed at another time, and that means if they're free of the constraints of the particular proposal then, in effect, everything is capable of being offset provided you can find something else, and that, as I

say, in a biodiversity context, that simply means increasing the amount of land that you're dealing with. In a pollution context that might say, well, for every tonne of carbon I emit, I will simply sequester three or five. It becomes, in effect, how deep are the pockets of the proponent to a certain extent.

MARTIN CJ: But if there is the capacity to create a net environmental gain, for example, by sequestering three tonnes of carbon - - -

JACKSON, MR: Yes.

MARTIN CJ: - - - for every tonne emitted - - -

JACKSON, MR: What's the problem?

MARTIN CJ: - - - what's the problem?

JACKSON, MR: The problem is that section 44 doesn't allow that.

MARTIN CJ: Why?

JACKSON, MR: Because it anticipates that there must be proposals that are incapable of being implemented even with conditions.

MARTIN CJ: Well, let me give you an example of one. If this was the only foraging ground for a particular species of fauna such that the development of this ground would result in the loss of that species, then there would be no capacity to fix it by offsets, and so the answer would be no - no development.

JACKSON, MR: With respect, though, sir, condition 12(4) says if you can't find one, grow it. If you can't find something that matches the nature of the environment that's going to be impacted, grow it.

MARTIN CJ: But that's in the context of this particular case.

JACKSON, MR: It is.

MARTIN CJ: But when you're looking at statutory construction - - -

JACKSON, MR: Well - - -

MARTIN CJ: - - - your proposition, as I understand it, is that offsets can't be addressed as part of the question of whether a proposal should be implemented, because that would result in a situation in which no proposal could ever be refused. Is that - - -

JACKSON, MR: No.

MARTIN CJ: Or have I misunderstood the argument?

JACKSON, MR: Well, the argument is, before you address the adequacy, you have to ask whether offsets are appropriate.

MARTIN CJ: Well, whether they're capable of offsetting the environmental impact.

JACKSON, MR: That's right.

MARTIN CJ: And that's really the point I was making by my example - so that if you've got a species that is unique to this particular location with the result that there is no offset capable of preserving that species, then that would be a situation in which the EPA offsets would not remedy the environmental loss. But where you have a capacity for offsets - and the obvious one is carbon emission, so there is always a capacity there - then that shows that there is a - in other words, the section can be construed in such a way as to allow a refusal to allow implementation in some circumstances, and the recommendation that there be permission to implement on the basis of offsets and other circumstances. Doesn't it?

JACKSON, MR: Well, with respect - - -

MARTIN CJ: And then it's a question for the EPA to determine which category the case falls into.

JACKSON, MR: With respect, in relation to biodiversity, in my submission, it's the same, whether it's pollution or biodiversity. At a fundamental level, the EPA must ask are these impacts appropriate for offsetting, because there will be, to take your example, there will be some cases where the proposal is such as to make it inappropriate to offset, even where the offsets are available.

MARTIN CJ: Why?

JACKSON, MR: Why? Because otherwise all proposals are capable of being offset.

MARTIN CJ: No, they're not.

JACKSON, MR: Well - - -

MARTIN CJ: And I've given you an example of one.

JACKSON, MR: Well, with respect, by removing - by the very nature of offsets, you create the - sorry. The nature of an offset is such that it's not tied to a particular time and place, and, to take your example, if there is only one habitat that's suitable for a particular fauna or flora, then there's no reason why an offset can't be drafted or condition can't be drafted to require the creation of that other type of vegetation - that type of ecosystem - somewhere else. And that's in fact what happened here. So, with respect, I don't accept the correctness of the example that you've given, your Honour, because if the EPA can draft a condition which says we want you to offset this, there's nothing here for you to offset, but we will allow you to grow it, then anything can be done.

MARTIN CJ: Well, what about - again, to take an example - pollution of the marine environment?

JACKSON, MR: Yes.

MARTIN CJ: If a proposal that goes ahead for the development of an industrial project adjacent to a waterway
- - -

JACKSON, MR: Yes.

MARTIN CJ: - - - is going to result in discharge into the marine environment that pollutes it and causes the death of animals, how could you offset that?

JACKSON, MR: The policies acknowledge the difficulty of applying offsets to marine environment, so it's a very good example, your Honour. It's very difficult to - - -

MARTIN CJ: Well, then, if there is no capacity for an offset, then that gives work some scope for section 44 to do, doesn't it?

JACKSON, MR: Well, alternatively, it might be seen as an example of where offsets are inappropriate rather than unacceptable, but to look at the acceptability, the ocean is a big place, and so it might be said that impacts at this particular point at the end of the pipe can be offset

by works somewhere else - revegetation of breeding grounds for certain types of fish.

MARTIN CJ: But doesn't the discussion that we've been having illustrate that you can't segment these questions - that, really, the nature of the offsets to be provided, the adequacy and the quality of those offsets, is part and parcel of the decision about whether a proposal can be implemented, and if so, on what terms?

JACKSON, MR: No. With respect, there are difficult questions about adequacy in certain contexts, but that doesn't mean that the first question can be avoided. It can't be taken in altogether, because even in those difficult situations, you can create a condition - you can condition the proposal so as to make it acceptable. Now, we need to understand also that when we talk about adequacy, we are talking about policy documents which the EPA may or may not strictly apply, and so it may be that adequacy - to take your Honour's example about the adequacy of a particular habitat - requires a strict like for like, or indeed an improvement - a net gain.

But that's not available, so a condition is drafted so as to make the offset nonetheless acceptable in some way. But the fundamental proposition is the same: the EPA is capable in the exercise of its discretion of making any proposal acceptable by the drafting of a condition which requires offsets to be provided somewhere else - some other place, some other time. And indeed, as I've said, this idea that they can grow an offset means that the offset might not be available for some time.

The native vegetation is bowled over now; the replacement isn't provided for 10 or 15 years time - 20 - 50 years time.

MARTIN CJ: So just so that I understand ground 1A, it is the proposition that there has to be first addressed separately and discretely without consideration of the nature of the offsets - what is ground 1? Because I'm still struggling to understand it. That there has to be a two-stage decision-making process.

JACKSON, MR: There has to be a separate question asked.

MARTIN CJ: Right.

JACKSON, MR: Is this proposal suitable for offsetting?

MARTIN CJ: Right. And that has to be separately and discretely asked and answered in the report, does it? It can't be implicit in the recommendation that approval is recommended subject to conditions? I mean, surely you can't arrive at that conclusion without first considering whether or not approval would be acceptable subject conditions.

JACKSON, MR: No, indeed, but I will take your Honour to passages in the report which makes it plain that they didn't consider that question.

MARTIN CJ: All right. Well, before we get there you say if it is implicit in the terms of the report that it was considered.

JACKSON, MR: Yes.

MARTIN CJ: And an affirmative answer given to the question, namely that there are offsets which would be sufficiently desirable to allow, to permit recommendation of the proposal to proceed provided those offsets are provided. If that was implicit in the report then you would say there would be no breach of the law. Is that right?

JACKSON, MR: Under ground 1(a). Yes.

MARTIN CJ: Yes. All right. So then the question turns to whether the report should - well, let's assume - well, the first question, of course, is whether your construction of section 44 holds up.

JACKSON, MR: Yes.

MARTIN CJ: But if it does then the next question is a question of fact.

JACKSON, MR: Indeed.

MARTIN CJ: And that turns upon the inferences to be drawn from the terms of the report, I assume.

JACKSON, MR: That's right.

MARTIN CJ: And the report itself, do we need to go behind the report to look at the considerations and working processes, or do we just go to the report itself?

JACKSON, MR: In my submission you don't need to do that. Having said that, I'm conscious of your Honour's decision in the Wilderness Society that says that the assessment process is a continuous one. So I will take your Honour to the full process.

MARTIN CJ: Yes.

JACKSON, MR: But hopefully in a brief way. But, your Honour, before we move from that first construction point, if I can take you back to the policy document, the position statement.

MARTIN CJ: Yes.

JACKSON, MR: Have you got that, your Honour?

MARTIN CJ: Which one is this? This is tab 5?

JACKSON, MR: Tab 5. Yes.

MARTIN CJ: Yes.

JACKSON, MR: Under the introduction, in background, it says:

In recent decades there have been several attempts at developing and using environmental offsets as an environmental management tool.

And then a couple of paragraphs down:

The EPA currently recognises that various offset policies and approaches have been developed. It needs a common overarching principle.

The next paragraph:

The EPA is also concerned about perceptions that negotiated offset and compensation packages are being used to make otherwise unacceptable adverse environmental impacts acceptable. It's aware that some environmental offsets proposed in the guise of sustainability tools are sometimes overriding the protection and conservation of our State's most valuable environmental assets.

Now it seems, well, in my respectful submission, that's the issue that the EPA was seeking to address.

MARTIN CJ: Yes.

JACKSON, MR: The issue that I've just identified is what the EPA was seeking to address when it produced that document.

MARTIN CJ: Yes.

JACKSON, MR: All right. So it's now then necessary to turn to the report, which is volume 1.

MARTIN CJ: All right. Well, the construction for which you contend is to be found only in section 44(2).

JACKSON, MR: And the nature of the task to be undertaken by EPA.

MARTIN CJ: All right. So the wording of section 44:

The nature of the task undertaken, the purpose of the Act and the relationship between the EPA's role as report provider and the minister's role as decision maker.

JACKSON, MR: Indeed and it's - I don't need to make sure that the court has understood the point, but the State says you can have a look at all of the factors, all of the matters together; the identification of the asset to be impacted, the nature of the impacts, the significance of the impacts and the conditions to address those impacts. I don't take any issue - I will reframe that. It's not our submission that that approach is inappropriate in relation to the first type of conditions. Indeed, it's necessary to undertake that task.

It's necessary to say, all right, "Well, they propose to build a road from A to B, between A and B is this particular asset. If the road goes through it it's going to destroy that asset. How do we avoid that? Can we build around it? Can we build over? Something else?" Having understood that process, the avoidance and minimisation process, you then get to the offset stage and it's at that stage that the preliminary question has to be asked. So I don't quibble with - it's not - - -

MARTIN CJ: So it's a particular construction of section 44 that applies only to offsets, is it? It doesn't apply to other conditions.

JACKSON, MR: Because of the nature of offsets, sir, yes.

MARTIN CJ: That's winking a lot out of some very general language, Mr Jackson.

JACKSON, MR: Well, that's why I took - I understand the point, your Honour, but that's why I took you to the concept of condition. That's why the understanding of what a condition is in environmental protection legislation is so important because the EPA can impose a condition of extraordinarily broad scope, but when it comes down to it there's only two types. One deals with avoidance and mitigation and one deals with offsetting.

MARTIN CJ: I'm still struggling to see why there is this doctrinal difference between the two that you try and draw. And, again, going back to the emission controls, it seems to me to be a good example. Emission controls are designed to reduce the amount of carbon that goes into the atmosphere of the planet and so whether the carbon comes from one particular source or another doesn't really matter. What matters is the total quantity of carbon that goes in the atmosphere and so the decision about whether or not a particular proposal can proceed is inextricably tied up with the nature of the offsetting reductions in carbon in the atmosphere that could be provided by that particular proponent, isn't it. So that's what emission trading schemes are all about.

JACKSON, MR: Well, we're not dealing with emission trading schemes.

MARTIN CJ: No.

JACKSON, MR: But that's the theory of it.

MARTIN CJ: But it's about the essence of it though, is that you're saying, in a sense, there's a kind of emission trade, "You can put this in provided you take this much out."

JACKSON, MR: That's a good example of why offsets need to be addressed differently, because if that's the case every proposal that deals with carbon emissions can be offset.

MARTIN CJ: And what's wrong with that?

JACKSON, MR: The Act doesn't provide for that. The Act says there must be some proposals that can't be conditioned to make them acceptable.

MARTIN CJ: But it doesn't say there must be some emission proposals.

JACKSON, MR: No.

MARTIN CJ: There must be some proposals for which there are no offsets that would adequately remedy the environmental damage and those should not be allowed. Your proposition is that offsets can always negate every form of environmental damage, therefore the Act must be construed in such a way that the authority must ask itself separately and discreetly before considering offsets whether this is the type of case in which offsets can counteract the negative environmental impact. Is that it in a nutshell?

JACKSON, MR: I think so. Yes.

MARTIN CJ: All right. And then you were going to take me to the report, which I think is the factual question.

JACKSON, MR: Yes, your Honour.

MARTIN CJ: This is assuming your legal proposition is made out, the factual question is whether it's implicit in the report that the authority has decided that this is the kind of proposal where the negative effect can be offset.

JACKSON, MR: That's right. If I can take you to page 28 of that report.

MARTIN CJ: Yes.

JACKSON, MR: Which is page 2321.

MARTIN CJ: Yes.

JACKSON, MR: I beg your pardon, 29:

However, there still remains a significant residual impact to the EPA's key environmental factor of flora and vegetation -

MARTIN CJ: Now, where are you reading from? Sorry.

JACKSON, MR: I beg your pardon. I'm sorry, your Honour. The penultimate paragraph, the last full paragraph starts, "However."

MARTIN CJ: On page 2321?

JACKSON, MR: I beg your pardon, 2322.

MARTIN CJ: All right. Sorry. Yes.

JACKSON, MR:

However, there still remains a significant residual impact to the EPA's key environmental factor of flora and vegetation and hence an environmental offset is necessary in order to counter-balance the impacts from this proposal.

And it then goes on to say:

The proponent has put forward an environmental offsets package to address the proposal's significant residual impacts.

The quantum of the offset proposals, the objectives and their adequacy is set out in section 5.6 of this report. So section 5.6 - that's - I won't take you to it, but that's repeated at the bottom of page 36, your Honour.

MARTIN CJ: Yes. But then if you go on, in "Summary" it says, "having regard to," and there are conditions of the
- - -

JACKSON, MR: That's right.

MARTIN CJ: - - - the mitigation kind, to use your taxonomy.

JACKSON, MR: Yes.

MARTIN CJ: So that there are - if you go to the dot points at the bottom of that page, the first four are what you would call mitigation conditions.

JACKSON, MR: Indeed.

MARTIN CJ: And then the fifth is the offset condition.

JACKSON, MR: That's right.

MARTIN CJ: Now, why isn't it implicit in the fifth - the provision of the fifth, that the authority has decided that this is one of those proposals where the offsets are capable of producing an outcome which is acceptable?

JACKSON, MR: What it does - if I can take you back to page 29.

MARTIN CJ: Yes.

JACKSON, MR: Section 5.6 is described as assessing: "the quantum of the offset proposals" - that is, what the

proponent puts forward as an offset; "the objectives," which is the objective of the offset factor; and "their adequacy" - that is, the adequacy - the extent to which the offsets meet the objective. But they don't ask - there's nothing in there that asks whether the offsetting is appropriate.

MARTIN CJ: Well, isn't that implicit in the consideration at 5.6, whether the package is adequate? I mean, what's the difference between adequate and appropriate?

JACKSON, MR: Adequacy looks to quantum. Appropriateness looks backwards at the nature of the impacts.

MARTIN CJ: Right. Well, you wouldn't even get to adequacy unless you had implicitly decided that there were - that the nature of the environmental impact was such that it could be offset.

JACKSON, MR: With respect, you do get there if you don't ask yourself the question and you assume the answer.

