SUPREME COURT OF VICTORIA

COURT OF APPEAL

S EAPCI 2020 0013

HAMISH CUMMING

First Applicant

ADAM WALTON

Second Applicant

v

THE MINISTER FOR PLANNING

First Respondent

WESTWIND ENERGY PTY LTD  
(ACN 109 132 201)

Second Respondent

KELLIE WALTON

Third Respondent

---

JUDGES:

TATE, McLEISH and OSBORN JJA

WHERE HELD:

MELBOURNE

DATE OF HEARING:

15 June 2020

DATE OF JUDGMENT:

20 August 2020

MEDIUM NEUTRAL CITATION:

[2020] VSCA 208

JUDGMENT APPEALED FROM:

[2019] VSC 811 (Garde J)

---

PLANNING AND ENVIRONMENT – Appeal – Judicial review – Wind farm –Environmental effects assessment – Ministerial call in of permit application – Panel report – Brolga habitat protection buffers – Wind turbines – Decision to grant permit on conditions – Whether Minister denied applicants procedural fairness by not disclosing letter received from respondent after panel hearing – Whether Minister failed to consider amended planning scheme – Whether permit missing mandatory conditions invalid – Whether slip rule could be used to correct permit to impose missing mandatory conditions – Whether Minister’s assessment under *Environment Effects Act 1978* unreasonable, irrational or illogical having regard to Brolga habitat model – No denial of procedural fairness in granting permit after receipt of letter without giving objectors further opportunity to be heard – No failure to consider amended planning scheme provisions – Failure to include mandatory noise monitoring conditions did not render permit wholly invalid – Open to correct permit by substituting mandatory conditions pursuant to s 71 of the *Planning and Environment Act 1987* – Minister’s assessment of EES open and not shown to be unreasonable – *Planning and Environment Act 1987* ss 71, 72, 87, 97B, 97E, 97F, 97I, 97J; *Environment Effects Act 1978* ss 8, 9 – *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24; *South Australia v O’Shea* (1987) 163 CLR 378 – Leave granted – Appeal dismissed.

---

APPEARANCES:

Counsel

Solicitors

For the Applicants

Mr S Morris QC with

Mr C Tran

D S T Legal

For the First Respondent

Ms J Forsyth SC with

Ms C van Proctor

Victorian Government Solicitors’ Office

For the Second Respondent

Ms S Brennan SC with

Mr E Nekvapil

White & Case

TATE JA

McLEISH JA

OSBORN JA:

***Introduction***

1 The second respondent (WestWind) operates wind farms which generate electricity. It is the proponent of a project to construct and operate a wind farm called the Golden Plains Wind Farm on 16,739 hectares of agricultural land extending generally from the south-west to the south-east of the town of Rokewood. The overall scale and general proposed layout of the proposal is shown in the attached image comprising Appendix 1.

2 The applicants for leave to appeal oppose the project. The first applicant, Mr Cumming, lives at Darlington approximately 75 kilometres to the west of Rokewood on the western plains of Victoria. He is critically concerned with potential impacts of the wind farm upon Brolga, a native Australian crane.

3 The second applicant, Mr Walton, lives and works with his wife as farmers on land in close proximity to the project. Their concerns include the potential noise impacts from the wind farm turbines.

4 The project would comprise the largest wind farm in Victoria containing up to 228 turbines with a project total electricity generation capacity of 800 to 1,000 megawatts. As such it is put forward as having the capacity to add more than 3,500 gigawatt hours per annum of clean energy into the national electricity market, providing enough electricity to power over 500,000 households and saving more than 3.5 million tonnes of annual carbon dioxide equivalent emissions.

5 In turn, the project requires substantial infrastructure with a footprint of 251 hectares comprising turbines; meteorological masts; site access upgrades; internal access tracks; internal electricity collector works (including both underground cables and overhead power lines); staff accommodation; battery storage systems; and construction infrastructure.

6 The most contentious aspect of the proposal relates to the effects of the turbines which would rise to a height of approximately 230 metres from natural ground level to blade top at the highest point, have a rotor diameter in the order of 150 metres and a rotor sweep commencing at least 40 metres above ground level. The turbines are proposed to be arranged generally in rows aligned to predominant winds and are generally located at least 650 metres apart, with the rows spaced at least 900 metres apart, to ensure each turbine has maximum wind exposure.

7 The layout has been adjusted to particular environmental sensitivities of the site. Nonetheless, the proposal remains fundamentally unacceptable in scale and intensity to the applicants.

8 The present proceeding takes issue with the outcomes of a protracted land use approvals process which it is necessary to explain in order to understand the applicants’ complaints.

9 In order to proceed, the project requires a planning permit for the development of a wind energy facility pursuant to cls 35.07 and 53.32 of the *Golden Plains Planning Scheme* (‘the planning scheme’).

10 It also requires approvals under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth); the *Aboriginal Heritage Act 2006*; and the *Mineral Resources (Sustainable Development) Act 1990*. It may also require further approvals under the *Flora and Fauna Guarantee Act 1988*; the *Catchment and Land Protection Act 1994*; and the *Water Act 1989*.

11 On 14 June 2017, WestWind referred the project to the first respondent (‘the Minister’) under s 8(3) of the *Environment Effects Act 197*8 (‘EE Act’) for advice as to whether an environment effects statement (‘EES’) was required.

12 On 9 July 2017, the Minister decided under s 8B(3) of the EE Act that an EES was required for the project.

13 WestWind prepared an EES for the project which was the subject of public exhibition and comment between 4 May and 18 June 2018.

14 In parallel with this process, WestWind applied for a planning permit for the wind farm on 17 August 2017. The planning application included detailed plans of the proposal as required by the planning scheme.

15 On 19 September 2017, the Minister called in the planning permit application under s 97B(1)(c) of the *Planning and Environment Act 1987* (‘P&E Act’). The effect of the call in was that the Minister became the responsible authority for the determination of the permit application.

16 On 23 April 2018, the planning permit application was amended.

17 Between 4 May and 18 June 2018, WestWind gave notice of the permit application as amended in accordance with s 53 of the P&E Act.

18 On 17 June 2018, the Minister appointed a panel under pt 8 of the P&E Act. The members of the panel were also appointed under s 9(1) of the EE Act to hold an inquiry into the environmental effects of the project.

19 On 18 June 2018, both the applicants made submissions to the Minister objecting to the project.

20 On 21 June 2018, in accordance with s 97E of the P&E Act, the Minister referred all submissions received in respect of the project to the panel.

21 Between 30 July 2018 and 13 August 2018, the panel conducted public hearings in respect of the proposed wind farm as part of a detailed multi-dimensional environment effects enquiry.

22 The applicants, officers of the Minister’s department, the Department of Environment, Land, Water and Planning (‘DELWP’) and WestWind were among those who participated in the panel hearing. They each had an opportunity to call evidence, cross-examine and make oral and written submissions.

23 The first applicant made written and oral submissions to the panel and cross-examined WestWind’s experts on the impact of the project on Brolga.

24 The second applicant and his wife made written and oral submissions to the panel and cross-examined WestWind’s experts through counsel. They also called their own expert as to noise impacts.

25 WestWind called expert evidence, cross-examined the objector’s witness and made submissions amongst other things about both the impact of the project on Brolgas and the noise impacts of the project.

26 At the panel’s request, WestWind provided maps prepared by an ecological consulting firm, Brett Lane & Associates (‘BL&A’), showing how five different turbine-free Brolga buffer zone scenarios could be applied to the project. One of these maps, which depicted what was described as the ‘BL&A habitat model buffers’, was tabled at the panel hearing on 10 August 2018 and identified by the panel as ‘Document 86’.

27 During the course of the panel’s hearings, several versions of draft permit conditions were presented to the panel by the parties, which were described as being ‘without prejudice’.

28 After conducting the hearing and considering the evidence submitted to it, the panel produced a report with respect to the proposed project. The panel’s conclusion was that the impacts of the project could be managed to an acceptable level and that given the strong planning policy support for renewable energy proposals, a planning permit should be granted subject to conditions which controlled the proposed use and development in a detailed manner.

29 It summarised its conclusions about contentious environmental impacts as follows:

In essence the Panel considers:

• The wind farm will have limited adverse effect on agricultural land use, and will provide a more economically sustainable basis for host farms to operate.

• Impacts on the land, including surface water and groundwater, can be effectively managed through good project design, development and operation, including a Construction Environmental Management Plan that includes a Sediment Erosion and Water Quality Management Plan, a Hazardous Substances Management Plan and a salinity assessment report and management plan.

• The impact on the landscape will be significant, but the landscape is not identified or protected in the planning scheme as having particular significance.

• Impacts on Brolga can be managed to an acceptable level by providing increased turbine free buffers based on the BL&A habitat model polygons, and a Brolga Compensation Plan.

• Impacts on native vegetation and biodiversity other than Brolga can be managed to an acceptable level through a Flora and Fauna Management Plan, a BAM Plan[] and a Native Vegetation Management Plan.

• Technical aspects of the wind farm such as noise have been largely addressed, although some further assessment will be required following the grant of a permit, and once the wind farm is operating.

• Impacts of the temporary quarry (and of the temporary concrete batching plants) can be adequately managed through a CHMP,[] a quarry Work Plan approved by ERR,[] an Air Quality Management Plan and a Blasting Plan.

30 Amongst other things, the permit conditions recommended by the panel specifically addressed:

(a) a modification of the proposed layout of the wind farm to provide turbine-free Brolga buffer zones generally in accordance with Document 86; and

(b) the completion of a pre-construction noise assessment, a post-construction noise compliance report and a noise management plan.

31 On 4 October 2018, the planning scheme was amended by amendment VC149. It relevantly required that applications for wind energy facilities be accompanied by a mandatory noise assessment (cl 52.32-4) and that permits for wind energy facilities contain mandatory conditions requiring noise monitoring by way of a post-construction noise report accompanied by an independent audit (cl 52.32-5).

32 Having received the panel’s report, the Minister assessed the environmental effects of the project pursuant to the EE Act. The assessment was signed by the Minister on 20 October 2018. He accepted the panel’s recommendations both as to the overall acceptability of the project and the need for planning permit conditions modifying and controlling it. The Minister’s Assessment further recommended the modification and refinement of some permit conditions but substantially accepted the conditions recommended by the panel.

33 The executive summary of the Minister’s Assessment stated in part:

My assessment is that, subject to specified modifications, particularly the exclusion of some 47 turbines from the windfarm to protect Brolga breeding wetlands, the project’s environmental effects will be acceptable. This conclusion adopts the key findings and recommendations of the panel.

My assessment also makes recommendations for the consideration of relevant authorities about research and revision of guidelines which in my view will better inform prospective proponents and decision-makers about the configuration and approval of wind energy projects in future.

