SUPREME COURT OF QUEENSLAND

CITATION:	*Waratah v Mitchell & Anor* [2010] QSC 42
PARTIES:	**WARATAH COAL PTY LTD (ACN 114 165 669)** (Applicant) v **TONYA MITCHELL** (First Respondent) **SWANBANK RESOURCES PTY LTD (ACN 108 568 725)** (Second Respondent)
FILE NO/S:	BS 8639/07
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	18 February 2010
DELIVERED AT:	Cairns
HEARING DATE:	1-2 October 2009
JUDGE:	Jones J
ORDER:	**1. Application for judicial review is dismissed.** **2. The applicant pay to each respondent its costs of and incidental to the application to be assessed on the standard basis unless agreed.**
CATCHWORDS:	JUDICIAL REVIEW – Application for Exploration Permit for Coal – *Mineral Resources Act 1989* ss133-137 – priority of competing applications s134A – ministerial consideration of the applications –what grounds to take into account – intervening event – grounds for review – was there a consideration of the merits of the application – were relevant considerations taken into account – was the decision unreasonable – whether there was a breach of the rules of natural justice
COUNSEL:	D Kelly SC with S McLeod for the applicant R Douglas SC with G Handran for the first respondent J McKenna with G Sheahan for the second respondent
SOLICITORS:	Hopgood Ganim Lawyers for the applicant Crown Solicitor for the first respondent Allan Arthur Robinson for the second respondent

[1] By this proceeding, the applicant (hereinafter "Waratah") seeks a statutory order of review of a decision made by the first respondent determining the priority of lodgement of certain applications pursuant to the provisions of the *Mineral Resources Act* 1989 ("the Act"). The first respondent held the position of Principal Advisor Tenure Management with the Queensland Department of Mines and Energy. She was the duly authorised delegate of the Minister in whom the power of making the decision is vested under the Act.[1]

[2] The decision was made necessary because Waratah and the second respondent ("Swanbank") each made an application for an exploration permit for coal over partially co-incident areas of land. Swanbank sought a permit for 76 sub-blocks and Waratah a permit for 195 sub-blocks which included the 76 sub-blocks sought by Swanbank. Their applications were lodged on 1 November 2006 and were assigned the respective identifying numbers – EPC 1104 (Swanbank) and EPC 1105 (Waratah). The 76 common sub-blocks of land are within the Galilee coal basin. The previous holder of an EPC over those blocks had relinquished its rights some two months earlier and the land had been subjected to a moratorium as provided for by s 135 of the Act.

[3] On 16 March 2009, the first respondent determined that, in respect of the common sub-blocks, the Swanbank application would be given first priority and the Waratah application second priority. Waratah held first priority for the sub-blocks for which there was no competition.

[4] To appreciate the decision making process, it is necessary to have regard to the statutory regime and the policy considerations pursuant to which the decision was made.

Statutory regime

[5] The Act creates a system of permits whereby a person can seek authority to enter land owned by another to carry out specific activities in relation to the mineral resources of the State. For the purpose of the Act the surface of the earth is deemed to be divided into blocks and sub-blocks. Section 126. An exploration permit authorises entry to the sub-blocks of land specified in the permit. The exploration permit is granted in respect of specified minerals or coal. Section 130. An exploration permit shall not be granted in respect of a sub-block over which a current exploration permit exists for the same mineral. Section 131. The obtaining of an exploration permit is the starting point in a process that might blossom, if the exploration is successful, into a mineral development licence or a mining lease.

