SUPREME COURT OF QUEENSLAND

CITATION:	*Waratah Coal P/L v Mitchell & Anor* [2010] QCA 264
PARTIES:	**WARATAH COAL PTY LTD** ACN 114 165 669 (applicant/appellant) **v** **TONYA MITCHELL** (first respondent) **VALE COAL EXPLORATION PTY LTD (formerly SWANBANK RESOURCES PTY LTD)** ACN 108 568 725 (second respondent)
FILE NO/S:	Appeal No 2736 of 2010 SC No 8639 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	1 October 2010
DELIVERED AT:	Brisbane
HEARING DATE:	8 September 2010
JUDGES:	McMurdo P, Fraser and Chesterman JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – APPLYING POLICY AND MERITS OF CASE – where appellant and second respondent lodged competing applications for exploration permits over the same blocks of land on the same day – where Minister had to determine which application took priority pursuant to s 134A *Mineral Resources Act* 1989 (Qld) – where a departmental policy also applied to the assessment of competing applications – where a panel of geoscientists was employed pursuant to the policy – where appellant emailed the Technical Panel providing new information about the company about four months after lodgement of the application – where Technical Panel and first respondent ignored the information – where Technical Panel and first respondent favoured the second respondent's application – whether s 134A required a comparison of the applications "as lodged" or extended to material subsequently supplied or

requested – whether first respondent failed to consider the relative merits of the applications

Judicial Review Act 1991 (Qld), s 20(2)(e), s 23(f)
Mineral Resources Act 1989 (Qld), s 2, s 126, s 129, s 133, s 134A, s 134A(2), s 137, s 398

Jebb v Repatriation Commission (1988) 80 ALR 329; [1988] FCA 105, cited
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24; [1986] HCA 40, distinguished
Minister for Immigration and Multicultural and Indigenous Affairs v Huynh (2004) 139 FCR 505; [2004] FCAFC 256, applied
Shi v Migration Agents Registration Authority (2008) 235 CLR 286; [2008] HCA 31, applied

COUNSEL: D Kelly SC, with S A McLeod, for the appellant
R Douglas SC, with G J Handran, for the first respondent
J McKenna SC, with G D Sheahan, for the second respondent

SOLICITORS: Hopgood Ganim for the appellant
Crown Law for the first respondent
Allens Arthur Robinson for the second respondent

[1] **McMURDO P**: I agree with Chesterman JA's reasons for dismissing this appeal with costs.

[2] **FRASER JA**: I have had the advantage of reading the reasons for judgment of Chesterman JA. I agree with those reasons and with the order proposed by his Honour.

[3] **CHESTERMAN JA**: The *Mineral Resources Act* 1989 ("the Act") creates a system of permits which, when granted, allow the permit holder to enter onto land owned by others to carry out specific activities in relation to minerals on or under the land, which are resources of the State. Section 126 of the Act divides the surface of the earth into blocks and sub-blocks defined by minutes of longitude and latitude. By s 129 an exploration permit confers rights with respect to the sub-blocks of land and minerals specified in it.

[4] On 1 November 2006 the appellant ("Waratah") lodged an application for a permit to explore for coal over 195 sub-blocks within the Galilee Coal Basin. On the same day the second respondent ("Swanbank") applied for a permit to explore for coal over 76 sub-blocks in the Galilee Coal Basin. Those sub-blocks were included within the 195 sub-blocks identified in Waratah's application.

[5] Section 134A of the Act determines the priority to be afforded applications for explorations permits. It provides:

> "**134A Priority of applications for grant of exploration permit**
>
> (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) … ."

[6] Section 137 confers power on the Minister to grant an exploration permit. It provides:

"(1) If the Minister is satisfied that –

(a) the requirements of section 133 have been complied with for an application for an exploration permit and that the requirements of this Act have otherwise been complied with; and
(b) the applicant is an eligible person; and
(c) the application is made bona fide for the purposes of this Act;

the Minister may … grant and issue to the applicant an exploration permit in respect of all the land included in the application or such part or parts of it as the Minister specifies in the permit.