The project will have residual environmental impacts on threatened species and communities and landscape values. My assessment is that those impacts will be acceptable provided they are managed in accordance with my detailed recommendations. I also recommend further work to characterise potential noise and aviation effects, so that they may be managed appropriately. Therefore, provided that the findings and recommendations of my assessment, particularly those relating to Brolga, are considered and implemented, the project will provide a net community benefit, including a significant renewable energy contribution for the state.

34 As is apparent, the Minister’s Assessment emphasised the importance of modifying the project to protect Brolga.

35 WestWind sent a letter dated 9 November 2018 to the Minister concerning the terms of the proposed permit conditions.

36 The letter was not copied or shown to other submitters to the panel including the applicants.

37 The Minister subsequently issued a conditional planning permit to WestWind.

38 After the permit was issued, the Minister by his delegate ‘corrected’ the permit in January 2019 to include revised conditions relating to the monitoring of noise which had become mandatory by reason of amendment VC 149 to the planning scheme after the panel’s assessment of the proposal together with other incidental matters. A second correction in January 2019 subsequently addressed some further incidental matters.

39 In this proceeding, the applicants have sought to challenge by way of judicial review:

(a) the validity of the Minister’s Assessment made pursuant to the EE Act. It is submitted that that assessment is vitiated by legal unreasonableness and that in turn an essential precondition for the grant of a valid planning permit has not been fulfilled. The submission turns on the Minister’s adoption of a particular plan as the basis for the adjustment of turbine-free Brolga buffer zones.

(b) the validity of the grant of the permit after the receipt of the letter from WestWind concerning permit conditions of which the submitters were given no notice.

(c) the validity of the permit granted in circumstances where it is submitted that in consequence of amendment VC149 the Minister neither considered nor gave effect to the provisions of the planning scheme as amended relating to the control and mitigation of noise.

(d) the validity of corrections to the permit (including the insertion of mandatory conditions required by cl 52.32-5) made by the Minister’s delegate in purported reliance upon s 71(1)(a) of the P&E Act which embodies a ‘slip’ rule.

40 The matters relied upon were said to fatally infect:

(a) the Minister’s Assessment of the project under the EE Act;

(b) the grant by the Minister of the planning permit under s 97F of the P&E Act; and

(c) the purported corrections of the permit by the Minister’s delegate.

41 The primary judge dismissed these challenges. In summary, his Honour held that:

(a) He was not satisfied that the Minister erred in law in adopting a plan produced in the course of the panel hearing and endorsed by the panel as the basis for the further refinement of turbine-free Brolga buffer areas.

(b) Although the Minister was required to accord the applicants procedural fairness with respect to the grant of a permit under s 97F of the P&E Act, the Minister was not obliged to notify the applicants of the contents of WestWind’s letter of 9 November 2018 because it did not contain information which was significant to his decision. The receipt and consideration of the letter did not cause the applicants practical injustice.

(c) The permit application was not required to comply with the application requirements imposed by amendment VC149. The applicant complied with the planning scheme as it was at the time the application was made. In consequence, the Minister had a valid permit application before him. The permit conditions recommended by the panel to the Minister and ultimately imposed with respect to the permit were an appropriate response to the application requirements and the object of amendment VC149 with respect to these requirements.

(d) The mandatory conditions initially omitted from the permit were not germane to the Minister’s decision to grant the permit on the merits. The Minister did address VC149 and cl 52.32 of the planning scheme in considering whether to grant a permit. A failure to impose the mandatory conditions did not render the decision to grant the permit a nullity. Further, the subsequent correction of the permit to include mandatory conditions had retrospective effect.

(e) It was open to correct the permit by amendment pursuant to s 71 of the P&E Act to include the conditions required by amendment VC149.

(f) The correction of other incidental matters was a valid exercise of the power to correct a clerical mistake or an error arising from any accidental slip or omission pursuant to s 71 of the P&E Act.

42 The applicants now seek leave to appeal on the following grounds:

1. The trial judge erred in concluding that the Minister did not deny the plaintiffs procedural fairness by not disclosing to them the 9 November 2018 letter from WestWind.

2. The trial judge erred in concluding that the Minister addressed Amendment VC149 and cl 52.32 of the planning scheme.

3. The trial judge erred in concluding that a permit missing mandatory conditions is not invalid.

4. The trial judge erred in concluding that s 71 of the P&E Act could be exercised to impose the missing mandatory conditions.

5. The trial judge erred in concluding that the Minister’s assessment under the EE Act was not unreasonable, irrational or illogical having regard to Figure 2 and the BLA habitat model.

43 For the reasons set out below, we are of the view:

(a) that the applicants were not denied procedural fairness as a result of not being notified of WestWind’s letter to the Minister prior to the grant of the permit;

(b) that the evidence does not establish that the Minister failed to consider amendment VC149;

(c) that the failure to include the mandatory monitoring conditions required by amendment VC149 did not render the permit wholly invalid;

(d) that it was open to correct the permit by substituting the mandatory conditions pursuant to s 71 of the P&E Act; and

(e) that it was open to the Minister to assess the EES as he did.

44 We would grant leave to appeal on each of the proposed grounds of appeal save ground 2, but dismiss the appeal.

45 It is convenient to deal with proposed ground 5 first so as to consider the applicants’ contentions chronologically (as did the original grounds of the application for judicial review).

***Ground 5 – Was the Minister’s Assessment unreasonable, irrational or illogical having regard to Figure 2 and the BL&A habitat model?***

46 As we have noted above, the provisions of the EE Act were invoked after the proponent sought the advice of the Minister as to whether an EES should be prepared for the works and the Minister decided that an EES was required.

47 The applicants contend that in the present case the Minister’s Assessment of the environmental effects of the works was so unreasonable as to amount to no assessment within the meaning of the EE Act.

48 In turn, it is submitted that no valid decision could be made under the P&E Act to grant a planning permit until a valid assessment was made.

49 The basis of the argument is that the Minister’s Assessment adopted the plan comprised in Document 86 and included (in simplified form) as Figure 2 in the Minister’s Assessment as the basis for the future resolution of turbine-free Brolga buffer areas. It is submitted that the adoption of this plan as the basis for fixing the boundaries of such areas was unreasonable, irrational or illogical to such a degree as to be bad in law.

50 A copy of the Document 86 plan subsequently embodied in Figure 2 is attached as Appendix 2 to this judgment. It can be seen that it depicts a hatched home range buffer which excludes likely breeding wetlands and ‘suitable’ wetlands from the development area but includes some ‘unsuitable’ wetlands in the development area.

51 The applicants rely on the panel’s description of the methodology providing the rationale of this plan as demonstrating that the plan itself is defective.

The panel understands that the BL&A habitat model defines the breeding home range as a polygon, calculated as follows:

• 400 metre radius around the breeding wetland sites;

• all wetlands within 3.2 kilometres from a breeding site are identified and included in the mapped home range buffer;

• a further 300 metre disturbance buffer is placed around this home range.

52 The applicants submit that ‘not every wetland has been included at the second stage, only breeding wetlands have been included.’ Wetlands labelled ‘unsuitable’ have not been taken into account.

53 The applicants’ argument thus turns on the use of the phrase ‘all wetlands’ rather than ‘all suitable wetlands’ in the panel’s description of the methodology. As the primary judge put it:

The panel briefly summarised the criteria used in the BLA model in its report. The second criterion is stated as ‘all wetlands within 3.2 kilometres from a breeding site’. On a literal reading, this includes all wetlands, whether suitable or unsuitable as breeding wetlands. If, however, the second criteria is taken as referring to all wetlands that are suitable for breeding within 3.2km from a breeding site, the plaintiffs accepted that the buffer area shown in Document 86 was correct and their case failed.

54 It can be seen that this passage hypothesises the possibility of an inadequate summary description of the BL&A habitat model in the panel’s report (‘the misstated methodology hypothesis’).

55 The primary judge was not persuaded that the adoption by the panel, and in turn the Minister, of a plan in the form of Figure 2 was erroneous. His Honour reached this conclusion in part by reference to the misstated methodology hypothesis.

56 The decision as to the extent of appropriate turbine-free buffer zones for the protection of Brolga went to a significant issue. As the Minister’s Statement of Reasons for Decision to Grant Permit records, the Brolga is listed as a threatened species under the *Flora and Fauna Guarantee Act 1988*. The action statement prepared with respect to Brolga under that Act also identified loss of breeding wetlands as one of the key threats to Brolga in Victoria.

57 Prior to the current proposal, the Minister’s department had issued interim guidelines addressing the risk which the development of wind farms in south western Victoria may pose to Brolga (‘the Interim Brolga Guidelines’). The Interim Brolga Guidelines recommended default wind turbine buffer distances of 3.2 kilometres from breeding sites and 5 kilometres from flock roost sites, plus a 300 metre disturbance buffer for both. They provided that a wind farm proponent could nonetheless adopt proposal-specific reduced buffer distances in agreement with DELWP.

58 There were no known flock roost sites within 5 kilometres of the proposal the subject of this application. The proponent sought approval to reduce Brolga breeding site buffer distances from 3.5 kilometres (the default 3.2 kilometres plus a 300 metre disturbance buffer) to 700 metres (400 metres plus a 300 metre disturbance buffer). DELWP was not satisfied with the justification advanced for the reduction and did not agree to the proposed reduced buffer distances. The wind farm could not proceed in the form proposed by WestWind without acceptance by the Minister of a reduction in the default buffer distances proposed by the Interim Brolga Guidelines. Whether the default buffer distance should be reduced and, if so, by how much, was hotly contested before the panel. The question of the appropriate buffer was addressed in evidence before the panel by Mr Brett Lane, an ornithologist and Mr Ian Smales, an ecologist from the firm Biosis. It was also the subject of detailed submission by WestWind, Mr Cumming, the Waltons and officers of DELWP.

59 In the course of the hearing before it, the panel requested five plans be prepared illustrating five alternative buffer proposals demonstrating different outcomes ranging from WestWind’s proposal through to the default buffer provision set out in the Interim Brolga Guidelines. One of these was the BL&A habitat model buffers.

• the Proponent’s proposed final turbine layout – minimum 700 metre buffers (Document 83)

• 1000 metre buffers, DELWP Environment requested the Proponent to model during the course of the EES exhibition process (Document 84)

• 1,135 metre buffers based on the Biosis home range mapping for Penshurst and Mount Fyans wind farms (Document 85)

• BL&A habitat model buffers (Document 86)

• the default 3.2km set out in the Brolga Guidelines (Document 87).

60 Mr Lane was the principal of the firm of ecological consultants which produced Document  86. The same firm was also the author of the BL&A habitat model. The primary evidence of Mr Lane (which was comprised in a written report) summarised the context in which he addressed the protection of Brolga breeding sites.