MARTIN CJ: Right.

JACKSON, MR: There's nothing in section 5.6 that indicates either the appropriateness - it's - there's an inevitability in the relevant passages, and that's evident in the use of terms like "hence" and "therefore" and "necessarily." So, again, to go to paragraph - page 28. And I'm picking on those - they're examples. The language is repeated several times.

So, for example at page 28, the EPA notes that, "Despite the best efforts of the proponent to minimise impacts there is still the unavoidable loss of 6.8 hectares of wetlands. This is considered to be a significant residual impact and hence would require an environmental offset." And again, a few paragraphs down, just above the heading: Indirect Threats, it's the same language used.

And again on page 36. "Having taken all reasonable and practical measures to avoid and mitigate the potential impacts, there still remains a significant residual impact to the EPA's key environmental factor of terrestrial fauna through habitat fragmentation and loss of foraging habitat, and hence an environmental offset is necessary." Those passages, in effect, say they've done their best. There's still lots of impacts. There's no more opportunity to reduce them, and therefore you go to offsets.

MARTIN CJ: Well, couldn't you read that as implicitly saying that if the proposal is to be environmentally acceptable, an environmental offset of a character which can make it environmentally acceptable must be identified.

JACKSON, MR: I'm sorry, your Honour. Say that again.

MARTIN CJ: Well, you've drawn my attention to the use of the phrase, on several occasions, "hence would require an environmental offset." Well, wouldn't one construe that as saying, because of the significant adverse impacts to the environment which we have identified, the only way in which this proposal can be made to be acceptable is if there is identified an environmental offset which has that character and capacity.

JACKSON, MR: Yes.

MARTIN CJ: That is, the character of rendering an unacceptable proposal acceptable.

JACKSON, MR: Yes.

MARTIN CJ: And what's wrong with that?

JACKSON, MR: Well, there's two answers. In the context of 1(a) it's because, as I say, the nature of offset means that there will - every proposal is capable of being made acceptable.

MARTIN CJ: All right.

JACKSON, MR: And the second answer is the policy grounds, which says, these certain types of impacts can't be offset.

MARTIN CJ: I'm sorry. I understand the first one. The first one goes - - -

JACKSON, MR: I haven't taken - - -

MARTIN CJ: The first one goes - it's a question of statutory construction. And the second one is - - -

JACKSON, MR: The second one is the policy that says there is the presumption against - - -

MARTIN CJ: So this goes back to - this isn't statutory construction. This goes back - this is ground 1(b).

JACKSON, MR: Correct.

MARTIN CJ: All right. So ground 1(a) relies entirely on the proposition that because all adverse impacts can be offset, you - it's not sufficient to simply ask yourself whether there is in this case, offsets that are capable of rendering the proposal acceptable. You must first ask yourself separately and discretely, is this the type of case in which offsets are appropriate. And by appropriate you mean capable of rendering an unacceptable environment proposal into one which is acceptable - or what do you mean?

JACKSON, MR: Appropriate given the EPA's task - statutory task of protecting the environment.

MARTIN CJ: But it protects the environment by exercising its powers, which include the power to recommend whether proposals should be implemented or not implemented. So isn't it - doesn't "appropriate" have to draw its meaning from that, and wouldn't, therefore, "appropriate" mean "capable of rendering an unacceptable proposal acceptable"?

JACKSON, MR: With respect - I'm now repeating myself.

MARTIN CJ: Yes.

JACKSON, MR: One just goes back and says, if there are - if the Act provides that some proposals cannot be acceptable, even with conditions, and offset are always capable of making a proposal acceptable, the EPA has to, before it imposes an offsetting condition, ask itself whether this type of proposal and these types of impacts are appropriate. That's a decision for - - -

MARTIN CJ: But what do you mean by appropriate?

JACKSON, MR: Well, that's a matter for the EPA.

MARTIN CJ: Well, but, hang on, you're saying there's a legal obligation upon the EPA to ask itself whether it's appropriate, but what - so, it's not a matter for the EPA, with respect, it's a matter for the court.

JACKSON, MR: No. No.

MARTIN CJ: So the court must - what you're saying is that the court should construe the Act to impose an obligation upon the EPA.

JACKSON, MR: Indeed, but the answer to that question
- - -

MARTIN CJ: And what I'm trying to tease out from you is what's the nature of that obligation, and what you mean by - "appropriate" is a word that's capable of meaning all things to all people. So what do you mean by "appropriate"?

JACKSON, MR: "Appropriate" means in the context of the EPAs obligations to protect the environment - the nature of.

MARTIN CJ: I don't - but - giving me context is not answering my question, with respect, Mr Jackson. What does it mean?

JACKSON, MR: Well, it will mean different things at different times, but at the moment what it means is "significant impacts to critical assets." Now, that's not in the statute, but it must mean - perhaps I will withdraw that. At a very base level it must mean that the EPA acknowledges that some impacts on some assets aren't capable of being offset. They are too important to the State. Whether that's the Swan River or Kings Park, or the Bungle Bungles or something else, there will be some assets which can't be offset because they're too important.

MARTIN CJ: Yes. Right. Well, doesn't that, then, suggest that you're using "appropriate" to mean what I suggested it means, and that is, because those assets are too important, there is no offset which is capable of converting into a proposal that could be recommended for acceptance. If it was Kings Park, or - and I know people have different views about different environmental aspects. But let's take an iconic - - -

JACKSON, MR: Well, let's take Kings Park.

MARTIN CJ: Yes.

JACKSON, MR: The way the EPA would deal with that is to say, all right, what environmental impacts will the razing of Kings Park have? It provides certain types of vegetation and certain types of fauna habitat - foraging habitat, and those habitats can be provided elsewhere. We're not - there's - I withdraw that.

MARTIN CJ: But Kings Park, I think, is a good example, because the real value of Kings Park, it seems to me, lies in its proximity for human use and enjoyment. It's not its fundamental environmental quality, so that's not an environmental issue, that's a planning issue, really.

JACKSON, MR: Indeed. And that might be where the Minister steps in and says there are other matters outside of the environmental sphere that mean that this is - - -

MARTIN CJ: Yes.

JACKSON, MR: But if the EPA limits itself to its remit, it won't deal with that.

JACKSON, MR: I'm not sure I can take the matter much further, your Honour.

MARTIN CJ: Yes. All right.

JACKSON, MR: If I can then turn to ground 1(b). As I've said the ground - this ground is closely related to 1(a). Ground 1(b) looks to policy, which says that EPA must ask that question because there are some assets which must not be offset, even if they are available.

MARTIN CJ: And the proposition is that by publication of these documents.

JACKSON, MR: Yes.

MARTIN CJ: There are mandatory relevant considerations under the Act.

JACKSON, MR: Yes.

MARTIN CJ: In the sense in which those expressions were used by Mason J in Peko-Wallsend.

JACKSON, MR: Indeed. Except that - - -

MARTIN CJ: All right. Now, how does that happen unless the Act gives them that status, because on the fact of it you would think that no decision-maker can fetter itself by its own policy statements - and that's Drake's case, basically.

JACKSON, MR: Absolutely.

MARTIN CJ: So how can it fetter itself?

JACKSON, MR: I'm not - it's not submitted that it must fetter itself. It's submitted that it must give those policy documents proper, genuine and realistic consideration. There must be an intellectual engagement with them.

MARTIN CJ: And that's fundamentally, of course, first, a question of statutory construction.

JACKSON, MR: Indeed.

MARTIN CJ: And then a question of fact as to whether it did engage.

MARTIN CJ: If the statutory construction question is answered favourably to your clients.

JACKSON, MR: Quite. And so, fundamentally, the proposition is this: where the statute provides the EPA with the ability to create policy by which it will - its future decision making is guided, the Parliament cannot have intended such policy documents to be ignored. And that proposition - well, that proposition relies on section 16 and 17.

MARTIN CJ: Section 16 - sorry.

JACKSON, MR: And 17.

MARTIN CJ: Section 16 and 17. Yes.

JACKSON, MR: So section 16(n) says that:

The functions of the authority are to establish and develop criteria for the assessment of the extent of environmental change, pollution and environmental harm.

And 17(3)(d) says:

Without limiting the generality of 17(1) -

which says that it has all the powers reasonably necessary to enable it to perform its functions.

MARTIN CJ: But this is the criteria for the assessment of the extent of environmental change.

JACKSON, MR: Well, go back a step, your Honour. 16(a) says:

The functions of the authority are to conduct environmental impact assessments.

MARTIN CJ: Yes.

JACKSON, MR: (b) is:

To consider and initiate the means of protecting the environment and the means of preventing and controlling and abating pollution and environmental harm.

MARTIN CJ: Yes.

JACKSON, MR: (e):

To advise the Minister on environmental matters generally and on any matter which he may refer including environmental protection aspects of any proposal.

MARTIN CJ: Yes.

JACKSON, MR: (j):

To publish reports on environmental matters generally.

(k):

To publish for the benefit of planners, builders, engineers or other persons guidelines to assist them in undertaking their activities in a manner so as to minimise the effect on the environment of those activities.

(m):

To coordinate all such activities.

And (n):

To establish and develop criteria for the assessment of the extent of environmental change, pollution and environmental harm.

And then you go to section 17.

MARTIN CJ: In this case, (n) is all about the assessment of - it's the development of criteria for assessing the adverse impact on - - -

JACKSON, MR: Indeed.

MARTIN CJ: - - - the habitat.

JACKSON, MR: That's right.

MARTIN CJ: Etcetera. It's not about offsets.

JACKSON, MR: No. No, no, no.

MARTIN CJ: None of this is about offsets.

JACKSON, MR: No, no. None of this goes to offsets in its terms. What it does is say the EPA can develop criteria, publish them and by doing so establish guidelines for the future exercise of its statutory discretion.

MARTIN CJ: Well, isn't that the work done by Part III of the Act? That's policies. I read section 16 as being concerned with procedures whereas - - -

JACKSON, MR: Well, can I take you to section 17(3).

MARTIN CJ: Yes.

JACKSON, MR: Sorry, just missed it. 17(3) says:

Without limiting the generality of this section, the authority if it considers it appropriate or is requested to do so by the Minister may (b) advise the Minister on any matter relating to this Act or any proposals, schemes or questions that may be referred to it.

MARTIN CJ: Yes. But none of the documents you've taken me to are advice to the Minister, are they?

JACKSON, MR: No, no. The EPA can "if it considers appropriate or is requested to do by the Minister."

MARTIN CJ: Yes.

JACKSON, MR: And then (d):

Consider and make proposals as to the policy to be followed in a state with regard to environmental matters.

MARTIN CJ: Yes, and it makes proposals under Part III.

JACKSON, MR: No, no, because that is dealt with in 16(f) which says:

The functions of the authority are to prepare and seek approval for environmental protection policies.

So there's a distinction between policies of a statutory nature and policies of a non-statutory nature.

MARTIN CJ: So therefore (d) must be something other than
- - -

JACKSON, MR: Statutory policy.

MARTIN CJ: - - - an environmental protection policy.

JACKSON, MR: Indeed.

MARTIN CJ: Well, offsets - the extent to which offsets are capable of rendering a particular proposal acceptable must surely come into the scope of the environmental protection policy, mustn't it?

JACKSON, MR: Indeed, if it had been made but one hasn't been made.

MARTIN CJ: Then that seems to me to be the fundamental flaw in your argument because until it has been made, it's not a mandatory consideration because - in other words, if they haven't exercised the power in 16(f), then they can't, as it were, get in the back door by construing 17(3)(d) as authorising some other way what is authorised by 16(f) in Part III.

JACKSON, MR: Can I take you to authority 14 on my list of authorities, your Honour.

MARTIN CJ: Yes. And that is?

JACKSON, MR: Minister for Immigration, Local Government and Ethnic Affairs v Gray.

MARTIN CJ: Yes.

JACKSON, MR: If I can take you to page 205 of that report. At the bottom of that page, the application of ministerial policy:

It's right to say the tribunal which operates as part of a continuum of administrative decision-making is not bound by governmental policy, although it may take such policy into account in the exercise of the statutory power or discretion.

Now, that's a may.

MARTIN CJ: Yes.

JACKSON, MR: It then follows with a passage from Drake which your Honour referred to a moment ago:

If the original decision-maker has properly paid regard to some general government policy in reaching his decision, the existence of that policy will plainly be a relevant factor for the tribunal to take into account. On the other hand, the tribunal is not in the absence of specific statutory provision entitled to abdicate its function of determining whether the decision made was on the material before the tribunal the correct or preferable one.

That's the fettering point that your Honour just made.

MARTIN CJ: Yes.

JACKSON, MR:

The place of government policy in the tribunal's decision-making will depend upon the interests of good government and consistent decision-making on the one hand and the ideal of justice in the individual case on the other, but it's decision must be the result of an independent assessment of all the circumstances of the particular case and not the uncritical application of policy.

Again, that's the fettering argument.

MARTIN CJ: Yes.

JACKSON, MR: This is nothing more than a statement of what is sometimes called the non-fettering principle. The next paragraph:

The proposition that government policy cannot bind the tribunal does not imply that the policy can be ignored. It's reasonable to associate with the legislative intent that is taken to inform the construction of a wide statutory power and acceptance of the likelihood that policies or guidelines will be developed by the executive at either or both ministerial or departmental level to govern its application.

And then there's another passage from Drake:

The consistent exercise of discretionary administrative power in the absence of legislative guidelines will, in itself, almost inevitably lead to the formulation of some general policy or rules relating to the exercise of the relevant power.

So once you create - once an administrative decision-maker creates policies which are intended to guide its future decision-making, it's obliged to have regard to them if they are triggered by - if their terms are triggered by the facts of the case. Your Honour, can I then take you to number 6 of my authorities.

MARTIN CJ: Well, before you leave that though - - -

JACKSON, MR: Yes.

MARTIN CJ: - - - there's an important sentence at the bottom of page 206, isn't there, because the remarks that their Honours were directed to was the question of whether the extent to which a review tribunal should take into account government policy.

JACKSON, MR: Yes.

MARTIN CJ: Now, at the bottom of page there:

There is a question which need not be resolved at this time, namely, whether a primary decision-maker who also has a policy making function is free to disregard his or her own announced policy.

Now, that's this case, isn't it?

JACKSON, MR: Well - - -

MARTIN CJ: Because it's not a review, it's a question of whether the EPA as the policy maker has the capacity to disregard his or her own announced policy. And then they go on to refer to Wilcox J in NICAC:

The situation where the Minister is free deliberately to part from his own policy. It is difficult to see the decision by the Minister could be rendered invalid because in making it he misinterpreted the policy and has accidentally departed from it.

And then they go on to say we're not deciding that issue here.

JACKSON, MR: No. We're not. They weren't.

MARTIN CJ: So you're going to need a better authority than Gray, aren't you?

JACKSON, MR: The decision of Barker J in the decision of Elliot Jennings, which is number 6 in the bundle.

MARTIN CJ: Sorry. Which case is this?

JACKSON, MR: Number 6 in my bundle, Clive Elliot Jennings.

MARTIN CJ: I don't have - yes. Number - yes, Clive Elliot Jennings. Yes.

