

# SUPREME COURT OF QUEENSLAND

CITATION: *Waratah Coal Pty Ltd v Seeney & Anor* [2014] QSC 226

PARTIES: **WARATAH COAL PTY LTD**  
**ACN 114 165 669**  
(applicant)  
v  
**JEFFREY WILLIAM SEENEY, MINISTER FOR**  
**STATE DEVELOPMENT, INFRASTRUCTURE AND**  
**PLANNING**  
(first respondent)  
and  
**CO-ORDINATOR GENERAL, DEPARTMENT OF**  
**STATE DEVELOPMENT, INFRASTRUCTURE AND**  
**PLANNING**  
(second respondent)

FILE NO: 11583 of 2013

DIVISION: Trial Division

PROCEEDING: Application for a Statutory Order of Review

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 17 September 2014

DELIVERED AT: Brisbane

HEARING DATE: 11, 12 June 2014

Agreed chronology and further submissions on 25 July 2014

JUDGE: Daubney J

ORDER:

- 1. The amended application for a statutory order of review be dismissed.**
- 2. I will hear the parties as to costs.**

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW – GENERALLY – where the applicant is a proponent of a coal mining project in the Galilee Basin – where the applicant made an application for approval of a rail corridor linked with its mining project as an “infrastructure facility of significance” – where this application was made under s 125(1)(f) of the *State Development and Public Works Organisation Act 1971* (Qld) (“the Act”) – where the purpose of seeking the declaration was to enable subsequent

invocation of the discretionary powers of compulsory acquisition under s 125 of the Act - where the application was refused – where the decision is amenable to review under *Judicial Review Act 1991* (Qld) – where the applicant submits that pursuant to the *Judicial Review Act 1991* (Qld) the decision should be quashed or set aside, and referred back to the second respondent for consideration and determination according to the law – whether the decision to refuse approval of the rail line as an “infrastructure facility of significance” under s 125(1)(f)(ii) of the Act was infected by error such as to render it susceptible to judicial review

ADMINISTRATIVE LAW – JUDICIAL REVIEW –  
 GROUNDS OF REVIEW – FETTERING DISCRETION –  
 where the basis of the government’s policy was that there would be two rail corridors within which the powers of compulsory acquisition would be considered for exercise – where the applicant’s proposed rail line lay outside the two approved corridors – where the applicant contends that the decision-maker allowed his discretion to be fettered by improperly applying government policy – where the applicant further contends that the decision-maker failed to have regard to the merits of the application – whether the decision-maker gave proper, genuine and realistic consideration to the merits of the application and was ready to depart from government policy if the merits of the application justified such a course

ADMINISTRATIVE LAW – JUDICIAL REVIEW –  
 GROUNDS OF REVIEW – IRRELEVANT  
 CONSIDERATIONS – where the applicant submits that the decision-maker took into account two irrelevant considerations – where the first irrelevant consideration was that there was an absence of approval for the applicant’s facility under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) – where the second irrelevant consideration was that the statement of reasons improperly took into account the absence of settled arrangements for port facilities for the coal project – whether the decision-maker wrongly took irrelevant considerations into account

ADMINISTRATIVE LAW – JUDICIAL REVIEW –  
 GROUNDS OF REVIEW – RELEVANT  
 CONSIDERATIONS – where the applicant contends that the decision-maker failed to take relevant considerations into account – where the applicant submits that there were three relevant considerations – where these considerations concerned the negative comparable attributes of a rival proposed facility – whether the decision-maker failed to take relevant considerations into account

ADMINISTRATIVE LAW – JUDICIAL REVIEW –

GROUNDS OF REVIEW – UNREASONABLENESS – where the applicant contends that the decision was infected by “*Wednesbury*” unreasonableness – where the applicant submits that the ultimate irrationality was due to the fact the decision-maker proceeded on the basis that the government’s policy was immutable, that the absence of approval for the facility was taken into account and that the decision the facility would not have the requisite economic significance was irrational as the merits of the rail line were not addressed – whether the decision was so unreasonable that no reasonable person could have reached it

*State Development and Public Works Organisation Act 1971* (Qld), ss 26(1)(a) and s 125(1)(f)

*Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291; [1987] FCA 713, cited  
*Pupfan Pty Ltd v State of South Australia* (2003) SASR 195; [2003] SASC 283, cited  
*QCoal Pty Ltd and Others v Hinchcliffe, Minister for Infrastructure and Planning* (2011) 184 LGERA 77; [2011] QSC 334, cited

*Surinakova v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 33 FCR 87; 26 ALD 303, cited  
*Waratah Coal Pty Ltd v Coordinator-General, Department of State Development, Infrastructure and Planning* [2014] QSC 36, followed

COUNSEL: S L Doyle QC, with him S Mcleod and A Stumer, for the applicant  
M D Hinson QC, with him J M Horton for the respondents

SOLICITORS: Hopgood Ganim for the applicant  
Clayton Utz for the respondents

## Introduction

- [1] The applicant (“Waratah”) is the proponent of a coal mining project in the Galilee Basin in Central Queensland. The proposed project involves developing a thermal coal mine and a heavy haul standard gauge rail line to transport coal from the mine to a coal export facility at the Port of Abbot Point.
- [2] On 18 July 2008, the project was granted “significant project status” pursuant to s 26(1)(a) of the *State Development and Public Works Organisation Act 1971* (Qld) (“the Act”). A revised version of the project, including port facilities at Abbot Point, was granted “significant project status” on 28 November 2008. That status has not been revoked.

- [3] The material filed in the present application reveals that in 2010 Waratah entered into numerous agreements with various Chinese State-owned enterprises for the construction and management of the mining operations, the port facilities, and the rail line from the mine to the port, and for the purchase of coal from the project. The material also contains details of the funding arrangements which had been agreed to, in principle at least.
- [4] On 1 July 2011, Waratah submitted an application for approval of a rail corridor, proposed to link its mining project to the Port of Abbot Point export infrastructure, as an “infrastructure facility of significance” under s 125(1)(f) of the Act. The proposed infrastructure facility which was the subject of the application included the following components:
- a rail line of approximately 453 kilometres between the mine site and the boundary of the Abbot Point state development area;
  - a marshalling and refuelling yard (approximately five kilometres in length and 500 metres wide);
  - passing loops and maintenance sidings along the main line.

The application proposed a corridor width of 500 metres (250 metres on each side of the preferred rail centre line), but noted that future engineering studies would reduce that to a nominal operating corridor of 60 – 80 metres allowing for railway infrastructure, access road, drainage and other supporting infrastructure.

- [5] Details of the route of the proposed corridor were contained in the application.
- [6] On 6 June 2012, the first respondent (“the Minister”)<sup>1</sup>, who was the relevant responsible Minister, announced the State Government’s policy decisions concerning the development of rail corridors between the Galilee Basin and the Port of Abbot Point. It was announced, relevantly, that the government would support two common rail corridors, the first being generally located on a “west to east” alignment, and the second on a “south to north” alignment within the Galilee Basin. It was said that the government was intending to identify the “south to north” corridor in the vicinity of a rail corridor study area which had been identified in the environmental impact study for another mining project in the Galilee Basin, namely the Alpha Coal Project being undertaken by Hancock Coal Infrastructure Pty Ltd.
- [7] The iterations of the government policy concerning the common rail corridors from the Galilee Basin will be dealt with in more detail below. It is sufficient for the purposes of this introduction to note, and it was at no time in issue, that the rail corridor proposed in Waratah’s application does not fall within the location of the “south to north” common rail corridor referred to in the government policy.
- [8] Waratah was given express notice of the government’s policy and, despite the fact that the location of the proposed corridor clearly did not conform with that policy, requested that its application for approval of its proposed rail corridor as an “infrastructure facility of significance” be progressed. There was no suggestion that

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<sup>1</sup> The first respondent also was, and is, the Deputy Premier, but for the purposes of this judgment it is appropriate to refer to him by his relevant portfolio as Minister for State Development, Infrastructure and Planning.

Waratah had in any way been denied natural justice after the announcement of the policy, and counsel for Waratah expressly eschewed any such argument.

- [9] On 31 October 2013, the Governor-in-Council decided to refuse Waratah’s application, and reasons for that refusal were subsequently given.
- [10] Waratah now seeks orders pursuant to the *Judicial Review Act 1991 (Qld)* (“the *JR Act*”) quashing or setting aside that decision, and for its application to be referred back to the second respondent, the Co-ordinator General, and the Minister, on behalf of the Governor-in-Council, for consideration and determination according to law.
- [11] It was common ground before me that the decision is amenable to review under the *JR Act* and that Waratah has standing to bring this application.

***State Development and Public Works Organisation Act 1971 (Qld)***

- [12] The rail line within the corridor proposed in Waratah’s application would traverse land held by some 46 individual landholders, comprising five freehold lots and 41 leasehold parcels, and would be more than 450 kilometres long. It is uncontentious that Waratah’s purpose in making the application was to enliven the power of the Co-ordinator General under s 125 of the Act to compulsorily acquire land to enable the rail line to be built.
- [13] When the decision was made, s 125 of the Act relevantly provided:
- “(1) In addition to the power to take or otherwise acquire land under section 82, the Coordinator General may take land for any of the following purposes –
- ...
- (f) an infrastructure facility that is –
- (i) of significance, particularly economically or socially, to Australia, Queensland or the region in which the facility is to be constructed; and
- (ii) approved by the Governor in Council, by Gazette Notice, as having that significance.
- (2) In considering whether the infrastructure facility mentioned in subsection (1)(f) would be of economic or social significance, the potential for the facility to contribute to community wellbeing and economic growth or employment levels must be taken into account.
- (3) In assessing the potential mentioned in subsection (2), the contribution the infrastructure facility makes to agricultural, industrial, resource or technological development in Australia, Queensland or the region is a relevant consideration.”
- [14] By s 125(16)(a), the term “infrastructure facility” was defined to include a railway.

