SUPREME COURT OF QUEENSLAND

CITATION:	*Whitsunday Residents Against Dumping Ltd v Chief Executive, Department of Environment and Heritage Protection & Anor* [2017] QSC 121
PARTIES:	**WHITSUNDAY RESIDENTS AGAINST DUMPING LTD** (applicant) **v** **CHIEF EXECUTIVE, DEPARTMENT OF ENVIRONMENT AND HERITAGE PROTECTION** (first respondent) **and** **ADANI AUSTRALIA COAL TERMINAL PTY LTD** (second respondent)
FILE NO:	5508 of 2016
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	15 June 2017
DELIVERED AT:	Brisbane
HEARING DATE:	7 October 2016
JUDGE:	Daubney J
ORDERS:	**(1) The application for statutory order for review is dismissed;** **(2) I will hear the parties as to costs.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – IRRELEVANT CONSIDERATIONS – FAILURE TO OBSERVE STATUTORY PROCEDURES – JURISDICTIONAL MATTERS – ERROR OF LAW – where the second respondent applied to carry out environmentally relevant activities under the *Environmental Protection Act* 1994 (Qld) – where a delegate of the first respondent approved the application – where the applicant seeks statutory orders of review of the delegate's decision pursuant to the *Judicial Review Act* 1991 (Qld) – whether the decision-maker failed to take a relevant matter into consideration – whether the decision-maker followed procedural requirements – whether the decision-maker had authority to make the decision –

	whether the decision-maker erred in law in making the decision
	Environmental Protection Act 1994 (Qld)
	Environmental Protection Regulation 2008 (Qld)
	Judicial Review Act 1991 (Qld)
	Friends of Hinchinbrook Society Inc v Minister for Environment (1997) 69 FCR 28 *Minister for Immigration and Ethnic Affairs v Wu* (1996) 185 CLR 259 *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11
COUNSEL:	S J Keim SC and D C Fahl for the applicant R M Derrington QC for the first respondent D G Clothier QC and S J Webster for the second respondent
SOLICITORS:	Environmental Defenders Office (Qld) Inc for the applicant Crown Law for the first respondent Ashurst for the second respondent

Introduction

[1] On 6 May 2015, the second respondent made an application under the *Environmental Protection Act* 1994 (Qld) ("*EPA*") for a site specific Environmental Authority for prescribed environmentally relevant activities in a coal export terminal proposed to be developed by the second respondent at the Port of Abbot Point.

[2] On 7 December 2015, a delegate of the first respondent[1] made a decision under s 172(2)(a) of the *EPA* to approve the second respondent's application for these two environmentally relevant activities, namely bulk material handling and sewage treatment.

[3] On 3 March 2016, the applicant requested a statement of reasons from the decision-maker.

[4] On 6 May 2016, the decision-maker's statement of reasons was issued.[2] The relevant chronology is set out in that statement of reasons:

> "On **6 May 2015**, Adani made an application for a site specific EA for a prescribed ERA for the T0 project.

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1 The relevant powers of the Chief Executive of the Department had been delegated under s 518 of the *EPA*.
2 See annexure SPR-3 of the affidavit of Sean Patrick Ryan dated 3 June 2016.

> On **17 June 2015**, EHP sent an information request to Adani in accordance with section 140 of the EP Act. This information request sought more detail on how stormwater and sewage effluent will be managed on site.
>
> On **25 September 2015**, a response to the information request was provided by Adani.
>
> The EA application was not publicly notified as the notification stage under the EP Act did not apply (see section 149 of the EP Act).
>
> On **21 October 2015**, EHP extended the decision date for the application by twenty (20) business days in accordance with section 168(2) of the EP Act to allow additional time to consider Adani's response to EHP's information request and to allow time for a compliance inspection to be conducted by EHP at the adjacent Abbot Point T1 facility.
>
> On **23 November 2015**, EHP sought and received written agreement from Adani to extend the time for EHP to make its decision by a further ten (10) business days in accordance with section 168(4) of the EP Act, to allow time for Adani and EHP to generally agree to the conditions proposed by EHP.
>
> On **7 December 2015**, I decided to approve the application for a site specific EA for Abbot Point T0 subject to conditions in accordance with section 172 of the EP Act. The EA was issued to Adani on **14 December 2015** in accordance with section 195(d) of the EP Act."

[5] The applicant has now applied, pursuant to the *Judicial Review Act* 1991 (Qld) ("*JRA*"), for statutory orders of review of the decision of 7 December 2015. It was conceded that the applicant has sufficient standing to bring this application.

Statutory context

[6] There was no issue before me as to the relevant statutory context.