• A significant proportion of the wetlands in the RoI[] have been permanently drained and are no longer considered suitable for future use by Brolga.

• A significant proportion of the RoI, in particular the western and northern portions lack wetlands and the Brolga has not historically been recorded there.

• An estimated population of eight pairs of Brolga occurs in the southern and eastern parts of the RoI, representing under two percent of the Victorian population of the species (estimated at between 800 and 900 birds).

• Suitable breeding wetlands in the RoI occur mostly to the south of the proposed GPWF,[] with a small number of sites within and to the north east of the southern section of the proposed wind farm. Brolga have bred in 26 of these wetlands.

• Three of these breeding wetlands occur within the southern section of the proposed wind farm.

• Brolga have been recorded during the flocking season within the RoI, most regularly at Lake Weering, about 9 kilometres south of the proposed wind farm. Six flocking season records of 10 or more birds elsewhere in the RoI were found to be one-off flocking records and did not involve regular use of a wetland for overnight roosting purposes.

• Based on the activity of the Brolga in the RoI, the focus of assessment and mitigation has been on the use of the area for breeding. Much less risk is considered to arise from the use of the area during the flocking season.

• Mitigation of risks to the Brolga involves the establishment of turbine- free buffers around breeding sites on and near the wind farm. It has been assumed that Brolga move up to 3.2 kilometres from their breeding wetland. Turbine-free buffers have been developed by removing 12 turbines and adjusting the positions of five turbines near Brolga breeding sites within or closest to the wind farm.

61 The report went on to propose minimum 700 metre buffers derived from collision risk modelling and supported by a Brolga compensation plan.

62 In its assessment of Brolga impacts, the panel made clear that the object of the buffer zone should be to avoid significant reduction in breeding success.

The Panel accepts the analysis of the Brolga Impact Assessment that there are no traditional flocking sites within 5 kilometres of the wind farm or on the wind farm site itself. In the absence of demonstrated evidence of flocking sites within the vicinity of the Project site, the Panel agrees that the focus should be on breeding sites.

The key objective for breeding habitats set out in the Brolga Guidelines is to avoid significant reduction in breeding success. The Panel is guided by this objective in its consideration of appropriate buffers, and has applied an evidence-based approach in considering whether the alternative buffer scenarios are likely to achieve this objective.

The Brolga Guidelines recognise that Brolga breeding home ranges are likely to vary with local habitat quality and extent, and seasonal conditions. With this in mind the Guidelines contemplate the default 3.2 kilometre buffer being reduced, but only where site-specific investigations can show with a high degree of confidence the size and shape of home ranges for a project.

63 After summarising a series of factors supporting different buffer approaches it concluded:

Having weighed up the various factors and considered the evidence, including the outcomes of the PVA[] analysis, the Panel finds that there is no empirical basis to support a reduced buffer of 700 metres. It does not consider that the information and evidence put forward by the Proponent in support of the reduced buffers meets the threshold test of a high level of confidence. On the basis of the evidence before it, the Panel is not satisfied that a 700 metre buffer will be effective in achieving the objectives of the Brolga Guidelines.

In the circumstances, the Panel is satisfied that the application of the BL&A habitat model should satisfy the Guideline's objectives. While a map of the BL&A habitat model buffers has been provided (Document 86), the Panel considers that the final boundaries of the turbine free polygons should be agreed by DELWP Environment.

The Proponent may choose to undertake further assessment and investigation of Brolga breeding activity and home range mapping at the Project site, to provide a more sound, empirical evidence base to support reduced buffers and the provision of additional turbines. This would require a future amendment to the permit, which could be assessed through an independent process.

64 Conditions recommended by the panel gave effect to these conclusions requiring the provision of turbine-free buffer zones generally in accordance with Document 86 and including the requirement for a secondary approval process finalising the boundaries of the buffer zone.

65 Whilst it is clear that the design imperative guiding the BL&A habitat model was the protection of breeding habitat, it does not follow that the misstated methodology hypothesis is correct.

66 The Minister’s Assessment relevantly states his understanding of the BL&A habitat model as follows:

*In the case of Dundonnell, and in light of substantially more intensive local observations than were made for the Golden Plains wind farm EES, BL&A proposed asymmetrical home ranges of a minimum 400 m radius from the wetland boundary, with the home range extended to include any wetland within 3.2 km of the nesting wetland and allowing a further 300 m disturbance buffer. This ‘habitat’ approach reflected the observed willingness of birds to move further from the breeding wetland towards other wetlands, which may be likely to provide better foraging habitat than dry areas closer to the breeding site.*

Mr Ian Smales, who served as peer reviewer for the EES Brolga study for the project, is employed by Biosis, and responded to questions during the Golden Plains wind farm panel hearing about the Biosis approach for Penshurst and Mt Fyans. The Biosis approach is based on a database of observations, also more extensive than those gathered for the Golden Plains wind farm EES, at breeding sites in the vicinity of the proposed Penshurst and Mt Fyans wind farm sites. It proposes a home range of about 830 m radius from the wetland boundary (hence about 430 m larger than the home ranges proposed by BL&A for GPWF), plus a further 300 m disturbance buffer.

*In 2016, I assessed the environmental effects of the Dundonnell wind farm under the Environment Effects Act and granted a planning permit consistent with my assessment. The assessment generally accepted the BL&A habitat approach adopted for that EES to determine Brolga breeding site home ranges.* The proposed Penshurst wind farm, for which an EES was required, has now been abandoned by its proponent. The proposed Mt Fyans wind farm is the subject of a planning permit application lodged in September 2018, which is yet to be determined. Therefore, the Biosis approach remains untested in a statutory sense.

The Golden Plains wind farm panel heard references to the work of PhD student Ms lnka Veltheim, who conducted extensive field studies on Brolga breeding and flocking behaviour, supported by funding from the Commonwealth government, the former Department of Sustainability and Environment, Sustainability Victoria and the wind energy industry. Ms Veltheim’s studies included radio-tracking juvenile birds during their pre-fledging stage. Those movements therefore will provide an indication of breeding home ranges used by the breeding pairs to which the tracked juveniles belonged. Brolga chicks leave the nest at a young age, well before being able to fly, and forage on foot within and outside the breeding wetland, escorted by one or both parent birds until they fledge. One parent bird might at times forage further afield than the young, while the other parent guards the offspring, so the breeding home range might for practical purposes be larger than the area traversed by the walking juveniles.

Although Ms Veltheim’s work when published (expected shortly) will provide valuable empirical data about the dimensions of breeding home ranges for Victorian Brolgas, it will do so without direct reference to the influence of nearby wind farm infrastructure on Brolga’s choice of breeding wetlands or on home range size. I note that it has been claimed in submissions that Brolga use of historical breeding wetlands up to five kilometres from wind turbines is compromised. On the other hand, Brolga nesting has been recorded within the footprint of the Macarthur wind farm in western Victoria.

67 The first paragraph quoted makes clear that the Minister understood the BL&A habitat model to include ‘any wetland within 3.2 kilometres of the nesting wetland’ because such wetlands may provide foraging habitat in the vicinity of the breeding site.

68 The Minister went on to address the evidence as to the total Brolga population in south western Victoria and concluded that an adverse impact on the breeding Brolga pairs in the vicinity of the proposed wind farm would be a serious matter for the population as a whole.

69 The Minister then addressed collision risk modelling, population viability analysis and the potential significance of a Brolga compensation plan. He then expressed a series of conclusions. First, he rejected an argument that the predicted casualties from the Dundonnell wind farm established a benchmark against which the present proposal should be assessed. Next, he noted that one of the key threats to the Victorian Brolga population is loss of suitable breeding wetlands due to anthropogenic climate change. Brolgas are thus threatened both by climate change and by one of the key technologies available to mitigate climate change.

70 The Minister went on to say:

It remains uncertain what constitutes an adequate home range and buffer for Brolga breeding wetlands potentially affected by the Golden Plains wind farm proposal. I therefore consider it essential to apply the precautionary principle to protect those breeding sites at least to an extent consistent with the protection that has been applied through statutory approvals for wind farms to other breeding wetlands since the publication of the IBG.[] Accordingly, I support the panel’s finding that the BL&A habitat approach should be applied in the case of the Golden Plains breeding wetlands in the absence of compelling evidence justifying smaller site-specific home ranges.

However, I expect that further information will shortly come to light through the imminent publication of the results of Ms Veltheim’s research. This might lead after due consideration to a revision of the IBG with respect to breeding home range dimensions.

I note that new information about Brolga breeding home ranges may come to hand soon which may be considered by DELWP Environment as it seeks opportunities to provide better guidance to proponents and decision-makers about the impacts of wind farm development on biodiversity, especially avifauna. However, targeted research may be needed to characterise the potential disturbance effect of turbines on Brolgas’ choice of nesting sites, as it is likely to be a key determinant in the design and approvals consideration of future wind farms.

Accordingly, in response to the panel’s recommendations 1 and 2, I consider at this time that the approval for the Golden Plains wind farm should not permit the development of turbines falling within the BL&A habitat-based home ranges with 300 m disturbance buffer. Turbines mapped within the hatched area in Figure 2 (adapted from panel document No. 86) should be deleted from the plans for the planning permit.

71 The Minister then made observations to the effect that a further amendment to the permit might be possible allowing additional turbines if new standards were developed justifying such an increase.

72 The Minister’s Statement of Reasons for Decision to Grant Permit ultimately recorded both that the panel recommended the BL&A habitat model be used to determine buffers and that the Minister’s Assessment agreed with this recommendation.

73 When the detail of the Minister’s Assessment is taken into account and read in the context of the Panel Report, we do not accept the misstated methodology hypothesis as explaining the apparent discrepancy between the methodology used in the BL&A habitat model and Document 86. That hypothesis identifies the discrepancy as being that, whereas the methodology stated that all wetlands within 3.2 kilometres of a breeding site were included in the buffer zone, only breeding wetlands and wetlands suitable for breeding had been included in this way in Document 86. The hypothesis is that the methodology was intended to be confined to breeding wetlands and wetlands suitable for breeding. But the Minister’s Assessment makes it clear that properly understood the methodology treats wetlands suitable for foraging purposes within 3.2 kilometres of a breeding site as also being included. The applicants were correct to point to the discrepancy.

74 However, it does not follow that the applicants succeed in showing that the Minister’s decision was unreasonable, irrational or illogical. We shall return to that matter. In the meantime, it is necessary to say more about the identification by BL&A of ‘unsuitable’ wetlands. That notion informed the BL&A Report and the preparation of both Document 86 and Figure 2.

75 In the BL&A Report, Mr Lane explained the basis on which his firm had mapped wetlands for the purpose of his evidence.