## **The course of the application and statements concerning State Government policy<sup>2</sup>**

- [15] The relevant application was lodged with the Co-ordinator General under cover of a letter from Waratah dated 1 July 2011. The application addressed the following major headings:
- Project overview
  - Need for the project
  - Rail infrastructure facility
  - Economic benefits associated with the infrastructure facility
  - Social benefits associated with the infrastructure facility
  - Technical capabilities to build facility
  - Financial capacity to implement facility
  - Execution of the project
  - Environmental impacts and mitigation strategies

- [16] The rationale for the proposed infrastructure facility was described under the sub-heading “Necessity for a new railway facility” as follows:

“Waratah Coal intends to construct a standard gauge railway with laden grades no greater than 1 in 200 (0.5%). This provides for a much more efficient heavy haul operating system and will allow twice as much coal per train to be hauled than is possible with Queensland’s current narrow gauge system. This is also expected to result in lower long term operating costs due to the flatter overall grades and larger radius curves.

The railway line would be open to third party users and free up costly bottlenecks already inhibiting Australia’s coal industry. This includes the current restrictions with rail capacities that service the Bowen Basin and Hunter Valley, which coupled with strong demands of coal overseas and production delays at the mines, has resulted in queues of bulk carriers at Dalrymple Bay and the Port of Newcastle respectively.

The proposed railway corridor will encompass over 50 km of the Galilee Basin and open up access to other mining proponents including AMCI, Adani, Hancock Coal, Vale Coal, etc which all hold significant JORC inferred resources of thermal coal. The capacity of the railway could be easily expanded to account for increased tonnages from proponents through the addition of passing loops and progressive duplication of the main line if required.

Waratah Coal plans to keep the whole supply chain from mine site to port operating at maximum efficiency, ensuring all sections of the supply chain (mine, rail and port) are synchronised so that the coal coming into the terminal matches the size of ships that are scheduled to dock and can meet export demands globally. To ensure the future long-term coal chain

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<sup>2</sup> This section of the judgment is derived principally from the Agreed Chronology jointly submitted by the parties.

capacity of the Galilee Basin, the development of a new railway is imperative.

The proposed railway facility is a strategic and critical life line for the future developments in the Galilee Basin. Waratah Coal is aware of another proposed railway facility to support a project proposed by Hancock Coal and that the railway facility has been approved as an Infrastructure Facility of Significance. However Waratah Coal does not consider Hancock Coal's proposed railway facility sufficiently robust to reliably support Waratah Coal's future developments and investment.

Waratah Coal requires its own railway facility to support its project for the following reasons:

1. There are potential fatal flood risks and operational limitations inherent with construction within Q100 floodplains; and
2. Waratah Coal does not consider that Hancock Coal's proposed railway alignment would facilitate efficient access to the additional deposits in the basin owned by Waratah Coal; and
3. The route selected by Waratah Coal which is the subject of this application has opted for technical differentiators that allow for steeper gradients giving an optimised rail alignment. In particular the rail lines proximity to Q100 high risk flood plains is minimised by the selected route. Waratah Coal has selected its route to mitigate the risk of operational availability losses that would result from flooding. Further, the proposed alignment along the Galilee basin border facilitates better access to the additional Galilee reserves. As a whole, Waratah Coal's proposed railway facility is considerably shorter than that of the railway facility proposed by Hancock Coal. This minimises the impact of potential sterilisation of land, reduces impacts on the community environment, national parks, natural water courses, ecosystems and matters of national environmental significance."

[17] On 6 June 2012, the Minister made a statement on the floor of Parliament in which he said:

"Today I will be writing to all companies with interests in the Galilee Basin outlining our government's intentions to use our powers under the state development act to ensure a sensible outcome to this issue. After exhaustive negotiations with all of the proponents, we believe that the responsible development of the Galilee Basin can best be achieved by defining an east-west railway corridor as an extension of the existing QRN network and a north-south railway corridor to facilitate the construction of new standard gauge lines. Our government will support the declaration of state development areas, or SDAs, to define these two preferred corridors within which the government's powers of compulsory land acquisition will be exercised to bring about our clearly stated policy outcomes of a coordinated approach to railway development for the Galilee Basin.

Everyone should clearly understand that our government will be very unlikely to exercise our powers of compulsory land acquisition to establish railways outside these defined corridors. We would be very unlikely to compulsorily acquire land in a way that would bring about an outcome in contravention of our policy position.

...

There are, however, some very large tonnages envisaged by the large vertically integrated mine proposals in the longer term from the Galilee Basin. To facilitate these large tonnages, the government will define a north-south corridor that straddles the alignment of the railway proposed by GVK-Hancock coal for the new 500-kilometre standard gauge line from its proposed Alpha coalmine north to Abbot Point. We will continue to work closely with GVK-Hancock and other mine proponents to ensure third-party access to this new line and negotiate with other proponents to ensure that they are not left disadvantaged by our essential moves to rectify the former government's failure to properly plan this key economic infrastructure for Queensland's future. We will ensure third-party access options to the new railway built in this preferred corridor as well as the option for other large mining proposals to co-locate their own new railway in that corridor if it proves to be more commercially viable for them to do so."

- [18] Hansard of 6 June 2012 also records that, in response to a question without notice, the Minister referred to the fact that, whereas there had previously been six different proposals for rail lines from the Galilee Basin under consideration, the government had:

"...defined two corridors – one running north and one running east – to give the maximum number of opportunities to Galilee Basin proponents to do what we want them to do: mine the coal that Queenslanders own and earn the money for generations of Queenslanders to come".

- [19] On 6 June 2012, the Minister wrote to Mr Clive Palmer, the chairman of Mineralogy, which is the parent company of Waratah. This letter relevantly stated:

"The purpose of this letter is to inform you of the Government's policy decision regarding the development of rail corridors from the Galilee Basin to the Port of Abbot Point.

The Government has previously stated its strong view that the development of rail corridors from the Galilee Basin should be coordinated so as to achieve the most efficient and cost effective transport outcome, whilst minimising impacts on communities and other stakeholders in the Galilee Basin. The Government has also clearly indicated its preference for a common rail corridor or corridors to be developed.

...

### **Common rail corridor proposals**

The Government proposes to support two common rail corridors. The first is generally located on a "west to east" alignment and the second is generally located on a "south to north" alignment within the Galilee Basin.

...

The Government is considering the use of a range of State legislative powers which may assist in delivering access to land for proponents to deliver the objective of common rail corridors. The Government will be



very reluctant to exercise State powers unless this supports achievement of Government objectives and it is in the public interest to do so.

Further details of the proposed common rail corridors are set out below including the conditions which are envisaged to be complied with by proponents before the State will be prepared to support a common rail corridor.

As a result of this decision to support common rail corridors, the Government now encourages proponents to consider use of these preferred common rail corridors.

### **West to East**

...

### **South to North**

The Government considers there to be potential for development of a number of large scale, vertically integrated mining operations and in recognition of this is prepared to support a ‘south to north’ rail corridor to service these operations over the medium to longer term.

The Government acknowledges that a significant amount of environmental investigation and technical design work has occurred for a number of proposals in this area.

On 29 May 2012, the Coordinator-General released the evaluation report for the Hancock Coal Infrastructure Pty Ltd Alpha Coal Project, which includes the proposal to construct a railway line from the proposed mine to the Port of Abbot Point.

Given the advanced stage of development of the Alpha Coal Project, the Government is intending to identify a “south to north” corridor in the vicinity of the rail corridor study area identified in the Alpha Coal Project Environmental Impact Study.

However, this announcement should not be taken as an endorsement by the Government of the Alpha Coat Rail project, and any corridor established will also be available to other proponents.

The boundaries of a common rail corridor on the “south to north” alignment will be finalised following further independent investigations. Additionally, if the Government is not satisfied that a railway or railways can be built in this corridor and that a number of preconditions can be met in the short term the Government may consider other alternatives.

### **Conditions to be satisfied and further investigations to be completed prior to announcing final alignment of common rail corridors**

The Government is prepared to facilitate the development of preferred common rail corridors from the Galilee basin to the Port of Abbot Point through use of a range of legislative tools if certain preconditions are met. Before the Government will determine a final alignment for the common rail corridors environmental and other approvals at a State and Federal

level need to be obtained and proponents interests in using the common rail corridors will need to:

- (a) give a commitment to the Government that it will seek approval from the ACCC or the QCA of a voluntary third party access undertaking, on terms acceptable to the Government.
- (b) enter into an agreement with the State to access geotechnical and similar data for the proposed rail corridor on terms satisfactory to the State; and
- (c) provide the Government with evidence of the proponent's ability to proceed with its project, within a reasonable timeframe, within the common rail corridor. This includes completion of any necessary environmental assessment processes, obtaining other approvals (including Commonwealth approvals and ILUAs if applicable) and providing satisfactory evidence of funding. The Government will inform proponents of additional criteria as the further investigations are progressed; and
- (d) any other requirements that the Government may nominate as a result of further investigations or considerations.

It should be noted that the Government may amend its rail corridor preferences at any time in the future if the Government considers that technical, environmental, commercial or other issues make it desirable to do so.

#### **Processes placed on hold**

The Government has decided to place a hold on rail proposals which are not related or linked to the preferred west to east and south to north corridors. This will commence immediately and operate until at least 31 December 2012. It may be extended if necessary.

During this time all existing applications for State assistance for railways from the Galilee Basin which are unrelated to the preferred common rail corridors will not be dealt with...This will include, for example, applications for significant projects, infrastructure facility of significance, investigation authorities and use of State powers to compulsorily acquire land.

If a rail proposal has already been declared a significant project and is currently undergoing an Environmental Impact Statement process, this hold will not specifically apply to the Environmental Impact Statement process. However, it should be understood that the progression of any such projects which are unrelated to the preferred rail corridors will be at the proponent's own risk."

- [20] On 6 June 2012, the Minister also issued a media statement, in which he said: "The Newman Government today announced two rail corridors to service new and existing coal mines in both the Galilee and Bowen Basins.

An east-west corridor will see an extension of the existing QR National network from near Moranbah for the central Galilee Basin and will provide links to coal ports of Abbot Point, Dalrymple Bay and Dudgeon Point.

A north-south rail corridor will be defined along the proposed GVK-Hancock coal alignment to facilitate the construction of new standard gauge rail lines to link the proposed large-scale, vertically integrated mining operations in the southern Galilee Basin to Abbot Point.

...

[The Minister] told Parliament today the two corridors were the only areas in which the State Government was likely to use its powers to compulsorily acquire land for new rail lines.

...