[7] Section 3 of the *EPA* provides:

> "The object of this Act is to protect Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends (***ecologically sustainable development***)."

[8] By s 4(1), the "protection of Queensland's environment is to be achieved by an integrated management program that is consistent with ecologically sustainable development". The subsequent subsections of s 4 then describe the cyclical nature of the integrated management program and describes the phases of that program, namely:

(a) phase 1 – establishing the state of the environment and defining environmental objectives;

(b) phase 2 – developing effective environmental strategies;

(c) phase 3 – implementing environmental strategies and integrating them into efficient resource management;

(d) phase 4 – ensuring accountability of environmental strategies.

[9] Relevant for present purposes is the *EPA's* concern with "environmentally relevant activities". Section 18 defines the activities which are environmentally relevant activities, and s 18 and s 19, read together, enable regulations to be made which prescribe an activity as an "environmentally relevant activity". Each of these is a "prescribed ERA".[3]

[10] It was not in issue that the second respondent's application concerned prescribed ERA's under Schedule 2 of the *Environmental Protection Regulation* 2008 (Qld) ("*the Regulation*").

[11] In order to undertake an activity which is a prescribed ERA, a person must hold an "Environmental Authority" ("EA") which approves that activity.[4]

[12] The *EPA* prescribes an assessment process for EA applications. Section 114 provides:

> "**114 Stages of assessment process**
>
> (1) The assessment process for applications for environmental authorities involve the following possible stages –
> - application stage
> - information stage
> - notification stage
> - decision stage.
>
> (2) Not all stages, or all parts of a stage, apply to all applications."

[13] Section 121 of the *EPA* identifies different types of applications for an EA, including "site-specific applications", which, in turn, is defined in s 124. It was not in issue that the second respondent's application was a "site-specific application".

[14] Section 125 of the *EPA* sets out, in mandatory terms, the general requirements for an application for an EA. These include that the application must:

> "(a) be made to the administering authority; and
>
> (b) be made in the approved form; and

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3 Section 106.

4 See definition of "Environmental Authority" in *EPA* Schedule 4 and *EPA* s 195.

(c) describe all environmentally relevant activities for the application …"

[15] Subsequent sections of the *EPA* then provide for the "information stage" concerning an application. This is the time during which the administering authority has the opportunity to ask the applicant for further information needed to assess the application.[5]

[16] After the "information stage" comes the "decision stage", which is regulated by *EPA* Chapter 5, Part 5. Section 172, which applies specifically to a "site-specific application" relevantly provides:

"(2) The administering authority must decide that the application –

(a) be approved subject to conditions; or

(b) be refused."

[17] Section 176 then sets out the criteria for the decision-maker in relation to a site-specific application. The relevant provision is s 176(2) which provides:

"(2) In deciding the application, the administering authority must –

(a) comply with any relevant regulatory requirement; and

(b) subject to subparagraph (a), have regard to each of the following –

(i) the application;

(ii) any standard conditions for the relevant activity or authority;

(iii) any response given for an information request;

(iv) the standard criteria."

[18] In order to identify the "relevant regulatory requirements" with which the administering authority must comply under s 176(2)(a), it is then necessary to turn to the *Regulation*.

[19] Section 50 of the *Regulation* provides that Chapter 4 Part 2 of the *Regulation* applies to the administering authority for making any "environmental management decision". An "environmental management decision" is a decision under the *EPA* for which the administering authority making the decision is required to comply with regulatory requirements.[6] Accordingly, a decision on a site-specific application for an EA is an "environmental management decision".

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5 Section 137.

6 *Regulation*, s 48.

[20] Section 51 of the *Regulation* provides:

> "**51 Matters to be complied with for environmental management decisions**
>
> (1) The administering authority must, for making an environmental management decision relating to an environmentally relevant activity, other than a prescribed ERA –
>
> (a) carry out an environmental objective assessment against the environmental objective and performance outcomes mentioned in schedule 5, part 3, tables 1 and 2; and
>
> (b) consider the environmental values declared under this regulation; and
>
> (ba) if the activity is to be carried out in a strategic environmental area – consider the impacts of the activity on the environmental attributes for the area under the *Regional Planning Interests Act 2014*; and
>
> (c) consider each of the following under any relevant environmental protection policies –
>
> (i) the management hierarchy;
>
> (ii) environmental values;
>
> (iii) quality objectives;
>
> (iv) the management intent; and
>
> (d) if a bilateral agreement requires the matters of national environmental significance to be considered – consider those matters.
>
> (1A) However, the administering agency is not required to consider the matters mentioned in subsection (1)(d) if the Coordinator-General has, under the State Development Act, section 54Y, issued an environmental approval for the undertaking of all or part of the coordinated project to which the activity relates.
>
> (2) For an environmental management decision relating to a prescribed ERA, the administering authority making the decision must –
>
> (a) carry out an environmental objective assessment against the environmental objective and performance outcomes mentioned in schedule 5, part 3, table 1; and
>
> (b) consider the matters mentioned in subsection (1)(b), (ba) and (c)."