JACKSON, MR: Now, this is dealing with a planning context, which might arguable be said to be a little bit closer to the current situation than immigration. At paragraph 24:

In some cases the Commission may have adopted a set of planning principles which it, for the sake of convenience, has called a policy in which it's stated to be relevant to subdivision applications. In such cases the document is not a policy given force by the Town Planning and Development Act, but nonetheless it may be relevant to the exercise of its discretion to approve or reject a particular plan lodged with it. If the Commission has adopted such a policy and is relevant to the application, the policy will be expected to guide the exercise of discretion. However, the existence of such a policy is not intended to replace the discretion of the Commission in the sense that it's to be inflexibly applied, regardless of the merits of the particular case. Notwithstanding this, understanding the relevant consideration in many applications will -

I think that should be be -

...be why the policy should not be applied. While there are planning principles that find expression in the policy are not relevant to the particular application, good public administration demands no less an approach. Much has been written about the use of policy in administrative decision-making. Administrators do not act unlawfully in adopting policies to structure their discretionary powers. Indeed courts have accepted that it's desirable that they should do so. However, an administrator exercising discretionary power will be found to have acted ultra vires if the discretion is exercised inflexibly -

which we have already - - -

MARTIN CJ: Well, that's the fetter.

JACKSON, MR: That's the fetter.

MARTIN CJ: That's the fetter point. Then his Honour goes on in paragraph 26.

JACKSON, MR:

A relevant policy, provided it's not ultra vires, may therefore be regarded as one relevant consideration which the administrator is effectively bound to take into account.

MARTIN CJ: But the only authority cited for that proposition is Drake.

JACKSON, MR: Yes.

MARTIN CJ: And Drake does not stand for that proposition as French and Drummond Js made clear in Gray.

JACKSON, MR: Well - - -

MARTIN CJ: So with respect to his Honour, I'm not aware of any authority that would stand for that proposition, that by formulating a policy a decision-maker creates a mandatory relevant consideration in the sense used by Mason J in Peko-Wallsend and that's why French and Drummond Js stayed away from that question in Gray. And with respect to Barker J, there doesn't appear to be any legitimate authority to support that proposition. So this is as good as it gets, is it?

JACKSON, MR: Well, no. Those authorities are as good as it gets in terms of authorities, your Honour. The basic principle though remains that where the - - -

MARTIN CJ: But surely it gets - your case gets harder, doesn't it, when you have got part III of the Act which specifies a procedure that has to be followed to create a mandatory relevant consideration, which is a policy approved by the Minister and which has the effect for which a provision is made by part III. To construe the Act as providing a back door means by which the EPA can fetter itself by requiring itself to take - in the sense that it requires itself to take into account policies, without those policies having been approved by the Minister, would circumvent part III of the Act, wouldn't it?

JACKSON, MR: Well, no, because with respect that goes to weight. It may well be - well, it's accepted that State environmental protection policies must be given more weight than a non-statutory policy.

MARTIN CJ: Well, no. They have a particular statutory effect.

JACKSON, MR: Indeed.

MARTIN CJ: It's section 34, I think, isn't it?

JACKSON, MR: Indeed. So a non-statutory policy can't
- - -

MARTIN CJ: No. I'm wrong. Hang on. Let me find it. It's 33. Yes. It has the force of law as though enacted.

JACKSON, MR: Indeed.

MARTIN CJ: So that - - -

JACKSON, MR: So a non-statutory policy can't overwhelm it. But where a decision-maker says this is how I'm going to make my decisions in the future, and where the Act says that it can do that, then with respect - - -

MARTIN CJ: Well, where does the Act say that? It refers to - you go back to 16 and 17. 16(f) you accept is focused on part III of the Act.

JACKSON, MR: Indeed.

MARTIN CJ: So it has to be 17(3)(d). But see the wording of (3)(d) is quite interesting, isn't it:

Make proposals as to the policy to be followed in the State.

Proposals to who? 17(3)(d) doesn't cover that. It's not proposal, what you're saying, is it? Make proposals to whom?

JACKSON, MR: As I said, your Honour, we rely also on 16(n) to establish and develop criteria for the assessment of the - - -

MARTIN CJ: But that's assessing damage.

JACKSON, MR: Well, it's assessing the impact of a proposal - - -

MARTIN CJ: Yes.

JACKSON, MR: - - - on the environment.

MARTIN CJ: Well, no. It is:

The assessment of - - -

JACKSON, MR: Amongst other things.

MARTIN CJ:

- - - the extent of environmental change, pollution and environmental harm.

That's the negative side of the scoresheet if you like.

JACKSON, MR: Indeed.

MARTIN CJ: Well, that's the development of criteria. The technique is to be used to assess the negative side of the scoresheet. How are we going to count carbon emission? How are we going to count and measure the environmental - the marine pollution that's produced?

JACKSON, MR: Yes.

MARTIN CJ: That's not these policies and 17(3)(d) doesn't cover it either because this is making proposals. It's not adopting policies. It's making proposals.

JACKSON, MR: Well, as I say we - - -

MARTIN CJ: Adopting policies is done under part III.

JACKSON, MR: In my respectful submission, section 16 and 17 provide the authority with the power to develop guidelines for its future decision making activities.

MARTIN CJ: And just to be clear, that, that's to be found in 16(n) and 17(3)(d)?

JACKSON, MR: Well - - -

MARTIN CJ: Is that it?

JACKSON, MR: It's 16 - as I said, 16(1)(a) is to conduct environmental impact assessments.

MARTIN CJ: Yes.

JACKSON, MR: And 17(1) gives the power to do all things necessary to perform its functions.

MARTIN CJ: Yes.

JACKSON, MR: At its very broadest, that must include the development of guidelines for its future discretion, exercise of its discretion. 16 - - -

MARTIN CJ: Which it must then take into account, you say.

JACKSON, MR: Which, which it must then take into account. It need not apply. It can depart from it in an appropriate sense, in an appropriate case. But it must acknowledge that the policy exists, and then, to use the language of intellectually engaged - intellectual engagement, engage with that process, engage with that policy and, and determine whether it should depart from it or not. So it's not a fetter argument. This is simply to say that the EPA is required to take into account, to have regard to, to consider its own policies.

And as those authorities suggested, I think it was the Minister v Gray, it's implicit in a broad discretion. It's implicit in a - in the provision of a broad discretion that a decision-maker will have the power to develop such guidelines and policies. And that's not to say that those guidelines have to be strictly applied. Simply that the decision-maker must take them into account.

MARTIN CJ: And what they said in Gray was that because the AAT is not the Minister for Immigration and is not a specialist involved in the administration of literally tens of thousands of decisions, it should take those policies into account. But they stopped from saying - - -

JACKSON, MR: They did.

MARTIN CJ: - - - that, that the Migration Department was obliged to take those, that the Minister was himself obliged to take that policy into account. And you could understand the distinction between the two. You could understand the consistency that administration decision-making requires a reviewing authority which lacks the expertise of the original decision-maker to act consistently with lawful policies adopted by the original decision-maker, but it's a different thing to saying that the original decision-maker can require itself to take into account its own policies.

JACKSON, MR: With respect, the principles of good decision-making apply, in my respectful submission, even more so when you're dealing with a department that deals

with many, many decisions. It must be in order to provide some consistency of decision-making.

MARTIN CJ: Yes.

JACKSON, MR: Your Honour, I'm not sure whether you need to hear from me in relation to the policies themselves. I was proposing to take you through - - -

MARTIN CJ: Well, there's a second question of fact - - -

JACKSON, MR: It is a second question of fact.

MARTIN CJ: - - - and that is, you know, you, you - you've got two hurdles to get over. The first is the construction hurdle, and the second hurdle is to show that they weren't taken into account.

JACKSON, MR: Yes.

MARTIN CJ: So you can't win unless you get over both of them.

JACKSON, MR: Indeed. And it would appear that you're against me on the first one.

MARTIN CJ: Well, yes. But I haven't decided that yet.

JACKSON, MR: All right. Your Honour, the - if I can take you to volume 2 of the three volume bundle. I will take you back to policy number 5.

MARTIN CJ: Yes.

JACKSON, MR: And I took you to page 1. I won't repeat that. On page 2, the fourth, sorry, the third full paragraph:

In view of the aforementioned issues, the EPA is developing this position statement to provide overarching guidance and to establish a consistent policy approach on the matter. This position statement provides some clarification -

and so on.

Where a proponent -

Next paragraph -

Where a proponent for a development is set subject to the environmental impact assessment and approval process and environmental offsets are properly part of these, those considerations, the EPA expects proponents to put forward commitments for offsets as part of their proposal.

Section 1.2 then deals with why offsets are important. Page 56 of the bundle deals with the strengths of offsets. Page 57 deals with the limitations of offsets. If I can take you to the third full paragraph on page 57:

MARTIN CJ: Yes.

JACKSON, MR:

Offsets may also be perceived as suggesting that all environmental assets are up for grabs. This perception highlights an important point: There must be clear and unambiguous delineation about the role and offsets as an environmental impact management tool and not as a project approval negotiation tool. It emphasises the need to re-affirm the mitigation sequence for environmental impact assessment - management and to re-affirm the conservation and protection of critical assets that represent our State's most important - important environmental assets.

MARTIN CJ: Well, is that really saying that offsets can't be used to diminish the significance of mitigation conditions?

JACKSON, MR: No. What it says is you go through the mitigation process - - -

MARTIN CJ: Yes.

JACKSON, MR: - - - and then you ask is there a significant impact on a critical asset, and if there is, there's a presumption that offsets aren't included because it's important - it, that paragraph is re-affirming the conservation and protection, not the offset - - -

MARTIN CJ: Well, but it talks about the role and use of offsets as an environmental impact management tool.

JACKSON, MR: Yes.

MARTIN CJ: So what it seems to be saying, I would have thought, is that you go through all the mitigation

procedures, you impose conditions which limit environmental
- adverse environmental impact - - -

JACKSON, MR: Yes.

MARTIN CJ: - - - then once you've done that and you get to the point that there remain environmental impacts despite all the mitigation conditions you can impose, then you look at the question of whether offsets can make the proposal environmentally acceptable. Isn't that what this paragraph's saying?

JACKSON, MR: Yes, subject to the appropriateness step.

MARTIN CJ: Yes. But isn't that what - - -

JACKSON, MR: So you go - - -

MARTIN CJ: - - - the authority did in its report? It looked at the environmental impacts, looked at the mitigation conditions proposed, said, "Yes. These conditions are - these conditions will have this effect but there will remain residual adverse environmental impact." So then the question is what offsets are needed to render that acceptable.

JACKSON, MR: Well, except that it said, "Therefore environmental offsets are necessary."

MARTIN CJ: Right. And that goes back to ground 1(a).

JACKSON, MR: Well, that's - that's the issue. That's one of the issues that we discussed in relation to ground 1.

MARTIN CJ: Under - and ground 1(b) as well.

JACKSON, MR: Yes.

MARTIN CJ: All right. But I haven't yet seen - - -

JACKSON, MR: No. You haven't - - -

MARTIN CJ: - - - in the doc - - -

JACKSON, MR: - - - because I'm taking - I'm taking you
- - -

MARTIN CJ: Yes. All right. All right.

JACKSON, MR: Again, that last paragraph:

The apparent limitations of environmental offsets highlight the need for EPA to establish strong principles based on a foundation of environmental protection, highlights the need for the State to re-affirm its position on critical assets to provide a scope for the intended use of environmental offsets, must be re-enforced that offsets are only one tool in the suite, and must be used in conjunction with proactive tools.

We then go over to page 59 or 6, which is the purpose:

EPA considers the purpose, scope and principles in this position statement to be important. These will help guide the EPA in future decision-making.

We then go to section 3, which I'll skip over for the minute. They are - they are the principles. That is they are the questions that need to be asked to determine whether offsets are adequate.

MARTIN CJ: Well, the policy, just looking at that paragraph you took me to, the last sentence of that policy seems to be directly contrary to your view of the Act because it provides:

The EPA holds the view that environmental offsets should not be considered in isolation but rather as part of an integrated framework for improved management of the environment that includes regulatory and behavioural incentive programs.

JACKSON, MR: Indeed, but that's consistent with my - my submission in relation to 1(a) which says you, you look at the off - you look at the impacts and you look at the mitigation and whether it has been avoided, and then you ask are offsets, given the impact, given the scale of the impact and the nature of the asset, are offsets appropriate. So it's for - it's part of a - I don't quibble with those words. It's an integrated framework, but it's not one question. There has to be a linear - linearity to the question making - question asking. Can I then take you to section 4, Scope.

The scope of this -

Sorry. That's page 67 of the bundle.

MARTIN CJ: Yes.

JACKSON, MR:

The scope of this position statement applies to all environmental issues, matters and advice for which the EPA has jurisdiction.

Ecosystems and Emissions - so under that heading it basically deals with both the brown and the green - and then under Critical Assets it says:

Critical assets represent the most important environmental assets in the state that must be fully protected and conserved in order for the state to fulfil its statutory and policy requirements, the state to remain sustainable in the longer term, and the EPA to comply with its general principles for advice and decision-making.

And then comes the presumption:

Therefore, when the issue is before the EPA, there is a presumption against recommending approval for proposals that are likely to have significant adverse impacts to critical assets. The EPA 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 -

and what then follows is a list of critical assets.

MARTIN CJ: And this as it comes within 4, does it?

JACKSON, MR: Well, this actually satisfies a number of these.

MARTIN CJ: Well, perhaps you could - - -

JACKSON, MR: So for example - - -

MARTIN CJ: Yes, which ones?

JACKSON, MR: Well, (1) Public Conservation Reserve System.

MARTIN CJ: Public Conservation Reserve System, yes.

JACKSON, MR: Because it's both a regional park and a - sorry. No. It's just a regional park. Native Vegetation where some of those are satisfied. So for example it includes - - -

MARTIN CJ: Which ones? Can you - - -

JACKSON, MR: So under Native Vegetation:

It comprises the whole or a part of or is necessary for the maintenance of a threatened ecological -

I beg your pardon. Sorry. That's not right. I will take you to - I will bring you back to that. The third dot point is Bush Forever reserves. This is one of those. Biodiversity - - -

MARTIN CJ: Yes. Sorry. Where's the Bush - - -

JACKSON, MR: Sorry. The - - -

MARTIN CJ: Bush Forever. Yes, I've got it.

JACKSON, MR: That's right.

MARTIN CJ: Thank you. Yes.

JACKSON, MR: Sorry. I was taking you to (d) under Native Vegetation, but I was in error; it's (iii) Biodiversity, Declared Threatened Fauna and (iv) Wetlands because they are both Environmental Protection Policy wetlands which is Bibra Lake, and Conservation Category Wetlands.

MARTIN CJ: Are there any Ramsar Wetlands?

JACKSON, MR: There is a reference on page 11 of the report to international significance given, but it doesn't actually refer to Ramsar.

MARTIN CJ: Right. Yes.

JACKSON, MR: The international nature of it does appear to arise as a result of those migratory birds.

MARTIN CJ: Yes. Thank you.

JACKSON, MR: And then on page 70, your Honour, it says under Government Decision Framework:

In some instances, significant adverse impacts to critical assets may be approved by State Government ministers to provide an essential community service, public benefit or to allow strategic social or economic development to occur. Under these circumstances, the EPA's advice is that approval of any such project of

this nature should be made conditional on certain things.