[The Minister said] “The Government will work towards declaring State Development Areas to define these two preferred corridors within which the Government’s powers of compulsory land acquisition can be exercised to bring about our clearly stated policy outcomes of a co-ordinated approach to railway development. ...”

...

For the large, vertically integrated mines proposed for the southern Galilee area the Government will define a corridor that straddles the alignment proposed by GVK-Hancock Coal for a new 500km standard gauge line north to Abbot Point.

“The Government will ensure third party access to each of these corridors and no proponent will be disadvantaged.”

“There will be the option for other large mining proposals to co-locate their own new railway lines within north south corridor should they consider that to be more commercially viable.”

- [21] On 22 June 2012, the managing director of Waratah wrote to the Co-ordinator General referring to the application which had been submitted on 1 July 2011, and asked for information on the progress of the application. The Co-ordinator General wrote in response on 25 June 2012 to the managing director of Waratah, saying:

“The Deputy Premier and Minister for State Development, Infrastructure and Planning has announced a clear Government policy in relation to railway proposals in the Galilee Basin. This includes the Government’s preferred “south to north” and “west to east” corridors.

Despite this announcement, you have requested that your application be assessed and I am prepared to progress the assessment of your application.

In the assessment I expect that the Government’s policy on preferred rail corridors in the Galilee Basin would be taken into account.

I note that your application was prepared prior to this policy direction being announced. Therefore, if there are any submissions you would like to make in relation to the application of this policy to your project or the assessment, please provide them in writing to me by 5pm on Monday, 2 July 2012.”

- [22] On 22 August 2012, the Minister made a ministerial statement to Parliament in which he tabled, *inter alia*, the letter he had written to Mr Palmer on 6 June 2012. In the course of that ministerial statement, the Minister said:

“The government has made it clear that it would support only two corridors. In other words, the government’s power to compulsorily acquire land, if it were needed, would be exercised only to effect our policy

outcome. The power to compulsorily acquire land would be exercised only in the areas that we identified. Indeed, it was also made clear that the government policy position was not an endorsement by the government of a particular project and any corridor established would also need to be available to other proponents.

The policy position does not preclude a mine proponent building a rail project somewhere else, but they will have to do so without government support. Indeed, I am advised that the Coordinator-General is currently assessing Clive Palmer's China First coal project for an environmental impact statement and for an infrastructure facility of significant application, as is the normal process. Let me add that the normal process has and will be followed through all developments in the Galilee Basin. Our government is very keen to deal with anyone interested in investing in the Galilee Basin – we are very keen to deal with anyone interested in investing in Queensland – but we will deal with all of those people on a fair and equal basis. We will deal with all of the proponents in the Galilee Basin on a fair and equal basis and Clive Palmer and his China First project will be dealt with exactly the same as every other proponent in the Galilee Basin.”

[23] On 7 November 2012 the Director-General of the Department of State Development, Infrastructure and Planning wrote, on behalf of the Minister, to the managing director of Waratah saying:

“You have asked for confirmation that as, in your view, GVK will not be able to provide satisfactory evidence of funding by 31 December 2012, Waratah Coal's China First project can now proceed, with its own corridor.

In the Deputy Premier's correspondence of 6 June 2012, Waratah was advised that the Government is considering identifying a “south to north” corridor in the vicinity of the rail corridor study area identified in the Alpha Coal Project Environmental Impact Study and that the boundaries of a common rail corridor on the “south to north” alignment would be finalised following further independent investigations. The letter also noted that the policy announcement should not be taken as an endorsement by the Government of the Alpha Coal Rail project, and that any corridor established will also be available to other proponents.

As noted in your correspondence, the Deputy Premier advised that if the Government is not satisfied that a railway or railways can be built in this corridor and that a number of preconditions can be met in the short term, the Government may consider other alternatives.

Investigations into the location of the proposed north south corridor are expected to be completed next year. The Government will determine the final alignment of the common rail corridor after the investigations are completed and after other preconditions are satisfied.

While the Deputy Premier's letter states that a hold is placed on other rail proposals until 31 December 2012 (which date may be extended) there was no requirement for preconditions to be met by 31 December 2012.

As you have noted, it remains open to the Government to amend its rail corridor preferences in the future if the Government considers technical, environmental, and commercial or other issues make it desirable to do so.

I draw to your attention that Waratah is not precluded from progressing its projects through the usual processes and at its own risk. As you know, the Deputy Premier's letter of 6 June 2012 advised that an application for State assistance for a railway in the Galilee Basin which is unrelated to the preferred rail corridors will not be dealt with while the hold on such rail proposals is in place. However, as noted in the Deputy Premier's letter, this does not apply to existing declared significant projects undergoing an Environmental Impact Statement process, such as the China First Project. I note that the environmental impact study for the China First Project continues to be coordinated and assessed by the Coordinator-General and has not been delayed."

- [24] On 12 December 2012, the Minister wrote a letter to Mr Palmer in which it was relevantly said:

"I acknowledge that many of the factors influencing the possible development of the Galilee Basin have changed markedly in the last six months with the retraction of the world economy, the sudden reduction in coal prices and the associated difficulty of raising large amounts of capital.

I confirm that I will, as I indicated earlier in the year, be reviewing the position in regard to the Galilee Basin early in the New Year to determine whether any of the Government's current policies need to be altered to accommodate the changed circumstances in the world economy and the coal market.

I invite you to be part of that review process and will ensure my Department provides every opportunity for your company representatives, in common with all other Galilee Basin proponents, to meet with Departmental officers on a regular basis to ensure a full understanding of the current situation and the emerging challenges."

- [25] On 21 December 2012, the Minister issued a media release in which he said that the government was seeking registrations of interest to participate in the first stage of potential development of new export coal terminal capacity at the Port of Abbot Point.

- [26] On 14 January 2013, the Minister wrote to Mr Palmer. It is appropriate to set out the terms of this letter in full:

"I am writing to you regarding development of the Galilee Coal Basin and in particular, the development of railway infrastructure, which is essential to the opening of the Basin.

In my correspondence to you of 6 June 2012, I articulated the government's policy with respect to development of railway(s) to service the Galilee Basin.

The government is assessing progress on the implementation of its policy and the purpose of this letter is to further seek submissions and information from Galilee Basin stakeholders regarding the government's policy and any other issues which stakeholders may believe are relevant.

In developing the government's policy last year, I consulted with a number of stakeholders and the views expressed were taken into account along with a number of additional considerations. These considerations included the interests of landholders and community stakeholders, that 'open access'

arrangements be available to access seekers, and that wherever possible, infrastructure be developed on a shared or multi-user basis.

My letter of 6 June 2012, noted the government's strong view that the development of rail corridors from the Galilee Basin should be coordinated. I outlined the government's preference for the development of two common rail corridors, one generally located on a west to east alignment, and one generally located on a north to south alignment.

The government remains firmly of the view that the policy intent communicated to you in June 2012 strikes the right balance between a number of interests. However, I am very much aware of the changes that have occurred since June 2012 in the world economy generally and world coal markets in particular, and the potential for those changes to affect to some extent the investment decisions of all Galilee Basin proponents. I also understand that those effects may potentially vary markedly between different proponents and different projects.

I believe it is important for our government to be fully aware of the potential effects of the changed world economic circumstances on the development of the Galilee Basin. I also believe it is my responsibility to review our government's policy positions and to consider whatever issues are necessary to facilitate and assist the development of the Galilee Basin in a timely way.

I therefore invite you to make a submission in regard to your current view of the development of your Galilee Basin proposal, particularly in regard to the policy positions formerly outlined by our government and the changes that have occurred in the world economy and global coal markets since you were advised of those policy positions in June 2012.

The following points provide an overview of the government's communicated policy positions with respect to the development of the Galilee Basin rail infrastructure and I invite you to address in your submission these and any other issues you believe are relevant.

#### *Policy Position 1*

*The government recognises and wants to promote the concept of "the first mover advantage" in determining the provision of rail infrastructure in the Galilee Basin and any government policy position will avoid constraining or delaying any proponent able to take commercial advantage from being the first mover.*

#### *Policy Position 2*

*The government's preference is for shared use of infrastructure that facilitates incremental expansion wherever possible with open access arrangements and the common use of corridors to minimise impacts on landholders and the environment.*

#### *Policy Position 3*

*The government will consider the use of a range of State Government land acquisition powers to acquire land for infrastructure corridors that meet the government's policy intentions and our objective of developing the coal*

*resources of the Galilee Basin and those land acquisition powers will be used when the government has a high degree of confidence that a project is able to proceed to construction.*

You can be assured that our government remains committed to the overriding objective of developing the coal resources of the Galilee Basin and is keen to work with you towards that objective. In that regard I would appreciate any comments or submissions you may choose to make by 28 February 2013.”

- [27] On 11 March 2013, the Minister issued a press release headed “Aurizon and GVK to jointly work on Galilee rail-port”. The media release said:

“The potential to unlock the Galilee Basin coal reserves, creating thousands of new jobs in Queensland and providing billions of dollars of export revenue and royalties for the State, has moved a step closer with today’s announcement that GVK-Hancock and Aurizon will work together to develop rail and port infrastructure.

It also means the Newman Government’s preference for consolidation of rail corridors from the Galilee Basin is more likely, with the two companies assessing the optimum rail solution based on the two corridors already announced.”

The media announcement quoted the Minister as saying:

“We want sensible, incremental infrastructure development.

...

[The announcement by GVK-Hancock and Aurizon] is a commercial arrangement that requires further negotiations, but those negotiations have the potential to progress our strategy of seeing consolidated multi-use rail corridors that have the least impact on local communities and landholders.

By coming together the companies could deliver the optimum rail solution for all parties.”

The media release also quoted the Minister as saying:

“...both GVK-Hancock’s north-south rail project and Aurizon’s east-west proposal have been declared as coordinated projects previously by the Queensland Coordinator-General”.

- [28] On 19 March 2013, the Minister made a statement to Parliament concerning major projects, in the course of which he said:

“The giant Alpha Coal Project continues to move forward with the most recent announcement last week of the Alpha proponent GVK Hancock joining with Aurizon to work together on the massive rail and port development needed to support the as yet undeveloped Galilee Basin coalfields. The expression of interest process for the further development of Abbot Point is well advanced, with the government currently assessing 19 submissions for future development.”