[21] As the present application concerned a "prescribed ERA", s 51(2) was the relevant provision.

[22] Turning then to Schedule 5 of the *Regulation*, Part 1 of that schedule sets out the definitions of terms used in the schedule. Part 2 of Schedule 5 contains "general matters to be addressed by environmental objective assessment", and provides:

"**Part 2 General matters to be addressed by environmental objective assessment**

General information

(1) The assessor must decide the extent to which the application achieves each environmental objective relevant to the application.

(2) In assessing whether the application achieves the relevant environmental objective, the assessor must decide whether the activity the subject of the application achieves item 1 of the performance outcome stated for the environmental objective.

(3) If the assessor is not satisfied the activity the subject of the application achieves item 1 of the performance outcome for the relevant environmental objective, the assessor must decide whether the activity achieves the relevant item 2 performance outcomes stated for the environmental objective.

(4) The application achieves the relevant environmental objective if the assessor is satisfied the activity the subject of the application achieves –

(a) item 1 of the performance outcome for the relevant environmental objective; or

(b) item 2 of the performance outcomes for the relevant environmental objective.

(5) If the assessor is not satisfied the application achieves a performance outcome for the relevant environmental objective, the assessor may still decide the application achieves the relevant environmental objective if the application includes alternative measures for the activity the subject of the application to achieve the environmental objective.

Note –

Nothing in this schedule prevents the assessor from granting an application that the assessor considers does not satisfy each environmental objective mentioned in this schedule or prevents the assessor from refusing to grant an application the assessor is satisfied achieves each environmental objective mentioned in this schedule.

Assessing whether application minimised adverse effects

(6) If a performance outcome requires the assessor to assess whether an adverse effect has been minimised, an adverse effect has been minimised if the assessor is satisfied all reasonable and practical measures have been taken to minimise the adverse effect.

(7) In deciding whether all reasonable and practical measures have been taken to minimise the adverse effect, the assessor must consider the following matters –

(a) the nature of the harm or potential harm;

(b) the sensitivity of the receiving environment;

(c) the current state of technical knowledge for the activity;

(d) the likelihood of successful application of different measures that might be taken to minimise the adverse effects;

(e) the financial implications of the different measures as they would relate to the type of activity;

(f) if the adverse effect is caused by the location of the activity being carried out, whether it is feasible to carry out the activity at another location."

[23] Schedule 5, Part 3 is headed "Environmental objectives and performance outcomes". Schedule 5, Part 3, Table 1 is entitled "Operational Assessment" and specifies environmental objectives and performance outcomes under headings for air, water, wetlands, groundwater, noise, waste and land. Each topic has a discrete "environmental objective" and "performance outcomes". Each "environmental objective" is drafted such that the assessment to be made is whether the "activity will be operated in a way that protects the environmental values" of each topic. The performance outcomes listed for each topic are intended to minimise specific adverse effects of the activities.

[24] So, for example, under Schedule 5, Part 3, Table 1, the environmental objective and performance outcomes in relation to air are as follows:

"**Air**

Environmental Objective
The activity will be operated in a way that protects the environmental values of air.

Performance Outcomes
1 There is no discharge to air of contaminants that may cause an adverse effect on the environment from the operation of the activity.
2 All of the following –
(a) fugitive emissions of contaminants from storage, handling and processing of materials and transporting materials within the site are prevented or minimised;
(b) contingency measures will prevent or minimise adverse effects on the environment from unplanned emissions and shut down and start up emissions of contaminants to air;
(c) releases of contaminants to the atmosphere for dispersion will be managed to prevent or minimise adverse effects on environmental values."

[25] Schedule 5, Part 2, paragraph (4) states that the application will achieve the "relevant environmental objective if the assessor is satisfied the activity the subject of the application achieves" either Item 1 or Item 2 of the performance outcomes for the

relevant environmental objective. In that regard, each of the topics of Schedule 5, Part 3, Table 1 lists two performance outcomes. I have set out above the performance outcomes for "air". As another example, the performance outcomes for "wetlands" are:

> "1 There will be no potential or actual adverse effect on a wetland as part of carrying out the activity.
>
> 2 The activity will be managed in a way that prevents or minimises adverse effects on wetlands."

