

EDO NSW Report

Merits Review in Planning in NSW



Foreword

In its thoughtful report “Merits Review in Planning in NSW”, EDO NSW draws on its considerable experience to demonstrate the public benefits of third party appeals to the Land and Environment Court against development consents for high impact major resource projects, and thereby puts a strong case for considerable restraint in the ministerial exercise of a power to extinguish those appeal rights.

For almost 40 years the Land and Environment Court’s jurisdiction has included merits review in planning and other matters. Its merits review jurisdiction in planning matters includes, first, appeals by developers against refusal of development applications or conditions of development consents and, second, appeals by third party objectors against the grant of development consents for, essentially, major projects that are high impact and possibly of state significance. However, under existing legislation these appeal rights are extinguished if, before consent is granted, the Planning Assessment Commission holds a public hearing into the matter, this being done at the request of the Minister (or Secretary of the Department) on a case by case basis. The focus of EDO NSW’s report is on the frequency and consequences of such requests in the case of major resource projects that would otherwise attract third party appeal rights. Some 38 matters have gone to a PAC public hearing at the request of the Minister (or Secretary) since the inception of the PAC in 2008, of which 29 have been for resource projects – a number that EDO NSW describes as disproportionate.

The report points out that such extinguishment of third party appeals to the Land and Environment Court disempowers disaffected community groups, and expresses the view that it deprives the public of the benefit of good decision-making in environmental matters and consequently serves to undermine the integrity of the planning system. The report identifies the well known main benefits of merits review as conducted by the Land and Environment Court; namely improvements in the consistency, quality, fairness and accountability of decision-making. After a careful analysis (including case studies of third party community group appeals concerning major resource projects), the report concludes that the consistency, quality, fairness and accountability of merits review decision-making by the Land and Environment Court results in better environmental and social outcomes and contrasts with poorer outcomes and inferior processes in PAC public hearings.

The report notes that during the last decade ICAC has more than once recommended to the NSW government that third party merits appeal rights should be extended to improve transparency and accountability of development approval processes.

Parliament has bestowed generally on third party objectors a right of appeal to the Land and Environment Court against major project development consents. While parliament has also bestowed on the Minister the power to negate that appeal right in a particular case, ensuring their general availability even on a matter of moment to the government of the day is consistent with the legislative intention and is highly desirable in a country governed by the rule of law. As that most eminent English judge Lord Bingham observed, there are countries where all court decisions find favour with the powers that be, but they are not places where any of us would wish to live.

The Honourable Peter Biscoe QC

Executive Summary

This report demonstrates that merits review is an essential part of the planning system and it is crucial that it continues to be recognised and facilitated in NSW. In addition, there are clear benefits to allowing third party merits review in relation to major projects in NSW. These benefits relate to improving the consistency, quality and accountability of decision-making in environmental matters. In particular, merits review has facilitated the development of an environmental jurisprudence, enabled better outcomes through conditions, provides scrutiny of decisions and fosters natural justice and fairness. Better environmental and social outcomes and decisions based on ecologically sustainable development is the result.

Merits review has a long history in NSW, being a key element of planning reforms introduced in 1979 to a politicised and overly-complex system in drastic need for reform. The reforms sought to simplify and improve planning in NSW, as well as to depoliticise and take the heat out of decision-making. Fulsome public participation and the establishment of a specialist court – the Land and Environment Court – were key components in this enterprise.

Merits review for developers and third parties in the Land and Environment Court were, in turn, crucial elements in restoring the integrity and legitimacy of planning and decision-making for environmental matters.

Recent moves to limit third party merits review – particularly for resource projects – deprive the broader public of the benefits of good decision-making in environmental matters and serve to undermine the integrity of the planning system. The consistency, quality and accountability of decision-making by merits review undertaken by the Land and Environment Court contrasts with weaker decision-making, poorer outcomes and the inferior processes in public hearings held by the recently established Planning Assessment Commission.

The flow on result is that communities are disempowered and alienated by both the extinguishment of their merits review rights and the weakening of decision-making in environmental matters which, in turn, undermines the integrity of the NSW planning system.

Introduction

Merits review has a long history in planning in NSW, being a fundamental part of reforms introduced over 35 years ago. These forward-looking reforms – namely, the passing of new planning legislation and the establishment of a specialist Land and Environment Court in 1979 – were designed to do things differently and better in NSW. In particular, they were a much-needed response to a system beset, on the one hand, by corruption and complexity and, on the other hand, by a community looking beyond the law and using Green bans to “resolve” disputes.

The reforms sought to simplify and improve planning in NSW, as well as to depoliticise and take the heat out of decision-making. Fulsome public participation provided an in-built integrity to the system, seeking to improve the quality of decisions and ensure that they were more legitimate in the eyes of the community. Likewise, the establishment of the Land and Environment Court served to both rationalise complex functions exercised by a miscellany of Courts and Tribunals and to give specialist treatment to issues of increasing complexity. And merits review for developers and third parties was central to all these endeavours.

However, in many cases these forward-thinking reforms have now been wound back, particularly over the last decade. Complexity, corruption and politicised decision-making have returned, accompanied by a widely-acknowledged crisis in public confidence in the planning system.¹

At the same time, and adding to the crisis in community confidence, merits review has also been considerably eroded. Specifically, the extinguishment of merits review for resource projects has been a key feature of planning over the past few years, resulting in disempowered communities and an on-the-ground legacy that these communities will face for years to come.

More positively, there is currently an impetus for reform of the planning system in NSW.² This provides another opportunity to both rebuild the community’s confidence in planning, as well as to restore the integrity, logic and elegance of the system as a whole.