- [29] In May 2013, the State Government released a document entitled “Galilee Basin Coal Infrastructure Framework”. This document recited that the purpose of the framework was as follows:

“To realise the potential of the Galilee Basin, it is critical for all levels of government, proponents and local communities to understand how each type of infrastructure works synergistically to support development in the basin.

The Galilee Basin Coal Infrastructure Framework provides a strategic approach to the optimal development of the basin’s coal reserves by:

- ensuring that all future infrastructure supports the sustainable development of the Galilee Basin’s coal resource, while maximising benefits to Queensland through royalty return, employment and related regional economic development
- encouraging project proponents to consider how their project(s) fit into the wider development of the Galilee Basin – environmentally, economically and socially
- streamlining planning, assessment and approval processes by guiding government agencies with regard to their policy, strategic and governance arrangements in the provision of infrastructure. This approach aims to provide timely decisions to investors and proponents
- providing guidance to the private sector of relevant government facilitation, assessment and decision-making pathways.”

The framework document then referred specifically to “Rail and ports”, and relevantly said:

**“Rail**

Rail is the most cost effective method for large-scale haulage of coal. At present, no line with sufficient capacity exists to connect the undeveloped coal deposits of the Galilee Basin to coastal coal export ports.

To facilitate the development of necessary rail infrastructure, the Queensland Government is taking an active role in the development of Galilee Basin railway(s). In June 2012, the government announced it supported development of two common rail corridors from the Galilee Basin to the Port of Abbot Point:

- South to North corridor – given the advanced stage of development of the Alpha Coal Project, the government supported development of a corridor in the vicinity of the area studied by GVK/Hancock for the Alpha Coal Project environmental impact statements (EIS).
- West to East corridor – this corridor was to connect the central and northern areas of the basin to the existing Aurizon (formerly QR National) coal rail systems, combining greenfield rail line development with further development of existing coal rail system corridors. The alignment for this corridor is consistent with the areas being studied respectively by Adani and Aurizon, as part of developing the EIS for their proposed projects.

**Options**

In announcing its preferences, the government communicated its intention to strike a balance between the interests of a range of stakeholders including landholders and the community. The government encouraged incremental expansion where feasible and sought that proponents minimise impacts on landholders and the environment wherever possible. The



government also emphasised its view that ‘open access’ arrangements should be available to access seekers and that, wherever possible, infrastructure be developed on a shared or multi-user basis.

An important consideration for the government is supporting ‘the first mover advantage’. In determining the provision of rail infrastructure in the Galilee Basin, the goal of government policy is to avoid delaying any proponent who is able to take commercial advantage from being the first mover.

In order to assist in the establishment of common rail corridors from the Galilee Basin to the Port of Abbot Point, the government will consider use of state development area powers under the *State Development and Public Works Organisation Act 1971*. These provisions may be used if the government has a high degree of confidence that a project is able to proceed to construction.”

- [30] On 4 June 2013, the Minister made a statement to the House, in which he referred to the current status of several mining projects in the Galilee Basin. His statement continued:

“In June last year the government made clear its preference to the consolidation of rail infrastructure into two corridors from the Galilee Basin to the port of Abbot Point. In January I wrote to Galilee Basin stakeholders requesting submissions for government consideration about project progress and the effects of changed international market conditions on projects in the Galilee Basin.

While the government will continue to do what we can to encourage this consolidation of the required infrastructure, we recognise that some proponents will be better able to progress their projects in the current investment climate than others. We also recognise the advantage that will naturally accrue to the first proponent able to establish rail and port infrastructure in that they will be in a position to provide access to other projects during their developmental stages. The government’s support for a consolidation of infrastructure remains unchanged. However, we recognise that it is crucial to support proponents that have the capacity to be the first mover, especially in the constrained international investment climate that all proponents face. We will certainly ensure that every Galilee Basin project has the opportunity to progress if the proponent has the capacity and the appetite to proceed in that constrained international investment environment. We will fully support projects that have an ability to move forward those projects with pit-to-port infrastructure solutions, those projects with approvals in place and those that have a demonstrated financial capacity to commit to real development.

More importantly, though, it needs to be understood that while our government is considering a range of options to support these developments the bar has been set high with respect to state support. I want to stress again that state government land acquisition powers will only be considered if we have a high degree of confidence that a project is in a position to proceed. If we assist a proponent to acquire land for their project, we will also make sure that any infrastructure is developed on a multiuser basis and that there is minimal impact on landholders and the natural environment. This government is committed to getting Queensland back on track. We are committed to facilitating the Galilee Basin projects.

They are crucial to boosting the resources sector – one of the state’s four economic pillars that will be important for Queensland’s economic future.”

- [31] On 8 August 2013, the Co-ordinator General released his evaluation report on the environmental impact statement relating to Waratah’s project. That report included the following:

**“Galilee Basin rail policy**

In June 2012, the State Government announced a rail policy to guide and facilitate the orderly development of rail infrastructure to service the Galilee Coal Basin. The policy supports the development of a single north-south corridor to service mines in the southern Galilee Basin and a single east-west corridor to service mines in the central and northern Galilee Basin. The Hancock/GVK Alpha Project rail alignment was nominated as the preferred alignment for the north-south corridor and the Adani Carmichael Coal Project/Aurizon Central Queensland Rail Project rail alignment was nominated as the preferred alignment for the east-west corridor.

The Deputy Premier announced in Parliament on 4 June 2013 that the government would continue to encourage the consolidation of required infrastructure while recognising the need to support proposals that provide a ‘pit-to-port’ solution from proponents that have demonstrated financial capacity to commit to real development. Provided these proposals can be developed on a shared or multi-user basis and can demonstrate an ability to proceed to construction, the government has indicated a preparedness to support a ‘first mover advantage’ and assist in the acquisition of land for the corridors.

The GC project rail alignment is not a preferred alignment under the current policy and the government has given no commitment to assist with land acquisition. However, the government has not said it would prevent a proponent developing its own rail line if it could acquire all the necessary land and obtain all the necessary approvals.

Although mindful of the Galilee rail policy, I have conducted my environmental evaluation of the GC project in accordance with Part 4 of the SDPWO Act having regard to environmental matters relevant to the rail alignment proposed. The government policy on preferred corridors and proponent assistance with land acquisition are outside the scope of this EIS evaluation.”

- [32] On 31 October 2013, the Governor-in-Council refused Waratah’s application. On 1 November 2013, the Minister provided Waratah with a statement of reasons for that refusal.

- [33] Counsel for Waratah also referred me to a government document entitled “Galilee Basin Development Strategy” which was issued on 7 November 2013. Clearly enough, this document was issued after the relevant decision was made, but counsel for the applicant nevertheless submitted it was relevant to have regard to various statements made in the strategy document concerning government policy. In the foreword to the strategy document, signed by the Premier and the Minister, it was said:

“The government is finding new ways to support and encourage business and industry to develop key infrastructure across the southern and central Galilee Basin.

One of these is the Galilee Basin Development Strategy which outlines the government’s approach towards assisting business and industry to lower their upfront costs, encourage greater investment and create jobs.

Importantly, under this strategy, first movers will receive top priority to develop infrastructure for this region – vital for Queensland’s future development.”

Under the heading “Streamlining land acquisition, planning approvals and red tape reduction” the strategy document contained a section concerning “Galilee Basin State Development Area declaration and rail Solution” in which it was said:

“Rail is the most cost-effective method for large-scale haulage of coal. At present, no line with sufficient capacity exists to connect the undeveloped coal deposits of the Galilee Basin to coastal coal export ports.

To facilitate development of the necessary rail infrastructure, in June 2012 the government announced it supported the development of two common rail corridors from the Galilee Basin to the Port of Abbot Point – a west to east corridor to service the central area and a south to north corridor to service the southern end of the basin.

Importantly, the government recognises that significant delays to projects can occur as private sector developers face difficulties acquiring the land needed to develop railway corridors over significant distances, and that compulsory land acquisition may be required.

**The government’s Galilee Basin State Development Area declaration and rail initiative will:**

- consider the declaration of the Galilee Basin State Development Area (GBSDA) in early 2014 under the powers of the *State Development and Public Works Organisation Act 1971* (SDPWO Act)
- enable the government to compulsorily acquire land for projects
- provide high level certainty to proponents and their financiers.

Initially, the GBSDA will cover an extended area that will be further defined when rail first movers are identified to construct railways to service the southern and central areas of the Galilee Basin. An approach of initially declaring a larger state development area will reduce the uncertainty previously associated with multiple railway proposals, and will in turn facilitate the early establishment of the two rail corridors needed to service the basin.

Before considering compulsory land acquisitions the government will strike the right balance between the interests of stakeholders, including landholders and the community. It will encourage incremental expansion where feasible and ask proponents to minimise impacts on landholders and the environment wherever possible. Open access arrangements will also be required so that later projects can access rail infrastructure already developed on a shared, multi-user basis.”

**The statement of reasons**

- [34] The statement of reasons (“the reasons”) (a 55 page document) commences with a recitation of the decision which had been made on 31 October 2013 to refuse the application for approval of Waratah’s railway facility as an “infrastructure facility of significance” under s 125(1)(f) of the Act. The document set out the relevant legislative framework, and listed the material to which the Governor in Council had regard in making the decision, including, the application and all of the attachments to the application, the relevant legislation, and the Guidelines for acquisition of land for infrastructure projects by persons other than the State which had been made under s 174 of the Act in September 1999 (“the Guidelines”). The reasons summarised the progress of the application, noting that the decision was based on the alignment set out in the application as requested by Waratah, and confirming that Waratah had advised that this was the alignment which it wanted assessed.
- [35] Under the heading “State Government policy regarding the Galilee Basin”, the statement of reasons said:  
 “On 6 June 2012, the Deputy Premier advised the Parliament of Queensland (the **Parliament**) of the State Government’s policy position in respect of rail corridors in the Galilee Basin (the “**Galilee Basin rail policy**”).”