[6] An application for an exploration permit is made pursuant to s 133 of the Act which provides:-

> *"133. **Application for exploration permit***
> *(1) An application for an exploration permit may be made by an eligible person and shall—*
> *(a) be in the approved form; and*
> *(b) specify the name of each applicant; and*
> *(c) specify the name and address for service of 1 person upon whom any notice may be served on behalf of the applicant or the applicants; and*

[1] For the power to delegate see s 398

(d) identify in the prescribed manner the land in respect of which an exploration permit is sought; and

(e) specify the mineral or minerals in respect of which the exploration permit is sought; and

(f) be lodged at an office prescribed for the time being for the receipt of applications for exploration permits in respect of the land the subject of the application; and

(g) be accompanied by a statement—

(i) specifying a description of the program of work proposed to be carried out under the authority of the exploration permit, if granted; and

(ii) specifying the estimated human, technical and financial resources proposed to be committed to exploration work during each year of the exploration permit, if granted; and

(iii) detailing exploration data captured by the applicant prior to the application in relation to that land; and

(h) be accompanied by—

(i) a statement, separate from the statement mentioned in paragraph (g), detailing the applicant's financial and technical resources; and

(ii) if the application relates to land that includes sub-blocks of land that do not have a common boundary—a statement detailing how the work proposed can be carried out using competent and efficient mineral exploration practices; and

(iii) if the application relates to an area of land that exceeds the area prescribed for the mineral or minerals—a statement about why the applicant requires more than the prescribed area of land; and

(iv) proof of the applicant's identity; and

(v) the application fee prescribed under a regulation.

(2) The chief executive must, within the following period, give the EPA administering authority a copy of the application—

(a) if section 134A(2) applies—10 business days after the Minister decides the priority of the application under that section;

(b) otherwise—5 business days after the chief executive receives the application.

(3) Subsection (2) ceases to apply if—

(a) the application is rejected under section 137; or

(b) the Minister decides, under section 134A(2), another application takes priority over the application."

[7] The requirements of a valid application are quite detailed. This is because the next stage – ministerial consideration of the application – requires only satisfaction about compliance with the section, that the applicant is an eligible person and that work program is approved. Section 137. The substance of the application and supporting documents are necessarily technical thereby requiring assessment by persons with relevant technical expertise.

[8] It is open to the Minister to request further information –

> *"**133A***
>
> *(1) The Minister may give an applicant for an exploration permit a notice requiring the applicant to give the Minister information the Minister reasonably requires to assess the application.*
>
> *(2) If the information is not given to the Minister within the reasonable period stated in the notice, the Minister may refuse the application."*

This power is important having regard to the matters about which the Minister must be satisfied for the purpose of s 137.

[9] Ordinarily, applications are considered in the date order in which they are lodged. Difficulties arise when applications are lodged on the same date as occurred in this case. The relevant provision for determining priority of applications is as follows:-

> *"**134A***
>
> *(1) Applications for the grant of exploration permits in respect of the same mineral, duly made in respect of or including the same land take priority, for the purpose of considering and deciding the applications, according to the day on which they are lodged under section 133(1)(f).*
>
> *(2) If applications are lodged on the same day, they take the priority the Minister decides, after considering **the relative merits of each application**.*
>
> *(3) If an application is lodged by mail, courier service or similar means, it is taken to be lodged on the day the application is received at the prescribed office under section 133(1)(f)."*

Relevant facts

[10] As the subject applications were lodged on the same day, the task for the first respondent was to determine, as the Minister's delegate, the priority in which the application would be considered. This ranking task required an assessment of the relative merits of each application. To facilitate this assessment, a specific departmental policy was promulgated for competitive applications – Policy 116.[2] The policy required the applications to be evaluated by a panel of not less than two relevant authorised departmental officers in accordance with a prescribed Evaluation Form. The topics of the evaluation effectively mirror the technical aspects to which the decision maker must have regard.