So that plainly creates a role for the EPA - when you consider that passage in contradistinction to the passage on 67, what it says is:

EPA will not approve proposals that have a significant impact on critical assets.

However, the Minister might, and if the Minister does, then there needs to be these things, and it would be entirely consistent with the EPA's role to provide a report that says EPA recommends against the implementation of this proposal. Obviously, the Minister must have regard to this report, but can disagree - can take a different view - and in those circumstances, the Minister ought to be satisfied that x, y and z and provide advice as to whether in fact those things exist.

And that, with respect, is at the heart of the appropriateness or not, because those two dot points there - the first dot point is has everything been done to avoid and mitigate, and then the second one is an acceptable comprehensive offsets package for significant residual adverse impacts. The EPA in its policy is clearly distinguishing between appropriateness and acceptability, because it basically says - - -

MARTIN CJ: But it doesn't refer to appropriateness.

JACKSON, MR: No, it does back on 67.

MARTIN CJ: Where does it - - -

JACKSON, MR: The middle of the main paragraph under Critical Assets:

EPA does not consider it appropriate to validate or endorse the use of offsets where projects are predicted to have significant adverse impacts to critical assets.

MARTIN CJ: Yes.

JACKSON, MR: At section 5 on page 71 - When and How Should Environmental Offsets be Approved - there's several tests there. Test 2 is has everything been done to avoid and minimise, and test 3, once you've done that:

Are residual environmental impacts expected to have a significant adverse impact on critical or high value assets?

And if you then turn the page to page - - -

MARTIN CJ: Well, test 4 - - -

JACKSON, MR: No, indeed. I'm quite conscious of test 4, but what test 4 says is you can have impacts that are very significant that are either acceptable or unacceptable, but it avoids the question of critical assets. Test 4 avoids the question of critical assets, because that question has already been asked in test 3.

MARTIN CJ: Yes.

JACKSON, MR: And that's plain when you turn the page and deal with the decision framework. You can see that if there's critical assets, the presumption that no significant impacts are acceptable. And if you look at the text on page 72:

The following environmental asset types affect how project proposals and related offset activities are assessed. Critical assets represent the state's most important environmental assets - must be fully protected and conserved. Significant adverse impacts should be avoided at all costs. Therefore, the EPA in providing its advice will adopt a presumption against approval of project proposals where significant adverse impacts affect critical assets. However, where projects have been approved by the State Government, approval should be conditional on x and y -

that is, avoid and minimise and an appropriate offsets package.

MARTIN CJ: Well, how does that fit into the structure of sections 44 and 45 of the Act? What does a project approved by the State Government mean?

JACKSON, MR: Well, it acknowledges - and that goes back to page 17 (indistinct) page 470 - back a page - it acknowledges that the Minister can disagree with the EPA's assessment.

MARTIN CJ: But which Minister? It has to be the Minister for the Environment under section 45.

JACKSON, MR: Indeed. Absolutely. So - - -

MARTIN CJ: So it says see section 4 approval. So that's going back to - - -

JACKSON, MR: Those passages - - -

MARTIN CJ: passage - - -

JACKSON, MR: - - - that I took you to. It does have to be the Minister for the Environment under section 45. So what it says is - - -

MARTIN CJ: But it rather seems to be jumping the gun. It's rather saying, well, if we're told the government is going to approve it whatever we say, then we will limit our advice to the maximum extent of mitigation and offsets.

JACKSON, MR: With respect, that construction shouldn't be given to it, because that's not - - -

MARTIN CJ: Because that would be illegal.

JACKSON, MR: Indeed.

MARTIN CJ: Yes.

JACKSON, MR: So the only construction available is that the EPA will assess the proposal and recommend that if significant impacts on critical assets are what's left after avoid and minimise, then the EPA will subject - not fettered - but will, unless there's exceptional circumstances or some other reason to depart from the policy, will recommend against approval.

Acknowledging that the Minister may well approve it nonetheless, in which case the EPA may well say, "The offsets package that has been put forward is acceptable. We don't accept that it's appropriate, but it's acceptable, and if you, sir/madam, wish to approve it, then we're satisfied that that criteria is met."

MARTIN CJ: Yes.

JACKSON, MR: The same approach is taken in the document under tab 6, your Honour.

MARTIN CJ: All right. So they're the only parts that you want to take me to in that one.

JACKSON, MR: Yes. I've already taken you to - - -

MARTIN CJ: Yes.

JACKSON, MR: - - - the types of offset. And section 3, which is the principles, are dealt with - - -

MARTIN CJ: Yes.

JACKSON, MR: - - - in the next document.

MARTIN CJ: All right. So now we're on tab 6. Sorry, tab 7.

JACKSON, MR: No, no. Tab 6, your Honour.

MARTIN CJ: Tab 6. Yes.

JACKSON, MR: It's a document with "text withdrawn" across it, but the evidence is to the effect that this was in place at the time. This was - - -

MARTIN CJ: What time?

JACKSON, MR: At the time of the decision.

MARTIN CJ: Being the republication of the report.

JACKSON, MR: Indeed.

MARTIN CJ: Yes. All right. Where is that evidence? Can you help me with that?

JACKSON, MR: That is in the affidavit of Ms Arrowsmith
- - -

MARTIN CJ: Yes.

JACKSON, MR: - - - where she says at paragraph 27:

I've prepared a table below identifying the policies and procedures which were in operation between 20 April 2009 and 13 September 2013 -

which is the publication date of the EPOs report. And in relation to NJA6, that table says that the policy took effect in September 2008 and ended on 14 August 2014.

MARTIN CJ: Right. Thank you.

JACKSON, MR: Under the heading Purpose, in effect, if I can take you, fifth paragraph:

This guidance statement provides advice for the development of offsets packages by proponents which the EPA will assess on a case by case basis against the principles in position statement number 9.

So the two documents were prepared more or less at the same time. But the first one deals with both the brown and the green, but this one is dealing only with biodiversity.

MARTIN CJ: Right.

JACKSON, MR: The last paragraph on page 1:

The scope of this guidance statement applies to all proposals and schemes referred to the EPA that have significant adverse impacts on biodiversity assets of high or critical value.

And then the issue:

The EPAs position statement established a policy approach for the use of environmental offsets in the context of EIA.

That's part 4 of the Act.

This policy approach forms the basis for this guidance statement -

and so on. The next paragraph:

Specifically, these issues require clarification about the EPAs expectation for the appropriate use of environmental offsets.

And then at section 3:

This guidance statement provides direction for developing biodiversity offsets with an emphasis on meeting the principles set out in the position statement number 9. It's not considered to be appropriate.

What you then have over the page is section 3.1, which is headed Determining When it is Appropriate to Apply Offsets. And that's to be contrasted with page 93, which is section 3.2, which is Formulating an Environmental Offsets Package. Under the heading Significant Adverse Impacts to Assets, that first paragraph:

Where there are significant adverse impacts to critical assets, the EPA will assess the proposal through EIA. The EPA in providing its advice to the Minister will adopt a presumption against recommending approval of proposals or schemes where significant adverse environmental impacts affect critical assets.

And two further - two paragraphs further down - - -

MARTIN CJ: And you say that the report shows that it didn't adopt that presumption.

JACKSON, MR: There's no reference to a presumption at all.

MARTIN CJ: Yes.

JACKSON, MR: There's no engagement with the concept. The third paragraph under that heading:

In some cases, a proposal or scheme that has significant impacts on a high value may also be found to be environmentally acceptable, whether a comprehensive offset package is proposed.

So it's clearly distinguishing between its presumption in relation to critical assets and its position, which is, "Well, we will have a look at it and see." And then you - then you ask yourself - well, the second dot point is exhaustion of mitigation options. And then under the third dot point, it talks about the significance of adverse environmental impacts, and basically says, "It's for the EPA to determine how significant an impact is."

MARTIN CJ: Yes.

JACKSON, MR: And then as we go over the page, 3.2, Formulating an Environmental Offsets Package, it then goes through each of the principles, and those principles are the ones set out in the position statement, and it gives more flesh to those principles in a biodiversity context. I don't need to take you to that because that goes to the adequacy.

MARTIN CJ: Yes. And adequacy is a matter for the EPA.

JACKSON, MR: Indeed.

MARTIN CJ: Not the court.

JACKSON, MR: Absolutely.

MARTIN CJ: Yes.

JACKSON, MR: Yes. Page 17, your Honour, or page 104, there's a flow chart:

EPA undertakes assessment of a proposal. Strategic advice on offsets by relevant DMAs could take place before referral and during. Proponent demonstrates that all reasonable attempts to mitigate adverse impacts have been exhausted.

And then:

When significant adverse residual impacts on critical assets remain -

and the significance is a judgment of the EPA -

offset discussions are ceased due to EPA's presumption against recommending the approval.

It then goes to the report to the minister. And, as I've said, there may well be a role for the EPA to advise the minister that the offsets package is adequate, notwithstanding that the EPA has recommended against.

MARTIN CJ: Well, it's odd, isn't it, because the box above that, on the left side of the page, says:

Offset discussions are ceased due to EPA presumption against recommending approval.

And the arrow goes down to:

On the report based on the above, EPA will take account of any offsets package put forward by proponents.

JACKSON, MR: Yes. But, as I say, that's for the advice to the minister, in my respectful submission. That's how that needs to be read in light of what has already come before. The last document that I propose to take you to, the last, is NJA7.

MARTIN CJ: Yes.

JACKSON, MR: I've already taken you to this, your Honour, under the heading of What Are Environmental Offsets. I won't take you to that. The last paragraph says:

Major development proposals or schemes that have significant environmental impacts, particularly on critical and high-value assets will usually trigger the EIA. Critical assets are the most important environmental assets in the State and are listed in the position statement.

The next paragraph:

The EPA advises the Minister for the Environment on whether a project should be approved or not, and providing its advice, EPA adopts a presumption against recommending approval of proposed projects where significant and adverse environmental impacts affect critical assets. It is for the EPA to determine how significant an impact is and this, in turn, influences the decision to assess the project and its recommendations to the minister, including advice on the adequacy of proposed offsets.

Now, if I can take your Honour to the decision itself, or the report, rather.

MARTIN CJ: Yes.

JACKSON, MR: Sorry, your Honour. I've just grabbed the wrong bundle. There is a reference to the position statement.

MARTIN CJ: Yes.

JACKSON, MR: That's in section 5.6, at page 40. So what it says is these things are critical assets. Section 5.6, it sets out the environmental objective. It says:

After all avoidance and minimisation actions have occurred, the following significant residual impacts remain.

It then says:

CCWs, threatened fauna, priority fauna and conservation areas are all critical assets in accordance with position statement number 9. Impacts to critical assets should be avoided and minimised as far as possible. The residual impacts are considered to be significant due to the importance of these assets.

Now, the State, in its submissions, says that last sentence shows that the EPA did turn its mind to the presumption because what it says is the presumption - the

State says there's an implication there that the presumption doesn't arise because - sorry, your Honour. I'm on page 40.

MARTIN CJ: Yes. Yes. I'm aware of that. But I'm looking also at the context because, of course, there had been an earlier assessment, not an environmental impact assessment.

JACKSON, MR: Indeed.

MARTIN CJ: And the EPA acknowledged in this report an earlier conclusion that any proposal would be extremely difficult to be made environmentally acceptable.

JACKSON, MR: Indeed. And much of this report is focused on the difference between what it says it assessed in 2003 and what it's assessing now, in relation to the detail.

MARTIN CJ: Yes.

JACKSON, MR: And that, for example - - -

MARTIN CJ: So I guess what I'm saying is you read page 40 in the context of - - -

JACKSON, MR: You do. Indeed. But that context is very important, because what the EPA has done in other parts - and I will take you to them - is make findings that the impacts on critical assets in some cases are not significant. They're described as minimal or minor or reasonable, and so on. And so it can't be the case that the residual impacts are considered to be significant, brackets, (only) due to the importance of these assets, which is the implication that the State seeks to draw.

That sentence doesn't include the word "only". What it says is, "These are significant assets." But the State says, by including that sentence, the EPA is to be understood as to say, "The impacts are only significant because of the nature of the assets, not because of the nature of the impacts." And, in my respectful submission, that conclusion can't be drawn because the EPA has made decisions about critical assets which, in effect, distinguish between significant and others.

MARTIN CJ: Well, I mean, if you look at what they've described is going to occur if the proposal is implemented, clearing almost 100 hectares of remnant native vegetation, 78 hectares of foraging habitat for Carnaby's cockatoos, 73 for the Red-tailed black cockatoo, and so on.

JACKSON, MR: It must be significant. It must be.

MARTIN CJ: It would be difficult to construe the word "significant" as not applying to the character of those effects.

JACKSON, MR: If your Honour's with me on that, I don't need to press the point.

MARTIN CJ: Yes. But the problem for your argument, though, is that if it's construed that way, then it appears to be precisely the sort of language that you find in position statement 9. So, implicitly, it's saying, well, under position statement 9, first ask yourself: is this a critical asset. Answer, yes, because it's Bush Forever and Conservation Wetland, etcetera. The next question is: are the impacts significant? And what they seem to be saying is the answer to that is yes, too.

So, implicitly, then, they're saying, "Well, we've ticked both the boxes under position statement 9." What you say is, well, then the error is that instead of expressly acknowledging that the outcome of both of those boxes being ticked is a presumption against recommendation for approval, they've gone on to consider offsets without noting that presumption.

JACKSON, MR: Indeed. It's not so much the noting though, sir, it's that there's - it removes itself from the presumption without explaining why and so where you have got a policy that says, "There is a presumption. This is how we're going to make the decision", there must be - the EPA must critically engage with that presumption and come to a decision as to why the presumption should not apply, and there's none of that in here, and that's, in effect, that's the basis - that's the factual basis for what is said to be the error in ground 1(b), but ground 1(c) says the EPA was required to provide adequate reasons and there's a gap here. We can't understand why the presumption has not - why the policy has not been followed, why the presumption has not been applied. The EPA is entitled to depart from the presumption, it's entitled to depart - that's the no fettering rule, but if it does so it has to actively engage intellectually with it, and - - -

MARTIN CJ: You will come back to ground 1(c) and tell me how you get around all the law about reasons?

JACKSON, MR: Well - - -

MARTIN CJ: Or do you want to deal with it now?

JACKSON, MR: I might deal with it now. Obviously Osmond is authority for the proposition that there's no general common-law presumption, but it's plain, and the cases make plain, that there can be a statutory implication - - -

MARTIN CJ: Yes.

JACKSON, MR: - - - and such a statutory implication arises in this case, in my respectful submission, because if it doesn't, the rights of the public to appeal the EPAs decision to the Minister are rendered nugatory.

MARTIN CJ: But - - -

JACKSON, MR: And that - - -

MARTIN CJ: But why?

JACKSON, MR: Why? Because - - -

MARTIN CJ: Well, in the starting point the problem you have got, I think, the first problem you have got is section 44(2) itself, which sets out the minimum requirements of an assessment report - - -

JACKSON, MR: Yes.

MARTIN CJ: - - - and if it had been the intention of the legislature that the EPA had to provide reasons for its recommendations, then it would have said so in section 44(2), wouldn't it?

JACKSON, MR: Well, if I can take your Honour to section 100 - - -

MARTIN CJ: Yes.