This report will discuss and analyse the importance of merits review – and, by extension, the value of third party merits review – in NSW. It will do so by doing two things.

Part A outlines what merits review is and when it is used in NSW specifically:

- 1) When is merits review available?
- 2) How is merits review conducted?

Part B demonstrates how merits review before the Land and Environment Court can, and has, improved the consistency, quality and accountability of decision-making in NSW. Each of these positive attributes of merits reviews are discussed below, together with recent case studies. These examples are all drawn from resource projects, and the arguments below demonstrate how the consistency, quality and accountability of decision-making through merits review undertaken by the Court contrasts

¹ The Coalition went to the 2011 election on a platform of repealing Part 3A and reviewing the planning system. An independent review was commissioned and undertaken by Tim Moore and Ron Dyer with a Green Paper, White Paper and Exposure draft. The overall package of reforms stalled in Parliament in early 2014, although more discrete and piece-meal reforms have since taken place.

² Rob Stokes Minister for Planning media release “Legislative changes to simplify the planning system”, 6 May 2016.

with the markedly poorer outcomes and processes of Planning Assessment Commission public hearings.

Part B addresses:

- 1) Improving the consistency of decision making.
- 2) Improving the quality of decision-making, through:
 - a) the development of an environmental jurisprudence;
 - b) improving outcomes through conditions;
 - c) providing scrutiny and facilitating good outcomes; and
 - d) fostering natural justice and fairness.
- 3) Improving the accountability of decision-making.

Part A: What is merits review and when is it used?

Merits review involves the re-exercise of the administrative power previously exercised by an original decision-maker such as a council, Minister or specialist planning body. The Court – in NSW, the Land and Environment Court – becomes the new decision-maker, having the same powers and functions as the original decision-maker. The Court can uphold the original decision, or overturn the decision and make a fresh one.

1) When is merits review available?

A person can seek merits review to challenge the refusal of their development application or the grant of a consent that is subject to conditions with which the person is dissatisfied.³ The overwhelming majority of merits reviews are brought on this basis.⁴

In more limited circumstances, merits review is permitted for a third party. These circumstances essentially include major developments where the development is high impact and possibly of state significance.⁵ Examples include chemical factories, large-scale breweries, resource projects such as coal mines and quarries, and turf farms. Major projects such as these are often accompanied by diverse and significant impacts, including impacts on air quality and public health, amenity, employment and social cohesion, landscape health and biodiversity, and water management and quality. Consequently, these projects are frequently of considerable community concern and it is recognised that there is a public interest in involving third parties (that is, people or organisations with no special or private interest) in the resolution of what to do about them.

Merits review only extends to third parties for these major developments where that person or body was also an objector (that is, lodged a submission objecting to the development during the exhibition period). An appeal for merits review must be brought within 28 days.⁶

However, merits review is not available to any party if the decision was made after the Planning Assessment Commission (PAC) held a public hearing (this being done at the request of the Minister or the Secretary of the Department of Planning on a case by case basis).⁷ Following a public hearing, the PAC provides a report with recommendations but there is no need for the decision-maker to follow its recommendations.

Put another way, merits review is extinguished by the holding of a public hearing that has no decision-making power over the determination outcome. Of the 38 matters to go to a public hearing since the

³ *Environmental Planning and Assessment Act 1979* (NSW) s 97(1)-(3).

⁴ This is the case even though, in turn, the overwhelming majority of development applications are approved for example, the NSW Department of Planning reported a 98% approval rate in the Major Development Monitor 2008-09 (119 of 121 DAs); and in 2009-10 (138 of 140)

⁵ *Environmental Planning and Assessment Act 1979* (NSW) s 98(1) and (4).

⁶ Specifically, 28 days from the date on which notice of the determination was given to the objector.

⁷ *Environmental Planning and Assessment Act 1979* (NSW) ss 97(7) and 98(5). See also *Environmental Planning and Assessment Act 1979* (NSW) s 23D (1)(b)(iii) and Planning Assessment Commission (2013) *Guide to Public Hearings* at: http://www.pac.nsw.gov.au/Portals/0/Documents/Guide%20to%20Public%20Hearings_Nov%202013.pdf

inception of the PAC, resource projects have been disproportionately represented (with 29, or 76%, being for such projects).⁸

2) How is merits review conducted?

Merits review is usually heard by a Commissioner, rather than a Judge of the Court. However, if the proceedings are likely to be lengthy, complex or controversial, the matter can be heard by two or more Commissioners, or a Judge and a Commissioner sitting together.⁹ A site inspection is usually held¹⁰ and the Court hears witness statements both on site and in the Court room.

The Judge or Commissioner can take into consideration all of the material submitted to the original decision-maker, and can consider any fresh evidence which they think may be relevant.¹¹ Merits review is usually informal in nature, and the rules of evidence do not apply.¹² The Court is required to take into consideration the same matters as the original decision-maker in making its decision, including relevant legislation, the circumstances of the case, and the public interest.¹³

Each side in a merits review usually presents a number of written reports by experts to show the benefits or failings of the proposal. For example, an objector to a designated development might tender a report from a town planner showing what impact the proposal is likely to have on the amenity of the area, or a report by an ecologist could be tendered to show the likely impact on threatened species.

If more than one party engages experts to give evidence on the same issue, the Court usually requires that the experts confer and then prepare a joint report, setting out what matters they agree and disagree on. If a party wants to challenge what is said by an expert in a written report, the expert would generally attend the hearing and be cross-examined about their report.