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2 Ex 7

[11] In accordance with this policy, an expert panel was formed to give advice to the first respondent about the relative merits of each application. The expert panel consisted of three geo-scientists from the Tenure Management Unit of the Department of Mines and Energy (the department). Each expert separately evaluated the competing applications and each independently rated Swanbank's application as being superior. On 1 March 2007 they met to consider their assessments and to provide a recommendation to the first respondent. The written recommendation was signed by the respective members of the panel on 1 and 7 March 2007. Swanbank received a score of 610 compared with 400 for Waratah. The evaluation form which details how these scores were arrived at is in the following form:-

COMPETITIVE APPLICATIONS – EVALUATION FORM

Criteria		Weighting	Rating	EP No 1104		EP No 1105	
				Score	Total	Score	Total
Work Program Evaluation	Geological Concepts/ Rationale	15%	1,2,3,4,5,6,7	6	90	4	60
	Work Program (timing / appropriateness)	20%	1,2,3,4,5,6,7	6	120	4	80
	Proposed Expenditure	30%	1,2,3,4,5,6,7	6	180	4	120
Company/ Applicant profile	Exploration Performance	20%	1,2,3,4,5,6,7	6	120	4	80
	Financial Capability	10%	1,2,3,4,5,6,7	7	70	4	40
	Technical Resources	5%	1,2,3,4,5,6,7	6	30	4	20
				Totals	610		400

Ranking: (if necessary, provide additional sheets for comments)
1. EPC 1104 Swanbank Resources P/L 2. EPC 1105 Waratah Coal P/L

Recommendations:

Proceed with offer of grant process to Swanbank

119 sub-blocks in EPC 1105 application uncontested

Signatures:…….(signed)……

Position held: Geoscientist – Technical Assessment Services

01/03/2007 / /2006 7/3/2007

NOTES:
1. If information is not supplied, a zero rating is given. If information appears acceptable but cannot be verified, a score of up to 4 will be applied.
2. If exploration record is unknown, a score of 4 will be applied.

It is to be noted that Waratah received a number of scores of 4 indicating an application of the policy where the information is deficient. These have been referred to as "neutral" scores. But some scores were arrived at based on the comparison of prior exploration experience and reliability.

[12] The first respondent does not hold technical qualifications. However, she states that she read all the material provided with the competing applications and considered the technical assessment provided by the three panellists. This, together with the Act, the policy and the applications constituted the material which informed her decision. She agreed with the recommendation of the technical panel. The

members of the technical panel were unanimous in their assessment that the relative merits of the respective applications favoured the granting of priority to Swanbank. Thus stated, the progression from lodgement of application to determination of the priority would appear to be uncontroversial unless there was some requirement to investigate situations attracting a neutral score.

The intervening event

[13] In the period between the meeting of the expert panel and the first respondent's decision, Mr Peter Lynch managing director of Waratah, met with Mr Malcolm Cremer, Deputy Director of the Department at a mining industry conference in Toronto, Canada. Mr Lynch had been directly involved in researching and compiling Waratah's application. He inquired of Mr Cremer whether the decision had yet been made because he wished to make further submissions to bolster Waratah's application. Mr Cremer's responsibility within the department did not include oversight of applications such as these. He had no knowledge of the application but he made certain inquiries which resulted in the suggestion that Mr Lynch contact a departmental manager in Brisbane named Mr Jim Grundy. Mr Lynch did this by email dated 7 March 2007. Mr Grundy's response was transmitted on the same day some 12 minutes later.[3] These emails were copied to the panel members and to the first respondent but they had no regard to them. They took the view that the material to which they should have regard was limited to the contents of each of the applications as lodged in accordance with s 133.[4]

[14] Mr. Lynch had searched the Register on 2 or 3 November 2006 and thus became aware that Waratah and Swanbank had each lodged competing applications. He described his formation of the above contention in these terms:-

> "15. During November and December 2006, in between dealing with various issues arising out of the acquisition of Waratah by Waratah Coal Inc, I began to consider the particular issues which were raised by the prospect of an ECP being granted to Swanbank in respect of its application which was competitive with the Waratah application concerning the land. I formed the belief that the determination of the priority to be afforded these applications had profound consequences for the future development of the Galilee Basin in which the land was situated. On my understanding of the particular geometry of the tenements and the information available to me regarding the target coal seams, the future development of the Galilee Basin would be impaired and thrown into jeopardy if the geometry of the target coal seams and the pre-existing exploration permits for coal and pending applications were not properly taken into account. By this time, I had started to turn my mind to the best way of presenting to the department my concerns and further information relevant to the determination of the applications."