JACKSON, MR: - - - which is the appeal provisions, section 100(1)(d) provides that any person that disagrees with the content of or any recommendation in the report prepared under section 44 in respect of a proposal may lodge, with the Minister, an appeal.

MARTIN CJ: Yes.

JACKSON, MR: So the term "the content" must be given meaning. All 44(2) says is the EPA has to identify the key environmental factors and include its recommendations. That leaves no room for the word "content" to work.

MARTIN CJ: But you're going further. You're saying that there has to be - the gap, you say, in this report is the failure to provide reasons for overriding the presumption against approval.

JACKSON, MR: Well, that's an example in this case. That's the situation here - - -

MARTIN CJ: But that's - - -

JACKSON, MR: - - - but the proposition is broader, because the EPA is required - sorry. In order - it's important to understand one other thing, which is the Minister's powers on appeal. Section 101(1)(d), as opposed to 100(1)(d) - - -

MARTIN CJ: Yes.

JACKSON, MR: - - - says that:

...the Minister is entitled, having considered the appeal, to remit the proposal to the EPA for assessment.

That is, the Minister may decide that the EPAs assessment is inadequate and it needs to go back and be done again.

MARTIN CJ: But the fundamental proposition is you say Osmond doesn't apply because of section 100, which confers the right of appeal, general right of appeal on anybody - - -

JACKSON, MR: Yes.

MARTIN CJ: - - - but if you have got - and your appeal could be based on the fact that they didn't identify a sufficient - they missed an environmental factor - - -

JACKSON, MR: It could be.

MARTIN CJ: - - - or that having regard to the environmental factors they did identify, they should not have recommended approval - - -

JACKSON, MR: Precisely.

MARTIN CJ: - - - or they should have included other conditions upon the recommendations for approval.

JACKSON, MR: Well, no, your Honour - - -

MARTIN CJ: All of those things are covered by a report that deals with 44(2), aren't they?

JACKSON, MR: With respect, no, because 100(1)(d) says that:

Any person can appeal against the content of, or any recommendation in -

MARTIN CJ: Yes.

JACKSON, MR: Now - - -

MARTIN CJ: So the content could be you have not identified all relevant environmental factors, or if you're the proponent, you have identified a factor that isn't relevant - - -

JACKSON, MR: The Minister's - - -

MARTIN CJ: - - - in the recommendation. So I'm just seeing why you would need to augment - why you would need to read into 44(2) words that aren't there in order to make section 100 meaningful.

JACKSON, MR: Because the Minister has the power to either remit the proposal or to vary the authority's recommendations by - - -

MARTIN CJ: Well - - -

JACKSON, MR: - - - changing the implementation conditions. Now, in order for the - - -

MARTIN CJ: So if the appeal is on the ground, if they missed an environmental factor. Well, all right EPA, go back and have a look at that factor, or they didn't include a condition that they should have included. All right EPA, include the condition.

JACKSON, MR: But that approach gives no meaning to the word "content", sir. It must - the term "content" must be the movement of the EPA, its thinking from the identification of key environmental factors to its conclusions as to recommendations.

MARTIN CJ: Well, it's the - well, if the key environmental effect is identified, don't justify the recommendations, then that's a ground for the appeal.

JACKSON, MR: Indeed, but how does the member of the public know what the EPA has - how the EPA has reached it if it isn't required to provide reasons?

MARTIN CJ: Because you can read what the - he or she can read what the factors are identified and see the recommendation and say, "Well, in the light of those factors, how could you reasonably have recommended approval" or "How could you have missed the imposition of this or that condition".

JACKSON, MR: And then the Minister says, "Well" - I don't know what the - beg your pardon. The EPAs report is inadequate to allow me to understand how it got from A to B. I need to understand that in the same way that the member of the public needs to understand that process of
- - -

MARTIN CJ: Well, how the EPA got there doesn't really matter, does it - - -

JACKSON, MR: Well, it does if the - - -

MARTIN CJ: - - - because the reviewing panel will advise the Minister, "Well, having regard to these factors, the recommendation was right" or "it was wrong" or "it should be augmented by these conditions".

JACKSON, MR: How does the proponent - beg your pardon, I will withdraw that. How does a member of the public understand that it's just a best guess? "I reckon you have identified this and you have reached this. I reckon you must have made a mistake". The Minister can't - the member of the public can't properly formulate an appeal ground and the Minister, in assessing it, can't properly understand whether the appeal ground has got any strength.

MARTIN CJ: Yes.

JACKSON, MR: It's acknowledged, sir, that there's - the Court of Appeal decision in Osmond, Priestley J says - makes reference to the High Court decision in Taylor and says, "Well, Mr Taylor had a right of merits review, in fact, a re-hearing", and there might be some grounds on which to - in such a case it's not necessary for the decision-maker at first instance to provide reasons, because everything is redone at the second stage. So it's neither here nor there.

MARTIN CJ: What does this Act say about the nature of the appellant process?

JACKSON, MR: Well, that's what I was taking you to, sir. It was - section 101(1)(d) says that the Minister doesn't remake the EPAs decision. It sends it back to the EPA for reassessment, or it can amend the implementation conditions, not the recommendations themselves.

MARTIN CJ: But in practice there's a panel that advises the Ministers, isn't there, and is that dealt with by the Act?

JACKSON, MR: That is dealt with by the Act. That's dealt with in section 106(1)(a).

MARTIN CJ: Yes.

JACKSON, MR:

When an appeal is lodged under this -

MARTIN CJ: That's right. The Minister appoints an appeals committee.

JACKSON, MR: That's right. Well, a convenor and committee and there's complicated and uncertain ways of how those two interact, but 106(1)(a), there's an appeals convenor and they consult with the appellant and they ask the EPA to report to the Minister on the appeal, and if the decision appealed against is not a decision of the Minister, they consider and then report to the Minister on the appeal.

JACKSON, MR: So, in my respectful submission, this case - as I've said - sorry. There's also section 107B, which says section 109 applies to the Appeals Convenor, as if the Appeals Convenor were appeals committee. And then section 109 says:

Appeals committee shall consult the EPA in the case of an appeal against a decision of the Minister or the Authority and the appellant shall act according to equity, good conscience and substantial merits.

If I can take your Honour to the decision of Vegan, which your Honour referred to in Hancock, which is tab 4 - - -

MARTIN CJ: Yes.

JACKSON, MR: I'm sorry, your Honour. I didn't asterisk this. I - - -

MARTIN CJ: I probably don't have it then.

JACKSON, MR: Well, perhaps I can - I beg your pardon. I'm sorry. I - Handley J says at paragraphs 26 and 27 - sorry, 26 to 28:

The appeal panel doesn't have an express duty to give proper reasons -

an express duty to give proper reasons -

but, in my judgment, there are two bases for finding an implied duty.

The first one is relevant to the particular facts of that case:

A cumulative basis for finding an implied duty to give reasons is that they would enable the court or the commission to properly exercise the power under section 329(1)(b) to order a further medical assessment.

So the appeal board has the power to send it back and have it done properly:

The existing assessment will be binding, but the power to order a further assessment is available where other evidence suggests that the assessment was wrong or the worker's condition has changed. The power is analogous to that of an appellate court to order a new trial.

And in my respectful submission, that's what the Minister has got here, the power to remit it back to the EPA, but that power can only have meaning if potential appellants understand how the EPA got to its decision and the Minister understands that too and can compare the two.

MARTIN CJ: But, here, the only gap - well, correct me if I'm wrong, but you say the inadequacy arises only from the policies because otherwise the key environmental factors and the recommendation are - so 44(2), on its face, has been complied with.

JACKSON, MR: I don't disagree with that.

MARTIN CJ: So then the inadequacy of the reasons can only arise if there was an obligation to take into account the presumption against recommendation and to explain why that presumption was not being applied in this case. Is that the - - -

JACKSON, MR: Well, it also goes to (1)(a), if there's an obligation to ask the question arising out of section 44.

MARTIN CJ: So two components: failure to explain why the presumption didn't apply; and secondly, failure to address separately and specifically whether offsets were appropriate in this case.

JACKSON, MR: Indeed. Now, that - - -

MARTIN CJ: That's the two - - -

JACKSON, MR: The presumption - the presumption - - -

MARTIN CJ: They're the only two gaps in the reasons, just so that I'm clear.

JACKSON, MR: They're the only two gaps that are put forward by the applicant.

MARTIN CJ: Yes. All right.

JACKSON, MR: Yes. So the presumption, in effect, requires the asking of the appropriateness question and then says if certain things are satisfied, this is the course that we take. Now, there is a question which your Honour will be familiar with, as to whether the failure to provide reasons, if there is one, constitutes jurisdictional error.

MARTIN CJ: Yes.

JACKSON, MR: That's a question - according to Project Blue Sky, that says it's a question of statutory construction, that is, whether the provision of reasons is a condition of the valid exercise of the power. In this case, the temporal - the fact that the EPAs decision as to whether to implement - whether the proposal should be implemented or not, the fact that that is contained within and forms part of the report is, in my submission, sufficient to justify such a conclusion.

MARTIN CJ: Yes. I think I looked at that question in the context of one of the Parole Board cases.

JACKSON, MR: Indeed.

MARTIN CJ: But that was where there's an express obligation to provide reasons.

JACKSON, MR: No. With respect, sir, the - in Seiffert
- - -

MARTIN CJ: Seiffert. That's right.

JACKSON, MR: - - - that question was asked and there
wasn't an express obligation.

MARTIN CJ: Right.

JACKSON, MR: And your Honour found that because the
Parole Board was required to give reasons as soon as
practicable, that was sufficient to create a break, but
your Honour said that because of the temporal closeness
there might be an argument, but nonetheless - and so that's
the basis of the submission in that regard.

MARTIN CJ: Yes. All right.

JACKSON, MR: Your Honour, I haven't taken you to -
because I went to the reasons, I haven't taken you to the
distinction between the way the EPA dealt with some
critical - or some impacts to critical impact - sorry.
Withdraw that. Some impacts to critical assets as opposed
to others. The most obvious example is that dealing with
priority fauna, where a number of - which the EPA, in
section 5.6, says is a critical asset, but in a number of
cases the EPA found that the impacts would be manageable or
minimal or reasonable or something of that - - -

MARTIN CJ: Yes. Can you take me to some of those.

JACKSON, MR: Yes, I can. So have you got the report
there, sir?

MARTIN CJ: I do.

JACKSON, MR: So on page 33 there's a table - - -

MARTIN CJ: Yes.

JACKSON, MR: - - - which sets out certain types of what's
said to be significant fauna species. Now, the Southern
brown bandicoot is described as a priority 5 fauna, but at
the bottom of page 33 it's said:

Impacts of the proposed project are likely to be highly
localised.

MARTIN CJ: Is that code for insignificant?

JACKSON, MR: Yes.

MARTIN CJ: Yes.

JACKSON, MR: And over the page, the Graceful Sun Moth - there's no assessment at all of that impact, but reading between the lines, it's clear that, in fact, the EPA is not convinced that it's a priority - list the animal at all. The next paragraph though refers to the Perth Lined Lerista, which it says is a skink, and the EPA concurs that impacts would be minimal.

MARTIN CJ: Again further down that page:

A migratory wetland bird species - - -

JACKSON, MR: Indeed.

MARTIN CJ:

...likely to be minor at the regional scale.

But doesn't all that suggest that they are working within the framework of policy statement 9 and looking whether there are significant impacts?

JACKSON, MR: They are, but they then, in relation to black-tailed cockatoos, find that the impact will be significant and so - and what that shows is that the - that there can't be an implication in that section - in that sentence on page 40, that the impacts are only because of the nature of the asset rather than the - - -

MARTIN CJ: So am I right in thinking that you submit that they applied some, but not all of policy statement 9? So they addressed the question of whether it was significant in relation to critical assets, in relation to each of the environmental factors that they addressed, but then didn't apply the presumption?

JACKSON, MR: Indeed.

MARTIN CJ: That's your case.

JACKSON, MR: That's precisely the point.

MARTIN CJ: Yes.

JACKSON, MR: Because if you go to page 36, which is the black-tailed cockatoos - - -

MARTIN CJ: Yes.

JACKSON, MR:

Having taken all reasonable and practical measures to avoid and mitigate the potential impacts, there still remains a significant residual impact to the key environmental factor of terrestrial fauna though habitat fragmentation and loss of black cockatoo foraging habitat.

And, with respect, the same process appears to have occurred in relation to conservation category wetlands where section 5.1 and 5.2 deal with impacts to water quality and water quantity, and the proposal is found to have impacts which are manageable. So at the end of section 5.1.

MARTIN CJ: Yes.

JACKSON, MR: That's all okay. And at the end of section 5.2, on page 20, EPA's recommended condition 10, etcetera - I beg your pardon. It's useful to go back to page 19. The second last - sorry, the third last sentence deals with the impact of the road between Bibra Lake and Horse Paddock and says that the risk is considered to be low. It then deals with the impact on the road on Roe swamp.

MARTIN CJ: Sorry, are you in the last paragraph on page 19?

JACKSON, MR: I'm in the second last.

MARTIN CJ: The second last.

JACKSON, MR: Start at the third last, because that's Bibra Lake and Horse Paddock Lake.

MARTIN CJ: Yes. Thank you. Yes. I've got it now.

JACKSON, MR: Second last deals - says, "For the section of the road through the Roe swamp the proponent's site specific investigations show that the weight of the road may alter the properties of the silty and muddy sediments." And then the last paragraph it says the proponent has put forward, in effect, a sacrificial portion of 10 metres, which it describes as a zone of indirect impacts.

And then over the page, on page 20, the third paragraph, the EPA considers that the proponent's zone of

indirect impacts "is reasonable." And yet, the last paragraph before that word, "Summary": "The direct significant residual impacts to wetlands are discussed in sections 5.3 and 5.6." Your Honour, if I can - I think I should be able to finish in the next 20 minutes, so - - -

MARTIN CJ: Yes. Well, no rush, Mr Jackson. Take as long as you need.

JACKSON, MR: If I can take you to ground 2(b).

MARTIN CJ: Yes. Ground 2(a) is abandoned.

JACKSON, MR: 2(a) is abandoned. Yes, sir. Ground 2(b). By this ground the applicant's allege that there's been a failure of the EPA to consider the accumulative and total impacts of the proposal on the environment, and such a failure constituted a failure to ask the correct question. The EPA's consideration was limited to the key environmental factors. Section 44.2(a) requires EPA to set out what it considers to be the key environmental factors identified in the course of the assessment, and the applicants therefore take no issue with EPA doing so.

But it's plain that at no time did EPA ask itself whether the total impacts make the proposal acceptable or suitable for recommendation. And that's plain from two things - firstly the structure of the report. And your Honour should be sufficiently across the report in that regard.

MARTIN CJ: Yes.

JACKSON, MR: So that section 1 provides an introduction, section 2 provides the background, section 3 details the finding of the 2003 bulletin, section 4 describes the proposal, and then section 5 identifies each key environmental factor, assesses their impacts and makes recommendations.

MARTIN CJ: Well, I'm just looking at - if you like, the executive summary at the commencement of the report.

JACKSON, MR: Yes.

MARTIN CJ: And it says, "deals with the clear environmental factors and principles."

JACKSON, MR: I'm sorry, your Honour. Where are you?