[26] In respect of each topic, the assessor needs to be satisfied that the activity achieves either one of the specified performance outcomes. However, the assessor may still decide that the application achieves the environmental objective if the application includes "alternative measures … to achieve the environmental objective".[7] Schedule 5, Part 2, paragraph (6) provides that where a performance outcome requires an adverse effect to be minimised, it will be taken as minimised if "the assessor is satisfied all reasonable and practical measures have been taken to minimise the adverse effect".

[27] In short, by *EPA*, s 176(2)(a) and *Regulation*, s 51(2)(a), the decision-maker in this case was required, inter alia, to "carry out an environmental objective assessment against the environmental objective and performance outcomes mentioned in Schedule 5, Part 3, Table 1".

[28] The applicant's case for judicial review effectively turns on whether this requirement was properly observed by the decision-maker in this instance.

The statement of reasons

[29] The statement of reasons dated 6 May 2016 commenced with a brief statement of the background to the decision, the chronology (which I have reproduced above) and a list of the "material and other evidence" which the decision-maker considered. This included reference to the "regulatory requirements" set out in s 51 of the *Regulation*, as well as the conditions to be considered for environmental management decisions under s 52 and the matters relevant to the imposition of monitoring conditions listed in s 53.

[30] The statement of reasons then set out the decision-maker's findings of fact. The background factual matters were not in issue before me, and need not be set out here at length. The decision-maker's summary included some further detail of the proposed

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7 Schedule 5, Part 2, paragraph (5).

bulk handling material and sewage treatment activities which were the subject of the application.

[31] The decision-maker then turned to address the specific issues relevant to a site-specific application. Under the heading "A. Regulatory Requirements pursuant to sections 51, 52 and 53 of [the *Regulations*]", the decision-maker relevantly said:

> "In complying with the regulatory requirements listed under sections 51, 52 and 53, of the EP Reg (as required under section 176(2)(a) of the EP Act), I considered the EHP guideline titled: '*Assessment requirements for making a decision for an environmental authority for an environmentally relevant activity' (EM1127)*. In accordance with this guideline a detailed assessment of the possible impacts on environmental values, their nature, scale and likelihood was undertaken. I also assessed whether any of those impacts that were identified might cause serious environmental harm and what the likelihood of that harm was.
>
> I carefully considered the environmental values located in the T0 project area and what the level of impact of the prescribed ERAs on those environmental values would be. I also took into account any management objectives for those values to manage the impacts proposed by the prescribed ERAs for the T0 project.
>
> Given that the T0 project underwent an EIS assessment under the EPBC Act, I carefully considered the outcomes of that assessment, and the processes used to develop conditions for the project. Where I have included conditions in the EA that set the outcome the prescribed ERA must achieve, I have applied the precautionary principle to ensure environmental risks will be managed appropriately.
>
> I have formed the view that based on the information listed above, and the information contained within the EHP assessment report completed for the site specific EA application, the conditions I have placed on the EA adequately address the regulatory requirements set out in sections 51, 52 and 53 of the EP Reg. In particular, I consider that the conditions are appropriate to manage the potential impact of the prescribed ERAs on the environment and any sensitive receptors.
>
> Material facts which led to that finding were:
>
> 1. A detailed environmental objective assessment was undertaken … against the environmental objective and performance outcomes listed in the EP Reg, schedule 5, part 3, table 1. This assessment forms part of EHP's internal assessment process, and was provided to me as the delegated decision maker to inform my decision. …"

[32] The statement of reasons then referred to the "standard criteria, pursuant to Schedule 4" of the EPA. In that context, the decision-maker confirmed having considered, amongst other things, the assessment report completed for the site-specific application. She said:

> "I have used these documents and information to develop EA conditions for the prescribed ERAs for the T0 project. I consider that these documents provide a very detailed assessment of the T0 project and its potential impacts on the environment and provide sufficient information to assist me in effectively conditioning the EA for the prescribed ERAs for the T0 project."

[33] Further, the decision-maker said:

> "I have considered the environmental values of the receiving environment surrounding the project site and how these will be impacted from the construction and operation of the proposed project. In relation to the character, resilience and values of the receiving environment, I have considered the environmental commitments, mitigation and management measures which Adani has proposed as part of the application for the project and in the EIS. I have formed the view that these commitments and measures, along with the conditions placed on the EA will adequately manage impacts of the project.
>
> The conditions incorporated on the EA are outcome focussed with some prescription to protect social (via a complaint process), air (dust and PM10), noise, water, land and biodiversity values. Outcome focussed conditions are written to achieve a certain goal, such as condition E1 which states '*Contaminants that will, or have the potential to cause environmental harm must not be released directly or indirectly to any surface waters or groundwater, except as permitted under the conditions of this environmental authority'*. In this example, the goal is to protect the environmental values of surface and groundwater by restricting the release of contaminants in the way described by the condition."