⁸ See Planning Assessment Commission, *PAC Reviews* at: <http://www.pac.nsw.gov.au/Projects/PACReviews/tabid/106/Default.aspx>

⁹ *Land and Environment Court Act 1979* (NSW) s 34C(1), 37(1).

¹⁰ *Land and Environment Court Act 1979* (NSW) s 34D.

¹¹ *Land and Environment Court Act 1979* (NSW) s 38(2), 39(3).

¹² *Land and Environment Court Act 1979* (NSW) s 38(1), (2).

¹³ *Land and Environment Court Act 1979* (NSW) s 39(4). Preston B and Smith J, "Legislation needed for an effective Court" in *Promises, Perception, Problems and Remedies, The Land and Environment Court and Environmental Law 1979-1999*, Conference Proceedings, Nature Conservation Council of NSW, 1999, at 107.

Part B: Improving decision-making in NSW: consistency, quality and accountability

As Preston and Smith have identified, the benefits of merits review include the following:

- enhancing the quality of the reasons for decisions;
- providing a forum for full and open consideration of issues of major importance;
- increasing the accountability of decision makers;
- clarifying the meaning of legislation;
- ensuring adherence to legislative principles and objects by administrative decision makers;
- focusing attention on the accuracy and quality of policy documents, guidelines and planning instruments; and
- highlighting problems that should be addressed by law reform.¹⁴

These attributes provide three salient key benefits – improving the consistency, quality and accountability of decision-making.

The following discussion is structured as follows:

- 1) Improving the consistency of decision making.
- 2) Improving the quality of decision-making, through:
 - a) the development of an environmental jurisprudence;
 - b) improving outcomes through conditions;
 - c) providing scrutiny and facilitating good outcomes; and
 - d) fostering natural justice and fairness.
- 3) Improving the accountability of decision-making.

1) Improving the consistency of decision-making

The establishment of the Land and Environment Court in NSW was intended to foster consistency in decision-making. As was said at the time:

The Land and Environment Court...will be fair and equitable in its handling of matters, will establish and observe precedent, and will be consistent in its decisions.¹⁵

¹⁴ Preston B and Smith J, "Legislation needed for an effective Court" in *Promises, Perception, Problems and Remedies, The Land and Environment Court and Environmental Law 1979-1999*, Conference Proceedings, Nature Conservation Council of NSW, 1999, at 107.

¹⁵ NSW, *Parliamentary Debates*, Legislative Assembly, 20 November 1979, 3260 (Keith O'Connell, Member for Peats).

This resolve remains today, as Commissioner Pearson recently noted:

Maintaining consistency and predictability within a court or tribunal, providing a framework for predictability in decision-making across a diverse range of local authorities, and assisting in framing the context within which ADR [alternative dispute resolution] processes can operate, are valuable outcomes, provided that there is always room for argument about the circumstances of the particular case.¹⁶

The role of the Land and Environment Court in facilitating consistency has also been recognised by the private legal profession:

There is little doubt that Councils look to decisions of the Court to assist in the interpretation and application of planning instruments. Court decisions thus add uniformity, consistency and certainty to the decision making process across the State.¹⁷

The Chief Judge of the Land and Environment Court has also identified what he calls “comprehensive and centralised jurisdiction” as one of 12 characteristics of successful environmental courts and tribunals:

More successful ECTs [environmental courts and tribunals], such as the Land and Environment Court of NSW, have the authority to hear, determine and dispose of many different types of cases... by enabling all of these types of cases to be centralised in a “one-stop shop”, the quality, consistency and speed of decision-making can all be enhanced.¹⁸

Over the past decade or so, the Land and Environment Court has also developed a number of planning principles to guide decision-making in merits review. As stated on the Court’s website, a planning principle is:

A statement of a desirable outcome from a chain of reasoning aimed at reaching, or a list of appropriate matters to be considered in making, a planning decision.

While planning principles are stated in general terms, they may be applied to particular cases to promote consistency. Planning principles are not legally binding and they do not prevail over councils’ plans and policies.

Planning principles assist when making a planning decision, including:

- where there is a void in policy;
- where policies expressed in qualitative terms allow for more than one interpretation; and
- where policies lack clarity.

There are now over 40 planning principles developed by the Land and Environment Court. These are mainly of a local planning nature but also extend to broader public interest issues such as compliance, intensification of use, zoning, ecologically sustainable development and the precautionary principle.

¹⁶ Pearson L, “Planning Principles and Precedents in Merits Review” (paper delivered at the Australasian Conference of Planning and Environment Courts and Tribunals, Sydney, 31 August, 1-3 September 2010); “Policy, principles and guidance: Tribunal rule-making” (2012) 23 *Public Law Review* 16.

¹⁷ Lalich P and Neilson S, “Review of the Land and Environment Courts Jurisdiction: Discussion of issues relating to the Working Party review and reform of the Court” (2011) 7 *Local Government Law Journal* 49, 52.

¹⁸ Preston BJ “Characteristics of Successful Environmental Courts and Tribunals” (paper delivered at the 27th LAWASIA Conference, Bangkok, Thailand, 3 - 6 October 2014, published in (2014); (2014) 26 *Journal of Environmental Law* 365.

At a broader jurisprudential level, it is clear that merits review is a key part of the armoury of the Land and Environment Court. As we will see from the discussion below, merits review has been crucial in the development of a leading-edge, global environmental jurisprudence.