[15] In fact, Mr Lynch did not act upon his concerns until he was in Canada some four months later. His contact with Mr Cremer was quite fortuitous. He had not made any inquiry of departmental officers before that date. The response he received from the department on 7 March 2007 was simply to advise that a decision was "to

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3 Exhibit PL-01 at p 93

4 Per first respondent at transcript 1-87/20-40; per McNamara transcript 1-44/50

be made shortly"[5]. None of the departmental officers told Lynch that no consideration would be given to the additional information he volunteered in his email.

[16] On Mr Lynch's return to Australia he arranged to hold briefing meetings with departmental officers intending to influence the decision by offering further information. By the time of the first of these meetings on 20 March 2007, the decision had already been made.

[17] The additional information Mr Lynch wanted to convey concerned some events occurring after the lodgement of Waratah's application – the listing of Waratah on the Toronto Stock Exchange; employment of an experienced explorationist; announcement of drilling on adjacent lands. It also included a contention that a grant of a permit to Waratah would allow a more favourable development of the permit area by reducing the risk of sterilisation of some part of the area. Such a contention could have been included in the original application or at least raised at an earlier time. The allegation is, in any event, challenged by Swanbank and to discuss the matter further would lead to an impermissible merits review.

The decision

[18] In her Statement of Reasons, the first respondent identified the material to which she had regard as follows:-

- The *Mineral Resources Act*;
- The applications and supporting documentation for EPC's 1104 and 1105;
- Departmental Policy No. 116; and
- The expert panel's recommendation.

In evidence, she said that she did not consider the email initiated by Waratah but confined her attention to the relative merits of the applications.[6]

[19] In her affidavit, the first respondent deposes that in accordance with her usual practice, she checked each application and its attachments and maps. She satisfied herself that the criteria evaluation by the technical panel members were appropriate and relevant and she accepted the ranking they recommended.[7]

Grounds for review

[20] Waratah relies on these facts to argue that the decision of the first respondent ought to be reviewed. It does so, on a number of detailed grounds which ultimately may be considered under the following heads identified in its written and oral submissions.

(a) The first respondent failed to consider the merits of its application;
(b) The first respondent failed to take account of relevant considerations;
(c) Unreasonableness; and
(d) Breach of the rules of natural justice;

I shall deal with each of these grounds in turn.

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5 Affidavit of Peter Lynch Ex PL-01 at p 95
6 Transcript 1-88 to 1-89
7 Affidavit Tonya Mitchell paras 9-12

(a) **No consideration of the merits**

[21] Waratah contends that the first respondent did not consider its application on its merits. The basis for this contention is that the decision maker, in determining the merits, did not look beyond the written applications as lodged. In so doing, she misconceived her function in exercising the discretion with which she was entrusted under s 134A(2). Waratah points to the fact that this discretion is not confined by any express terms of the statute and is thus subject only to such limitations as are implied by the subject matter, scope and purpose of the statute and by any policy duly made and consistent with the terms and purposes of the statute. Waratah accepts that Policy 116 was properly considered by the first respondent but that it should not have been allowed to curb, as it did, her decision making.

[22] Dealing with the first of these contentions, it was clearly the practice of departmental officers to regard consideration of the applications which became competitive by reason of s 134A as being limited to the content of the documents initially lodged. The policy provided that additional information "may be required from the applicants to assist with the technical assessment of the application" and by reference other policies strict time lines were set for responses to any such requirement. Mr McNamara, one of the expert panel members, regarded resort to additional information as arising in order "to clarify" the content of the application.[8] Mr Kelly, Senior Counsel, for Waratah argued that there was a lack of consistency between the departmental officers who gave evidence as to the way in which this policy was used in practise.[9] There is no need to refer to these differences in detail. Mr Cremer has never been involved in s 134A decision making. Both Mr McNamara and the first respondent described the practice in broadly consistent terms..