The reasons then set out details of the media statement made by the Minister on 6 June 2012, and referred to this statement and the letter to Mineralogy written on that day. The reasons then summarised the effect of, *inter alia*, the Co-ordinator-General’s letter of 25 June 2012, and the Minister’s statement to Parliament on 22 August 2012. The reasons then referred to the Minister’s letter to Mr Palmer of 14 January 2013, including the Minister’s invitation for submissions with respect to the government’s communicated policy positions, and referred to the three policy positions which were communicated. Reference was also made to, amongst other things, the framework document which had been released in May 2013.

- [36] The reasons then set out “Findings on Material Questions of Fact” under a number of headings. It was said that the conclusions contained in this section of the reasons ‘were made after having had regard to the evidence or other material and the State Government policy environment set out above’. It is sufficient to note presently that the headings under which these findings were considered were as follows:<sup>3</sup>
- Type of infrastructure facility proposed including land on which the facility is to be located
    - Details of the infrastructure facility
    - Details of the land upon which the infrastructure facility is proposed to be located
    - Details of the proposed alignment of the railway
    - Proposed railway facility alignment compared to State Government’s defined common rail corridor
  - Demand projections for the services associated with the infrastructure

<sup>3</sup> It was not in issue before me that the topics covered under these headings were generally conformable to the matters which the Guidelines specify as necessary to be addressed for assessment of the significance of an infrastructure facility. Refer to cl 3.08, cl 3.10 and Appendix A of the Guidelines.

- Needs which the facilities would meet and how the infrastructure would satisfy the identified need
- Timing of project or service delivery
- Special assistance required from government other than land acquisition
- Preliminary financial analysis of the proposed infrastructure facility
- Possible environmental impacts
- Proponent's financial and technical capacity to implement the proposed facility
- Negotiations to acquire land by agreement
- Investigations on the required land
- Public submissions
  - Traditional owners
  - Private individuals
  - Hancock Coal Pty Ltd
- Economic significance of the infrastructure facility
- Social significance of the infrastructure facilities

[37] The statement of reasons then provided the following reasons for the refusal:

- i. There is significant potential future export demand for substantial coal deposits located within the Galilee Basin (detailed further in section 6.2 of these reasons), including, but not limited to those of Waratah Coal, to be primarily exported by sea from the Port of Abbot Point, however the timing and scale of the demand is unclear, due to ongoing uncertainty in market forces.
- ii. There is therefore a need for heavy rail infrastructure for adequate transportation of that coal from the Galilee Basin to the Port of Abbot Point. There is no adequate rail infrastructure already constructed and in place.
- iii. On 6 June 2012, the State Government announced the Galilee Basin rail policy which supports the development of two railway corridors within the Galilee Basin – one on a ‘west-east’ configuration and one on a ‘south-north’ configuration. The intent of the policy is to open up the Galilee Basin’s coal resources while achieving the appropriate balance between this economic objective and minimising the impacts that the necessary heavy rail infrastructure would have upon landholders, the community and the environment.
- iv. The Galilee Basin rail policy is relevant to the consideration of the economic and social significance of the Railway Facility. It is clear that the intent and effect of the Government’s Galilee Basin rail policy is to address the demand arising from the coal reserves

contained within the Galilee Basin, and to realise and enable the development of the Galilee Basin, but in a way that consolidates all existing multiple railway proposals, including Waratah Coal's, into two preferred corridors to ensure a coordinated approach to all rail infrastructure, and in doing so, to minimise adverse impacts on local communities, landholders and the environment. The demand assessment of the Railway Facility must be considered against the existence of the Galilee Basin rail policy.

- v. There is insufficient evidence to demonstrate how the Railway Facility would satisfy identified needs, given the anticipated development of other rail infrastructure within the preferred common user corridors which will otherwise address and satisfy transportation demand between the Galilee Basin and export facilities at the Port of Abbot Point.
- vi. There is insufficient evidence in the Application as to how the Railway Facility would be of economic or social significance if these benefits have already been provided by the construction of rail capacity within the Government's preferred corridors. The aforementioned need for heavy rail infrastructure, and consequently the Railway Facility's ability to demonstrate a satisfaction of that need, are diminished as a consequence of the Galilee Basin rail policy. This substantially diminishes the economic significance of the Railway Facility, particularly its potential to contribute to economic growth, including in respect of resource development in opening up the Galilee Basin. Whilst construction of the Railway Facility would provide benefit to Waratah Coal, its potential to contribute additionally to community wellbeing, and economic growth in the Galilee Basin area, Mackay and Central West Regions, Queensland and Australia is also diminished to the point that it lacks significance that warrants approval under s 125.
- vii. The Application does not demonstrate that the Railway Facility will be undertaken within the timeframes set out in the Application, because the approval required under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) for the progression of the Railway Facility has not yet been obtained, and the environmental impact statement required for that approval is still in progress; and therefore the time of the commencement of operations cannot be accurately predicted.
- viii. An assessment of the economic and social significance of the Railway Facility, in terms of its potential to 'open up' mining opportunities and investment in the Galilee Basin, must necessarily be undertaken in the context of the Galilee Basin rail policy and the fact that the alignment proposed by Waratah Coal is not consistent with the Government's supported corridors. Waratah Coal has not demonstrated that the Railway Facility in the location identified in the Application will have the economic significance claimed in the Application because the construction of a railway or railways, with common user and open access arrangements, within the Government's preferred corridors will otherwise achieve the objective of 'opening up' the Galilee Basin, and achieve this first.

- ix. The Government's Galilee Basin rail policy was developed to address the negative cumulative impacts of multiple rail corridors being built. The construction of additional rail corridors outside of the preferred corridors supported by the policy would generate avoidable negative economic, environmental and social impacts on the communities affected by the additional rail facility outside the Government's preferred corridors that are clearly aimed at consolidating heavy rail infrastructure. The Railway Facility is approximately 453km long and would affect 46 individual land interest holders. The environmental and social impacts of the Railway Facility are significant, as demonstrated in the EIS and SEIS material, responses to the EIS from public consultation, and the Coordinator-General's evaluation report. Whilst individually manageable subject to conditions similar to those in the Coordinator-General's evaluation report, such management would be largely diminished in circumstances where multiple, large-scale, heavy rail infrastructure was constructed in the same geographical area.
- x. The Government is taking a wider coordinated approach in its policy on rail to support the Galilee Basin and has articulated this process and approach to all proponents. The Railway Facility is outside the preferred corridors.
- xi. Given the unlikelihood of Government support for the use of compulsory acquisition powers to establish railways outside the preferred corridors under the Government's Galilee Basin rail policy, the timely progression and the progression at all of the Railway Facility is unlikely, such that the potential for the Railway Facility to contribute to community wellbeing and economic growth or employment levels is substantially diminished.
- xii. It is considered that Waratah Coal's Financial and Technical Capacity statement and relevant supporting documentation, and material provided for inspection on a commercial-in-confidence basis demonstrate that Waratah Coal appears to have progressed the implementation planning of the Railway Facility as far as possible at this point and that on the basis of the information provided to date, the implementation planning appears feasible and reasonable. However, this, by itself, is not sufficient to support approval of the Application.
- xiii. Upon review of the Application, publicly available material and commercial-in-confidence material made available by Waratah Coal for inspection, it is considered that Waratah Coal has progressed and completed the preliminary financial analysis of the Railway Facility as far as reasonably possible at this stage.
- xiv. On the basis of the factors identified in this statement giving reasons:
  - 1. the Railway Facility has potential to contribute to resource development in the Galilee Basin area and the relevant regions as contemplated by section 125(3) of the SDPWO Act; and
  - 2. the Railway Facility has potential to contribute to economic growth and employment levels within the Mackay and Central

West regions and within Queensland and Australia, pursuant to section 125(2) of the SDPWO Act;

- xv. However, in light of the Government's support for the construction of open access consolidated rail infrastructure within corridors supported by the Galilee Basin rail policy, it is expected that other railways will also make such contributions to the Mackay and Central West regions, Queensland and Australia, and facilitate the opening up of the Galilee Basin, but will do so first in time.
- xvi. On the basis of the factors identified in this statement of reasons, the Railway Facility has the potential to provide both positive and negative social impacts. However in light of the Government's Galilee Basin rail policy, it is likely that railways within the supported corridors will have the same social significance as that proposed by Waratah Coal. If the Railway Facility was constructed in addition to such other railways, it would have a significant adverse social impact.
- xvii. Therefore, given it is expected and likely that one or more other railways will be constructed in common rail corridors supported by the Government's Galilee Basin rail policy, the Governor in Council is not satisfied that there is sufficient evidence that the Railway Facility:
  1. has sufficient economic or social significance to warrant approval under section 125(1)(f) of the SDPWO Act; or
  2. has, on balance, the potential to contribute to community wellbeing, pursuant to section 125(2) of the SDPWO Act."

### **Assessment of merits and identification of policy**

[38] Waratah's primary arguments were:

- (a) the decision-maker gave primacy to the 6 June 2012 policy not only as a statement of government policy but as determinative of the application, and there was no proper and genuine assessment of the application on its merits;<sup>4</sup>
- (b) the reasons for the decision elevated the policy to the status of dictating the reality, i.e. it anticipated the fact of a railway being built within the approved corridor ahead of the applicant's railway when the policy was directed to encouraging there being a railway built within the approved corridor;<sup>5</sup>
- (c) the decision-maker failed to have any regard to important shifts in policy after 6 June 2012.<sup>6</sup>

[39] It is convenient to deal first with the final point, because identification of the policy properly to be considered by the decision-maker impacts, in part at least, on consideration of the first two arguments.

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<sup>4</sup> T 1-44, 45.

<sup>5</sup> T 1-45, 5.

<sup>6</sup> T 1-50, 16.



- [40] In the reasons, the term “Galilee Basin rail policy” was defined by reference to the policy announced by the Minister on 6 June 2012 and further articulated in his letter to Mineralogy of the same date. Part 5 of the reasons commenced:

“On 6 June 2012, the Deputy Premier advised the Parliament of Queensland (the **Parliament**) of the State Government’s policy position in respect of rail corridors in the Galilee Basin (the “**Galilee Basin rail policy**”). The Deputy Premier said that two preferred corridors were to be defined within the Galilee Basin – one on a ‘west-east’ configuration, and the other on a ‘south-north’ configuration. The Deputy Premier also stated that “Our Government will support the declaration of State Development Areas, or SDAs, to define these two preferred corridors within which the State Government’s powers of compulsory land acquisition will be exercised to bring about our clearly stated policy outcomes of a coordinated approach to railway development for the Galilee Basin.” The Deputy Premier stated that “our Government will be very unlikely to exercise our powers of compulsory land acquisition to establish railways outside these defined corridors ... in a way that would bring about an outcome in contravention of our policy position.”