MARTIN CJ: I'm at page, Roman numerals, i. "Summary recommendations." 2284 on the top right hand side. Here are the key environmental factors."

JACKSON, MR: Yes.

MARTIN CJ: Here are the principles - the proportionary principle, intergenerational equity, etcetera.

JACKSON, MR: Yes.

MARTIN CJ: Background and context of the report, previously saying it's going to be hard. Assessment and conclusion - we've looked at it all, we've looked through the process, proponent's extensive consultation and planning, and the changes that have been made since we looked at it before. "After having considered it all, here are the residual impacts."

JACKSON, MR: Yes.

MARTIN CJ: Which is at the bottom of page 4, "clearing of 97 hectares," etcetera. The next page is, "Here's the package of environmental offset measures. Satisfied the proponent has demonstrated all efforts have been made to avoid or minimise environmental impact."

JACKSON, MR: Yes.

MARTIN CJ: So all the mitigation conditions have been - and then they deal with that. And then they say, "the EPA" - and I'm reading at page 6 - "the EPA has therefore concluded that the proposal would meet the EPA's objectives for the key environmental factors assessed and as such it recommends the proposal be approved."

JACKSON, MR: That's precisely the point. That last paragraph is precisely the point, because what it says is if you meet the objectives for the key environmental factors therefore as such, it recommends the proposal be approved. What it hasn't done is take the step back and say how do these impacts look when you consider them in totality?

MARTIN CJ: But isn't that precisely what this section of the report is doing in saying, "Here's the list of impacts. Here's the offsets. We've got different multipliers for different adverse impacts." So therefore if those multipliers are applied, there will a net environmental

benefit. So all of our objectives are met and so therefore we approve.

JACKSON, MR: No. Because the - to take your example, your Honour, the multipliers are limited to considering how the key environmental factors - how each key environmental factor can be offset.

MARTIN CJ: But then if you've - - -

JACKSON, MR: For example.

MARTIN CJ: - - - offset them all - let's take Carnaby's black cockatoo. You provide more space than you're losing, therefore there's a plus for the cockatoos because they've got more foraging space than they previously had. And the same with each of the others. So if you go through and tick them all off and you say, "Well, we're in front, therefore we recommend approval." Isn't that what they've done?

JACKSON, MR: That is what they've done. They've taken five environmental factors and they've said, "We're satisfied in relation to each one of those." What they haven't done is take a step back and ask whether the impact on the environment as a whole is acceptable. And in my respectful submission, that approach is necessary given the broad - what's described by Kiefel J in Nathan Dams as high public policy which, in her Honour's - in that case said you can't take a narrow approach to these things. And that's what the EPA has done.

The EPA has said, "Well, we're required to consider the key environmental factors and that's what we'll do." But they haven't looked at the cumulative - accumulative, cumulative has a different meaning - accumulative or total impacts. Now, it's possible that the answer is the same. Indeed, it may be the same. But the EPA has to ask itself that question because its mandate is to protect the environment, not to ask whether various aspects of the environment are adequately addressed. It's a neat point, your Honour, and I'm not going to labour it.

MARTIN CJ: Yes. No. It's either right or it's not.

JACKSON, MR: Sorry?

MARTIN CJ: It's either right or it's not.

JACKSON, MR: It's either right or it's not. But as I say, we do rely - I do rely on Kiefel J's decision in

Nathan Dams where her Honour found - and it was upheld on appeal - that it was an error to limit consideration to the direct impacts caused by that dam as opposed to looking at the indirect impacts. And her Honour said that was a narrow approach. You need to take a particularly broad approach given the high public policy. In my respectful submission, the same thinking applies in this case.

The final ground, your Honour, is ground 3. This is a constructive failure to exercise jurisdiction ground. The EPA was obliged to recommend to the Minister whether or not the proposal may be implemented with or without conditions. It purported to do so on the basis that certain conditions would be satisfied. One of those conditions was that certain land be identified and acquired before construction commenced.

Now, I can take you to various sections of the report. If I can take you to page 28. Sorry, this needs to be done in two parts. The first is the main body of the report. And the second to have regard to section - or to the proposed conditions. I don't think I need to take you through those - well, quickly. Page 28, just ahead of the heading Conversation Areas:

The EPA notes that despite the best efforts by the proponent to minimise impacts, there's still the unavoidable loss of 6.8 hectares of wetlands. This is considered a significant residual impact and hence would require an environmental offset.

And the same with terrestrial fauna on page 36. And as I took you to before, your Honour, the offset on page 36 refers to both habitat fragmentation and the loss of foraging habitat. And if you then go to the conditions at the end of that report, which is a draft statement for the Minister starting at page 2375. We've then got condition 12.1 which says:

In view of the significant residual impacts to the environment, including impacts to -

so and so:

...there needs to be offsets in 12.2 to 12.16.

Now, 12.2 to 12.5 deals with black cockatoo habitat and the fragmentation issue and the wetlands. And that's apparent in section 5.6 at paragraph - sorry, a page 41. Has your Honour got that?

MARTIN CJ: Yes.

JACKSON, MR:

As such -

this is under Terrestrial Fauna dealing with black cockatoos:

As such -

middle of that paragraph:

EPA has recommended conditions 12.2 to 12.5.

MARTIN CJ: Yes.

JACKSON, MR: Do you see that?

MARTIN CJ: Yes.

JACKSON, MR: And then on the next page, on page 42, page 2335 - - -

MARTIN CJ: Just before you leave 41 - - -

JACKSON, MR: Yes.

MARTIN CJ: - - - at the top of that page it's got:

Prior to

- in the first paragraph in the middle of that it has got:

Prior to construction - - -

JACKSON, MR: Yes.

MARTIN CJ:

...the proponent will be required to prepare and submit a land acquisition management plan.

JACKSON, MR: That's right.

MARTIN CJ: Yes.

JACKSON, MR: And at page - well, sorry, your Honour, that's the key - I was going to come back to that but that is the point.

MARTIN CJ: Yes.

JACKSON, MR: And it then goes on to say - - -

MARTIN CJ: So that was - that's the text. But then 12.2 erodes that.

JACKSON, MR: Indeed. But if I can take you back to - - -

MARTIN CJ: Why is that illegal? Why does that take the EPA outside jurisdiction?

JACKSON, MR: Because it hasn't made a decision about what's required to have - for the proposal to be implemented.

MARTIN CJ: Well, it's said if the CEO - - -

JACKSON, MR: Yes.

MARTIN CJ: Who is the CEO of the EPA.

JACKSON, MR: Well, no. He's the CEO - - -

MARTIN CJ: The CEO of the department.

JACKSON, MR: He's the CEO - that's explained on page 2391.

MARTIN CJ: Yes.

JACKSON, MR: He's the CEO of the department of the public service of the state responsible for the administration of the Act.

MARTIN CJ: Right. So it's the CEO of the Department of Environment.

JACKSON, MR: I think it's actually the CEO of the Office of the EPA. But I might be wrong.

MARTIN CJ: The Office of the EPA. All right.

JACKSON, MR: But either way, that CEO doesn't have the benefit of immunity from direction, for example. But he or she sits outside the EPA. So why is it illegal? Because - well, it's important to understand - can I go back and just make plain the first point. 12.2 to 12.5 deals with cockatoo habitat. But it also might deal with wetlands. That's on page 42, the penultimate paragraph.

MARTIN CJ: Yes.

JACKSON, MR: In the event that the wetland buffer contains Carnaby's and red-tailed black cockatoo habitat, the EPA considers this offset could be combined. So the wetland offset can be combined with the black cockatoo offset. And same on page 44, middle of - - -

MARTIN CJ: And 43 again refers to Prada Construction.

JACKSON, MR: Indeed. But all of this is prior to construction. And 44 also says:

The EPA considers that the proposed offset which aligns with these managements plans will address fragmentation.

MARTIN CJ: Yes.

JACKSON, MR: So - - -

MARTIN CJ: Again, the conditions are prior to commencement of construction or as otherwise agreed by the CEO.

JACKSON, MR: Indeed. So if I can take you - - -

MARTIN CJ: But that - might that be to accommodate the fact that commencement of construction could occur with relatively minor works that are themselves incapable of having no adverse impact on the environment?

JACKSON, MR: Well, can I just take you to that because 12.2 has those words but so does 12.4 - sorry - 12.3 and 12.5.

MARTIN CJ: Yes.

JACKSON, MR: 12.3 talks about the implementation of the land acquisition management plan. Now, it's unclear what "implementation" means but - - -

MARTIN CJ: Well, implement - that means, presumably, buy it.

JACKSON, MR: Implement - well - - -

MARTIN CJ: Go and buy the land.

JACKSON, MR: Well, 12.5 deals with acquisition. 12.5 says:

Prior to commencement of construction, the proponent shall acquire or fully fund the acquisition of the land identified.

So it's unclear what 12.3 means in addition to 12.5, but the ground the applicants rely on doesn't take issue with 12.3 and with 12.5 because it may well be that once you've identified the land there might be certain circumstances where construction might commence - - -

MARTIN CJ: Well, you can acquire the offset land under a conditional contract or something - - -

JACKSON, MR: Correct.

MARTIN CJ: - - - of that sort.

JACKSON, MR: Indeed. Indeed. But we haven't even identified it, sir. That's a different matter.

MARTIN CJ: So you only complain about 12.2?

JACKSON, MR: We do.

MARTIN CJ: You don't complain about 12.3 or any of the others?

JACKSON, MR: That's right. That's right.

MARTIN CJ: It's the submission of the land acquisition management plan.

JACKSON, MR: And that's - and that decision has got to be understood in the context of the EPAs minutes where it agreed - and these are - this is tab 47 of the same volume, so just a couple of tabs back.

MARTIN CJ: This is tab - - -

JACKSON, MR: Tab 41 of volume 1.

MARTIN CJ: Yes.

JACKSON, MR: Under - this is the decision - sorry - the meeting of July 2013.

MARTIN CJ: Yes.

JACKSON, MR: And under - on page 2275 under section 6.2 there's a general discussion between the EPA and the office of the EPA, one, two, three, four, and then you've got Main Roads department joining the meeting and discussing various issues, one of which is offsets, and the proponent says to the EPA, "We've got limited offset options," and then over the page:

Although the offsets package is still to be determined, the government is keen to reach a decision on the environmental acceptability of the proposal prior to reviewing costing and making a decision on implementation, funding and timing.

And then the EPA agreed to proceed with the assessment on the basis that the details of the offset package remain to be finalised and that there would be some discussions. So the EPA knows, because Main Roads has told it, that it's going to find it hard to get an offset, and so the EPA says, "Well, that's all right, we will just say that (indistinct) we will recommend approval but before construction starts you've got to find the offsets."

MARTIN CJ: But you don't complain about the prior to construction, you complain about the power of the CEO to agree otherwise.

JACKSON, MR: We do. Yes.

MARTIN CJ: Yes. All right.

JACKSON, MR: Yes. And, as I say, it's difficult to see in what circumstances that discretion can be exercised where you haven't even identified the offsets. Now, it can be said that - and I presume it will be said that the offsets are designed to offset a particular type of environmental impact so why can't construction begin in an area that doesn't have those offsets.

MARTIN CJ: Mr Jackson, we're going after 1. You will be a little while longer, I think, won't you?

JACKSON, MR: This is the last point, sir, and this is the last ground and this is last point.

MARTIN CJ: All right.

JACKSON, MR: I'm happy to break for lunch, sir. I'm in

- - -

MARTIN CJ: Why don't we break now. You might want to take the opportunity to review your notes over the lunchtime. Something might occur to you. So we will adjourn now until 2.15.

JACKSON, MR: The court (indistinct)

(LUNCHEON ADJOURNMENT)

MARTIN CJ: Mr Jackson.

JACKSON, MR: May it please the court. We were at condition 12.2, your Honour.

MARTIN CJ: Yes.

JACKSON, MR: And the third ground of the applicant says, or asserts, that that condition is inconsistent with the EPAs determination elsewhere in the report - - -

MARTIN CJ: But why does that inconsistency take the RPA beyond jurisdiction?

JACKSON, MR: Because it hasn't decided whether the proposal is capable of being conditioned to make it acceptable.

MARTIN CJ: But it has. It said that - it has left the question of the timing of the land acquisition and management plan to the CEO. It hasn't left the question of whether there should be a land acquisition and management plan to the CEO. It has left the question of timing to him, that is, whether it should be submitted prior to or after the commencement of construction.

JACKSON, MR: In circumstances where it has said very clearly that it must be before construction commences.

MARTIN CJ: But the fact that it contemplates a circumstance in which the CEO might, for good reason, depart from that timing - why does that take it beyond jurisdiction?

JACKSON, MR: Well, it's difficult to see what the CEO - how the CEO might exercise that discretion.

MARTIN CJ: But why does that take - so why does that - I'm still struggling to see why that takes the EPA beyond the limits of its legal jurisdiction.

JACKSON, MR: Because it must make a decision as to whether the proposal is capable of being - - -

MARTIN CJ: But it has, and it said:

The proposal can only be implemented if an adequate land acquisition and management plan is provided.

And there's a condition to that effect. So it's not as if the CEO is empowered to dispense with that requirement.

JACKSON, MR: Well, and that's ultimately, I suppose, where we get to, because in circumstances where all the land acquisition management plan does is identify land of a particular type, how can the CEO allow construction to occur before the land has even been identified?

MARTIN CJ: Well, he may not.

JACKSON, MR: He may not, but - - -

MARTIN CJ: But - and - - -

JACKSON, MR: - - - in what sense?

MARTIN CJ: But I'm still - I mean, answering my question with questions as to the difficulty of the CEO is not really answering my question. What I'm concerned with - of course, as you know, I don't sit as a court of appeal from the EPA. I only sit to determine whether it has complied with its legislation - - -

JACKSON, MR: Indeed.

MARTIN CJ: - - - and if it hasn't, whether the extent of its noncompliant constitutes jurisdictional error. What I'm struggling with in relation to this ground is, I mean, I can see the practical problems to which you point, and, you know, they're clear, but what I don't see is why that takes the EPA beyond its jurisdiction. I mean, the EPA has power to impose conditions. It could impose conditions that some people might think are silly.

JACKSON, MR: Yes.

MARTIN CJ: And I'm not suggesting this is such a condition, but just because it's silly, it doesn't mean that it has gone - that the EPA has gone beyond its jurisdiction by imposing such a condition.

JACKSON, MR: I - the EPA has to - and now I'm repeating myself but I won't in a moment. The EPA has to determine whether the proposal is capable of being implemented. If it does so, on the basis that of X and then imposes a condition that says X may not occur, then it hasn't done its job.

MARTIN CJ: But that's not - but that is, I guess, the point, because I don't read 12.2 as empowering the CEO to say that there never need be a land acquisition and management plan. It simply gives him a power to depart from the timing proposed, which is that the plan be submitted prior to the commencement of construction.

JACKSON, MR: But that's - - -

MARTIN CJ: Now, if - let me take a hypothetical - let's say at the commencement of construction involved, sending in surveyors to put in survey pegs so that they could survey the work, and the CEO was satisfied that that would cause no adverse impact upon the environment and Main Roads said, "We are close to finalising the land acquisition and management plan, but there's a few more Ts we have to cross and few Is we have to dot. Is it okay if we send in the surveyors before we give you the management plan," he might say yes. But that's - to read this condition as saying the CEO is empowered to dispense with the requirement for a land and management plan misconstrues it, I think.