[23] A distinction must be made between the approach to an application which is not competitive where, pursuant to s 133A, information may be sought in a general way and s 134A which calls for a discrete inquiry as to the relative merits of each application. This distinction is clear from a reading of the terms of the statute and the limited purpose of s 134A and it is honoured in practice according to the evidence of Mr McNamara. When he was asked about his practice, the following exchange occurred:-

> "So, to what experience then are you referring in paragraph [6] of his affidavit if you had never requested further information from a competitive applicant? – the experience I'm referring to is in a **normal application situation outside of competitors – outside of the competitive scenario**, where we do ask for further information purely to allow natural justice for the applicants, and that can delay their applications quite some time if we don't receive a response within a month or up to a month and a half. So that is the experience I'm talking about when we are requesting further information, but I have never been involved in requesting further information as part of a **competitive application process.**[10]

[24] Waratah complains that the first respondent merely followed the recommendation of the expert panel, paying only lip-service to her obligation to consider the merits.

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8 Transcript 1-48/58
9 Transcript 2-10/5
10 Transcript 1-46/5

Waratah argues that such an approach conflicts with the objects of the statute identified in s 2(a)(b)(e) and (f) which highlight the interests of the State of Queensland. In circumstances where the technical panel awarded "neutral" scores on certain criteria of Waratah's application, the first respondent had an obligation to seek verification, the lack of which caused the scores to be assessed at that reduced level. Waratah further argues that the first respondent's own reasoning indicates that she slavishly followed the recommendations of the expert panel.

[25] The first respondent in evidence rejected that suggestion that all she did was to, "rubber stamp a recommendation made by the expert panel".[11] She had on other occasions acted contrary to recommendations where she considered them to be wrong.[12]

[26] I reject the suggestion also. The first respondent was bound to follow Policy 116 and in fact did so. That is not to say that she should (or did) follow it slavishly. The simple question to be addressed is whether the critical matters were considered by her. *Anderson v Director-General of the Department of Environment and Climate Change*[13]. The fact that a decision maker agrees with the unanimous recommendation of a three member technical panel does not lead to a conclusion of any lack of consideration of the merits. The first respondent stated that she had regard to the requirements of the statute and to the material accompanying the applications as referred to in paragraph 19 above.

[27] Waratah's application as lodged, was clearly inferior to Swanbank's. So much can be said without descending into a merits review. Waratah's argument relies upon establishing an obligation on the part of the decision maker to make and inquiry. No such obligation arises from the terms of s 134A or of the Policy. Waratah contends this obligation arises from a consideration of the general objectives of the Act and a body of new evidence which it claims enhances its application and compels the new inquiry. Swanbank challenges the value of that claim and proffers different opinions as to its validity. The first respondent adduces evidence from one of the technical panel members who undertook a reassessment based on new information. I regard all of these approaches now as being no more than an impermissible merits review. Waratah's claim does not succeed in identifying any **obligation** on the first respondent to make any inquiry. Waratah comes to the process of the application as a stranger seeking a benefit. I am not persuaded that the objects of the Act support the contention that the decision maker was bound to act upon Waratah's belated request.

[28] It is not for this Court to review the merits of the respective applications or to comment upon the recommendations of the technical panel. A decision maker, exercising the discretion such as that provided by s 134A, is entitled "to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power". *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*[14].