The Deputy Premier also advised the Parliament that the State Government will “define a ‘north-south’ corridor that straddles the alignment of the railway proposed by GVK-Hancock Coal for the new 500 kilometre standard gauge line from its proposed Alpha coal mine north to Abbot Point.’ The Deputy Premier stated that the State Government “will ensure third party access options to the new railway built in this preferred corridor as well as the option for other large mining proposals to co-locate their own new railways in that corridor if it proves to be more commercially viable for them to do so.””

- [41] The reasons then referred to the Minister’s media statement of 6 June 2012, and then at length to his letter to Mineralogy of 6 June 2012, saying amongst other things:

“The letter of 6 June 2012 to Mineralogy stated that the State Government recognised the potential for development of a number of large scale, vertically integrated mining operations and indicated the State Government’s support of a ‘south to north’ rail corridor to service these operations. The letter went on to state that, given the advanced stage of development of the Alpha Coal Project, the State Government is intending to identify a ‘south to north’ corridor in the vicinity of the rail corridor study area identified in the Alpha Coal Project Environmental Impact Study. The letter said that this announcement was not an endorsement of the Alpha Coal Rail Project and that any corridor established would also be available to other proponents.

The letter of 6 June 2012 to Mineralogy also stated the State Government had decided to place on hold rail proposals which were not related to or linked to the preferred ‘west-east’ and ‘south-north’ corridors. Despite this, on 22 June 2012, Waratah Coal wrote to the Coordinator-General requesting that the Coordinator-General proceed with the assessment of the Application.”

- [42] It is clear from the reasons that the particular component of that policy which informed the decision was the announcement of, relevantly, a common rail corridor on a “south-north” configuration, straddling the alignment of the railway proposed by GVK-Hancock. Waratah’s proposed facility did not lie within the government’s

preferred south-north rail corridor. Despite this patent, and one might have thought fundamental, disconnect between Waratah's application and the announced government policy, Waratah insisted that its application nevertheless be considered. The application was, of course, for declaration of Waratah's proposed facility as an "infrastructure facility of significance" under s 125(1)(f) of the Act. However, it is clear that the only purpose in seeking such a declaration – indeed - the only purpose at all for seeking such a declaration was to enable subsequent invocation of the discretionary powers of compulsory acquisition.

- [43] Waratah's argument was that there was a subsequent shift in government policy, to be discerned particularly from the Minister's letter of 14 January 2013, the Galilee Basin coal infrastructure framework of May 2013, and also from the Minister's letter of 12 December 2012 and the Ministerial statement of 4 June 2013.
- [44] Waratah's contentions were that:<sup>7</sup>
- (a) by the letter of 14 January 2013, the Minister set out a summary of the government's policy, identifying that the "overriding objective" to be developing the coal resource and the policy specifically stated that the government "recognises and wants to promote the concept of first mover advantage" in determining the provision of rail infrastructure in the Galilee Basin and any government policy position will avoid constraining or delaying any proponent able to take commercial advantage from being the first mover;
  - (b) this policy shift in the 14 January 2013 letter demonstrated that the government was not committed to the preferred rail corridors announced on 6 June 2012 and would in fact give preference to any party who could demonstrate it was the "first mover".
- [45] Waratah reinforced these contentions particularly by reference to the May 2013 framework, albeit noting properly that the framework also referred to the preferred rail corridors which had been referred to in the June 2012 policy announcements.
- [46] By his letter of 12 December 2012, the Minister flagged a review of "the position in regard to the Galilee Basin early in [2013] to determine whether any of the government's current policies need to be altered to accommodate the changed circumstances in the world economy and the coal market" and expressly invited Mr Palmer (and thereby Waratah) to be part of that "review process".
- [47] The Minister's letter of 14 January 2013, then, was clearly the instigation of the review process to which the Minister had referred the previous month. It was not, on any fair reading of the letter, an announcement of revised policies. It was not evidence of a "shift" in policy having occurred. The letter invited Waratah to "make a submission in regard to your current view of your Galilee Basin proposal, particularly in regard to the policy positions formerly outlined by [the] government and the changes that have occurred in the world economy and global coal markets since you were advised of these policy positions in June 2012".
- [48] Waratah placed great store on the articulation in the 14 January 2013 letter of "Policy Position 1":
- "The government recognises and wants to promote the concept of "the first mover advantage" in determining the provision of rail infrastructure in the

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<sup>7</sup> Applicant's contentions in agreed chronology under heading "Document 12".

Galilee Basin and any government policy position will avoid constraining or delaying any proponent able to take commercial advantage from being the first mover.”

- [49] This, it was said, was the first time that the “first mover advantage” had been identified as a matter of government policy, and represented an important change or shift in government policy.
- [50] I am not inclined to accept this characterisation of the situation by Waratah. The letter of 14 January 2013 was not a statement of a shift in government policy, but, relevantly, called for Waratah to address in any submission it chose to make about the matters identified under the heading “Policy Position 1”. It is correct, as Waratah submitted, that the precise phrase “first mover advantage” had not previously been employed in the statements of government policy, but the cognate underlying notion of the practical advantage which would be enjoyed by a first in time rail line proponent within the government’s announced common rail corridors had been acknowledged not just by express references to the advanced stage of the Alpha Coal Project proposal, but by the government having made clear from the outset of its policy announcements that the powers of compulsory acquisition would not be utilised outside its preferred rail corridors.
- [51] But even if, from early 2013, the notion of “first mover advantage” formed a discreet part of the government’s Galilee Basin rail policy, this augmentation of the policy did not “shift” the policy in such a way as to displace the primacy of the government’s preferred rail corridors within the policy. On the contrary, it remained the case that the basis of the government’s policy was that there would be two approved corridors within which the powers of compulsory acquisition would be considered for exercise and, by necessary inference, proposals outside those corridors could expect no assistance by way of the exercise of the powers of compulsory acquisition. So much is clear from the May 2013 framework. In that context, and assuming that recognition of “first mover advantage” had become an element of government policy after early 2013, reference to that element of the policy was irrelevant to a proposal for a rail facility which lay outside the identified preferred corridors.
- [52] There is a further consideration. The notion that a “first mover” will or may enjoy a commercial advantage is obviously a reference to a benefit which will be enjoyed by the particular proponent which becomes the “first mover”. But this application was not about benefits which might be created for a particular proponent. Rather, it involved an evaluation of Waratah’s proposal to assess whether it should be declared as an “infrastructure facility of significance” for the purpose of enlivening the discretionary powers of compulsory acquisition under s 125 of the Act. Consideration of the government’s announced policy as to the locations in which proponents could expect consideration of the exercise of the powers of compulsory acquisition was clearly relevant to that assessment. Consideration of benefits which might inure to a particular proponent were not.
- [53] Waratah has not persuaded me that there was an error in the identification of the relevant policy considered by the decision-maker.
- [54] Returning now to Waratah’s first two arguments, it can be said that the fundamental propositions underlying these submissions were that, in making the assessment under s 125(1)(f)(ii) of the Act, the decision-maker allowed his discretion to be

fettered by the government policy concerning the preferred rail corridors and that Waratah's application was not properly considered on its merits.

[55] As I said on another occasion, the decision-making process for the purposes of s 125(1)(f)(ii) was evaluative, and involved the making of a value judgment by the decision-maker.<sup>8</sup> It can also, I think, properly be said that such an assessment could not, in the present case at least, take place in either a legislative or a policy vacuum. Under the Act, the only purpose for seeking a declaration of significance under s 125(1)(f)(ii) was to enliven the discretion for the exercise of the compulsory acquisition powers. The government policy at the time the decision was made was that it was not, as a matter of policy, disposed to that discretion being exercised for the benefit of rail lines which were not within its preferred rail corridors.

[56] In seeking to make out these arguments, counsel for Waratah undertook a detailed exegesis of those parts of the reasons in which the decision-maker was said to have given primacy to the government policy on preferred rail corridors. So, for example, Waratah was critical of the decision-maker's findings under the heading "Demand projections for the services associated with the infrastructure". This was one of the topics specifically required to be addressed for the economical social significance of a project.<sup>9</sup> It was submitted for Waratah:

"45. *First*, the Statement of Reasons (pp 23-25) addresses the projected demand for infrastructure for the transport of coal from the Galilee Basin. After noting the likely increases in demand, the following is stated (p 25):

[I]t is clear that the intent and effect of the State Government's Galilee Basin rail policy is to address the demand arising from the coal reserves contained within the Galilee Basin, and to realise and enable the development of the Galilee Basin, but in a way that consolidates the existing multiple railway proposals, including Waratah Coal's, into two preferred corridors to ensure a coordinated approach to all rail infrastructure, and in doing so, to minimise the adverse impacts on local communities, landholders and the environment.

...

The demand assessment of the Railway Facility must be considered against the existence of the Galilee Basin rail policy. Waratah Coal's application does not address the effect of the Galilee Basin rail policy on its assessment of the demand for the Waratah Coal Railway Facility.

46. The summary conclusion of the Statement of Reasons notes (p 51-52 (iv)-(v)):

iv. ... The demand assessment of the Railway Facility must be considered against the existence of the Galilee Basin rail policy.

v. There is insufficient evidence to demonstrate how the Railway Facility would satisfy identified needs, given the

<sup>8</sup> *QCoal Pty Ltd and Others v Hinchliffe, Minister for Infrastructure and Planning* (2011) 184 LGERA 77 at [54]; see also *Pupfan Pty Ltd v State of South Australia* (2003) 86 SASR 195.

<sup>9</sup> Guidelines, Appendix A.

anticipated development of other rail infrastructure within the preferred common user corridors which will otherwise address and satisfy transportation demand between the Galilee Basin and export facilities at the Port of Abbot Point.