**Historical breeding sites**

The historical databases up to 2016 when this study commenced indicated that there were 31 locations that had breeding records of Brolga within the radius of investigation (Figure 2). Of these, 15 records (crossed out in 2) were too far from wetlands due to inaccurate co-ordinates so these have been excluded from the analysis as they are not located in suitable breeding habitat (Figure 2). Records accepted near wetlands generally occurred within 300 metres, whereas others were well beyond this distance. Such records are described in Table 4. The quality rankings in this table refer to breeding habitat quality, the criteria for which are detailed in Section 4.2.2. All maps in this report that show wetlands are based on the DELWP wetland layer, plus any additional, confirmed wetland habitats in which Brolga breeding or flocking records were identified. Wetlands listed in Table 4 and shown in Figure 2 not used for breeding and not considered ‘unsuitable’ provide potential foraging habitat of varying quality for the Brolga.

During the Level Two investigations (see Section 4.2.2), 10 additional breeding sites were found in the RoI during the Brolga breeding survey from the ground and the air and in discussions with landholders (see section 4.2.3). These observations have been discussed later in this chapter in sections 4.2.2 and 4.2.3 and brought the total number of accurately known breeding sites in the RoI to 26 wetlands.

As described in section 4.2.2, all wetlands that could be visited within the RoI (i.e. not subject to landholder access limitations) were assessed for their suitability for future Brolga breeding. Specifically, this inspection ascertained whether the wetland had been permanently drained, defined as having been altered hydrologically to the point of not functioning as a natural wetland capable of supporting breeding Brolga due to drainage for agriculture, including the construction of a deep stock watering dam within it. In the latter case, dams in wetlands with small basins and catchments, in which the dam occupied a significant proportion of the natural wetland basin, prevented water from pooling in the original wetland basin, effectively draining it and not allowing emergent vegetation to grow.

Table 4 summarises the results of the desktop and field assessments for all wetlands assessed and presents the information used to identify the 26 breeding sites as such. The wetland numbers in this table are shown on Figure 2. Habitat quality criteria are detailed in Section 4.2.2.

76 Importantly this passage indicates four things:

(a) the base map used by Mr Lane was obtained from DELWP;

(b) the base map required supplementation by way of the inclusion of wetlands not recorded upon it but identified through further investigation;

(c) the base map included areas denoted as wetlands which were upon investigation found not in fact to be wetlands (whilst remaining denoted as wetlands on the map);

(d) Table 4 to the BL&A Report described the results of the investigations.

77 Whilst the purpose of Table 4 in the BL&A Report is to identify wetlands suitable for breeding, it records a substantial number of instances in which putative wetlands were found to have been permanently drained or otherwise to have lost their character as wetlands. Moreover, as we have noted, one of Mr Lane’s overall conclusions was that a significant number of wetlands in the RoI have been permanently drained and are no longer considered suitable for further use by Brolga.

78 Senior counsel for the applicants emphasised in his oral submissions that a series of wetlands referred to in Table 4 as ‘unsuitable’ were in fact suitable for foraging. He pointed to instances such as wetland 52284 which was classified as ‘unsuitable’ and described as follows:

Medium sized wetland, grazed by sheep, no emergent vegetation, unsuitable for breeding though three Brolga present that were foraging. These birds were most likely young birds that were not sexually active as yet and staying close to their flocking site at Lake Weering.

79 Table 4 lists all wetlands the subject of historical records within the radius of investigation being within, and up to 10 kilometres from, the proposed wind farm site. The examples to which senior counsel referred do not appear to us to be within the wind farm site.

80 More importantly, the two large ‘unsuitable’ wetlands partially comprised within the reduced wind farm site and partially comprised within the buffer zone appear to us to be described in terms which cast doubt upon the extent to which they in fact constitute wetlands.

• 54211 — ‘area mapped as wetland is old stony rise (barrier) — no standing water. Scattered Juncus and tussock grass in a grazed paddock.’

• 54224 — ‘no surface water present, grazed land with some tussock grass.’

81 It was initially submitted to the Court by the applicants that it could conclude that the BL&A habitat model was not properly reflected in Document 86 simply by itself viewing the scale in Document 86 and visually appraising the plan with a ruler.

First, the error in Figure 2 is evident by using the scale supplied in the figure and measuring which wetlands have been included in the buffer zone. Some have not been included that plainly should have been. The only rational explanation for their exclusion is that unsuitable wetlands were excluded. But not only from the Panel’s description of the BLA model, but also from other evidence, it is clear that all wetlands should have been included.

82 Senior counsel for the applicants submitted that the discrepancy between the BL&A methodology and Document 86 was so great that it was illogical for the Minister to have accepted that methodology and then imposed a condition requiring the buffer zone to be generally in accordance with Document 86. However, once it is seen that Document 86 depicts as wetlands areas which the supporting documentation suggests do not fit that description, the position is less clear. Certainly it cannot be concluded merely by comparing the two that the adoption of Document 86 was unreasonable, irrational or illogical.

83 In reply, the applicants’ submission ultimately fell back to the position that Table 4 demonstrated that it was possible that Document 86 did not accurately and satisfactorily apply the relevant methodology.

84 We are not satisfied that the Minister’s acceptance of the panel’s endorsement of Document 86 as representing the application of the methodology used in the BL&A habitat model as the basis for the resolution of buffers was demonstrably irrational or illogical.

85 First, the Minister was on the face of it entitled to rely upon the report of an expert panel which had itself received and considered expert evidence. The panel was comprised of members having skills and experience in biodiversity and habitat, land use planning, and wind farm and power infrastructure. The Panel Report was prepared after an eight day hearing at which the Minister’s department was represented. Document 86 goes to an issue in respect of which DELWP actively participated and joined issue with WestWind. The Minister’s Assessment demonstrates that officers of his department were familiar with the methodology now in issue. Even if the panel made a mistake of fact it was not in our view unreasonable for the Minister to rely upon the Panel Report given the process which led to its production and the expertise of the panel. For the reasons we have explained, Document 86 was not (as the applicants submit) necessarily in conflict with the relevant methodology. That question turned on an assessment of the evidence as a whole as to the actual extent of wetlands depicted upon it.

86 Secondly, we do not know what the evidence before the panel was. The primary evidence of Mr Lane (which was comprised in the BL&A Report) before the panel was before the primary judge. But there was no transcript of his oral evidence nor a transcript of discussion before the panel with respect to Document 86 which formed the basis of Figure 2. Nor were all documents bearing on the buffer zone issue produced to the Court. The Panel Report lists the following documents amongst those to which it was referred during the hearing:

90 13/08/2018 BL&A Memo final response to Panel questions

101 16/08/2018 DELWP Environment’s response to questions from the Panel put at the Hearing on 10 August 2018

102 16/08/2018 DELWP Environment’s response to B Lane’s Expert Witness Statement

87 In oral submission, the applicants contended that what happened before the panel does not matter. We do not agree. The ultimate question raised by this proposed ground of appeal is whether it was open to the Minister to accept Document 86 as part of the basis of his assessment. But it is implicit in the applicants’ case that it was not open to the panel in the first instance to endorse Document 86 as representing the application of the BL&A habitat methodology. In the absence of the full evidence which was before the panel, this conclusion cannot be justified. At least since the observations of Stephen J in *Spurling v Development Underwriting (Vic) Pty Ltd*, it has been accepted that supervisory courts should be reluctant to conclude that a factual conclusion was not open to an expert planning tribunal. The same principles should be applied to the panel. Where the evidence is unclear it cannot be confidently concluded that the panel did in fact make an error.

88 Thirdly, no expert evidence was called before the primary judge addressing the factual basis of the ground. The extent to which Document 86 did not reflect the BL&A habitat methodology (if any) was a matter capable of clarification and elucidation by evidence but no such evidence was adduced. Rather, the choice was made to address the issue solely by way of submission made by reference to incomplete documentation. It was inherently unsatisfactory to ask the primary judge to scale off a photocopy plan himself. At the very least the ‘wetlands’ upon which the applicants’ argument turns should have been identified by evidence and the dimensions of the alleged mistake postulated and clarified by reference to stated assumptions.

89 Fourthly, the fact that the author of Document 86 was also the author of the relevant methodology counts against accidental error.

90 Fifthly, both the Panel Report and the Minister’s Assessment contemplated Document 86 would be subject to further evaluation and the boundaries of the buffer zone would be fixed by agreement with DELWP.

91 The applicants must show that it was not open to the Minister to adopt Document 86 as the basis of his assessment and to respond to it with qualified acceptance. A decision will be illogical or irrational in the relevant sense ‘if only one conclusion is open on the evidence, and the decision maker does not come to that conclusion, or if the decision to which the decision maker came was simply not open on the evidence or if there is no logical connection between the evidence and the inferences or conclusions drawn.’

92 At its highest, the applicants have demonstrated that it is possible that there has been some misapplication of the BL&A habitat methodology in Document 86. This is not sufficient. The applicants have not positively demonstrated that the factual decision of the Minister was perverse.

93 The applicants made the following specific subsidiary submissions in their written case with respect to the primary judge’s Reasons. It is submitted that the applicants did not have the opportunity to cross-examine Mr Lane with respect to Document 86 because it was produced at a late stage of the panel hearing. This is correct but they did have the opportunity to cross-examine him with respect to the buffer issue generally and to present evidence and make submissions with respect to the buffer issue. We do not rely on the failure to cross-examine as an answer to the applicants’ case. It is the absence of a record before us of the full evidence before the panel which is of significance. Ultimately, as we have explained, there is no satisfactory basis for concluding that the panel, or the Minister, misunderstood Document 86.

94 The applicants further contend that it is no answer to their case to say the Minister acted on expert ecological evidence. In our view, the Minister was entitled to rely on the panel’s endorsement of Document 86 as an expert body to provide a basis for the fixing of buffer zones and to rely upon the fact that it was produced by BL&A in circumstances where Mr Lane had given expert evidence before the panel. These matters may not demonstrate conclusively that the Minister’s decision was reasonable but they are significant considerations against a conclusion of irrationality or illogicality.

95 We would add for completeness that it may be doubted whether the scheme of the EE Act has the effect for which the applicants contend.

96 Ground 6 of the application for judicial review contended:

If the environment effects assessment is quashed for jurisdictional error, then it follows that the grant of the permit should also be quashed for jurisdictional error.

97 The applicants’ written submissions at first instance articulated two reasons for this:

First, the Minister made it very clear in his statement of reasons for granting the Permit that he took into account, and acted upon the Assessment: see especially at paragraphs 62, 67, 105, 113. If that Assessment is quashed, then a significant substratum of the Minister’s decision falls away, and is flawed. The basis for the decision is so affected that it can only be taken to be a constructive failure to exercise jurisdiction.