[34] The decision-maker then went on to list other matters considered by her in making her decision, including best practice environmental management, financial implications, the public interest, proposed site management plans, and relevant management plans and other systems that will form part of Adani's Environmental Management System.

[35] Under the heading "Reasons for decision", the decision-maker said:

> "After careful consideration of the material and other evidence identified above, and having made the above findings of fact, I decided to approve the site-specific EA application for the Abbot Point T0 Phase 1 project, subject to conditions, under s 172(2)(a) of the EP Act.
>
> I acknowledge that the proposed project will result in activities close to the GBRWHA and CVW and there is potential for noise, air and surface water impacts as a result. I also acknowledged that water will be managed onsite so that there will be no direct releases of water to the environment.
>
> With regard to the EIS process, I have considered the fact that the project has undergone a comprehensive environmental impact assessment under the EPBC Act. I have considered that the Commonwealth approved the EIS subject to conditions.
>
> In making my decision I have considered all of the relevant regulatory requirements, the standard criteria, other relevant provisions of the EP Act, any subordinate legislation, and any relevant EHP policies and guidelines.
>
> I consider that the monitoring, recording, reporting and mitigation measures required by the conditions of the EA will ensure there are sufficient measures in place to manage the environmental issues and impacts resulting from prescribed ERA's proposed as part of the Abbot Point T0 project."

The environmental objective assessment

[36] A copy of the environmental objective assessment to which the decision-maker referred in the reasons for decision was in evidence before me.[8] It was headed "Assessment of a site-specific application", and was clearly the product of a "pro forma" document which was supplied for completion by assessors. After identifying details of the proposed project, the assessment report set out a summary of the proposed operation, and referred specifically to the external documents to which the assessor had regard for the purposes of the assessment.

[37] The next heading on the form was "(2) Environmental values and associated environmental impacts". The "pro forma" then set out a number of questions or topics which the assessor needed to address. In brief, those were:

(a) a listing of all of the environmental risks, proposed discharges or emissions as a result of the activity and highlighting the level of risk;

(b) identifying the environmental values that may be affected by the identified risks/discharges;

(c) identifying whether mitigation measures had been proposed and whether an acceptable level of impact had been determined if discharges/emissions are unavoidable; and

(d) whether any conditions were needed for the approval.

[38] In the assessment under the first of these topics, the assessor identified the risks relating to air, water, sewage, noise and vibration, waste, and land and biodiversity, and provided a commentary in relation to each of those identified risks.

[39] Under the second topic, the assessor identified, and provided commentary with respect to, each of the identified risks, namely air, water, noise and vibration, waste and land and biodiversity.

[40] Then, under subparagraph (c), the assessor referred to the proposed mitigation measures and whether an acceptable level of impact had been determined if discharges/emissions were unavoidable. In that regard, it is sufficient for present purposes to reproduce the following part of the assessment:

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[8] See exhibit MW-1 of the affidavit of Menaka Wickramasinghe dated 6 July 2016.

> "The applicant has detailed mitigation measures that will be adopted during the operation of the project to minimise impacts to environmental values. Mitigation measures can be found in more detail in each corresponding EIS chapter, and through various sections of the report provided with the application. However, the management hierarchy has been considered as per the relevant EPPs and *Waste Reduction and Recycling Act 2011* for the applicable environmental values:
>
> Air
> *Avoid*: Air emissions cannot be avoided as the movement of coal and operation of equipment using diesel are essential to the operation of the port.
> *Recycle*: there is no option to recycle air on site.
> *Minimise*: The holder of the EA is required to minimise contaminant releases to air in order to comply with the EA limits. PM10 has an objective that is to be achieved, which is based on the EPP Air (50µg/m³ over a 24 hour averaging time). An objective for dust was included at the level prescribed within the administering authority's guideline (120mg/m²/day averaged over one month).
> *Manage*: Where PM10 and dust exceed the limits prescribed in the EA, the holder of the EA is required to ensure reasonable and practical measures are implemented to minimise environmental harm. The impacts can be managed through the development and implementation of an air monitoring program which is required within the EA.
>
> The environmental objective and performance outcome for air, as per Schedule 5, Part 3, Table 1 of the EP Reg is:
> - Environmental objective: The activity will be operated in a way that protects the environmental values of air.
> - Performance outcome: All of the following –
>   a) Fugitive emissions of contaminants from storage, handling and processing of materials and transporting materials within the site are prevented or minimised;
>   b) Contingency measures will prevent or minimise adverse effects on the environment from unplanned emissions and shut down and start up emissions of contaminants to air;
>   c) Releases of contaminants to the atmosphere for dispersion will be managed to prevent or minimise adverse effects on environmental values."