… ."

[7] Section 133 of the Act is important. It 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
(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 acceptable to the Minister—

(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, acceptable to the Minister, but separate from the statement mentioned in paragraph (g), detailing the applicant's financial and technical resources; and

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

(iii) the application fee prescribed under a regulation.

(2) …

(3) …

(4) In this section—

financial resources, for subsection (1)(g)(ii), includes the financial resources necessary to comply with each of the following—

(a) the native title provisions;

(b) any registered indigenous land use agreement under the Commonwealth Native Title Act for the area to which the application relates;

(c) the right to negotiate provisions."

[8] By s 398 the Minister may delegate all or any of his or her powers to an officer of the Department of Mines and Energy. The Minister in fact delegated the duty of determining which of Waratah's and Swanbank's applications for exploration permits should be given priority in accordance with the terms of s 134A to the first respondent Ms Mitchell, a senior employee of the department. She was therefore required to consider "the relative merits of each application".

[9] The department had developed a policy to guide the assessment of what were called competitive applications, those lodged on the same day, one of which had to be given priority over the other. The policy was numbered 116 and was entitled:

> "Technical Assessment of competitive applications for Exploration Permits (not associated with a tender process or special land release) lodged under Section 131 of [the Act]."

[10] In accordance with the policy a Technical Panel of three geoscientists employed by the department was appointed to consider the relative merits of the two applications and to advise the first respondent of their opinion. The Technical Panel favoured Swanbank's application. The first respondent agreed, having made her own assessment of the application and of the Technical Panel's recommendation. The Swanbank application was numbered 1104 and the appellant's application was 1105.

[11] The appellant was dissatisfied with the decision and sought an order for review pursuant to the *Judicial Review Act* 1991 ("*JR Act*"). The application was dismissed. Waratah has appealed seeking orders that the decision of the first respondent be set aside and that the question of priority be remitted to her to be

decided according to law. To understand the points raised in the appeal it is necessary to say something more of the facts.

[12] Each member of the Technical Panel assessed both applications. They met on 1 March 2007 to consider their assessments and provide a recommendation to the first respondent. The recommendation was signed on 1 March and 7 March 2007. The terms of the recommendation were set out in full in the reasons of the trial judge. His Honour said:

> [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 Signatures …… (signed) ……..

119 sub-blocks in EPC 1105 application uncontested 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."

[13] Waratah makes no complaint about the existence or terms of the policy or of the first respondent's right to refer to it in coming to her decision. Waratah accepts, as well, that Ms Mitchell was entitled to have regard to the recommendations of the Technical Panel. The trial judge found, having heard Ms Mitchell's testimony, that her decision was her own, made upon relevant materials, and was not an automatic acceptance of the expert recommendation.

[14] By chance, Waratah's Chief Executive Officer Mr Peter Lynch met the Deputy Director of the department at a Mining Industry Conference in Canada on 6 March 2007. As a result of the discussion Mr Lynch emailed Mr Grundy, another officer in the department in Brisbane, on 7 March 2007. The email contained "additional information" which Mr Lynch "thought may be useful in conveying why Waratah … was a good choice …" for the grant of an exploration permit. It is not necessary to set out the details of the additional information Mr Lynch provided. It is enough to note that the information was germane to the merit of Waratah's application. Waratah's financial resources had improved between 1 November 2006 and 6 March 2007 and some details of the improvements were conveyed by the email.

[15] Mr Grundy sent Mr Lynch's email immediately to the members of the Technical Panel. Although they received it shortly before the last member signed the recommendation they did not take the additional information into account. They did not reconsider their assessment of the relative merits of the two applications by reference to the additional information.

[16] Ms Mitchell was aware when she considered the Panel's recommendation and determined the priority of the competing applications that Waratah's additional information had not been taken into account.

[17] Waratah was not informed of the decision to give priority to Swanbank's application until 31 July 2009.