By contrast, PACs do not have the capacity or expertise to develop a consistent approach to matters such as planning principles or environmental jurisprudence. Terms of office are much shorter (3 years vis-à-vis 7 years), and required expertise narrower.¹⁹ The PAC's Review of projects such as the Russell Vale Colliery expansion, where approval was first recommended and then not recommended, hint at this shortcoming.²⁰

2) Quality of decision-making

Merits review improves the quality of decision-making in four main ways – namely:

- a) the development of an environmental jurisprudence;
- b) improving outcomes through conditions;
- c) providing scrutiny and facilitating good outcomes; and
- d) fostering natural justice and fairness.

a) Development of an environmental jurisprudence

First, the specialist nature of the Land and Environment Court has greatly increased the ability of the Court to develop a jurisprudence of environmental law. As Justice Biscoe noted, this function has largely been performed and enhanced through the merits review process:

Decisions on ecologically sustainable development (ESD) by the Land and Environment Court... mostly have been in its merit review jurisdiction. It is because the Court has an unusual merits review jurisdiction that it has been able to deliver a significant number of judgments on ESD in which, standing in the shoes of the administrative decision-maker, it has determined the dispute on the merits.²¹

Seminal merits review cases such as *Leatch*, *BGP Properties*, *BT Goldsmith* and *Telstra* fit into this category.²² These cases – nominally concerned with mundane or prosaic matters such as mobile telephone base stations, subdivision of lots for industrial use, pearl farming, and residential subdivisions – have forged a body of law which is globally influential.²³

Two cases dealing with resource projects demonstrate this point.

19 PAC members can also only be renewed once: see *Land and Environment Court Act 1979* (NSW) s 12, Schedule 1 clauses 1 and 6.

20 See Planning Assessment Commission, R030/14 – *Russell Vale Colliery Underground Expansion Project Review* (2015) <http://www.pac.nsw.gov.au/Projects/PACReviews/tabid/106/ctl/viewreview/mid/461/pac/455/view/readonly/myctl/rev/Default.aspx>.

21 Biscoe P, "Ecologically Sustainable Development in NSW" (paper delivered at the 5th Worldwide Colloquium of the IUCN Academy of Environmental Law, Paraty, Brazil, 2 June 2007) pp 27-28.

22 For key cases, see *Carstens v Pittwater Council* (1999) 111 LGERA 1; [1999] NSWLEC 249.; *BGP Properties Pty Ltd v Lake Macquarie City Council* (2004) 138 LGERA 237; [2004] NSWLEC 399; *Telstra Corp Ltd v Hornsby Shire Council* (2006) 148 LGERA 124; [2006] NSWLEC 285; *McDougall v Warringah Shire Council* (1993) 80 LGERA 151, (NSWCA); *Leatch v National Parks and Wildlife Service and Shoalhaven City Council* (1993) 81 LGERA 270; *Nicholls v Director-General of National Parks & Wildlife* (1994) 84 LGERA 397; *Port Stephens Pearls Pty Ltd v Minister for Infrastructure & Planning* [2005] NSWLEC 426; *Greenpeace Australia Ltd v Redbank Power Co Pty Ltd* (1994) 86 LGERA 143; *Gales Holdings Pty Ltd v Tweed Shire Council* (2006) 146 LGERA 236; [2006] NSWLEC 85; and *BT Goldsmith Planning Services Pty Ltd v Blacktown City Council* [2005] NSWLEC 210.

23 See Preston BJ, "The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific" (2005) 9 *APJEL* 109; Biscoe P, "Ecologically Sustainable Development in NSW" (paper delivered at the 5th Worldwide Colloquium of the IUCN Academy of Environmental Law, Paraty, Brazil, 2 June 2007); Preston BJ, "Water and Ecologically Sustainable Development in the Courts" (paper delivered at the Australian Sustainability Laws and Water Management: The Future Symposium, University of South Australia Adelaide, South Australia, 17 October 2008); (2009) 6 *Macquarie Journal of International and Comparative Environmental Law* 129; Smith, J, "Jurisprudence and the Land and Environment Court" (paper delivered at EPLA Conference, 21 October 2005).

Case Study #1: Warkworth mine extension

In this long-running matter, a community group appealed an approval by the PAC to extend an open-cut coal mine in the Hunter Valley owned by Rio Tinto. The approval would extend the life of the mine for 10 years, allow the extraction of an additional 18 million tonnes of coal from the mine every year, and bring the mine closer to the village of Bulga.

In originally approving the expansion, the PAC had observed:

A number of rural communities have been faced with this situation in the past. In almost all cases the mines have been approved and the communities have either been radically altered in character or become non-viable. With the current price of coal this outcome is almost inevitable when the overall economic benefits of the mines are balanced against local community impacts. It appears that it is only if there are wider negative implications from the mining proposal that refusal becomes a possibility. If this is to change, the NSW (sic) will need to develop a clear policy position that provides further guidance to decision-makers as to how social impacts on rural villages are to be balanced in the approval process for coal mines.²⁴

The community group sought merits review of this approval in the Land and Environment Court on essentially two bases.

The first basis was that the mine would have occurred on land that had already been set aside as a biodiversity offset area and cleared a number of endangered ecological communities contrary to the public interest and ecologically sustainable development. Controversially, the PAC approval had allowed the open-cut mining of part of an ecologically significant biodiversity offset that was required to be protected as a condition of an approval given in 2003. The offset area also contains unique and endangered ecological communities, including Warkworth Sands Woodland. As well as providing habitat for threatened plants and animals, including the squirrel glider and speckled warbler, the offset area acted as a buffer between the village of Bulga and the mine.