Second, the evident purpose of the *Environment Effects Act 1978* (Vic) is to inform decision-makers, including here the Minister, about the environmental effects of projects. If an assessment is affected by jurisdictional error, then a project should not be permitted to advance until a lawful assessment is completed. Any other interpretation is inconsistent with the purpose of the Act. An interpretation that promotes the purpose of the Act is to be preferred.

98 On the appeal, senior counsel for the applicants confirmed in the course of argument that it was contended that the EE Act required that a valid assessment be completed before the Minister could grant a planning permit.

99 The scheme of the EE Act does not go that far. Section 8C provides:

**8C Decisions not to be made and works not to proceed until assessment considered**

(1) If the Minister gives a notice under section 8B to a person or body (other than the proponent) advising that a statement should be prepared for works—

(a) the works must not proceed; and

(b) no decision can be made under an Act or law by that person or body in relation to the works until—

(i) the proponent has caused the statement to be prepared and submitted to the Minister for the Minister's assessment of the environmental effects of the works; and

(ii) the assessment has been considered by that person or body.

100 In the present case, the proponent sought advice as to whether an EES was required and the Minister required the proponent to prepare an EES. The case does not fall within s 8C(1). Whilst the effect of s 8F of the EE Act is that ss 8 to 8E can apply to a decision to grant a planning permit, this case falls within the bracketed exception referred to in s 8C(1), ie the subsection applies when the Minister gives notice to ‘a person or body (other than the proponent)’ because here the Minister gave notice to the proponent under s 8B(4) that an EES should be prepared for the works. Accordingly, there was no statutory requirement that the Minister prepare an assessment of the EES as a precondition to the grant of a planning permit.

101 It follows that it is only if the alleged defect in the assessment necessarily invalidated the Minister’s reasoning with respect to the grant of a permit that such grant could be challenged by reference to the assessment. We do not accept that this ultimate conclusion would be justified even if the premise of error in Document 86 were made out.

102 The assessment is intended to assist the ultimate decision-maker but it is not itself a decision upon the merits of the proposal. It is for the ultimate decision-maker to decide whether the reasons expressed in the assessment should be accepted.

103 It follows that the decision which affected the applicants’ rights was the decision to grant a planning permit. At the date of this decision the Minister had material before him going beyond the Panel Report and his assessment of it. In particular, he was provided with a Ministerial Briefing Paper. This described the rationale of the BL&A habitat model as follows:

The panel and your assessment under the EE Act were not satisfied with the proponent’s buffers and recommended the alternative ‘Brett Lane and Associates habitat model’ be used to determine buffers.

a. This model has been used in the past for the Dundonnell wind farm, which was also subject to an EES inquiry/panel hearing.

b. This buffer model involves a minimum 400-metre buffer around breeding wetlands, extended to include any wetland habitat within 3.2 kilometres of the breeding wetland, plus an additional 300-metre disturbance buffer around the resultant polygon.

c. The resulting Brolga buffer for Golden Plains wind farm, as recommended by the panel, is shown at Attachment 5.

104 As we understand the evidence, Attachment 5 reflected Document 86. Given the factual complexity of the matter, it was not unreasonable for the Minister to rely upon the Ministerial Briefing Paper.

105 The grounds of review did not in terms challenge the Minister’s decision to grant the permit as legally unreasonable or identify legal error in it. We do not accept that a defect in the assessment if established would necessarily infect the decision to grant a permit and automatically justify the conclusion that the grant of the planning permit must be quashed.

106 In any event, however, the challenge to the primary judge’s reasoning concerning the Minister’s Assessment expressed in proposed ground 5 of appeal must fail because unreasonableness has not been established.

***Proposed Ground 1 – Did the Minister deny the applicants procedural fairness?***

107 The panel recommended detailed permit conditions relating to turbine numbers and location which were relevantly accepted by the Minister in the Minister’s Assessment.

**DEVELOPMENT PLANS**

1. Before development starts, development plans must be submitted to, approved and endorsed by the responsible authority. When endorsed, the plans will form part of this permit.

The plans must be fully dimensioned and drawn to scale. The plans must be generally in accordance with the application plans *'Golden Plains Wind Farm: Site Layout – Inset Maps 1-6,'* dated 24 April 2018 (Jacobs), and must include:

a. the final location, specifications, materials and finishes of the wind energy facility

b. a maximum of 228 turbines (reduced as required to comply with condition l(c)) with the following specifications:

i. maximum blade tip height of up to 230 metres above ground level

ii. minimum blade tip clearance from ground level no less than 40 metres

c. turbine free buffer zones for Brolga generally in accordance with Document 86 presented to the Golden Plains Wind Farm EES Inquiry and Panel, 'Brett Lane & Associates Plan, BL&A Habitat model turbine free buffers', with the final boundaries to be agreed with DELWP Environment

d. realignment of the proposed grid connection powerline between the collector station on Bells Road and the 500kV terminal station on Geggies Road to avoid Baths Swamp and associated peripheral wetland dependent vegetation

e. clear delineation of the boundary for the transmission station site, which must not intrude into the boundary of the Plains Grassy Wetland Ecological Vegetation Class boundary. The boundary of the transmission site must be approved by the DELWP Environment Portfolio

f. the final design and location of any proposed business identification signage

g. the location and extent of native vegetation to be removed under this permit

h. no buildings or structures on the existing Ausnet Transmission Group easement, except for access tracks, underground cables and interface works required for the connection of the wind farm electrical system to the existing 500kV Moorabool to Mortlake/Tarrone transmission line

i. no aviation safety lighting on any turbine.

108 Condition 3 required that the use and development be generally in accordance with the endorsed plans and that the endorsed plans must not be altered or modified without the written consent of the responsible authority.

109 Conditions 5 to 8 provided for adjustments in the micro-siting of turbines subject to strict conditions.

110 WestWind submitted a letter to the Minister on 9 November 2018 which propounded a different set of permit conditions. The letter commenced (omitting formal parts):

Thank you for the recent finalisation of the Environmental Effect Statement (EES) Inquiry and Planning Permit Application Panel Report (Inquiry/Panel Report) and the Minister’s Assessment under the *Environmental Effects Act 1978* (Minister’s Assessment) for the Golden Plains Wind Farm (GPWF).

After careful consideration of both the Inquiry/Panel Report, the Minister’s Assessment and the approval by the Wutherong and Aboriginal Victoria of the Cultural Heritage Management Plan (CHMP) we now submit to you draft conditions for Planning Permit PA1700266 (Planning Permit) for your final assessment and approval.

The Golden Plains Windfarm (GPFW) is an exemplar project which will provide:

• Power to the equivalent of 500,000 homes;

• Approximately $1,000,000 revenue in Local Government rates;

• More than $3.5 million in annual income across approximately 40 host landholders; and

• Save more than 3 million tonnes of carbon dioxide, annually.

The project will also generate the equivalent amount of electricity to cover 8–10% of Victoria’s electricity consumption and create 768 construction jobs in addition to 72 direct operational jobs, all in Victoria.

The State Government of Victoria have continued to demonstrate their commitment to supporting renewable energy and we look forward to achieving your final endorsement of the project with the approval of the Planning Permit.

The Planning Permit (Attachment A) incorporates the amendments outlined by the findings and recommendations of the Inquiry/Panel Report and the Ministers Assessment. The amendments include relocating turbines outside of the ‘turbine free buffer zone for the brolga’ as defined by Brett Lane and Associates. We are happy to advise that further modelling has enabled turbines previously located within the buffer area to relocate within the wind farm limiting the reduction to turbine numbers. In addition to this, final detailed modelling to be undertaken with the future appointment of a ‘turbine provider’ may also achieve less turbine loss whilst ensuring the protection of the brolga buffer zone. Therefore, it is essential that the planning permit issued reflects the recommendations of the Inquiry/ Panel Report and allow for a maximum of 228 turbines.

111 The draft conditions referred to in paragraph 2 of the letter and comprised in the attachment to it, proposed a series of changes to the permit conditions endorsed by the Minister’s Assessment. The attachment indicated proposed modifications in red with insertions underlined and deletions struck-through. Condition 1 was as follows:

112 In the event, the Minister rejected the proposed changes to condition 1. The form adopted by him upon the grant of the permit directly reflected the Minister’s Assessment and the conditions endorsed by him as a component of that assessment. Condition 1 as issued was as follows:

**DEVELOPMENT PLANS**

1. Before development starts, development plans must be submitted to, approved and endorsed by the responsible authority. When endorsed, the plans will form part of this permit.

The plans must be fully dimensioned and drawn to scale. The plans must be generally in accordance with the application plans ‘*Golden Plains Wind Farm: Site Layout- Inset Maps 1-*6,’ dated 24 April 2018 (Jacobs), and must include:

a. the final location, specifications, materials and finishes of the wind energy facility

b. a maximum of up to 228 turbines (reduced as required to comply with condition l(c)) with the following specifications:

i. maximum blade tip height of up to 230 metres above ground level

ii. minimum blade tip clearance from ground level no less than 40 metres

c. turbine free buffer zones for Brolga in accordance with Document 86 presented to the Golden Plains Wind Farm EES Inquiry and Panel, ‘Brett Lane & Associates Plan, BL&A Habitat model turbine free buffers’, with the final boundaries to be agreed with DELWP Environment Portfolio

d. realignment of the proposed grid connection powerline between the collector station on Bells Road and the 500kV terminal station on Geggies Road to avoid Baths Swamp and associated peripheral wetland dependent vegetation

e. clear delineation of the boundary for the transmission station site, which must not intrude into the boundary of the Plains Grassy Wetland Ecological Vegetation Class boundary. The boundary of the transmission site must be approved by DELWP Environment Portfolio

f. the final design and location of any proposed business identification signage

g. the location and extent of native vegetation to be removed under this permit

h. no buildings or structures on the existing Ausnet Transmission Group easement, except for access tracks, underground cables and interface works required for the connection of the wind farm electrical system to the existing 500kV Moorabool to Mortlake/Tarrone transmission line

i. no aviation safety lighting on any turbine.

113 It can be seen that:

• The proposal that the condition commence by stating that the application plans indicating the site layout be ‘modified’ was rejected.

• The requirement that the plans ‘must include’ the specified components was retained and not deleted.

• The alteration of proposed condition 1(a) was rejected.

• The phrase ‘a maximum of up to 228 turbines’ was substituted for ‘a maximum of 228 turbines’.

• The deletion of the bracketed phrase ‘reduced as required to comply with condition 1(c)’ was rejected.

• The turbine-free buffer zones were required to be ‘in accordance with Document 86’.

• The provision for final boundaries of the buffer zones to be agreed with DELWP was retained and not deleted as proposed by WestWind.

• The suggested form of provision for an alternative turbine-free buffer zone to that shown in Document 86 as provided for in WestWind’s condition 1(b) was rejected.