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11 Transcript 1-89/50

12 Ibid at para 16

13 [2008] NSWCA 337 at para [58]

14 [1985-6] 162 CLR 24 per Mason J at p 41; see also *Buck v Bavone* (1976) 135 CLR 110 and *Braemar Power Project Pty Ltd v Department of Mines and Energy* [2009] QCA 162 para [19]

[29] Waratah contends that in circumstances where its application was accorded "neutral scores" in respect of some of the matters subject to technical assessment that there was an obligation on the part of the panel members to seek further information in order to "verify" or "clarify" the information which led to that neutral score being applied. This was particularly so, having regard to the four months which had elapsed between the lodging of the applications and the assessment and in circumstances where Waratah had advised there had been a change in its circumstances. Waratah relied particularly on a passage in the judgment of Mason J in *Peko Wallsend* commencing with the words:-

> "Once it is accepted that the subject matter, scope and purpose of the Act indicate that a detriment may be occasioned by a proposed land grant is a factor vital to the exercise of the Minister's discretion, it is but a short and logical step to conclude that a consideration of that factor must be based on the most recent and accurate information that the Minister has at hand."[15]

[30] That passage was concerned with the position of a decision maker considering the grant of a benefit – the equivalent in this instance to the Minister's role under s 137. It does not, in my view, have relevance to the fixing of priority of applications deemed to have been made simultaneously.

[31] The second respondent argues that the relative merits affecting priority fall to be considered on the terms of the applications as lodged. An application for an exploration permit is not founded upon any particular status held by the applicant. There is nothing in the legislation concerned to protect the applicant or to confer rights upon the applicant. The administration framework provides for a speedy resolution of the competitive issue. There is sufficient information required to be included in the application to allow a merits assessment. Swanbank contends that the fairness of the system would be defeated if an applicant were allowed to obtain "merits" not available at the time of the lodgement.

[32] To my mind, the consequence of allowing additional information to be submitted would be to create great uncertainty as to when the priority could be determined. It would lead to continuing exchanges of information and possibly conflicts. It would allow applicants to refer to developments which occurred after the date of lodgement and might be changing up to the date of determination. To establish a priority based upon "relative merits" there must be a fixed time at which the merits are to be assessed. The terms of s 134A and its purpose in the statutory administrative scheme make it plain that the date for effective determination is the date of lodgement of the applications.

[33] This, it seems to me, is the clear intent of the section which was introduced into the Act in 1997 replacing the earlier s 131(3) and (4). The Act now deals with priority for exploration permits to be accorded in accordance with the date of the lodgement and provides by s 134A for simultaneous lodgements.

[34] The Act generally deals with priorities in different ways for difference in applications. The amendment brought applications for exploration permits into line with the general rule for many applications, namely priority in accordance with the

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15 *Peko-Wallsend* (supra) at p 44

date of lodgement.[16] One exception to this general rule is the granting of mineral development licences under s 185. But the general rule causes difficulty when applications are lodged on the same day, and so there are provisions to determine priority. In some instances priority is determined by ballot.[17] In the case of exploration permits, which can only be lodged after the expiration of a moratorium period, some mechanism less arbitrary than a ballot was obviously thought necessary. The objects of the Act and the interests of the State would dictate that the priority in which exploration permits ought to be considered should involve some overview of the merits of competing applications. The importance of the application documentation is well illustrated by the detailed information which must accompany it.

[35] The Act does not provide any definition for what is to be included in a consideration of "relative merits" nor does it prescribe any administrative procedure to be followed. The required content of the application documentation and its obvious purpose are clear guides as to what is to be considered and compared. That it would be open to the Minister to determine "relative merits" at any time after the applications had been lodged is another indication of what is intended to be compared.

[36] Accordingly, I construe s 134A to require the Minister to consider the relative merits of each application as lodged. There is no basis for importing into the terms of the section any obligation to consider such further information as an applicant may wish to add to the application. This being the case, I find there was no failure on the part of the first respondent in considering the relative merits of each application.

(b) Failed to take account of relevant considerations

[37] This ground arises from Waratah's contention that the first respondent did not consider Waratah's assertion that coal reserves would be "sterilised" unless its application was given priority. This was not a matter included in its application but was the substance of its later approach to departmental officers. Nonetheless, Waratah relies upon the objects of the Act and the interests of the State to contend that all information relevant to mining efficiency and maximising returns ought to be considered.