The second basis the group sought refusal was that the expansion would result in unacceptable social impacts – particularly for noise and dust – on the Bulga community, again contrary to the principles of ecologically sustainable development. The group also presented ground-breaking expert evidence about the economic impacts of the project, and whether the stated benefits truly outweighed the social and environmental impacts of the project. This was the first time that environmental economics had been presented before the Court in deciding a mining project.

In a landmark decision, the Court overturned the approval. The Court concluded that the project would have significant and unacceptable impacts on biodiversity, as well as unacceptable noise and social impacts. The Court considered that the proposed conditions of approval were inadequate and would not allow the project to achieve satisfactory levels of impact on the environment, including the residents and community of Bulga. The Court found that these matters outweighed the substantial economic benefits and positive social impacts of the project on the region, and that the extension project should not go ahead.²⁵

²⁴ Planning Assessment Commission, *Warkworth Extension Project* (09_0202), 3 February 2012, pp 8 9.

²⁵ *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* [2013] NSWLEC 48; (2013) 194 LGERA 347 (Appeal dismissed), *Warkworth Mining Limited v Bulga Milbrodale Progress Association Inc* [2014] NSWCA 105; (2014) 86 NSWLR 527).

Following this decision, the mining company submitted a further application, which was approved by the PAC in late 2015. The community's right to appeal this decision on its merits was extinguished by the Planning Minister's request to the PAC to hold a public hearing as part of its review of the project.



Bulga Milbrodale Progress Association following their win in court.

Case Study #2: Ulan mine expansion

In this case, a community group challenged the Minister's approval of the consolidation and expansion of the Ulan coal mine, doubling its production rate to 20 million tonnes of coal per year.

The community raised three key issues, by which it submitted that the project was in breach of the principles of ecologically sustainable development. These were:

- the experts agreed that the reduction in aquifer pressures caused by longwall mining operations would impact groundwater baseflows to nearby creeks and rivers and it would take up to 500 years for groundwater systems to recover;
- the project would result in the clearing of over 400 hectares of vegetation, including 69 hectares of White Box Woodland EEC, an endangered ecological community under NSW law and a critically endangered ecological community under the federal law and the biodiversity offsets that Ulan was required to set aside as compensation for the clearing were inadequate; and

- the project would exacerbate global anthropogenic climate change due to the greenhouse gas emissions that would result from the mining activities and the burning of the coal. The community sought conditions requiring Ulan to offset its scope 1 and 2 greenhouse gas emissions.

The Court handed down two judgments in the proceedings – the first granted “in principle” approval while the second imposed stringent and innovative conditions following further consultation.²⁶

Ulan is a landmark case in that the greenhouse gas conditions sought by the third party were the first of their kind to be considered by a Court in Australia. The Court’s first judgment – in which it expressed an intention to impose the greenhouse gas conditions pending consideration of the implication of the Clean Energy regime – sets an important precedent. Also significant were the Court’s endorsement of offsets to address groundwater, biodiversity and greenhouse gas emissions impacts, and its statement about the scope of the relevant condition-making power, which was held to be wide.

b) Improving outcomes through conditions

Second, the court process itself – the playing out of an adversarial process where evidence is tested and scrutinised under oath – has facilitated better environmental outcomes through the imposition of conditions. Furthermore, the Court process allows for the involvement of the community – either as experts or lay witnesses – which is in itself a key mechanism by which decision-making is improved. In addition, the Land and Environment Court has sophisticated practices and procedures in place where experts can give evidence concurrently (or “hot-tub”). As Justice Pepper has noted, concurrent evidence typically involves seven distinct stages:²⁷

- identification of the issues upon which expert evidence is required;
- the preparation of individual expert reports;
- a conference between the experts, without lawyers, in order to prepare a joint report that sets out the matters upon which there is agreement and the matters upon which there is disagreement, including, where possible, short reasons as to why they disagree;
- the preparation of the joint report (again, without lawyers);
- the experts are called to give evidence together, at a convenient time in the proceedings, usually following the tendering of the lay evidence;
- the experts are given an opportunity to explain the issues in dispute in their own words. Each expert is then allowed to comment on or question the other expert; and
- cross-examination of the experts. During this process, each party is permitted to rely on their own expert for clarification of an answer. The parties usually prepare and hand up to the trial judge a list of cross-examination topics (written at a high level of generality) prior to the commencement of the cross-examination.

In complex and controversial matters including those involving major resource projects, concurrent evidence facilitates both an understanding and testing of expert evidence. For example, the merits review matter of Warkworth was heard over 14 days. Under the traditional linear Court process, the

²⁶ *Hunter Environment Lobby Inc v Minister for Planning* [2011] NSWLEC 221; *Hunter Environment Lobby Inc v Minister for Planning* [2012] NSWLEC 40.

²⁷ Pepper, R “Hot-Tubbing”: The Use of Concurrent Expert Evidence in the Land And Environment Court of New South Wales and Beyond” (paper delivered at the 2015 Annual Alaskan Bar Association Conference in Fairbanks, Alaska, United States of America, 14 May 2015).

matter would inevitably become mired in complexity. With concurrent evidence, experts could be called to give evidence together with issues “clumped” together to aid clarity and comprehension.

The following two cases also demonstrate how merits review can produce improved conditions and thus better environmental outcomes.

Case Study# 3: Duralie extension project

In this case, a community group sought a merits review of the Minister’s approval of a new open-cut coal mine 10 kilometres north of Stroud in the Hunter Valley.²⁸ The main concerns of the community were in relation to impacts on the Mammy Johnsons River and biodiversity (including the Giant-Barred Frog, which is a critically endangered species); human health concerns; and the inadequacy of the environmental impact assessment.