• The insertion of a condition specifically contemplating the relocation of turbines and other works as proposed by WestWind’s condition 1(c) was rejected.

• The proposed changes to the definition of the construction boundary contained in WestWind’s condition 1(e) were rejected.

114 Despite the wholesale rejection by the Minister of the proposed changes to condition 1 of the permit, the applicants submit that they should have been given notice of WestWind’s letter because it addressed the ambit of the number of turbines permitted by the permit.

115 In particular, the applicants submit that procedural fairness required them to be given an opportunity to answer the last paragraph of the letter quoted above in which it was asserted that it was essential that the planning permit issued reflect the recommendation of the panel and allow for a maximum of 228 turbines.

116 In support of the submission that the applicants were denied procedural fairness, reliance is placed on the Minister’s Statement of Reasons for Decision to Grant Permit to which we have already referred. The relevant passages of those reasons were as follows:

73. The Panel was not satisfied that the proponent’s buffers satisfied the objective of avoiding and minimising adverse impacts on Brolga and recommended the alternative ‘Brett Lane and Associates habitat model’ be used to determine buffers. The Panel recommended that permit conditions be included requiring the final boundaries to be agreed with DELWP Environment. My EE Assessment agreed with these recommendations. The Panel Report also recommended that permit conditions be included requiring a Brolga Monitoring and Compensation Plan to be prepared in consultation with DELWP prior to development commencing. I agreed with the inclusion of these conditions.

74. The alternative buffer model was predicted to result in deletion of 47 turbines in the south-eastern portion of the site based on the layout submitted under the permit application. Following the Panel’s Report, the proponent wrote to me on 9 November 2018 suggesting that the site layout can be rearranged to include the required buffers and relocate some turbines, and that it is therefore not necessary to stipulate any reduction in turbine numbers in the permit conditions.

75. I agreed with this approach, as the purpose is to provide adequate buffers between turbines and breeding wetlands, rather than specifically reducing or stipulating the number of turbines.

117 These reasons reflect the Ministerial Briefing Paper placed before the Minister at the time of his decision. The applicants refer to the case of *East Melbourne Group Inc v Minister for Planning* as supporting the view the Minister should ordinarily be held to his stated reasons.

118 We will return below to the significance of the terms of the Minister’s Statement of Reasons for Decision to Grant Permit but in essence the applicants submit that they demonstrate that the Minister fixed the maximum of up to 228 turbines because he agreed with the suggestion that the site layout might be rearranged to include turbines to be relocated from the proposed buffer to the residual wind farm. Conversely, the respondents submit the Minister simply agreed with the retention of a condition stating a maximum number of 228 turbines as the panel had recommended, because the purpose of the restrictions imposed by condition 1 as a whole was to provide adequate buffers. Before returning to, and saying more about, these competing constructions, it is necessary to say something about the principles of law pursuant to which the Minister was obliged to act and the context in which the reasons fall to be understood.

119 As the primary judge observed, the general scheme of the relevant provisions of the P&E Act is of the kind described by Mason CJ in *South Australia v O’Shea*:

The scheme…is not unfamiliar. It allows a place for the presentation of the offender's case — before the Board when it is considering whether it should make a recommendation for release. There are many illustrations of this legislative model which entails the holding of an inquiry by a body authorized to make a recommendation to a Board or Minister which may make a decision rejecting the recommendation without conducting any further inquiry. The hearing before the recommending body provides a sufficient opportunity for a party to present his case so that the decision-making process, viewed in its entirety, entails procedural fairness. *If the decision-maker intends to take account of some new matter, not appearing in the report of the recommending body, and the party has had no opportunity of dealing with it, the decision-maker should give him that opportunity*.

120 Brennan J said:

A need for a further hearing by a repository of a power after a hearing by an expert board may arise *if, in the particular circumstances, the interests of a party are affected by some new fact or matter which the decision-maker proposes to take into account and which the party has had no opportunity to deal with*.

121 Both Mason CJ and Brennan J had earlier addressed the same principles in *Minister for Aboriginal Affairs v Peko-Wallsend*. In that case, Brennan J said:

A decision-maker is entitled to take into consideration relevant information contained in an ex parte communication *and* any response by the other party; he is not entitled to take such information into consideration without giving the other party an opportunity to respond. Under the Act, the Minister can receive from one party information to correct, elucidate or add to what is in the Commissioner’s report — for there is nothing in the Act to prevent his doing so — but he cannot take that information into account unless he gives the parties whose interests might be affected an opportunity for correcting or contradicting it.

122 His Honour went on to say:

The Minister is bound to inquire into information furnished to him in an ex parte communication if (i) the information is credible; (ii) it is significant to a matter to which the Minister is bound to have regard in exercising his power; (iii) an adequate reason for non-disclosure of the information to the Commissioner during his inquiry has been disclosed; and (iv) the Minister does not decide that, even if the information be true, the information would not affect his decision.

123 Dealing with the facts in that case, his Honour further observed:

But unless the Minister, having had his attention drawn to the information contained in the respondents’ ex parte communications, had decided to refuse to consider it or had decided that, even if it were true, it would not affect his decision under s. 11(1), he was bound to submit it to the Aboriginal claimants for their response and to have regard to it and to their response in making that decision.

124 The legislative scheme of the P&E Act relating to planning permit applications which are called in by the Minister provides for notice of the application for a planning permit to be given, objections to be made and an enquiry to be undertaken by a panel at which interested objectors may be heard.

125 In the present case, the hearing addressed not only the question of whether a permit should be granted for a wind farm but also the terms and conditions upon which it might be appropriate to grant such permit. Draft conditions were the subject of submissions to the panel by the parties who appeared before it. In turn, both the panel and the Minister’s Assessment endorsed the proposal subject to the imposition of detailed planning permit conditions substantially formulated by the panel. If after this process, the Minister were to decide on the terms of the permit by reference to considerations raised by WestWind but not ventilated before the panel then the objectors would be deprived of a fair hearing and the scheme of the P&E Act would be defeated. In this regard, we accept the applicants’ submission that if, hypothetically, agreement by the Minister to a particular form of permit condition were based on the receipt of new modelling concerning the impact of turbines to which the applicants were given no opportunity to respond, this would constitute a denial of procedural fairness.

126 Nonetheless, the mere fact of receipt of the letter from WestWind does not demonstrate that it was material to the Minister’s decision.

127 A fundamental difficulty confronting the applicants in the present case is that the receipt of the letter appears to have had no effect upon the Minister’s decision, and in particular, the terms of the conditions imposed by him as to the maximum number of turbines permitted and the extent of the turbine-free buffer zones.

128 In these circumstances, it is difficult to conclude in terms of the principle stated by Mason CJ and Brennan J in *South Australia v O’Shea* that the Minister failed to advise the applicants of the letter in circumstances where he intended to take account of some new matter not appearing in the Panel Report. Likewise, it is difficult to resist the conclusion in terms of Brennan J’s formulation in *Minister for Aboriginal Affairs v Peko-Wallsend* that the Minister formed a view that, even if true, the information contained in the letter would not affect his decision.

129 The primary judge held that the receipt of the letter caused the applicants no practical injustice:

I am satisfied that the plaintiffs’ interests were not adversely affected by any action taken by the Minister in consequence of the letter. The permit subsequently granted by the Minister very largely gave effect to the conditions recommended by the panel. The permit changes made by the Minister as a consequence of the letter were modest and had no significance as far as the plaintiffs were concerned. I find that they did not cause any substantial wrong to the plaintiffs or deprive them of the possibility of a successful outcome.

I am satisfied that no practical injustice to the plaintiffs was occasioned by the changes made by the Minister to the panel’s recommended conditions in consequence of the letter. The plaintiffs already had a comprehensive opportunity to present their cases to the panel. Procedural fairness did not require the Minister to hear from the plaintiffs again before making the decision to grant the permit.

130 The primary judge further held that receipt of the letter had no material effect on the Minister’s decision.

I find that the permit changes suggested in the letter that survived rejection by the Minister were of such marginal significance that the denial of an opportunity to the plaintiffs to make submissions concerning them could not realistically have made any difference to the result. The issues had been fully canvassed at the panel hearing. The Minister had previously supported the panel’s findings and recommendations in the Minister’s assessment. The changes made to the permit suggested by the letter were not material to the issues and concerns of the plaintiffs. The letter made no difference to the ultimate result.

131 In essence, the applicants submit that the letter was material because:

(a) it was received in a context in which it was ‘on the cards’ that the Minister would impose a condition limiting the number of turbines to a lower specific number than that comprised in the application for permit; and

(b) the Minister’s Statement of Reasons for Decision to Grant Permit demonstrates that he had regard to the letter when determining the maximum number of turbines stipulated in condition 1 of the permit.

132 The applicants do not take issue with the incidental fine-tuning changes referred to in the primary judge’s Reasons quoted immediately above. His Honour described these changes as follows:

The changes made to the permit conditions resulting from the letter were minor and unrelated to the location of turbines or buffer areas. A date certain fixed for determining noise sensitive locations was substituted for the date of the permit in some conditions. Provision was made for background noise monitoring to continue until 4,032 data points had been collected or a six week period of monitoring completed. The species to be included in the BAM plan were clarified. The changes that were made had no significance in the context of the plaintiffs’ concerns as expressed in their submissions and evidence to the panel. They were of a fine tuning nature, and improved the conditions recommended by the panel.

133 Before the primary judge, the applicants submitted that:

(a) procedural fairness required the Minister to state that he was intending to depart from his previously stated position to reduce the number of turbines;

(b) the Minister was influenced by the letter;

(c) the plaintiffs were not given the opportunity to controvert the Minister’s change of position; and

(d) the Minister failed to afford procedural fairness in relation to the letter.

134 The Minister submitted in response:

(a) the plaintiffs had been given the opportunity to be heard at the panel hearing;

(b) the panel recommended a Brolga buffer area greater than that proposed by WestWind;

(c) the panel proposed permit conditions in accordance with its recommendations;

(d) the draft permit conditions did not require any specific reduction in the number of wind turbines. They required deletion of all turbines within the Brolga buffer area identified by reference to Document 86;

(e) the Minister accepted the panel’s recommendations and permit conditions in relation to the buffer areas;

(f) the letter endorsed the panel’s recommended permit conditions so far as they related to the buffer areas and reinforced the position the Minister had already taken in the Minister’s assessment;

(g) the letter cannot be said to have set the Minister on a new course;

(h) the Minister was not required to provide parties to the panel hearing with an opportunity to be heard in relation to the letter; and

(i) the letter was essentially an administrative letter relating to the workability of the proposed permit conditions.