47. In effect, it was determined that the Waratah Railway Facility may not be necessary to meet demand for the transport of coal, because some of the demand would be met by the Galilee Basin Rail Policy. However, that conclusion failed to contend with the question of whether the rail corridors proposed under the Galilee Basin Rail Policy were more suitable than the proposed Waratah Railway Facility. The decision maker merely deferred to the Galilee Basin Rail Policy without any assessment of the relative merit of the Waratah Railway Facility.”

[57] Waratah’s present arguments that the decision-maker gave primacy to government policy and failed to have regard to the merits of its application are similar to those it advanced in an application for judicial review of the Co-ordinator General’s refusal to make a declaration under s 27 of the Act that a proposed stand-alone jetty project at Abbot Point was “significant project”. In *Waratah Coal Pty Ltd v Coordinator-General, Department of State Development, Infrastructure & Planning*,<sup>10</sup> Applegarth J said:

**“Did the respondent allow policy to fetter his discretion?”**

[60] Waratah contends that the respondent merely applied government policy rather than exercised his power under s 26 in accordance with matters made relevant under that section and having regard to the merits of the application. In doing so, he is said to have fettered his own decision-making by applying policy without regard to the merits of the application. The respondent rejects this argument and submits that there is no error in treating the policy frameworks as having decisive weight, particularly where the decision to declare or not to declare a project involves a value judgment made by reference to imprecise criteria and the decision-maker represents the executive government. In reply, Waratah submits that, even assuming the application was incompatible with policy frameworks, it would nonetheless be an error to treat a policy framework as having decisive weight without the decision-maker conducting a genuine assessment of the merits of the application.

[61] It is well-established that an administrative decision-maker must decide an application on its merits considering the relevant material. It cannot simply apply government policy.<sup>11</sup> In *Kahn v Minister for Immigration and Ethnic Affairs*,<sup>12</sup> Gummow J stated that in considering all relevant material in respect of an application, the decision-maker must give “proper, genuine and realistic consideration to the merits of the case and be ready in a proper case to depart from any applicable policy”. This formulation has been adopted by decisions of this Court in the context of the *Judicial*

<sup>10</sup> [2014] QSC 36.

<sup>11</sup> *Minister for Immigration, Local Government and Ethnic Affairs v Gray* (1994) 50 FCR 189, 206.

<sup>12</sup> (1987) 14 ALD 291.

*Review Act* 1991.<sup>13</sup> The statement of Gummow J was not purporting to lay down a new principle of administrative law<sup>14</sup> and has been followed in other jurisdictions.<sup>15</sup> The High Court in *Minister for Immigration v SZJSS* explained the reference in *Khan* to a “proper, genuine and realistic consideration to the merits of the case”. It was not to encourage a slide into impermissible merits review where the court emphatically disagrees with the decision-maker’s assessment of matters.<sup>16</sup> The principle is not one which has its origins in the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) or the *Judicial Review Act* 1991 (Qld). That legislation contains a ground for judicial review in respect of an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case.<sup>17</sup> The same principle about the inflexible following of policy without regard to the merits in exercising a discretion can be found in general doctrines about the conditions for the lawful exercise of statutory powers.<sup>18</sup>

- [62] The issue, then is whether the respondent gave proper, genuine and realistic consideration to the merits of the application and was ready to depart from government policy if the merits of the application justified such a course.
- [63] There is no doubt that the respondent had regard to the relevant material placed before him. He accepted the accuracy of material placed before him by Waratah in respect of matters to which he was required to have regard. It has not been shown that the respondent gave only a perfunctory or cursory consideration of those matters and failed to give proper consideration to them in assessing the merits of the application.
- [64] The respondent was entitled to conclude that declaring a project to be a significant project would create an approval process which was inconsistent with government policy to coordinate strategic planning for the future development of Abbot Point, including the process involving the facilitator who would consider a range of development proposals. The respondent also was entitled to conclude that Waratah’s proposed Single Jetty Project was inconsistent with existing planning for development of the State Development Area and potentially inconsistent with the outcomes of the independent facilitator process.

<sup>13</sup> *Gough v Southern Queensland Regional Parole Board* [2008] QSC 222; *Cuzack v Queensland Parole Board* [2010] QSC 264; *Wiggington v Queensland Parole Board* [2010] QSC 59; *Origin Energy Electricity Ltd v Queensland Competition Authority* [2012] QSC 414; *Younan v Crime Reference Committee* [2014] QSC 24 and see Billings and Cassimatis ‘Twenty-one years of the Judicial Review Act 1991: Enhancing Access to Justice and Promoting Legal Accountability?’ 32 *University of Queensland Law Journal* 1.

<sup>14</sup> *Origin Energy Electricity Pty Ltd v Queensland Competition Authority* [2012] QSC 414 at [93].

<sup>15</sup> See for example *Barro Group Pty Ltd v Brimbank City Council* (2012) VR 281 at [109]; *Director of Liquor Licensing v Kordister Pty Ltd* [2011] VSC 207 at [229].

<sup>16</sup> (2010) 243 CLR 164, 174 [25] – 177 [34]

<sup>17</sup> *Judicial Review Act* 1991 (Qld), s 23(f); *Administrative Decisions (Judicial Review) Act* 1977 (Cth) s 5(2)(f).

<sup>18</sup> Aronson & Groves (Supra) [5.240-5.330]; H.W.R Wade & C. F. Forsyth *Administrative Law* 10<sup>th</sup> ed. (Oxford University Press 2009) 270-276.

- [65] The respondent may have accorded decisive weight to government policy and other matters which persuaded him that any benefits from the Single Jetty Project would arise at the expense of the alienation of the best industrial area in the relevant parcel of land and that the project would otherwise jeopardise the “orderly, timely and efficient development of the port and the APSDA”.
- [66] It has not been shown that, in reaching that conclusion the respondent merely applied government policy and did not have regards to the merits of the application. Having considered the application and the assumed benefits of the project, the respondent concluded that competing considerations, including government policy, meant that he should not declare the project as a significant project under s 26(1)(a) of the Act. Waratah has not established an invalid exercise of power on the ground that the respondent allowed policy to fetter discretion.”
- [58] I respectfully adopt his Honour’s statement of the relevant principles in [61] of that judgment, and would only add a reference to *Surinakova v Minister for Immigration, Local Government and Ethnic Affairs* in which Hill J said<sup>19</sup> that “a decision maker must take care to ensure that he does not slavishly follow a policy and disregard the particular circumstances of a case”.<sup>20</sup>
- [59] It should also be recalled that this is not a merits review. The question is not so much what the decision-maker made of the merits of Waratah’s application, but whether the decision-maker properly had regard to the merits in reaching the decision.<sup>21</sup>
- [60] Contrary to the submissions by counsel for Waratah, this was not a case in which the decision-maker did nothing more than note the contents of Waratah’s application, thereby rendering the consideration of the merits to be, to adopt the words of Gummow J in *Khan v Minister for Immigration and Ethnic Affairs*, “so limited as to be indicative of a perfunctory and cursory consideration rather than a proper genuine and realistic consideration”.<sup>22</sup> For example, in that part of the reasons dealing with “demand projections for the services associated with the infrastructure”, the passages quoted in Waratah’s submissions were preceded by a two and a half page exposition of the relevant contentions made on this topic in Waratah’s application. This discussion was neither perfunctory nor cursory, and exhibited a comprehension of the merits of those aspects of Waratah’s application which were relevant to this aspect of the assessment.
- [61] Nor was this a case, as was suggested by counsel for Waratah<sup>23</sup> in which the decision-maker simply applied the policy because he considered the reasons which the applicant advanced were inconsistent with that policy. When one views the

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<sup>19</sup> (1991) 33 FCR 87, 98.

<sup>20</sup> References to authorities to similar effect could be multiplied. See, for example, the cases referred to by Burchett J in *Chumbairux v Minister for Immigration and Ethnic Affairs* (1986) 74 ALR 480, 492-494.

<sup>21</sup> The decision-maker will not have committed an error if, having properly considered the merits of Waratah’s application, the decision-maker gave greater, and even decisive, weight to countervailing government policy.

<sup>22</sup> (1987) 14 ALD 291 at [33].

<sup>23</sup> Relying particularly on *BHP Direct Reduced Iron Pty Ltd v Chief Executive Officer, Australian Customs Service* (1998) 55 ALD 665.

reasons as a whole, it is clear that there were elements of Waratah's application which stood in its favour in the assessment of the merits of the proposal – see for example the matters cited in paragraphs xii, xiii and xiv of the reasons. The decision-maker's reference to, and reliance on, the government policy in outweighing those factors did not, however, merely amount to an uncritical acknowledgment that Waratah's proposal was inconsistent with government policy.

- [62] Waratah knew that its application was for a facility which was not in accordance with government policy, but nevertheless insisted that the assessment be completed. The reasons identify a number of areas in which Waratah's application did not address the implications of the government policy. One example is identified in paragraph v of the reasons. It was not for the decision-maker to make Waratah's case for it. Rather, the decision-maker was entitled to take account of the potential consequences of the divergences between Waratah's application and government policy, and of Waratah's failure to put on material to persuade the decision-maker that, notwithstanding those divergences, Waratah's proposal was of sufficient merit to outweigh government policy.
- [63] Nor, in my view, has Waratah demonstrated that the decision-maker improperly adopted an approach which involved elevating the policy to reality. It is necessary again to recall that this assessment under s 125(1)(f)(ii) was for one purpose, and one purpose only, namely to enliven the discretion for compulsory acquisition. In the context of making a prospective evaluation<sup>24</sup> of the significance of Waratah's proposed facility, it would be unrealistic for the decision-maker not to proceed on the basis that the government would act in accordance with its stated policy with respect to the exercise of the powers of compulsory acquisition. The approach contended for by Waratah would have the decision-maker pretending either or both that the government would, contrary to its policy, exercise the powers of compulsory acquisition in cases which fell outside the parameters of its policy or not exercise the power in cases which fell within its policy.
- [64] In all the circumstances, I do not consider that Waratah has demonstrated that the decision-maker in this case either fettered his discretion by improperly applying government policy or improperly failed to consider the merits of Waratah's application.

### **Irrelevant considerations**

- [65] Waratah's next argument was that the decision-maker took into account two irrelevant considerations.<sup>25</sup>
- [66] The first point was that the reasons identified at paragraph vii, that approval for Waratah's facility had not yet been granted under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) so that the timing of commencement of the facility could not be accurately predicted. It was argued that the absence of that approval at the time the decision was made could not rationally affect the assessment of the application because:

<sup>24</sup> *QCoal Pty Ltd and Others v Hinchcliffe* (supra) at [54].