[41] Commentary in a similar format was then set out with respect to each of "noise and vibration", "waste", "water and sewage" and "land and biodiversity".

[42] In relation to the fourth topic, the assessment set out a consideration of conditions which needed to be placed on the approval.

[43] Under the "pro forma", there were then several tables completed by the assessor relating to a land use assessment and consideration of the "standard criteria", followed by a listing of other assessment considerations which had been taken into account. There was then a commentary on the consultations which had been undertaken.

[44] The assessment report then set out at length a table concerning the sorts of conditions which needed to be considered, together with a commentary on whether the particular conditions were considered necessary or not necessary for the particular matter.

[45] The assessment report concluded with a recommendation that the application be approved.

The date of the environmental objective assessment

[46] The assessment was signed by the relevant assessing officer on 7 December 2015, i.e. the same date as the decision-maker's decision to approve the application for the site-specific EA. The decision-maker's signature on the assessment report, signifying her approval of the assessor's recommendation based on the reasons stated in the report, was dated 10 December 2015.

[47] This anomaly was initially relied on by the applicant as indicative, in effect, of the proposition that, given the disparity in the dates, the decision-maker could not properly have had regard to the environmental objective assessment when she made the decision on 7 December 2015. Considerable argument was advanced on that basis, particularly in the applicant's assertion that the decision-maker had failed to take account of a relevant consideration.

[48] Further evidence was adduced from the decision-maker. It is appropriate that her explanation of the discrepancy be recorded.

[49] In an affidavit filed before me,[9] the decision-maker described the assessment report as a document which "brings together the matters which have to be considered for the purposes of making a decision in relation to a site-specific application for an environmental authority". She said that assertions by the applicant to the effect that she did not receive a draft of the assessment report before making her decision, or that she did not have time to consider the report before making her decision, were untrue. The decision-maker said that she directed a member of her team to prepare a draft assessment report for consideration. That preparation necessitated regular consultations with the decision-maker, when she would review the work done and discuss the issues being investigated with the team member who was conducting the assessment. The

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[9] See the affidavit of Katherine Jean Bennink sworn 19 September 2016.

decision-maker said that she was provided with a final draft of the assessment report on 7 December 2015, following which she met with the author of the report and clarified aspects of it. She confirmed that, when she made her decision, she was already very familiar with the report's general content and the circumstances concerning the issues requiring consideration.

[50] In explaining the reason why she signed the assessment report three days after she had made her decision, the decision-maker explained that, due to matters concerning the applicant's permit, she was required to issue a "notice of decision" under EPA s 198(3)(b) as well as the EA to the second respondent. Those steps had to be taken within five days of the decision being made. As a consequence, a notice of decision was prepared. It was at this point, just prior to the notice being issued, that the decision-maker attended to all documentation relating to the decision, including signing the notice and the assessment report. The decision-maker said that she had agreed with and approved the content of the assessment report, and the EA for that matter, on 7 December 2015, prior to making the decision.

[51] The decision-maker also deposed to the fact that she was aware at all material times that, regardless of what recommendation may have been made by a staff member, the decision under s 172 was hers to make. She confirmed her understanding of the requirement that she exercise the power to make a decision under s 172 independently and according to the legislation, and said that this is what she did in the present case.

[52] In the hearing before me, that explanation was not challenged in any way by the applicant. Indeed, in argument senior counsel for the applicant effectively abandoned reliance on the argument arising out of the discrepancy of the dates. In those circumstances, it is unnecessary for me to consider that aspect further.

Criticisms of the environmental objective assessment

[53] The applicant's arguments for judicial review were founded principally in criticisms it levelled against the environmental objective assessment.

[54] The kernel of those criticisms were set out in the following passage of the applicant's written submissions[10]:

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[10] At para 62.

"(d) the Assessment Report, while acknowledging the requirements of the environmental objective assessment (by reproducing the relevant environmental objective and one of the two performance outcomes for each environmental value) makes no discernible attempt to carry out the assessment in the manner envisaged by part 2 of the Schedule 5 of the Regulation. On any reading, it is not possible to find where the assessor has:

- decided the extent to which the application achieves each relevant environmental objective;
- assessed whether the relevant environmental objective is achieved, whether by meeting item 1 or 2 of the performance outcome;
- assessed whether an alternative measure is proposed for the performance outcomes and, if so, whether it serves to meet the environmental objective; or
- assessed whether, in the case where a performance outcome requires the minimisation of adverse effects, reasonable and practical measures have been taken to minimise the adverse effect, by considering the mandated criteria."