[18] There is another fact which the appellant regards as relevant. On 1 November 2006 on receipt of Swanbank's application an employee of the department telephoned an employee of Swanbank to advise him that there was an error in its application which misdescribed the blocks and sub-blocks the subject of the application. Following that discussion, and as a result of it, Swanbank sent a facsimile transmission to the department amending its application which was then assessed by reference to the amendment.

[19] Policy No. 116 contains the following:

> "Additional Information
>
> Additional information (in relation to the criteria) may be required from the applicants to assist with the technical assessment of the application but no change to expenditure or work program can be made. Refer to Policy No 21 for appropriate response times. Failure to respond to such a request may result in the application being given a lower ranking. Refer to Policy No 63."

[20] The "criteria" are those described in the policy. They are geological concepts; work program; proposed exploration expenditure; exploration performance; financial capability; and technical resources.

[21] The first respondent and the members of the Technical Panel all took the view that s 134A required them to make an assessment of the relative merits of competing applications having regard only to the materials which were supplied when the applications were lodged. They thought, and acted in accordance with the belief, that they should ignore any subsequent material supplied by an applicant other than additional information furnished in response to a request made pursuant to the express terms of Policy No. 116. (Swanbank's correction of its application was of that type).

[22] The trial judge endorsed that view. His Honour said:

> [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. 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 (sic). 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.
>
> …
>
> [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.
>
> …
>
> [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."

[23] Waratah submits that this opinion is wrong, and complains that the first respondent's assessment of the relative merits of the applications without regard to the contents of Mr Lynch's email of 7 March 2007 was not lawful, because it was not an assessment of the relative merits of the application, which s 134A required. The argument could have been put in a number of ways but Waratah chose to describe it as the making of a decision which involved an exercise of discretionary power in accordance with a policy and without regarding the merits of the case. Sections 20(2)(e) and 23(f) of the *JR Act* were cited as the source of invalidity of such a decision. Waratah's point, shortly expressed, is the relative merits of the two applications could only be assessed by an examination of all information relevant to the departmental criteria which had been supplied to the department before the decision was made.

[24] Waratah complained also that by disregarding the additional information it had been denied procedural fairness and that the first respondent had denied it natural justice in making her decision. The trial judge ruled that there was no duty to accord procedural fairness in the circumstances and that there had been no denial of natural justice. Those points will not arise for consideration unless Waratah makes good its contention that the first respondent was obliged to consider the additional information in the decision making process. If that contention is rejected the appeal must fail.

[25] Waratah's application was given a numerical score by reference to that part of the policy which provided "if information appears acceptable but cannot be verified, a score of up to 4 will be applied". As the trial judge explained, Waratah's application "received a number of scores of 4 indicating an application of the policy where the information is deficient." Waratah submits that had Mr Lynch's email of 7 March 2007 been considered, its application would not have been relevantly deficient and a higher score would have been awarded to it. The argument thus runs that its score was determined by the application of the policy and not by reference to the true merits of the application.

[26] Waratah takes issue with the trial judge's remark:

> "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."

Waratah submits that the trial judge wrongly assumed that the scores which were attributed to Waratah's application by applying the policy were an assessment of the relative merits of the competing applications, when in fact what they indicated was that the application lacked verifiable information.

[27] Waratah submitted that where the application of the policy would result in the attribution of a neutral score to one or more of the criteria identified in the policy, because information was deficient or could not be verified, the Minister was obliged to request the applicant to furnish further information to make good the deficiency or to enable the existing information to be verified. The implication of such an obligation is necessary, the submission continues, if the relative merits of competing applications are to be compared. The "true" merits of an application which lack substance in some regard can only be determined when the deficiencies are removed by the provision of further information. There is said to be an unfairness in failing "to seek additional information as contemplated by the Policy in order to assist with the technical assessment yet … then … to assign neutral scores … signifying that information could not be verified (as if an attempt had been made to verify the information)". The appellant contends that had further information been requested it would have been answered by Mr Lynch's email of 7 March 2007.