[38] This assertion, now agitated in this proceeding, is challenged by Swanbank on a number of factual and technical grounds. It has also been the subject of further comment by some of the technical panel members. It is not necessary to canvass the nature and the scope of the competing argument except to note that were this a topic fully traversed at the decision making stage, the merits would not necessarily favour Waratah. But the issue for me is to determine whether there was any requirement for the first respondent to consider this assertion when it was raised. That in turn depends upon the statutory provision conferring the discretion exercised by the decision maker. This proposition was considered by Mason J in *Peko-Wallsend* (supra) where he said:-

> "(a) The ground of failure to take into account a relevant consideration can only be made out if a decision-maker fails to take

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16 See s 63(1) and s 105(3) for mining claims; s 251(1) for mining leases; s 298(3) for mining leases for other minerals

17 See s 63(2); s 251(2); s 390(4)

> into account a consideration which he is *bound* to take into account in making that decision:…
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> (b) What factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion. If the statute expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether those numerated factors are exhaustive or merely inclusive. If the relevant factors – and in this context I use this expression to refer to the factors which the decision-maker is bound to consider – are not expressly stated, they must be determined by implication from the subject matter, scope and purpose of the Act…
>
> (c) Not every consideration that a decision-maker is bound to take into account but fails to take into account will justify the court setting aside the impugned decision and ordering that the discretion be re-exercised according to law."[18]

Brennan J to similar effect said:-

> "The court has no jurisdiction to visit the exercise of a statutory power with invalidity for failure to have regard to a particular matter unless some statute expressly or by implication requires the repository of the power to have regard to that matter or to matters of that kind as a condition of exercising the power."[19]

[39] The provisions of s 134A or s 137 of the Act do not prescribe any matters to which the decision maker is bound to have regard. As discussed above, the formal requirements of the application are quite rigorous and the procedure provided for by Policy 116 are consistent with meeting the objects of the Act and the interests of the State. As a result of this process, the evaluation so favoured Swanbank there is little likelihood that the issue of "sterilisation" – an assertion highly contestable and in fact contested – would make any significant difference. The technical members have in their respective affidavits justified the valuation each made at the relevant time. These indicate the panel members' awareness of each applicant's other explorastion interests and the potential that would have winning coal.[20] Moreover, some of the matters which underpin Waratah's assertion did not exist at the time of the lodgement of the applications and therefore, in accordance with my previous ruling, ought not to have been considered in any event.

[40] I am not persuaded that the first respondent failed to take into account any relevant consideration.

(c) Unreasonableness

[41] Waratah acknowledges at the outset that the tests for establishing unreasonableness is a stringent test and it referred to *Minister for Immigration and Ethnic Affairs v Teoh*[21] where Mason CJ and Deane J said:-

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18 162 CLR at p 39

19 Ibid at p 55

20 Affidavit of McNamara, paras 13 and 14; affidavit of Klenim paras 13 and 26; affidavit of Reinks paras 19 and 24

21 [1994-5] 183 CLR 273

> "Just as a power is exercised in an improper manner if it is, upon the material before the decision maker, a decision to which no reasonable person could come, so it is exercised in an improper manner if the decision maker makes his or her decision in a manner so devoid of plausible justification that no reasonable person could have taken that course."[22]

[42] The principle arising from the decision of Lord Green NR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*[23] has been considered in a variety of cases with a consequence that it has been expressed in a variety of ways which do not in any event change the thrust of what was said in *Leoh.*.

[43] Waratah relies upon its submissions made in respect of the other grounds of review to found its contention that the first respondent's decision was unreasonable in the *Wednesbury* sense. Having regard to the view I have taken of the proper scope of the first respondent's consideration of the issue for her determination and particularly her reliance upon the recommendations of the technical expert panel, there is no basis upon which Waratah can succeed in showing that her decision was unreasonable.