<sup>25</sup> In the sense described by Gummow J in *Bond Corporation Holdings Ltd v Australian Broadcasting Tribunal* (1988) 84 ALR 669, 682.



- (a) there was nothing in s 125(1)(f) which required an infrastructure facility to have been approved under the Commonwealth legislation before the facility could be declared “significant”;
- (b) Waratah had submitted its environmental impact statement to the Commonwealth government on 3 September 2013, and there was no reason or evidence to support the view that approval under the Commonwealth legislation would be delayed, so that Waratah’s facility would be delayed;
- (c) approval for a rail corridor under s 125(1)(f) had been granted to GVK-Hancock on 1 October 2010 at a time when that other proponent had not, inter alia, received approval from the Commonwealth under the Commonwealth legislation.

[67] In fact, what this part of the reasons addressed was an assessment that, on the material before the decision-maker, the timing of the commencement of operations under Waratah’s proposed facility could not “be accurately predicted”. In the prospective evaluation which is required to be undertaken for the purposes of s 125(1)(f)(ii), it is clear that timing is a relevant consideration. So much is confirmed by the Guidelines made under s 174 of the Act, which expressly refer<sup>26</sup> to “proposed timing of the infrastructure facility or service delivery”. Matters affecting the time within which it might be predicted that Waratah’s facility could be delivered were therefore matters of rational relevance to the decision to be made. To the extent that Waratah relies on the fact that it had submitted its environmental impact statement to the Commonwealth government on 3 September 2013, there is no evidence that this information had been provided by Waratah to the decision-maker at the time the decision was made. Waratah’s reliance on its understanding of what did or did not happen on GVK-Hancock’s application (a different application in different circumstances made three years previously) is of no assistance.

[68] Waratah’s second contention is that the statement of reasons improperly took into account the absence of settled arrangements for port facilities for the Galilee coal project and reasoned that this could adversely impact on the timeliness of the progression of the Galilee coal project.

[69] In fact, what was said in the reasons was as follows:

“It is again noted that Waratah Coal does not currently have a fully integrated project as it does not yet have a finalised port solution at Abbot Point and therefore how the coal will be exported is not yet certain. This is to be contrasted with those proponents who already have export capability through the existing port facilities at Abbot Point, and those progressing through the further stages of the AP-X process. It is also again noted, however, that Waratah Coal’s port capacity and export arrangements do not need to be finally resolved for the purposes of this Application. These arrangements are the subject of separate determinative processes and will be settled in due course.

The absence currently of these settled arrangements may, however, adversely impact upon the timeliness of the progression of the China First Coal Project, and consequently, the Railway Facility. The relevance of this is addressed later in these reasons.”

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<sup>26</sup> Guidelines, Appendix A.

- [70] It is clear on the face of this passage that the decision-maker did not identify the absence of a finalised port solution as a reason for refusing Waratah's application. To the extent that the absence of such a solution could impact on the timeliness of progression of the proposed facility, however, it is clear that timeliness was a relevant consideration.
- [71] Waratah has not persuaded me that the decision-maker wrongly took irrelevant considerations into account.

### **Failing to take relevant considerations into account**

- [72] Waratah's next submission was that the decision-maker failed to take relevant considerations into account. This arose particularly from the fact that the "south-north" corridor proposed in the government's policy is in the vicinity of the Alpha Coal Project rail corridor proposed by GVK-Hancock. Waratah referred to the following passage in the reasons:
- "Hancock Coal and Waratah Coal's comments on each party's proposed railway and statement made by the [sic] each party in defence of their own railway proposal on the issues outlined in the application and Hancock's submission are not relevant for the purpose of assessing the significance of the railway facility and accordingly it is not necessary to address each of those issues in this statement giving reasons."
- [73] Waratah submitted that the decision-maker:
- (a) failed to have regard to so-called funding problems that GVK-Hancock had experienced in connection with its Galilee Basin projects and failed to compare that funding position with Waratah's position;
  - (b) the decision-maker failed to have any regard to the capacity of the GVK-Hancock rail line in comparison to the Waratah railway facility;
  - (c) the decision-maker failed to have regard to the relative flood mitigation strategies for the GVK-Hancock rail line and the Waratah rail facility.
- [74] In support of these arguments, counsel for Waratah advanced comprehensive submissions in which they addressed the fact that Waratah had provided a news report from October 2012 to the Minister in which reference was made to GVK-Hancock's funding problems and pointed to an email trail within Queensland Treasury from June 2012 which also referred to news of GVK-Hancock's funding problems. Counsel also made submissions on a comparison of the capacity of the rail line proposed by GVK-Hancock with that contained in Waratah's application, and comparisons of the flood mitigation design elements of Waratah's proposed facility when compared with what Waratah contended were inferior flood mitigation elements contained in the GVK-Hancock proposed rail facility.
- [75] The short answer to all of these complaints by Waratah is, however, that what was being assessed for the purposes of the subject application was Waratah's proposed facility. The positive or negative comparable attributes of the GVK-Hancock proposed facility had no relevance to consideration of Waratah's application. It was even less relevant to consider whether GVK-Hancock had funding to build its proposed railway. The only relevance of the existence of the GVK-Hancock proposed facility was that the location of that proposed facility was used to identify the government's preferred "south-north" rail corridor. It was clear that nothing

about the use of that proposed facility for the purposes of delineating the “south-north” preferred corridor amounted to an endorsement of the GVK-Hancock proposal. I accept the submission made on behalf of the respondents that the alleged funding problems of GVK-Hancock were irrelevant. The relevant issue for the decision-maker was not about who builds a railway but where it is built. Similarly, comparison of the capacities of the respective rail proposals was irrelevant. The rail policy said nothing about the identity of proponents or the capacity of their proposals. It was concerned with the location of corridors, shared access or co-located rail lines within those corridors, and the overall efficient co-ordination of railway development having regard to the interests of mine proponents, land owners and the environment. The flood mitigation comparison, which sought to go into particular engineering details of the differing proposals, was similarly irrelevant.

[76] Counsel for Waratah also submitted that, in assessing the economic significance of Waratah’s proposed facility, the decision-maker failed to have regard to the fact that Waratah’s Galilee Basin coal project is an “integrated project”, such that failure to obtain approval for a rail line would jeopardise the whole of the project. This meant, as a consequence, that the decision-maker failed to have regard to the loss of economic growth and employment if Waratah’s Galilee Basin coal project did not proceed. In support of that submission, Waratah pointed to the fact that the project had previously been granted “significant project” status under s 26 of the Act and also referred to statements made thereafter by various State and Federal politicians in support of the project.

[77] Statements of support by politicians over the years were completely irrelevant to the assessment which needed to be made under s 125(1)(f)(ii). Similarly, the declaration of the project as a “significant project” under s 26 of the Act had nothing to do with the assessment required under s 125(1)(f)(ii), and everything to do with whether or not an environmental impact statement was required in conformity with the process prescribed by Part 4 Division 3 of the Act.

[78] In any event, and contrary to the submissions by Waratah, it is clear that the decision-maker considered the economic benefits which would flow from Waratah’s facility as part of its integrated project. For example, in Part 6.12 of the reasons, under the heading “Economic Significance of the Infrastructure Facility”, it was said:

“Waratah Coal submits that there will be further significant flow-on economic benefits from the use and construction of these additional mines within the Galilee Basin. Waratah Coal states that regionally, the construction of the Railway Facility will lead to increased investment in the Galilee Basin, increased employment at the mines and for associated services and an increase in money spent in the relevant regions. At a State and national level, opening up the Galilee Basin will contribute to the growth of the coal industry in Queensland, an increase in royalties payable to the State and an increase in Australia’s export revenue.

In making the assessment under s 125(2) of the SDPWO Act, the potential contribution that the infrastructure facility makes to resource development in Australia, Queensland or the region is also a relevant consideration. The Railway Facility could have the potential to make a significant contribution to coal resource development in Australia, Queensland and the region.”

[79] Accordingly, I do not accept that Waratah has established that the decision-maker failed to take relevant considerations into account.

### **Unreasonableness of the decision**

[80] The final submission on behalf of Waratah was that this decision was infected by “*Wednesbury*” unreasonableness, in the sense that the decision was so unreasonable that no reasonable person could reach it.<sup>27</sup>

[81] Waratah argued that this ultimate irrationality in the decision could be seen in three aspects:

- (a) The decision-maker deferred to the government’s policy without considering the fact that the policy was inherently subject to revision, and it was irrational for the decision-maker to proceed on the basis that the policy was immutable;
- (b) It was irrational for the decision-maker to take into account the absence of approval for the Waratah facility under the Commonwealth environmental legislation;
- (c) Reasoning by the decision-maker that Waratah’s facility would not have the requisite economic significance because rail lines were already to be built in accordance with the government’s policy was irrational in the absence of addressing the relative merits of the proposed rail lines.

[82] The first of these arguments does not withstand scrutiny. It was not for the decision-maker, when making this decision, to speculate on what government policy might or might not be in the future. What was required in this case was for the decision-maker to identify the relevant government policy in existence at the time the decision was made (which he did), and to consider that along with the merits of Waratah’s application (which, for the reasons stated above, he did).

[83] The second and third arguments have been dealt with above. The absence of approval under the Commonwealth environmental legislation at the time the decision was made went to the relevant question of timing of the project. A comparison of the relative merits of the different rail lines put forward by different proponents was irrelevant to an assessment of Waratah’s application under s 125(1)(f)(ii).

[84] Accordingly, Waratah’s argument on “*Wednesbury* unreasonableness” has not been made out.

### **Conclusion**

[85] Waratah has not persuaded me that the decision to refuse approval of its rail line as an “infrastructure facility of significance” under s 125(1)(f)(ii) of the Act was infected by error such as to render it susceptible to judicial review.

[86] Accordingly, it will be ordered that the amended application for a statutory order of review be dismissed. I will hear the parties as to costs.

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<sup>27</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223,229-230; see also *Minister for Immigration and Citizenship v Li* (2013) (2013) 249 clr 332, per Gageler J at [108].