[28] The trial judge rejected this approach. His Honour reasoned that the comparison required by the Act was of the two applications "as lodged" on the same day. Only the materials supplied with the applications lodged on the same day were to be compared. Waratah submits that the limitation implied by the trial judge, that the comparison is between the information which appeared in the applications "as lodged", does not appear in the terms of s 134A.

[29] Counsel for Waratah placed significant weight on the judgment of Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 44-45:

> "The second question … is whether the Minister is also bound to take into account submissions made to him which correct, update or elucidate the Commissioner's comments on detriment. Once it is accepted that the subject-matter, scope and purpose of the Act indicate that the detriment that 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. … It would be a strange result indeed to hold that the Minister is entitled to ignore material of which he has … knowledge and which may have a direct bearing on the justice of making the land grant, and to proceed instead on the basis of material that may be incomplete, inaccurate or misleading. In one sense this conclusion may be seen as an application of the general principle that an administrative decision-maker is required to make his decision on the basis of material available to him at the time the decision is made. But that principle is itself a reflection of the fact that there may be found in the subject-matter, scope and purpose of nearly every statute conferring power to make an

> administrative decision an implication that the decision is to be made on the basis of the most current material available to the decision-maker."

[30] Waratah relies also on the fact that Policy No. 116 does not preclude an examination of information supplied subsequently to the lodging of an application. It specifically allows the decision maker to request additional material. This is said to show that the application process included and extended to the provision of information by applicants subsequent to the lodging of their applications.

[31] The question to be answered is whether the assessment of relative merits in s 134A(2) limits the inquiry to the material lodged by applicants on the same day, or whether it extends to supplementary materials either delivered gratuitously by an applicant or in response to a request from departmental officers.

[32] There are compelling reasons why the appellant's submissions should be rejected. The question which the appeal poses is to be answered by the proper construction of s 134A(2). The subsection requires the Minister to decide the relative merits of "applications … lodged on the same day." It is clear from the preceding subsection that the applications referred to are those "for the grant of exploration permits … duly made … lodged under section 133(1)(f)." That provision directs an application for an exploration permit to be "lodged at an office prescribed for the time being for the receipt of applications … ." The Minister is therefore to decide the relative merits of applications for exploration permits lodged on the same day and at a prescribed office.

[33] Section 133 describes in detail what an application for an exploration permit must contain. It must, uncontroversially, be in an approved form, specify the applicant's name, an address for service, the land over which the permit is sought and the minerals intended to be explored for. More importantly the application is to be accompanied by:

> (1) A statement specifying:
>
> (a) the program of work proposed to be carried out for the purpose of exploration;
>
> (b) the human, technical and financial resources proposed to be committed to the exploration;
>
> (c) the exploration data known to the applicant relating to the land.
>
> (2) A second statement specifying the applicant's financial and technical resources which can be committed to the exploration.

[34] It is obvious that the merits of an application will be found in the detail of the statements which are to accompany an application pursuant to sub-ss 133(1)(g) and (h). Only an application which is accompanied by both statements will be an application lodged under s 133 and be eligible for comparison. Where two applications are lodged on the same day the Minister must compare their relative merits by reference to the information contained in the two accompanying statements. They are, of necessity, statements "lodged on the same day". Section 134A(2), read in conjunction with s 133, plainly indicates that the subject matter of the comparison is the information in the application documents. There is no scope

for including additional information, with the possible exception of that requested by the Minister pursuant to Policy No. 116.

[35] Two comments may be made about the exception. The first is that it allows the Minister to request additional information. It says nothing about the receipt of additional material proffered by an applicant to bolster material lodged earlier. The second is that it is limited in its scope. The additional information which may be requested is only that which may "assist with the technical assessment of the application". Specifically the additional information must not "change … expenditure or work program", which topics are the subject matter of the two statements which must accompany and be lodged with an application. Mr Lynch's email of 7 March 2007 sought to change the depiction of Waratah's financial resources, and therefore the amount it could commit to expenditure, from that described in the application and accompanying documents lodged on 1 November 2006.