JACKSON, MR: Well, if construction is understood as sending in the surveyors, I think it's difficult to argue against that proposition, your Honour.

MARTIN CJ: So then the - well, then, the importance of that is that if there is a circumstance in which the condition can operate consistently with the thrust of the report, why does the condition take the EPA beyond jurisdiction.

JACKSON, MR: Well, because the whole point is that the construction - sorry. I will withdraw that. Construction must, in the context of this proposal - must involve the removal of native vegetation.

MARTIN CJ: Well, not all construction - not all commencement of construction would necessarily involve the removal of native vegetation.

JACKSON, MR: I've included a reference in my - - -

MARTIN CJ: I mean, some of the areas - as I read the report, some of the areas are already quite degraded.

JACKSON, MR: Well, can I take you to document 45 in volume 1.

MARTIN CJ: Yes.

JACKSON, MR: Tab 45 at page 2231. It's a document - - -

MARTIN CJ: 2231.

JACKSON, MR: That's right.

MARTIN CJ: For some reason, my volume 1 seems to go straight from page 214 to page 410.

JACKSON, MR: That's unhelpful - tab 45.

MARTIN CJ: Tab 45 - all right - in volume 1.

JACKSON, MR: In volume 1. It's - - -

MARTIN CJ: No. Yes. So there's - - -

JACKSON, MR: It's a briefing note.

MARTIN CJ: Yes. No. No. Two - - -

JACKSON, MR: 2231.

MARTIN CJ: Yes. I have it now.

JACKSON, MR: You see, that's a diagram showing the foraging habitat of the two types of cockatoos.

MARTIN CJ: Yes.

JACKSON, MR: And overlaid that is the project development envelope. That's not necessarily the construction envelope.

MARTIN CJ: No.

JACKSON, MR: But you will see there, sir, that the project development envelope and a foraging habitat are, with the exception of, in effect, the extension of Murdoch Drive, largely the same.

MARTIN CJ: Yes.

JACKSON, MR: Now, in effect, in my submission, the only way this condition can be read to give the CEO any discretion is to allow that part of the Murdoch Drive extension to be worked on.

MARTIN CJ: Why do you say that.

JACKSON, MR: Because everything else deals with cockatoo habit, foraging habitat.

MARTIN CJ: But it depends what you mean by construction.

JACKSON, MR: Well - - -

MARTIN CJ: If construction simply means preliminary work.

JACKSON, MR: I beg your pardon. If construction means?

MARTIN CJ: If construction simply means preliminary work, then that could be done without interference with the habitat, couldn't it, putting in pegs.

JACKSON, MR: Putting in pegs - as I say, it's - I can't argue with that, sir. If that's what construction means, I can't argue with that. But, in my submission, that's not what it means because the EPA has used the language - used the same language throughout the conditions.

MARTIN CJ: But even - let's say we take a narrow view of construction and say it means sending in - - -

JACKSON, MR: The bulldozers.

MARTIN CJ: - - - whatever equipment is going to be sent in, I still don't understand why giving the CEO the power presumably to be exercised in accordance with the obligations under the Act and so forth - - -

JACKSON, MR: And it might be said, inconsistent with the EPAs decision.

MARTIN CJ: Inconsistently with the report - why does giving the CEO the power to enable that to start before the land and management plan has been submitted take - why does that take the EPA beyond the legal jurisdiction conferred upon it by the Act?

JACKSON, MR: And now I'm repeating myself, your Honour, because - - -

MARTIN CJ: It's not decided.

JACKSON, MR: Because it hasn't decided - - -

MARTIN CJ: But it's a question of timing. It's - the CEO isn't given - I could understand your point if it was the CEO was given power to dispense with the need to provide a land and management plan that met the requirements specified in the report, and those requirements are relatively detailed. The land has to be of a certain area and has to be of a certain quality. So that simply has to be provided. There's no power to dispense with that.

JACKSON, MR: Well, your Honour - - -

MARTIN CJ: It's a question of timing.

JACKSON, MR: Well, it is - as I say, if what we're talking about is surveyor's pegs, I can't - I don't take an issue with that.

MARTIN CJ: No, but let's go to broader - let's say it's construction. But if - - -

JACKSON, MR: If it's construction, your Honour, then what we're dealing with here is a billion dollar road project. Once construction starts, let's say in that extension of Murdoch Drive, construction starts and then there's still no offsets identified.

MARTIN CJ: But the offsets have to be provided. It's a condition of the development.

JACKSON, MR: The offsets have to be provided unless the CEO says otherwise.

MARTIN CJ: No. The offset - the CEO can only agree to the time at which the plan - that's the point I'm making. The CEO is not given power to dispense with the need to provide the plan that meets the requirements in the report. He is only given power to dispense with the time at which it's provided.

JACKSON, MR: Indeed. So let's say that the - - -

MARTIN CJ: So why does the time take them beyond jurisdiction?

JACKSON, MR: Let's say that the - as I say, the construction commences in that Murdoch Drive extension and the - that portion is completed and they still haven't got a land acquisition management plan in. At what stage does

the - it can't be realistically be expected that the construction will then cease. The timing - the CEO has to
- - -

MARTIN CJ: But why should it cease? Because - - -

JACKSON, MR: Because there's - there could - - -

MARTIN CJ: - - - there is an obligation - there is a - the grant of the approval, subject to conditions, imposes a legal obligation upon Main Roads to comply with the conditions in default of which, enforcement action can be taken. So why would you equate a power to vary the presumptive timing for the provision of the plan with a power to dispense with the need to provide the offsets at all?

JACKSON, MR: Only because the power requires the - it's the identification. It's so preliminary that you don't get - as I say, we haven't taken issue with 12.3 and 12.5 because there are conditions in which it's not unreasonable to anticipate - - -

MARTIN CJ: I mean, for - if the CEO said, "You don't have to provide the land acquisition and management plan until 2050 - - -

JACKSON, MR: Yes.

MARTIN CJ: - - - that would not be the reasonable exercise of the discretion conferred by condition 12.2, read in the context of the report as a whole. So in other words, if you used the power to alter the timing to effectively dispense with the provision of the offsets in a timely fashion, it wouldn't be the genuine exercise of the discretion conferred upon him. So assuming that he has to exercise the discretion consistently with the tenor of the report - and that means provision of the offsets within a time that is relevant to the environmental damage that will be caused by the development proceeding - where's the - I'm still struggling to see why that takes - - -

JACKSON, MR: Yes. I understand that.

MARTIN CJ: - - - the EPA beyond. Because it's not not deciding; it has decided and the condition is that the offsets be provided. All it has done is said, "We're going to give a power to the CEO to vary the timing" and I don't understand why that takes them outside their legal powers.

JACKSON, MR: In effect, because there's - when the CEO exercises that discretion, he can have no comfort that there will ever be offsets provided if he - - -

MARTIN CJ: But they have to be. There's a condition that requires them to be provided. And if they don't, there's enforcement mechanisms.

JACKSON, MR: Indeed. But that's too late, sir.

MARTIN CJ: Well, it depends how the CEO exercises the discretion, doesn't it?

JACKSON, MR: It - well - - -

MARTIN CJ: If he exercises at all.

JACKSON, MR: If he - it does. But if the CEO exercises the discretion and says, "Well, you can send the bulldozers in, but I really need them by such - by - I really need the land by such and such a date", there's no basis on which to - if the proponent hasn't even identified the potential offsets that it hopes will be acquired in the future, then on what basis can the CEO exercise that discretion?

MARTIN CJ: Well, probably he can't, consistently with the tenor of the report. That's the point I'm making, that if you read the discretion given by clause - by condition 12.2 as a discretion that can only be exercised consistently with the reasoning evident in the report, it wouldn't be open to the CEO to give Main Roads, if you like an open date for compliance. There would have to be something more specific than that you would think.

JACKSON, MR: But - and that's the key point. What - it's difficult to see what the CEO can do to exercise that discretion.

MARTIN CJ: Well, I've given you an example. Minor works
- - -

JACKSON, MR: Well, the surveying - - -

MARTIN CJ: - - - at a time when the CEO is satisfied that Main Roads are on the cusp of providing a plan. That would provide a situation in which the discretion could be validly exercised consistent with the tenor of the report, isn't it?

JACKSON, MR: As I say, I can't - - -

MARTIN CJ: And if there is such a situation, I'm struggling to see how you get beyond jurisdiction.

JACKSON, MR: I can't quibble with the surveyor's pegs. But once a tree is knocked over, that's - in my submission, that's what construction means, because we're dealing with environmental impacts. We can't - that's the purpose of the environment - of the EIA. That's the purpose of part 4
- - -

MARTIN CJ: A tree in the sensitive area, not a tree in the Murdoch Road area?

JACKSON, MR: No. One - that's right. One of - a foraging habitat.

MARTIN CJ: Yes.

JACKSON, MR: Yes. And so in that circumstance, the - I was going to say the Carnaby's - but in those circumstances where the EPA is concerned with environmental impacts of a particular type, significant environmental impacts, construction must mean having an effect on the environment. And so construction can't mean sending in the surveyors if they're on foot. Your Honour, I think I've - - -

MARTIN CJ: Yes.

JACKSON, MR: - - - taken that as far as I can. The only other matter - and this is to go back a step and to make sure I haven't - I've fulfilled all of my duties. I mentioned that I was conscious of your Honour's decision in the Wilderness Society case and the continuing nature of the decision making. The issue of appropriateness use of - the appropriate use of offsets was raised by the EPA in 2010. If I can take you to volume 1 - - -

MARTIN CJ: Yes.

JACKSON, MR: - - - tab 19 at page 417.

MARTIN CJ: Thank you.

JACKSON, MR: Now, this is - and I will provide you with a reference for this proposition - but this meeting was concerned with the nature and terms of the scoping document. And in the middle of the page there, you will see that the EPA stated that the area is a critical asset and as such, environmental offsets may not be appropriate where there are likely to be significant residual adverse impacts. Now, that is in the context of the proponent

being part of that meeting, and you can see that at the top of the page; the proponent provided a presentation.

MARTIN CJ: Yes.

JACKSON, MR: And if you can then turn, your Honour, to tab 21, which is on page 603 - - -

MARTIN CJ: Yes.

JACKSON, MR: - - - you will see that the - that's a letter from the EPA to the commissioner of Main Roads that says:

The draft environment scoping document specifying the scope and content of the public environmental review document was considered by the EPA at meeting 978 on 29 April 2010.

And that's the document I first took you to.

EPA requested several modifications which have been incorporated. This ESD -

That's the scoping document -

...has been approved as an acceptable basis.

So what that - going back to page 417, which is - yes - all of that - keep going, your Honour.

MARTIN CJ: Yes. Going back to page - - -

JACKSON, MR: That's - no. Further. That's the - you're still in the environmental - beg your pardon. I - - -

MARTIN CJ: 417?

JACKSON, MR: Yes. You got that?

MARTIN CJ: Yes.

JACKSON, MR: All right. Very well. That is a warning to the proponent that you've - you might not be able to get there because we're dealing with critical assets. And if at the end of it all, there's a significant impact to those assets, we might not be able to - there will be a question as to whether offsets are appropriate.

MARTIN CJ: Yes.

JACKSON, MR: Now, that issue isn't taken up in the ESD as far as I can see. There's nothing in the environmental scoping document that picks up that appropriateness or the - that issue as a - at all.

MARTIN CJ: Well, what's page 604? Perhaps you could help me with this.

JACKSON, MR: 604. Yes. Hang on. Yes.

MARTIN CJ: This is a memo to Mr Whittaker from Assessment and Compliance Services, whoever they are. Presumably that's within the EPA. And it's South Metro Connect.

JACKSON, MR: That's the - - -

MARTIN CJ: It's Main Roads.

JACKSON, MR: Yes, in effect.

MARTIN CJ: And they said:

South Metro Connect agreed to move references to offsets regarding critical assets.

JACKSON, MR: Yes.

MARTIN CJ: They also pointed out that:

Offsets are not endorsed in situations where projects are predicted to have a significant adverse impact on critical assets.

JACKSON, MR: Yes.

MARTIN CJ: Well, isn't that recognition of precisely the point?

JACKSON, MR: No, that's SMC.

MARTIN CJ: Yes.

JACKSON, MR: Yes.

MARTIN CJ: But this is a memo to the acting chairman.

JACKSON, MR: Yes.

MARTIN CJ: So it wasn't as if the point escaped attention.

JACKSON, MR: No, no. And that's the point that I'm making. In 2010 they're saying this is an issue.

MARTIN CJ: Yes.

JACKSON, MR: But nothing happens after that to indicate that the EPA has turned its mind to that issue because at that stage obviously the impacts of the proposal haven't even been assessed. The Public Environmental Review hasn't been produced.

MARTIN CJ: Yes. Anything else, Mr Jackson?

JACKSON, MR: Thank you, your Honour.

MARTIN CJ: Thank you for your assistance. Thank you, Mr Jackson. Mr Tannin.

TANNIN, MR: May it please the court. I am content to rely on my written submissions in large part.

MARTIN CJ: Yes.

TANNIN, MR: Laced through grounds 1(a) and (c) is this concept that a presumption is there in terms of acceptability or environmental acceptability, none of which is part of the statutory language, insists that it would not be appropriate to construe this Act via that lens and my written submissions address how and why.

MARTIN CJ: Section 44 has to be given some meaning.

TANNIN, MR: Yes.

MARTIN CJ: And 44(2)says:

The report must be -

Well, what's the purpose of the report? The report is to say whether it can go ahead or whether it can't go ahead and if it can go ahead what conditions, if any, should be attached. So you can't construe 44(2) sensibly without construing it as obliging the EPA to consider whether the proposal should be implemented and to make a recommendation in that regard, can you?

TANNIN, MR: That's correct.

MARTIN CJ: So it has to at least do that. Now, the proposition is that it has to do that without regard to the prospect of offsets. That's as I understand it, that's

ground 1A. And you say that can't be winkled out of the statutory language.

TANNIN, MR: Well, the way the ground is articulated imposes a kind of hand brake on the thinking of the EPA that's just simply not imported by the statute and it doesn't make sense. A proposal of its nature might well affect the environment. The whole structure of Part IV of the Act is designed for the EPA to assess whether or not a proposal should proceed, if it can proceed and if it does proceed upon what conditions.

It's an exercise of evaluation in globo, not as a kind of structure that my friend calls linear where you first assume, or presume, and presumption being a kind of a truth or an idea whose truth is considered probable, and use that as the lens through which you make the assessment. Nothing in the Act requires this and that's a complete answer to grounds 1(a) and (c). My friend sought in ground 1(b) to elevate the reports as mandatory relevant considerations.

Well, they're clearly not part of the statutory scheme, they're not subsidiary legislation. They're distinct from subsidiary legislation and, in any event, one can see looking at the report that there's clear regard to each of the criteria that are referred to and I've detailed
- - -

MARTIN CJ: Well, except that the critical policy is that if there is a significant adverse impact upon critical assets then the presumption is that the EPA will recommend against approval and that presumption is nowhere addressed in the report. To the contrary, as Mr Jackson points out, there's no reference to that. Rather, the process of reasoning seems to be because there is a significant impact upon critical assets therefore there must be offsets.