During the hearing both the proponent and the community group presented expert evidence on these key issues, and the Court travelled to Gloucester to hear from residents on a range of issues, including the effects of noise and dust on communities from the trains that transport coal out of the mine.

The Court granted approval for the mine but with improved conditions.

In relation to water pollution, the Court required that there be no direct discharge into Mammy Johnsons River, meaning that there can be no runoff from the mine site, and the only points where water may enter the river are via controlled discharge at specified trigger levels.²⁹ There are also a number of conditions that more specifically regulate how water quality and impacts on the Giant-Barred Frog are monitored during the operation, which is important for determining whether the company is complying with its consent conditions.

In relation to biodiversity, the Court increased the areas to be maintained and enhanced for conservation purposes, and required closer correlation between cleared vegetation communities and those to be protected as offsets. The Court’s conditions also provided much more detail – compared to the Minister’s approval – as to how the company must compensate for lost habitat and maintain and improve the values of the offset areas. Importantly, the Court included conditions which require the company to either enter into a conservation agreement for the offsets or register in perpetuity a public positive covenant in favour of the Director-General of Planning over the offset area, thus ensuring more certain environmental outcomes. This has now become a standard practice in offsetting requirements, being a concept first implanted as a result of a merits review.

In relation to air quality, the Court required the company to ensure that, where limits are set for particulate matter emissions, emissions do not exceed limits. Accordingly, the Court set enforceable criteria for dust (compared to the Minister’s approval which only required the company to take “reasonable and feasible avoidance and mitigation measures”).

²⁸ *Ironstone Community Action Group Inc v NSW Minister for Planning and Duralie Coal Pty Ltd* [2011] NSWLEC 195.

²⁹ These trigger levels being set in accordance with guidelines for ecosystem protection in the revised Australian and New Zealand Environment Conservation Council (ANZECC) *Guidelines and Water Quality Objectives in NSW* (2000).

Importantly, in relation to transparency, the Court required all plans and studies prepared by the company under its conditions to be published on its website within one month of the approval, and that this website must be kept up to date. This, combined with more specific and enforceable conditions, assisted communities to better monitor compliance.

This case shows that merits review by third parties has the potential to not only create better outcomes for a particular project, but also has a broader application in developing new and innovative ways to protect the environment, and increase transparency and community engagement in large-scale planning proposals such as mining and coal seam gas. The Court-made approval was a significant improvement in a number of ways.

Case Study # 4: Majors Creek gold mine

In this case,³⁰ a community group was concerned about the impacts of a proposed underground gold mine – namely, impacts on groundwater and surface water quality and quantity in a catchment that supplies drinking water to Eurobodalla residents and impacts of reduced water flows on an endangered ecological community and downstream conservation areas.

Following discussions between the parties, the merits review proceedings were resolved by consent. The mediated outcome resulted in a number of significant improvements to conditions of consent. These include the following:

- an improved design for the tailings dam;
- safeguards to ensure that any water released from previous workings will not have a negative impact on water quality;
- a bond system that ensured that any harm caused to drinking water was the financial responsibility of the gold mine;
- obligations to consult further with Aboriginal stakeholders;
- an additional offsite biodiversity offset area to protect the Tablelands Basalt Forest (an endangered ecological community);
- improved monitoring conditions allowing all water users downstream of the project to be informed of the results of all monitoring, or of any major incidents, on the site; and
- all monitoring, major incident reports and other relevant information must be made public within 28 days.

Through the imposition of conditions, this case demonstrates how merits review can facilitate and ensure the imposition of conditions that are more likely to protect the environment.

³⁰ *Coastwatchers Association and Anor v NSW Minister for Planning and Infrastructure and Anor* [2012] NSWLEC 1025.

c) Providing scrutiny and facilitating good outcomes

Subtly, and crucially, the very prospect of merits review works to ensure that decisions in the first instance are based on clear and transparent reasoning, and are undertaken with a high degree of care and balance. A decision-maker that is aware that its decisions can be subject to merits review is more likely to carefully weigh considerations to ensure that the most appropriate decision is made, than one that knows its determination cannot be challenged. The *potential* for merits appeals, as much as the *taking* of them, can be expected to enhance the rigour of decision-making.

Furthermore, the merits review process ensures that large-scale projects are given appropriate levels of scrutiny, as befits their potential for significant adverse impacts and attendant levels of community concern. The rigour afforded by the adversarial process used by the Court – the more formal sifting and testing of evidence – is crucial in this regard.

Also, merits review provides an opportunity for fulsome public participation in large-scale projects across NSW. This is important in itself but also acts as a key check and balance in the system. As the Independent Commission Against Corruption (ICAC) has noted:

Community participation... act[s] as a counter balance to corrupt influences. The erosion of these requirements in the planning system reduces scrutiny of planning decisions and makes it easier to facilitate a corrupt decision.³¹



EDO NSW with clients at the Land and Environment Court.

³¹ Independent Commission Against Corruption (2012) *Anti-Corruption Safeguards and the NSW Planning System* at p 19: <http://www.icac.nsw.gov.au/documents/preventing-corruption/cp-publications-guidelines/3867-anti-corruption-safeguards-and-the-nsw-planning-system-2012/file>

d) Fostering natural justice and fairness

Finally, one of the key attributes of merits review is fairness. As has been noted:

The rationale for merits review is founded in the notion of natural justice. The rights, liberties and obligations of citizens should not be unduly dependent upon administrative decisions which are not subject to review on the merits. *Prima facie*, an administrative decision should be reviewable on the merits if it is likely to affect the interests of a person. Interests can be commercial, property and legal interests as well as intellectual, and like interests (e.g. environmental interests or concerns within the objects of an organisation). Interests can also include legitimate expectations.³²

In this respect, the contrast between a merits review in the Land and Environment Court and a PAC public hearing is stark. Put another way, only merits review delivers natural justice.