[55] To similar effect was the following further submission made by the applicant:

"91. A consideration of Part 2 of Schedule 5 – 'General matters to be addressed by environmental objective assessment' is illustrative of the point. Part 2 clearly operates as an instruction as to how the assessment against environmental objectives contained in Part 3 Table 1 is to be approached. When these statutory instructions, clearly expressed, are considered, the following conclusions are apparent about the Assessment Report:

(a) there is no evidence of a decision of the extent to which the application achieves each environmental objective;

(b) there is no mention, in respect of all but one of the objectives, of the first performance outcome. It follows that there was no decision as to whether the activity achieves Item 1 of the performance outcome stated for those objectives;

(c) in any event, there is no decision as to whether the activity achieves the relevant item 1 objective;

(d) there is no decision as to whether the activity achieves the relevant Item 2 performance outcome;

(e) there is no recognition or assessment or statement of satisfaction as to whether either Item 1 or 2 of the performance outcomes are achieved;

(f) there is no engagement in the process of understanding whether alternative measures for the activity are proposed to achieve the environmental objective. In this respect, it is correct to say that the Reasons and the Assessment Report identify proposed conditions and commitments but there is simply no attempt on the part of the author, or the decision-maker, to discern whether what is proposed amounts to acceptable measures to achieve the environmental objective; and

(g) there is no process of assessing whether reasonable and practical measures have been taken to minimise an adverse effect in the manner prescribed."

[56] In my view, on a proper and fair reading of the environmental objective assessment as a whole, these criticisms are unfounded. In that regard, I accept the submission made by senior counsel for the second respondent that the assessment report was not a statement of reasons, but was an internal document prepared under the *Regulation* to record the results of an assessment undertaken and conclusions reached by a departmental officer or employee. In that context, the normal principles which apply to construing statements of reasons beneficially and not "within an eye keenly attuned to the perception of error"[11] apply all the more to a document of this kind, being an internal administrative record.

[57] I have set out above the scheme by which the assessment report canvassed considerations relating to each of the topics identified in Schedule 5, Part 3, Table 1 as needing operational assessment. The assessment report needs to be read as a whole, and doing so, and having regard to the commentary provided by the assessor, reveals the assessor's identification and consideration in respect of each of the topics of:

(a) the environmental risks;

(b) the environmental values;

(c) the mitigation measures; and

(d) the necessity for any conditions.

[58] The assessor sufficiently exposed the matters to which the assessor had regard in respect of each of the topics, and the conclusions which flowed from that consideration.

[59] It is also simply not right for the applicant to say that there is no evidence of a decision of the extent to which the application achieved each environmental objective. Under Schedule 5, Part 2, paragraph (4) each relevant environmental objective was taken to be met if the assessor was satisfied that the activity the subject of the application achieved either Item 1 or Item 2 of the performance outcomes for the relevant environmental objective. It is clear on the face of the commentary that the assessor considered in respect of all of the objectives, except "waste", that Item 2 of the performance outcomes

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[11] *Friends of Hinchinbrook Society Inc v Minister for Environment* (1997) 69 FCR 28, per Sackville J at 57 – 58; see also *Minister for Immigration and Ethnic Affairs v Wu* (1996) 185 CLR 259 at 272 and *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11 at [8].

for each relevant environmental objective had been achieved. In respect of "waste" it was noted that both of the prescribed performance outcomes had been achieved.

[60] That this was the import of the assessment report is obvious from the extract I have set out above concerning "air". In the relevant commentary, the first thing that is noted is that air emissions cannot be avoided. Performance outcome Item 1 for "air" is that there is "no discharge to air of contaminants that may cause an adverse effect on the environment from the operation of the activity". It is obvious, on the face of the commentary, that this performance outcome cannot be met. What the assessor then did was consider whether the elements of Item 2 of the performance outcomes for "air" had been achieved.

[61] The final paragraph of that part of the commentary was not a mere recitation of the relevant "environmental objective" and "performance outcome" as specified in Schedule 5, Part 3, Table 1 for "air". Rather, it was a statement of conclusion by the assessor that each of the relevant environmental objectives and Item 2 of the performance outcome had been achieved.

[62] In relation to ground water, it is clear that the assessor was satisfied that the activity met at least performance outcome 2 under that item. It was recorded specifically that no water would be released from the T0 project directly into any waters.