But that is completely contrary to the policy. The conclusion, once you've - and it seems that policy statement number 9 is two questions. Are they critical assets and here are the criteria for defining what critical assets are and is the adverse impact significant? If the answer to both of those is "yes", then the presumption is that there will be no approval and, indeed, some of the flow charts - so we won't even discuss offsets when we get to that.

TANNIN, MR: Well - - -

MARTIN CJ: But that point appears to be entirely missed in the report. The presumption seems to be - it's almost as if it has been put in that category, in which there has been an antecedent decision by a government that this proposal is going ahead. In which case, the function of the EPA is limited to ensuring that maximum mitigation is provided and that all the offsets can be provided.

TANNIN, MR: Well, that's just not so.

MARTIN CJ: Well, isn't that the sense you get from reading the report?

TANNIN, MR: Not at all. These are - these guidelines were, my first point, not mandatory considerations. There is no room at all to determine that somehow there is a presumptive view that the thing or the project will proceed
- - -

MARTIN CJ: Well, leaving aside the question of mandatory considerations. I understand your argument there. The Act doesn't say they're mandatory, a decision-maker can't (indistinct) but there are a number of points in the report that Mr Jackson took me to. It says - for example, just reading from page 2321:

This is considered to be a significant residual impact of the proposal and, hence, would require an environmental offset.

Well, if you read policy statement 9, you would think the "and hence" would be and hence the presumption is that the EPA will not be approving this proposal.

TANNIN, MR: But that disregards what occurred in the application of the tests, which are set out in - I'm just trying to find where I set them out - sorry, I beg your pardon, sir, I've dealt with it at paragraph 32.

MARTIN CJ: Yes.

TANNIN, MR: If you look at the Fandry affidavit at page 192 - - -

MARTIN CJ: Paragraph 32. Yes.

TANNIN, MR: I'm sorry, sir, it's not the right page.

MARTIN CJ: Well, I think your paragraph 32 really acknowledges my point, because between C and D there is missed the step which you find in policy statement C and D

of your submissions on page 12. According to policy statement 9, as I read it, once you've decided that there are residual environmental impacts which remain significant despite all the mitigation conditions that you can reasonably apply, then under policy test 9 the presumption is against approval. But that's not what happened here. The - - -

TANNIN, MR: Well, can I take you - - -

MARTIN CJ: Yes.

TANNIN, MR: - - - to where the tests are applied in - - -

MARTIN CJ: Yes.

TANNIN, MR: At page 71 of the Arrowsmith affidavit in the part dealing with implementation.

MARTIN CJ: Page 71 of the affidavit? Not the report?

TANNIN, MR: It's in the - it's tab 5 of the report - of the position statement.

MARTIN CJ: Well, which volume are you in, Mr Tannin?

TANNIN, MR: The Arrowsmith affidavit.

MARTIN CJ: Well, what volume is that?

TANNIN, MR: Is volume 2.

MARTIN CJ: Volume 2. All right. Yes. This is position statement 9.

TANNIN, MR: Yes, no, this is the position statement.

MARTIN CJ: Yes.

TANNIN, MR: At page 71 we're dealing with the implementation of a position statement.

MARTIN CJ: Yes.

TANNIN, MR: Under the title:

When and how should environmental assessments be approved, the following are key questions about the application of the environmental offsets.

MARTIN CJ: Yes.

TANNIN, MR: They're dealt with in more detail in the companion paper, test 1:

Are these proposed new activities, extensions, etcetera
- - -

MARTIN CJ: Yes.

TANNIN, MR:

- - - likely to have significant environmental impacts?

Test 2:

Before offsets are considered are potential impacts demonstrably addressed following the hierarchy?

MARTIN CJ: Yes.

TANNIN, MR: Then 3:

Are residual environmental impacts expected to have a significant adverse impact on critical or high value assets?

MARTIN CJ: Yes.

TANNIN, MR: 4:

Do residual environmental impacts - - -

MARTIN CJ: No, but you're reading 4 as if it's consequential upon 3. If you read three in its context, go back to page 67 - - -

TANNIN, MR: But - - -

MARTIN CJ: - - - if the answer to 3 is yes then you don't go to four.

TANNIN, MR: - - - can I get you to 5?

MARTIN CJ: But you - - -

TANNIN, MR: 5 says - - -

MARTIN CJ: - - - don't get to 5 either because if you go back to 3, if you go back to page 67, it says:

When the issue is before the EPA there's a presumption against recommending approval for proposals like having significant adverse to critical assets.

It doesn't consider it appropriate, 2:

The EPA does not consider it appropriate to validate or endorse the use of environmental offsets where projects are predicted to have significant impacts to the following -

and then follow the list of assets that are described as "critical." So if the answer to 3 is yes that's the end of - according to the previous statement, that's the end of the test.

TANNIN, MR: But that couldn't be a bar to the assessment and you couldn't read it that there is this presumption that overrides all else.

MARTIN CJ: But that's what it says at page 67.

TANNIN, MR: But what occurred when you look at the report and recommendation of the EPA was this analysis and assessment of all factors involved.

MARTIN CJ: Yes, but no where is there reference to the principles set out at page 67.

TANNIN, MR: No, there's no reference to - - -

MARTIN CJ: That is, that there's a presumption.

TANNIN, MR: - - - that presumption by which they were not bound.

MARTIN CJ: There's just - but, as I say, that under the situation - under position paper 9 once you decide that, despite all mitigation, there is a significant impact on critical assets and then the presumption is against implementation. But in the report, once you've decided that there is a significant impact on critical assets, the presumption is there have to be offsets when position paper 9 says offsets are not the way of managing that kind of environmental harm.

TANNIN, MR: But you cannot read, with respect, the concept of a presumption that there is a significant environmental impact on a critical asset as being an absolute bar to anything.

MARTIN CJ: No, I'm not suggesting it is. But I'm suggesting that if you have a policy, why don't you apply it. The policy is a presumption against - so you - so, of course, the presumption isn't an absolute bar. It's only a presumption. But you start from the point of view of the presumption and then say, in this case, we're not going to apply the presumption because.

TANNIN, MR: But you can - - -

MARTIN CJ: But that's totally missing from the report, isn't it?

TANNIN, MR: It's missing but what is present in the report is a very, very detailed analysis of all of the environmental factors that will be impacted - - -

MARTIN CJ: Yes.

TANNIN, MR: - - - and a method of addressing them - - -

MARTIN CJ: Yes.

TANNIN, MR: - - - which will result - - -

MARTIN CJ: Offsets.

TANNIN, MR: Yes, which will result - - -

MARTIN CJ: But which are the very thing that position paper 9 says will, presumptively, be inappropriate where the impact is significant and adverse upon critical assets.

TANNIN, MR: Or where they are appropriate. But you can't use - - -

TANNIN, MR: No, the position paper says quite clearly that they're not appropriate. But all that the report does is say, well, we've identified that there are significant adverse impacts to critical assets, so let's go and look at the offsets, and that's what position paper 9 says that we're not going to do.

TANNIN, MR: We are in a situation where the authority is not bound by any mandatory considerations that arise from these papers where it has - - -

MARTIN CJ: All right. But that's a different question. I'm asking these questions on the assumption that it is because - - -

TANNIN, MR: Yes, I know.

MARTIN CJ: - - - if it is, then it doesn't seem to have taken the - there's nothing on the face of the report that suggests that the presumption against the use of offsets to render significant adverse impact upon critical assets acceptable has been applied by the EPA, is there?

TANNIN, MR: No.

MARTIN CJ: So if it is bound by the policy, it hasn't taken it into account.

TANNIN, MR: But it was not. Our submission is that it's not required to be.

MARTIN CJ: Yes. So you rely on - in relation to ground 1(b) you say it falls at the first hurdle.

TANNIN, MR: Yes.

MARTIN CJ: But do you accept that if it is mandatory then it falls at - that you fall in the second hurdle?

TANNIN, MR: Yes.

MARTIN CJ: Yes. All right.

TANNIN, MR: As to ground 3 - sorry, 1(c) the application was put to you on the basis that, from the concept of content within section 100 of the Act, one could imply a requirement for a specific form of reasoning in section 44. The answer to that is that, firstly, the concept of content in section 100 is designed to expand and elaborate the scope of an appeal under section 100. That is, it gives a person who objects the power to look at not only the decision but the content, meaning any aspect of its facts. It's not a provision that writes into section 44 any further obligations upon the EPA.

And your Honour gave the example to my friend when considering the extent of appeals that might be made by the public, in the absence of any reasons why they couldn't, for example, complain about offsets being applied at all. And, in fact, here, if you look at the affidavit of Ms Bramwell - that is page 266 - that is volume 3 - - -

MARTIN CJ: Yes.

TANNIN, MR: - - - you will see a summary of the substance of the appeals that were made to the minister, because there was an appeal on the merits I think from memory. The applicant were but two of the appellants. There were 165 in total. And you see in the summary of matters submitted the dot points that accord to the kinds of grounds that your Honour referred to.

That is, whether the EPA properly assessed avoidance mitigation, whether environmental offsets should be used at all, etcetera. So there is confinement whatsoever of the appellate ground, and none occurred in this case, and no basis to read into section 100 the requirements of even addressing this so called presumption within those reasons.

As to ground 2, the complaint at least before lunch was sent to be confined to - not to the deferral of the exercise of the discretion, but, rather, the fact that it has been vested in the CEO.

MARTIN CJ: So you're talking about ground 3 I think.

TANNIN, MR: Ground 3. I'm sorry.

MARTIN CJ: Yes.

TANNIN, MR: And that, in our submission, is easily answered in our written submissions, but, in effect, there is nothing in that condition that authorises the CEO to waive a condition or otherwise compromise it. And that being the case, that ground can't succeed either.

MARTIN CJ: Ground 2(b). Do you want to say anything about that? That is the suggestion that the proposals - proposal was assessed on the basis of the environmental elements being addressed in isolation rather than in combination.

TANNIN, MR: Well, again, that is not apparent anywhere in the report. You have - - -

MARTIN CJ: Well, the structure of the report is, here is the damage to the wetland - and it's how many hectares - so therefore we need an environmental offset for that. And it's - it has to be this area. And then it says, "All right. Here is black cockatoo. And it's this area and has to be that. But nowhere is it - nowhere in the report does it say, "Well, we've got the black cockatoo. We've got Carnaby's cockatoo. We've got the wetlands. We've got noise."

Putting it altogether is 100 hectares here for Carnaby's cockatoo, and another 80 here for the black cockatoo, and another seven here for the wetlands. Is that going to, in combination, be sufficient to overcome the damage to all of these factors in one site?

TANNIN, MR: Well, the report is structured to list all of the factors that were taken into account. It's not fair or appropriate to read into it a failure to look at the entirety of the transaction. It's just not capable of being so delineated. If you take the applicant's case at its highest, they complain - and I'm quoting that:

The EPA did not ask itself whether the proposals impact on the environment as a whole was acceptable. Rather, it limited its consideration to the proposals impact on different parts of the environment.

Now, this whole idea of environmental acceptability, and I'm simply repeating what's in our grounds 1(a), isn't part of the statutory language. They're creating a test for the determination of matters which is simply not there, and you can't accept that the court can legitimately reason in that way. There's no basis to assume that the authority here ignored any particular factor or the accumulation of those factors. I would - I was going to say in terms of the reasons, one of the judgments that your Honour cited to my learned friend in the course of the argument this morning was Seiffert, upon which - - -

MARTIN CJ: Yes.

TANNIN, MR: - - - you presided. What was striking about the Seiffert and Kirby and other judgments was that the tribunal or body that was the subject of those proceedings had simply not given any reasons. It was just an absolute absence. Contrast that with this case. But we're not talking about something that is merely compliant with section 44 in terms of the making of a recommendation. You're talking about a very, very detailed environmental report with calculations, with key considerations noted, with a very, very careful regard to what was occurring, full understanding of the environmental impact of what was proposed and a full understanding of the need to assess it and how it might proceed and what is imposed are a very, very rigorous set of conditions which will have a net environmental benefit. That is - and it's right through the report.

It's not even remotely like the Seiffert kind of case where no reasons are given. There are very sound reasons given here and this court can't embark upon the kind of risk assessment that the applicants are actually seeking you to do, to imply failures in the thinking of the EPA that just simply aren't fairly demonstrated on any of the documents. Ground 4, I think, follows - - -

MARTIN CJ: Well, you accept if any of the other grounds get up and the result is invalidity of the report, then the Minister had no jurisdiction?

TANNIN, MR: Yes. I mean, there are cases sometimes where that doesn't matter but it would - - -

MARTIN CJ: You accept for this case - - -

TANNIN, MR: - - - in this.

MARTIN CJ: In this. Yes.

TANNIN, MR: It would in this. I have not dealt - I won't deal with the question of standing. There was a particular nuance on that and there's also another procedural issue about leave to appeal on the basis of that and I have dealt with - - -

MARTIN CJ: You're happy for us to move on to the more substantive issues.

TANNIN, MR: Of course.

MARTIN CJ: Yes. All right.

TANNIN, MR: Thank you.

MARTIN CJ: Thank you, Mr Tannin. Before you sit down, Mr Tannin, because of the public interest in this case I was proposing, subject to any submissions you might wish to make, to make the transcript of today's hearing available on the website of the court together with documents necessary to make that intelligible to readers which would be the amended application, the written submissions of the parties and the four key documents in the case which are, I think, the three policy statements to which reference is made in ground 1(b) and the report itself. Would there be any objection to those - they're all public domain documents.

TANNIN, MR: That's right.

MARTIN CJ: Yes. All right. Mr Jackson, do you want to comment on that proposal?

JACKSON, MR: No objection from me, sir. Look, the - if I can be heard very briefly - - -

MARTIN CJ: Yes, certainly.

JACKSON, MR: - - - in reply. Just on the point about the reasons. The fact that the EPA has provided some reasons and that those reasons provide the basis on which some appellants have appealed can't be relied on to suggest that the EPA is not obliged to provide reasons more generally. It goes no further than that, but that, in my submission, is a relevant point. What's complained about here is that there is no explanation as to how the EPA arrived at its conclusions about offsets. There's no reasons about that at all. That's what we say is inadequate here and that's why there is no appeal grounds, because there's - as I understand it - - -

MARTIN CJ: But it really links into ground 1(b) though, doesn't it? Because unless you get the policy statement in as a mandatory relevant consideration - - -

JACKSON, MR: Indeed.

MARTIN CJ: - - - you - - -

JACKSON, MR: Indeed.

MARTIN CJ: It's - - -

JACKSON, MR: No. I accept that.

MARTIN CJ: Yes.

JACKSON, MR: Yes. That was all, sir.

MARTIN CJ: Yes. All right, thank you.

JACKSON, MR: Please the court.

MARTIN CJ: All right. Well then, you don't wish to be heard about the publication? You're happy with publication?

JACKSON, MR: No, I'm happy with the publication. Thank you, your Honour.

MARTIN CJ: Yes. All right. Well, I'm grateful to counsel for their assistance. I will, of course, have to reserve my decision so that I can give detailed consideration to all the arguments that I have received today and I will publish my reasons as soon as I can. In the meantime, the court will adjourn.

AT 3.00 PM THE MATTER WAS ADJOURNED ACCORDINGLY

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