Observations of resource projects over the past few years bear out this insight. A PAC public hearing usually takes one or two days with individual members of the community allowed only 5 minutes and community groups allowed only 15 minutes to tell the PAC why they support or object to the project. PAC members generally do not ask questions of the presenters and there is no opportunity for the decision makers, or the objectors and proponents, to properly interrogate expert evidence in an environment where experts with differing views are present and can discuss those differences.

In contrast, the Court process is much more rigorous. As discussed previously, in complex and contentious matters such as the Warkworth mine extension, the Court hearing before the Chief Judge lasted for 14 days. The Court process provides for cross-examination of experts, a long-standing and crucial element of the adversarial system, enabling the veracity of evidence presented to be tested. For example, cross-examination on the economic modeling used by the proponent in the Warkworth case, also seen in the Queensland Land Court consideration of the proposed number of local jobs claimed to be created by the Adani Carmichael mine in Queensland,³³ resulted in experts having to correct their initial claims significantly. In contrast, PAC members do not meet with experts presenting alternative views to that of the proponent's expert. Proponents and the experts employed by proponents are regularly given the opportunity to present to and discuss issues with PAC members and are consistently given a right of reply to other experts, without that expert being present.

Additionally, and crucially, the PAC always has a site visit to a proposed mine or development but does not always visit and meet with affected communities to gain a better understanding of the impacts. By contrast, the Land and Environment Court conducts both site visits and meets with affected community members (as most recently exemplified by the Ashton case where the Court visited Camberwell and all relevant and affected properties).³⁴ Both parties and legal representatives are present at site visits.

The deficiencies in the PAC public hearing process are demonstrated by the following example.

³² Preston B and Smith J, "Legislation needed for an effective Court" in *Promises, Perception, Problems and Remedies, The Land and Environment Court and Environmental Law 1979-1999*, Conference Proceedings, Nature Conservation Council of NSW, 1999, at 107.

³³ *Adani Mining Pty Ltd v Land Services of Coast and Country Inc & Ors* [2015] QLC 48 [575].

³⁴ Read more about the Hunter Environment Lobby's appeal against the approval of the extension of Ashton coal mine: EDO NSW, *Hunter Environment Lobby v Minister for Planning & Ashton Coal Operations Limited* (2014) at: http://www.edonsw.org.au/hunter_environment_lobby_v_minister_for_planning_ashton_coal_operations_limited.

Case Study #5: Mandalong mine extension

In this matter, the Minister for Planning requested that the PAC carry out a review of the Mandalong South Extension Project, including by holding a public hearing. The community group briefed experts in water quality and aquatic ecology, groundwater, subsidence impacts and economics to review the project documentation and provide expert advice to the environmental impact statement (EIS) assessment process, the PAC review, and the subsequent PAC determination meeting. Experts prepared written reports for the PAC public hearing, raising serious concerns about the economic assessment presented in the EIS and to the PAC.

However, the requirement to travel to Morisset to present to the PAC, plus the 5-minute time limit for presentations, meant that the PAC was not able to hear directly from the relevant experts at the public hearing. In any event, the PAC Review Report noted similar concerns to the expert reports:

The Commission has raised concerns regarding cost-benefit analysis methodology and assumptions used in mining projects in previous reviews. In particular it has been critical that Applicants have consistently over estimated project benefits and have included the use of Input-Output modelling to produce employment figures, failed to properly account for externalities and have included estimates of social benefits of employment in calculations of project benefits.³⁵

In consequence, the PAC concluded that it was appropriate for the proponent to provide an updated economic analysis prior to any project determination and that this should be peer reviewed. Nonetheless, the PAC concluded:

...the Commission agrees with the views of the Department and DTI that the proposal would result in a positive net economic benefit for the region and NSW. The Commission does not consider that the issues raised above would substantially change this broad conclusion, however it does impact upon the extent of the purported benefits.³⁶

The PAC Determination Report for the project found that:

The Commission notes that the economic assessment has been updated and a sensitivity analysis has been undertaken. While a specific peer review of the economic assessment has not been undertaken, the Commission notes that the Applicant has incorporated the key recommendations of recent independent peer reviews on other coal projects in the updated economic assessment... Overall the Commission is satisfied that the economic benefits of the proposal, including employment provided by the mine, contributions to the community fund and other indirect socio-economic benefits generated by the proposal, will provide a material benefit to the local area and the State.³⁷

This conclusion was not supported by the independent economic expert advice provided to the community group. In contrast, that advice found that the revised economic analysis continued to overstate the benefits of the project by including the cost of labour as a benefit and failing to use current coal prices in the analysis. Had these aspects been considered appropriately (and consequently

³⁵ Planning Assessment Commission, *Mandalong Southern Extension Project – Review Report*, April 2015 at p 25.

³⁶ Planning Assessment Commission, *Mandalong Southern Extension Project – Review Report*, April 2015 at p 25.

³⁷ Planning Assessment Commission, *Determination Report Mandalong Southern Extension Project* at p 6.

in line with the current economic assessment guidelines) the project would represent a cost to the NSW economy.