[63] Cognate criticisms by the applicant of the other items in respect of which operational assessment was required are answered in the same way.

[64] As I have said, I consider that when one reads the assessment report as a whole, the criticisms levelled by the applicant cannot properly be sustained. The assessment report makes a determination of the extent to which the application achieved each environmental objective, and did so by consideration of the relevant performance outcomes.

The grounds for judicial review

[65] I turn now to consider each of the grounds for judicial review argued on behalf of the applicant.

Improper exercise of power

[66] As already noted, considerable argument was advanced by the applicant that the decision-maker had failed to take a relevant matter into consideration, on the basis of the decision-maker's signature on the assessment report post-dating the relevant decision. For the reasons set out above, it is not necessary for me to consider this aspect any further.

[67] Otherwise, it was contended, on the basis of the applicant's criticisms of the assessment report, that the decision-maker cannot be said to have seriously engaged with the statutory requirements underpinning the assessment report and which, in turn, govern the exercise of the power in question. It was argued, also, that the reasons for decision did not expressly refer to the specific statutory elements required by an "environmental objective assessment" but simply deferred to the "detailed environmental objective assessment" undertaken and recorded in the assessment report, which itself failed to address the mandatory requirements.

[68] To the extent that this submission is founded on the applicant's criticisms of the assessment report, they cannot be accepted for the reasons given above.

[69] Otherwise, it is quite clear that the decision-maker expressly adverted to and considered the assessment report when making her decision. So much is clear from the extract from the reasons for decision I have set out above. In particular, that passage of the reasons for decision identify the relevant "assessment" and "considerations" which were carried out for the purposes of making the determination, and it is apparent that these were sufficient to satisfy the regulatory requirements in relation to ss 51, 52 and 53 of the *Regulations*.

[70] The applicant advanced a further argument contending that the decision-maker had effectively taken irrelevant considerations into account. This was said to arise because of the decision-maker's reliance on the assessment report, which in turn contained, as part of the "pro forma" document, an erroneous statement about the circumstances in which the author of an assessment report ought consider refusal of an application.

[71] The relevant passage in the assessment report appears at the very end of the document, immediately prior to the signatures. It is a "pro forma" passage that commences "You should only consider refusing an application if one or more of the following apply …". This passage then identifies a number of items, including the need to refuse if a wetland

will be destroyed or reduced in size, or if waste is not released entirely within a confined aquifer. It was not in issue that one of the dot points mentioned in this "pro forma" passage was not commensurate with the legislation. It was argued that this apparent error in the form introduced, in effect, an impermissible and potentially misleading consideration which did not reflect the decision-making approach expressed within the statute.[12]

[72] There are two answers to this criticism. First, reading the assessment report as a whole, it is clear that the misdirection in that part of the "pro forma" did not impact in any way on the extensive commentary and considerations set out by the assessor in the body of the report. Secondly, and more importantly, it cannot be inferred that this misdirection in the "pro forma" influenced the decision-maker. It is clear that the decision-maker, for the purposes of making a relevant decision, had regard to the substance of the matters which were required to be addressed under the *Regulations*, and which were set out a length in the body of the assessment report.

Non-observance of procedure

[73] To the extent that the applicant argued that, by reason of the discrepancy in dates, the necessary procedure had not been followed, this has been dealt with above.

[74] The applicant argued, alternatively, that its criticisms of the assessment report pointed to a lack of any serious attempt by the decision-maker to follow the regulatory requirements, such that the decision-maker was not possessed of information to enable her to decide whether the environmental objectives were met, or to consider the consequences of them not being met. As I have found that the applicant's criticisms of the assessment report are unfounded, this argument also falls away.

Want of jurisdiction

[75] Again, in reliance on the asserted criticisms of the assessment report, the applicant contended that there was a failure to properly carry out the environmental objective assessment which deprived the decision-maker of the authority to make the decision. In view of my finding that the applicant's criticisms cannot be sustained, this ground is not made out.

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[12] Applicant's submissions, para 106.

Error of law

[76] An alternative argument was advanced, similarly founded on the applicant's criticisms of the assessment report, to the effect that an error of law had been committed. It was conceded[13] that to "a large extent, the errors of law which are asserted, inevitably, overlap with the other grounds because it remains one significant failing which has occurred". For the reasons that I have given above, I do not consider that there was such a significant failing. No error of law has been demonstrated.

Conclusion

[77] Accordingly, I find that the applicant has not made out any of its grounds for judicial review of the decision made on 7 December 2015.

[78] There will be the following orders:

(1) The application for statutory order for review is dismissed;

(2) I will hear the parties as to costs.

[13] Applicant's submissions, para 138.