[36] The plain meaning of s 134A(2) is that the Minister is to make a comparison of like with like. What is to be compared are the applications, as described by s 133, lodged on the same day. There would not be a comparison of like with like if the Minister considered one application lodged on (say) 1 November 2006 and another consisting of documents lodged on 1 November 2006 and 7 March 2007.

[37] Waratah's submissions are predicated on the unexpressed premise that the Minister must determine which of two competing applicants will be the better explorer and thus exploiter of minerals in order to provide the best financial return to the State with the least "land use conflict" and environmental damage. The terms come from s 2 of the Act, the designation of its "principal objectives". It is argued that to achieve this end the Minister is required to undertake a continuous assessment of applications and base a decision on the most recent and comprehensive information available. This is said to be the source of the obligation to request an applicant to improve a defective application.

[38] The argument cannot be accepted. It overlooks two points. The first is that the determination of priority under s 134A is made only "for the purpose of considering and deciding the applications" for an exploration permit. The decision to grant a permit is made pursuant to s 137. The decision made under s 134A determines only the order in which the Minister will consider granting an exploration permit. The second point is that the earlier decision concerning priority is to be made by reference to two documents, or sets of documents, lodged on the same day. The terms of the subsection indicate that the comparison is to be made at one point in time by reference to information which exists at that point in time. The inquiry mandated by s 134A(2) is not to find the better applicant to be granted an exploration permit. It is to determine which of two applications should be considered first.

[39] The submission that the Minister was under an obligation to request further information from an applicant in circumstances where its application would attract neutral scores under the policy should also be rejected. There is nothing in the terms of s 134A which suggests such a duty. Moreover the duty is inconsistent with what I regard is the clear construction of s 134A(2), that the assessment of relative merit is to be made by reference to the applications (and accompanying statements) as lodged.

[40] Nor is there anything in the policy which would found such a duty. The policy conferred on the Minister a right, to be exercised as a matter of discretion, to request further information for limited purposes. It confers no obligation to seek information. In any event the terms of the policy cannot affect the operation or meaning of s 134A.

[41] There is a practical reason for rejecting the submission. An assessment of relative merit can be made between two applications differing in quality. Suppose one application contained comprehensive statements, carefully compiled and including much detail, and another was scant in content, marked by error and inconsistency, and lacking detail. It would be relevant to the assessment that one applicant had much to say, and said it carefully and provided verification for its assertions, and the other had not. The appellant's submission would require the Minister to ignore the obvious superiority of one application and insist upon the indolent or inefficient applicant putting together a better application.

[42] Such a result would offend commonsense.

[43] *Peko-Wallsend* is not on point. The trial judge said of the passage relied upon by Waratah that it:

> "… 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 … have relevance to the fixing of priority of applications deemed to have been made simultaneously."

[44] I respectfully agree. The administrative decision required by s 134A(2) is nothing like that which the Minister for Aboriginal Affairs was called upon to make under the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth). Section 134A requires a decision as to which is the better of two applications to be made by an examination of documents lodged on the same day. It gives no scope to the consideration of subsequent events, or subsequently supplied information, in the making of that assessment.

[45] A limitation on the application of the principle described by Mason J in *Peko-Wallsend* was identified by Kiefel and Bennett JJ in *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505. Their Honours said (522-3):

> "A relevant consideration in an administrative law sense has a limited meaning. It is one which the decision-maker is bound to take into account in making the decision in question. The factors which the decision-maker is bound to take into account are determined by the construction of the statute conferring the discretion. If they are not stated, they are to be determined by implication from the subject-matter, scope and purpose of the Act … ."

[46] Their Honours referred to Mason J's judgment in *Peko*, relied upon by Waratah, and went on (524-5):

> "Two observations may be made about his Honour's reasoning. The factor being considered, to which the material is relevant, must be essential to the exercise of the discretion before any obligation to examine the most recent and accurate information can arise. That is

> to say it must partake of the nature of a relevant consideration in the sense we have discussed."