The nature of the PAC public hearing process and – by extension – the absence of proper of merits review rights meant that these vastly differing claims could not be independently tested and a thorough examination of the issues raised was not undertaken.

3) Improving the accountability of decision-making

There are a number of ways in which merits review promotes accountability in decision-making.

First, merits review provides an additional layer of scrutiny, which improves and sustains community confidence in the decision-making process.

Merits review has historically been widely supported, including from the development industry and within government. As the Working Party on the Land and Environment Court noted in 2001:

There was strong support from the property and development industries and government agencies for retention of the current merit appeal system. It was thought that merits review increased transparency of the process in the public eyes, the accountability of decision-makers and the accuracy of decisions.³⁸

For almost a decade, ICAC has consistently recommended to the NSW Government that third party merits appeal rights should be extended, to improve transparency and accountability of development approval processes.³⁹ ICAC noted:

Merit-based reviews can provide a safeguard against the corrupt decision-making by consent authorities as well as enhancing their accountability. Consequently, the extension of third-party merit-based appeal rights may act as a disincentive for corrupt decision-making by consent authorities.⁴⁰

These recommendations were reiterated by ICAC during the NSW Planning review commenced in 2012.⁴¹

ICAC recommended the following categories of development should be accompanied by third party merits appeal rights:

- developments relying on significant SEPP 1 objections;
- developments where council is both the applicant and the consent authority, or where an application relates to land owned by a council;
- major and controversial developments *[emphasis added]*, including for example large residential flat developments; and

³⁸ Working Party on the Land and Environment Court (2001) Appendix D at p 90.

³⁹ See Independent Commission Against Corruption (2007) *Corruption Risks in NSW Development Processes* at: <http://www.icac.nsw.gov.au/documents/preventing-corruption/cp-publications-guidelines/1280-corruption-risks-in-nsw-development-approval-processes-position-paper/file>

⁴⁰ Independent Commission Against Corruption (2007) *Corruption Risks in NSW Development Processes* at p 19.

⁴¹ See also Independent Commission Against Corruption (2012) *Anti-Corruption Safeguards and the NSW Planning System* at: <http://www.icac.nsw.gov.au/documents/preventing-corruption/cp-publications-guidelines/3867-anti-corruption-safeguards-and-the-nsw-planning-system-2012/file>

- developments that are the subject of planning agreements.

As John Mant, planning consultant, has said about the restricted nature of merits review in NSW:

If you were serious about doing something about corruption in the planning system you would bring in third party merit appeals.⁴²

Second, merits review – housed within the Land and Environment Court – is transparent and accountable. In contrast, and by way of example, the PAC has a history of holding private meetings with the proponent and various government agencies. While there has been some reform around this practice, as a result of community pressure, the fact remains, the PAC meets with the proponent in isolation. The proponents (and experts hired by them) are given the opportunity to take the PAC in detail through their case, as does the Department of Planning, but no such opportunity is afforded to any member of the public.

Finally, the use of public hearings (through Ministerial or departmental requests) to extinguish merits review serves to highlight the disparity between such other administrative processes and accountability between resource and non-resource projects. As noted above, 76% of all projects referred to a public hearing have been resource projects, which suggests that public hearings are being used disproportionately to remove third party appeal rights for those projects.

From a community perspective, there is no difference between the practice of PAC public hearings and public meetings. Public meetings are the alternative public forum that is available to the PAC to engage with the community in relation to a project. However, unlike public hearings, public meetings do not lead to the loss of merits appeal rights. Both public hearings and public meetings are largely identical in terms of format and scope – neither provides any greater opportunity for public input or expert comment or interrogation than the other. For example, Shenhua's Watermark coal mine project on the Liverpool Plains was referred by the Department of Planning to the PAC for review in May 2014. The Minister for Planning had specified terms of reference for that review in November 2013 requiring the PAC to hold a public hearing. The public hearing was held in Gunnedah over two days in June 2014 and heard from 63 people and organisations, most of whom were opposed to the mine. In November 2014, the project was referred to the PAC for determination and the determination PAC decided to hold a public meeting which took place in Gunnedah over two days in December, hearing from 58 speakers, most of whom were opposed to the mine. This second meeting heard similar arguments and evidence from many of the same groups and individuals. The PAC also held closed meetings and site visits with the mine proponent, the Department of Planning and commissioned experts, as well as separately visiting nearby farms in the company of objectors.

From a legal perspective, of course, the difference is crucial: one pathway extinguishes merits review and the other does not. And by this legal difference there is a differential impact on the community: one pathway disempowers and disaffects communities and the other does not.

In this way, the extinguishment of merits review decreases the transparency and accountability of the very projects that are likely to have the most significant environmental and social impacts on communities.

⁴² The Sydney Morning Herald, "The right to appeal is there, says planning manager" 29 September 2009 at: <http://www.smh.com.au/national/the-right-to-appeal-is-there-says-planning-manager-20090928-g99n.html#ixzz48OMNi7zN>

Conclusion

Merits review is an essential part of the planning system and it is crucial that it continues to be recognised and facilitated in NSW. In addition, there are clear benefits to allowing third party merits review in relation to major projects in NSW. These benefits relate to improving the consistency, quality and accountability of decision-making in environmental matters. The net result of this is better environmental and social outcomes and decisions based on ecologically sustainable development.

Recent moves to further limit third party merits review – particularly for resource projects – deprive the broader public of these benefits and serve to undermine the integrity of the planning system. Communities are disempowered and alienated by the extinguishment of their merits review rights while, somewhat ironically, the PAC and decision-makers are no better informed (as public hearings and public meetings are essentially the same process in practice).

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