135 WestWind relevantly submitted:

(a) procedural fairness did not require disclosure of the letter to the plaintiffs;

(b) the plaintiffs were given a reasonable and substantial opportunity to be heard by the panel on appropriate buffer areas and noise conditions;

(c) permit conditions 1(b) and (c) as imposed by the Minister accorded entirely with the panel’s recommendations …

136 It can be seen that the starting point for this aspect of the applicants’ case is the characterisation of the context in which the Minister received WestWind’s letter. In particular, it is submitted that the Minister had previously stated that he intended to reduce the number of turbines. As we have indicated, this proposition was reformulated in argument by way of the proposition that it was ‘on the cards’ that the Minister would reduce the maximum number of turbines by way of a specific stipulation. We have no difficulty with the first proposition but do not accept the second.

137 In our view, when the Minister’s Assessment is read as a whole, it is clear that he did intend that there would be a reduction in turbine numbers as a consequence of enlarging the turbine-free buffer zone and that he provided for this outcome in the conditions proposed by the panel which he accepted. Thus, he stated in his assessment:

Accordingly, in response to the panel’s recommendations 1 and 2, I consider at this time that the approval for the Golden Plains wind farm should not permit the development of turbines falling within the BL&A habitat-based home ranges with 300 m disturbance buffer. *Turbines mapped within the hatched area in Figure 2 (adapted from panel document No. 86) should be deleted from the plans for the planning permit.*

138 The permit conditions endorsed by the Minister gave effect to this view:

• condition 1 required development ‘generally in accordance with’ the application plans;

• the development plans ‘must include’ a maximum of 228 turbines ‘reduced to comply with condition 1(c)’; and

• condition 1(c) required turbine-free zones generally in accordance with Document 86.

139 The plain effect of these conditions was that the number of turbines must be reduced (although the precise number of the reduction was not stipulated). The layout of the development plan could not both be generally in accordance with the application plans and reduce the number of turbines to comply with condition 1(c) without having this result. Whilst the process of final definition of the turbine-free buffer zone might permit some turbines to be relocated, no more than some incidental adjustment could occur. This might affect turbines drawn close to the boundary of the buffer zone in Document 86 or allow for some other modification which remained generally in accordance with the application plans but no more than this.

140 There is also powerful extrinsic evidence that the Minister (and WestWind) understood that this was the effect of the conditions. First, as we have said, the Minister’s Assessment itself spoke of the deletion of the turbines within the buffer zone.

141 Secondly, the Panel Report expressly stated that if further modelling justified reduced buffers and an increase in turbines, then the permit application would have to be amended. The Minister was presumably well aware of this view when he adopted the panel’s conditions.

142 Thirdly, the Minister himself contemplated that turbine numbers within the buffer zone might be increased to off-set the loss of turbines which would flow from his conclusion concerning the buffer zone in the event that the guidelines for wind farms in respect of Brolga habitat were better resolved. But again, the Minister’s Assessment made clear that such a change would require amendment to the permit.

I acknowledge the potential significant loss in renewable energy generation capacity at the associated loss of 47 turbines. Accordingly, it is my assessment that an application to amend the planning permit to install turbines within the part of the wind farm area designated as turbine-free in line with the BLA habitat model may be considered at a later date if consistent with revised DELWP guidelines …

143 The extrinsic material thus shows that the Minister contemplated a layout other than one in accordance with condition 1 might ultimately be approved, but only upon amendment of the permit application.

144 In his Reasons, the primary judge made the following findings of fact:

I am satisfied that:

(a) the plaintiffs were given a full opportunity to be heard. At the panel hearing, they presented substantial submissions and evidence on all aspects, including the need for extensive Brolga buffer areas;

(b) the panel accepted the need for buffer areas much greater than those originally proposed by WestWind, although not as great as those sought by the plaintiffs;

(c) the panel drafted permit conditions to exclude turbines from designated buffer areas according to the BLA model;

(d) it was the inevitable consequence that WestWind would have to revisit the number and layout of turbines and associated infrastructure if it were to comply with the proposed permit conditions; and

(e) the number and location of turbines to be constructed would only be known when WestWind provided a new plan showing a reconfigured turbine layout and associated infrastructure works, and that plan was approved and endorsed by the responsible authority.

I am also satisfied that:

(a) the Minister was supportive of the project as providing renewable energy generation capacity for Victoria, on the basis that Brolgas and other species would be protected through the provision of buffer areas and by other measures;

(b) the panel’s proposed permit conditions did not require the reduction of a specified number of turbines but did require the removal of turbines from the buffer areas described in Document 86;

(c) the Minister endorsed the panel report and approach with the consequence that WestWind was required by permit conditions to bring forward a revised layout plan for approval by the responsible authority; and

(d) neither the panel nor the Minister at any time specified by condition the precise number of turbines that would ultimately be permitted.

145 No error has been demonstrated in these findings but they do not expressly acknowledge the plain intention of the permit conditions endorsed by the Minister at the time of the Minister’s Assessment that the total turbine number would be reduced.

146 The applicants’ written case summarises the primary judge’s further reasoning as follows:

The primary judge accepted that the Minister was obliged to accord procedural fairness in making his decision. But his Honour found that the applicants were not denied procedural fairness because the 2018 letter did not affect the Minister’s decision as to the maximum number of turbines to allow, and consequently the applicants’ interests ‘were not adversely affected by any action taken by the Minister in consequence of the letter’. The permit application had sought approval for 228 turbines, the panel recommended conditions that would have allowed up to 228 turbines and the Minister had not previously said he would reduce that amount. In the result, the Permit allowed up to 228 turbines.

147 The applicants submit that the primary judge erred because procedural fairness required the Minister to disclose the letter to the applicants after having received it in circumstances where disclosure of the letter could have made a difference to the Minister’s decision.

148 In our view, in order to demonstrate breach of the principles stated in *Minister for Aboriginal Affairs v Peko-Wallsend* and *South Australia v O’Shea*, the applicants must show that the Minister failed to disclose the letter in circumstances where he intended to take into account the new facts which it asserted.

149 As we have explained, the Minister comprehensively rejected each of the proposed modifications to condition 1 relaxing requirements upon WestWind. Unless he were minded to consider altering the position at which he had arrived after the Minister’s Assessment it is difficult to see that there was any practical point to disclosure of the letter to the applicants.

150 We reject the applicants’ submission that the situation is comparable to that which arose in *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*. Given the process which had already occurred in this case, it was open to the Minister to reject the letter as stating matters that did not justify any change to the conditions he had previously endorsed.

151 Nonetheless, the applicants submit that the primary judge’s finding that the letter had no impact on the Minister’s decision was erroneous because the Minister’s Statement of Reasons for Decision to Grant Permit referred to the letter and said he ‘agreed with this approach’. This submission turns on a consideration of the Minister’s reasons. It is convenient to repeat the critical paragraphs:

The alternative buffer model was predicted to result in deletion of 47 turbines in the south-eastern portion of the site based on the layout submitted under the permit application. Following the Panel’s Report, the proponent wrote to me on 9 November 2018 suggesting that the site layout can be rearranged to include the required buffers and relocate some turbines, and that it is therefore not necessary to stipulate any reduction in turbine numbers in the permit conditions.

I agreed with this approach, as the purpose is to provide adequate buffers between turbines and breeding wetlands, rather than specifically reducing or stipulating the number of turbines.

152 If the Minister’s agreement with ‘this approach’ embraced the substantial rearrangement of the site layout to include the required buffers and relocate turbines as was proposed in WestWind’s letter, there is considerable force in the applicants’ submission. Conversely, if the Minister’s agreement with ‘this approach’ is understood simply to mean maintenance of the position that it was unnecessary to stipulate any specific reduction in turbine numbers in the permit conditions having regard to their purpose, then the argument falls away.

153 As we read the Minister’s Statement of Reasons for Decision to Grant Permit, his conclusion was based on his understanding of the purpose of the conditions originally formulated by the panel and not the subsequent submission in the letter from WestWind. The approach the Minister agreed with was simply the retention of a basket of conditions which did not stipulate a specific reduction in turbine numbers.

154 If the Minister had accepted that the conditions should take the ‘approach’ of facilitating a different site layout from that contained in the application plans, enabling the substantial relocation of turbines from the buffer zone, then he would have accepted that the introduction to the condition 1 should provide for the modification of the application plans as WestWind requested rather than plans that must be ‘generally in accordance with the application plans “*Golden Plains Wind Farm: Site Layout- Inset Maps 1-*6,” dated 24 April 2018 (Jacobs)’.

155 If the Minister had accepted that the conditions should take the ‘approach’ of facilitating an alternative buffer zone as sought by WestWind, then he would have accepted proposed condition 1(b) as put forward by WestWind allowing for an alternative turbine-free buffer zone plan.

156 If the Minister had accepted that the conditions should take the approach of facilitating substantial relocation of turbines from the buffer zone to the residual wind farm as sought by WestWind, he would have:

(a) deleted the requirement that the development plan be generally in accordance with the application plans as requested by WestWind;

(b) accepted a condition such as condition 1(c) as reformulated by WestWind which expressly contemplated the relocation of turbines; and

(c) removed the requirement that the development plans ‘must include’ no more than 228 turbines ‘reduced as required to comply with’ the buffer zone condition.

157 The Minister’s Statement of Reasons for Decision to Grant Permit must be read in the context of the conditions previously endorsed by way of the Minister’s Assessment and retained upon his decision following the receipt of, and despite, the terms of WestWind’s letter.

158 When this context is considered, it is apparent that the ‘approach’ with which the Minister agreed is limited to the retention of the conditions which he had previously endorsed and, in particular, the retention of the previously endorsed condition relating to turbine numbers as an element of these conditions.

159 Most importantly in terms of the question of procedural fairness, the use of a maximum 228 turbines as a component of the basket of conditions controlling turbine numbers was not something which was new or which did not appear in the Panel Report. It formed part of a set of conditions into which the applicants had direct input by way of submissions before the panel. Furthermore, it formed part of the conditions recommended by the panel which the Minister had in turn endorsed in the Minister’s Assessment. The Minister did not entertain any relevant change to these conditions.

160 The applicants further submit that the primary judge was impermissibly influenced by the fact that the permit conditions already allowed a maximum number of 228 turbines. As we have endeavoured to explain, the permit conditions took this course in the context of a basket of interlocking provisions. It is the fact that these provisions as a whole were retained that makes clear that WestWind’s letter had no relevant effect on the Minister’s decision.

161 The applicants also submit that the Court should infer that WestWind’s letter emphasised the need for maintaining 228 as the stipulated maximum number of turbines because the extent of public participation upon any subsequent application to amend the permit would be affected by the question whether the amendment increased the number of turbines permitted. We are not persuaded by this submission. The obvious purpose of the letter was to obtain a substantially revised basket of conditions which enabled the relocation of turbines without any further process of permit amendment. Moreover, and more fundamentally, the question for us is not what motivated WestWind (which is immaterial) but whether the Minister should have given notice of WestWind’s letter having regard to its contents.