Information obtained or supplied by an applicant for an exploration permit subsequent to the lodging of the application for the permit is not a consideration which the Act makes relevant to the determination of priority between applications lodged on the same day. The Act says nothing about such information. More importantly subsection 134A(2) identifies the relevant considerations, or material, by which the assessment of priority is to be made. The comparison is limited to the applications and accompanying statements lodged on that day.

[47] A second point to notice is that it was concerned with an administrative decision, whether to grant land to an Aboriginal Land Council, which had to be made by reference to the relevant considerations. It was held that the decision had to be made by reference to these factors at the time the decision was made. It may be accepted that that description applies to most administrative decisions but there is a class of such decisions which are required to be made by reference to a past state of facts. The difference was explained by Kirby J in *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286. His Honour said (at 300):

> "Sometimes, it may be inherent in the nature of a particular decision that review of that decision is confined to identified past events. If, for example, under federal legislation, a pension is payable at fortnightly rests, by reference to particular qualifications that may themselves alter over time, a "review" of an administrative "decision" to grant or refuse such a pension, by reference to statutory qualifications, may necessarily be limited to the facts at the particular time of the decision."

Kirby J then referred to *Jebb v Repatriation Commission* (1988) 80 ALR 329 in which Davies J had held that generally the practice of a tribunal substituting its decision for one made by a departmental officer was "to take account of events that have occurred up to the date of the [tribunal's] decision". Kirby J went on (301):

> "There is thus a *general* approach deriving in particular from the statutory function of substituting one administrative decision for another. Nevertheless, the *particular* nature of the "decision" in question may sometimes, exceptionally, confine the Tribunal's attention to the state of the evidence as at a particular time."

[48] Hayne and Heydon JJ in their joint judgment at 315 expressed the same opinion.

[49] The present case is within the smaller class, which may be exceptional, in which the statute which confers the decision making power shows that the decision is to be made by reference to the state of affairs as at a particular time. This emerges from the features of s 134A already discussed.

[50] The appellant's argument would give rise to difficulties in practice and introduce uncertainty into the determination of priority between competing applications. Counsel for Waratah accepted the logical conclusion of their submissions to be that an applicant could supplement its application at any time, and that the Minister was obliged to consider the applications as supplemented as late as the day of the decision. The practical consequence is that where additional information was lodged immediately prior to the decision the Minister would have to defer the

decision to consider the new material. If it be accepted that an applicant can supplement the application there is no limit to the number of times the application may be supplemented. The Minister would either be tempted to make decisions precipitately to pre-empt the delivery of further information, or to delay considerably to allow applicants an ample opportunity to deliver supplements to their applications.

[51] If one of the applicants should take advantage of the asserted right to deliver additional information the other may legitimately complain that it was not afforded procedural fairness if it was not informed that its rival was supplementing its application and given the like opportunity. If that applicant supplemented its application the other, learning of that fact, may add even further information to its application. The process could be prolonged as each applicant tried to "trump" the other. The Minister is obliged to consider applications as amended and augmented endlessly. No limit on the number of amendments, or the time in which they can be made, can be imposed.

[52] Such a result cannot be contemplated. It cannot be what s 134A intended. Should the section operate in that manner the Minister would not be called upon to determine the relative merits of applications lodged on the same day but the relative merits of applications lodged on different days. The relative merits of the applications may vary over time. The choice of time to make the assessment by the Minister will operate arbitrarily. A decision made earlier or later may have been different. The construction of s 134A which I think is correct avoids these problems. It fixes the materials by which priority is to be awarded by reference to the day of their lodgement.

[53] The information emailed by Mr Lynch on 7 March 2007 did not form part of Waratah's application lodged on 1 November 2006. The first respondent correctly ignored it, as did the Technical Panel. The comparison which the act required was between the applications lodged on the same day. That decision favoured Swanbank. The only available challenge to the decision making process, that the later material was not taken into account, has not been made out. The trial judge rightly dismissed Waratah's application for judicial review. There is no need to consider the arguments relating to want of procedural fairness. The appeal should be dismissed with costs.