(d) Breach of the rules of natural justice

[44] Waratah contends that it was denied procedural fairness by the first respondent's failure to give it the opportunity of presenting further information following its approach to Mr Cremer on 7 March 2007. Such information as it subsequently offered to departmental officers was not presented to the technical panel members or the first respondent. Nor was any request made by them to receive such information. Waratah argues that by reason of the responses of departmental officers to its approaches made to Mr Cremer it had a legitimate expectation that such information would be considered. This was so particularly because the decision of the first respondent was a discrete and independent decision from which there was no contemplated right of appeal.

[45] Waratah relies particularly on the general principle illustrated by the statement of Mason J in *Kioa v West*[24]to this effect:-

> "The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention."

[46] As to this factual background, I would observe firstly that Mr Lynch was made aware at the beginning that Mr Cremer had no knowledge of the process. Secondly, the terms of the emails do no more than indicate that a decision on the issue of priority would be made "shortly" and that he would be advised "of the outcome".[25] Thirdly, I accept Mr Cremer's evidence that Mr Lynch was not told that his later presentation of new material to departmental officers would be provided to the first respondent or the panel. If Mr Lynch had an expectation that this supposedly

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22 Ibid at p 290
23 [1948] 1 KB 223
24 (1985) 159 CLR 550 at 584
25 Affidavit of R A Lynch ex "PL-01" at p 95

significant new material could be placed in such a way before the Minister, or his delegate, then such expectation was, to say the least, misconceived.

[47] What constitutes the requirement for procedural fairness is determined by the terms of the statute and the nature of the issue being determined. By its application Waratah seeks a benefit or opportunity and so falls within the second of the three categories of cases identified by McGarry VC in *McGuiness v Onslow-Fane*[26]. That classification has been adopted by the High Court in a number of cases. For example in *FAI Insurances v Winneke*,[27] adopting McGarry VC's classification, Aitken J went on to say:-

> "The content of the conception of "natural justice" in this area remains imprecise but it is now clear at least that in the absence of a contrary legislative provision the cancellation of, or refusal to renew, a permit or licence to carry on some business activity must comply with the rules of natural justice…
>
> At the other end of the scale it requires most unusual circumstances to warrant the view that upon an initial application for a licence which is not one which the relevant authority must issue as of course upon the compliance with specified procedures, there is a duty to provide a hearing. Such licences rest in the discretion of the licensing authority and are not often subject of clearly prescribed criteria upon satisfaction of which the grant of a licence must follow as of right."[28]

[48] The circumstances do not give rise to considerations of reputation or other legal rights or interests where procedural fairness …are mandated. *Ainsworth v Queensland Crime and Misconduct Commission*[29]. The discretion to determine priorities according to "relative merits" does not affect established rights. Applicants for an exploration permit realise that the outcome is something of a gamble with no applicant having a right to be granted priority. In this sense, as the second respondent argues, the process is akin to tendering for a Government contract. This submission, it seems to me, is consistent with the statutory framework which, as I have found, requires the decision maker to consider the applications as lodged. That being so, there is no duty to accord procedural fairness consequent upon conduct that might have occurred after that date. In any event, I reject the suggestion that by reason of the informal approaches made by Mr Lynch and the department's response to those approaches, any legitimate expectation further hearing had arisen. I reject the contention that Waratah did not receive procedural fairness.

Conclusion

[49] It follows from the foregoing that the application for judicial review fails. It is unnecessary to consider the exercise of the discretionary power pursuant to s 48 of the *Judicial Review Act* which inevitably would call for consideration of contested matters relating to the merits of the permit application. The parties do not seek to

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26 [1978] 1 WLR 1520
27 (1982) 151 CLR 342
28 Ibid at p 394
29 [1991-2] 175 CLR 564

make any arguments about costs being content that on that issue costs should follow the event.

[50] I make the following orders:-

1. The application for judicial review is dismissed.
2. I order the applicant pay to each respondent its costs of and incidental to the application to be assessed on the standard basis unless agreed.