162 On the hearing of the application for leave to appeal, the applicants accepted that the question of the Minister’s state of mind at the time he received WestWind’s letter and the related question of whether WestWind’s letter had an impact upon his decision as to the appropriate form of relevant conditions are questions of fact. We are not persuaded that the applicants’ ultimate characterisation of the facts should be accepted. In particular, we are not persuaded that it was ‘on the cards’ that the Minister would depart from the conditions he had previously endorsed and stipulate a specific reduced number of turbines. Nor are we persuaded that he agreed with the approach to relevant permit conditions advocated in WestWind’s letter save in respect of retaining one element of the conditions which had been the subject of previous due process. Neither the terms nor the Minister’s understanding of the relevant conditions changed following receipt of WestWind’s letter. There is no doubt WestWind sought to obtain material changes to the permit conditions but the Minister refused to entertain them.

163 Ultimately, none of the matters now agitated demonstrate that the failure to disclose the letter to the applicants was material to the Minister’s decision. The applicants have not demonstrated that the Minister’s actions resulted in any practical injustice. They have not demonstrated that WestWind’s letter gave rise to a realistic possibility that the Minister would alter the permit conditions he had previously endorsed in a way adverse to their interests or that the letter was material to his decision.

164 We would grant leave to appeal on proposed ground 1 but dismiss the appeal on this ground.

***Proposed Ground 2 – Did the Minister consider cl 52.32–5 of the planning scheme when making his decision to grant a planning permit?***

165 Proposed ground 2 of appeal is:

The trial judge erred in concluding that the Minister addressed amendment VC149 and cl 52.32 of the planning scheme.

166 The primary judge stated the effect of amendment VC149 at [18]–[24] of his Reasons:

Clause 52.32 of the Victoria Planning Provisions regulates wind energy facilities.

The purpose of cl 52.32 is to facilitate the establishment and expansion of wind energy facilities in appropriate locations, with minimal impact on the amenity of the area.

Under cl 52.32-2, a permit is required to use and develop land for a wind energy facility. Clause 52.32-4 lists the plans, reports and information that must accompany an application. Clause 52.32-6 sets out the decision guidelines that the responsible authority must consider.

On 29 August 2018, the Minister approved Amendment VC149 to the Victorian Planning Provisions, having exempted the amendment from public exhibition.

On 4 October 2018, Amendment VC149 commenced. It introduced mandatory requirements that apply if an application is made, or a permit is issued to use and develop land for a wind energy facility.

Clause 52.32-4 contained new requirements for a permit application:

An application must be accompanied by the following information:

**Mandatory noise assessment**

• A pre-construction (predictive) noise assessment report demonstrating that the proposal can comply with the New Zealand Standard…

• An environmental audit report of the preconstruction (predictive) noise assessment report prepared…by an environmental auditor…The environmental audit report must verify that the acoustic assessment undertaken for the purpose of the pre-construction (predictive) noise assessment report has been conducted in accordance with the New Zealand Standard…

Clause 52.32-5 contained the following new mandatory conditions to be included in a permit:

A permit to use or develop land for a wind energy facility must include the following conditions:

• A post-construction noise assessment report prepared in accordance with the New Zealand Standard…demonstrating whether the wind energy facility complies with the Standard, must be submitted to the Responsible Authority. If the wind energy facility is constructed in stages, additional post-construction noise assessment reports for each stage must be submitted to the Responsible Authority.

• Each post-construction noise assessment report must be accompanied by an environmental audit report…by an environmental auditor…The environmental audit report must verify that the acoustic assessment undertaken for the purpose of the post-construction noise assessment report has been conducted in accordance with the New Zealand Standard…

167 The applicants contended before the primary judge that amendment VC149 imported new requirements for wind farm applications and permits into the planning scheme but the Minister did not consider those requirements.

168 The short answer to this contention is that the Minister specifically referred to amendment VC149 in the Minister’s Statement of Reasons for Decision to Grant Permit and there is no reason to conclude that he did not take it into account.

169 In his Reasons the primary judge stated under the heading ‘The minister did address amendment VC149 and clause 52.32 of the planning scheme’:

In the statement of reasons, the Minister referred to the planning scheme, noting that a permit was needed under cl 52.32, and stating that he had considered the scheme. He noted that a permit was needed under cl 52.32 listing the relevant considerations to be considered including the New Zealand Standard. He referred in some detail to the panel report, its conclusion and recommendations. He discussed what he described as significant issues including Brolga impacts and noise impacts referring to cl 52.32 and the New Zealand Standard in this context.

170 Various criticisms were made of this paragraph but in our view the primary judge was correct in substance to rely upon the Minister’s Statement of Reasons for Decision to Grant Permit as demonstrating that the Minister did consider the provisions of the planning scheme as amended by amendment VC149.

171 In pt A of the Minister’s Statement of Reasons for Decision to Grant Permit, the Minister summarised:

• the process followed prior to his decision;

• the general legal framework applicable to his decision; and

• planning policies and provisions applicable to the permit application.

172 The history of the process leading up to the Minister’s decision specifically recorded the implementation of amendment VC149 subsequent to the panel hearing and report.

*Amendment VC149 to the Scheme*

On 4 October 2018, after the Panel issued the Panel Report, the Notice of Approval of Amendment VC149 to the Scheme was gazetted and commenced. Amendment VC149 introduced mandatory requirements that applied where a permit is sought to use and develop land for a wind energy facility (clause 52.32–5 of the Scheme).

173 The subsequent summary of planning scheme policies and provisions to which the Minister had particular regard specifically refers to clause 52.32. The Minister’s Statement of Reasons for Decision to Grant Permit states a permit for a wind energy facility ‘must meet the requirements of clause 52.32’. Given the previous specific reference to amendment VC149 this must be taken to be a reference to cl 52.32 in the form in which it was at the date of the Minister’s decision consequent upon amendment VC149.

174 The Minister’s Statement of Reasons for Decision to Grant Permit also records that before deciding on an application, the responsible authority must consider the matters referred to in cl 52.32–6 including the New Zealand Standard. Clause 52.32-6 was introduced by amendment VC149. The equivalent provision setting out matters which the decision-maker must consider was contained in cl 52.32–5 prior to the amendment.

175 The applicants draw attention to the list of ‘material before me’ set out at paragraph [27] of the Minister’s Statement of Reasons for Decision to Grant Permit. It is submitted that because amendment VC149 is not referred to amongst the material set out that it should be inferred that it was not considered. This submission ignores the specific recognition of the fact of amendment VC149 only two paragraphs previously in the Minister’s Statement of Reasons for Decision to Grant Permit. The effect of the amendment was that it became part of the planning scheme and thus when the Minister two paragraphs later sets out a list of material which assisted him in considering matters that he was required to consider ‘under the Act and the scheme’ he must be taken to be referring to the scheme as amended.

176 Next, it is submitted that the evidence shows that the draft permit conditions given to the Minister to endorse upon the grant of the permit, and in turn approved by him, did not require a post-construction noise monitoring condition in the terms set out in amendment VC149. This is so but it does not compel the conclusion that the Minister failed to consider amendment VC149.

177 It is common ground that cl 52.32 of the planning scheme specifies that the operational noise associated with a new wind farm must be assessed against, and comply with, the New Zealand Standard. The panel found that the proposed wind farm would comply with requirements of the New Zealand Standard and recommended conditions subsequently endorsed by the Minister’s Assessment. These conditions required the completion of a pre-construction noise assessment, a post-construction compliance report, and a noise management plan providing for post-construction monitoring compliance reports. The acoustic compliance requirements were in turn the subject of a basket of conditions requiring peer review and environmental audit. Paragraphs [42]–[45] of the primary judge’s Reasons set out the critical provisions (but it is unnecessary to reiterate them at this point). The permit conditions required both a pre-construction and post-construction noise assessment report as did the process contemplated by cl 52.32 (as amended) albeit in different terms. The permit conditions also made provision for environmental audit of these reports again although in different terms from the conditions required by cl 52.32 as amended. They further provided a requirement for noise investigation reports and noise remediation plans.

178 The Ministerial Briefing Paper provided to the Minister at the time of his decision to grant a permit commenced the discussion of noise impacts as follows:

18. The panel found that the proposal would comply with the requirements of the relevant noise standard (New Zealand Standard *NZS6808:2010*).

a. The proposed permit conditions require that a revised predictive noise assessment be undertaken when the final turbine model is selected, and a post-construction noise assessment is undertaken after the proposal is built. Both these assessment reports are required to be accompanied by a statutory audit by an auditor appointed under Part IXD of the *Environment Protection Act 1970* confirming that the noise assessments have been undertaken in accordance with the noise standard.

179 This summary is apt to describe the substance of the mandatory conditions required by cl 52.32-5 with respect to a post-construction noise assessment and an environmental audit of that assessment, although the conditions did not in fact adopt the prescribed form of such conditions.

180 Thus, while it is true that the permit conditions approved by the Minister did not meet the specific requirements of cl 52.32–5 in respect of a post-construction noise assessment report, it cannot be inferred that the Minister failed to have regard to amendment VC149. Indeed the following circumstances favour the contrary conclusion:

(a) in the Minister’s Statement of Reasons for Decision to Grant Permit, the Minister specifically referred to amendment VC149 and to the terms of the planning scheme after the amendment;

(b) the conditions imposed gave effect to the objects of amendment VC149 albeit that they failed to adopt the prescribed terms with respect to the monitoring of post-construction noise; and

(c) the Ministerial Briefing Paper stated that the proposed permit conditions required a post-construction noise assessment and an environmental audit to be undertaken. It described the conditions in terms which reflected the substance of the requirements imposed by cl 52.32–5.

181 We would refuse leave to appeal on this ground.

***Proposed Ground 3 – Was the permit invalid because it did not include a condition in the terms prescribed by cl 52.32-5?***

182 The proposed ground 3 of appeal is:

The trial judge erred in concluding that a permit missing mandatory conditions is not invalid.

183 The conditions of the permit granted to WestWind were subsequently corrected by the Minister in reliance upon s 71 of the P&E Act. That course of action is the subject of separate challenge to which we shall return. In the first instance, it is convenient to deal with this proposed ground independently of s 71.

184 The primary judge considered that the mandatory conditions were ‘not germane to the merits of the permit application’ and that their omission did not invalidate the exercise of the Minister’s discretion to grant a permit.

185 The applicants now submit that to grant a permit without attaching to it conditions that the planning scheme and the P&E Act require to be attached is to make a decision that does not exhibit all the features required by the P&E Act to grant a permit.

186 So much may be accepted. Section 62(1)(a) of the P&E Act requires a responsible authority in deciding to grant a permit to include any condition that the planning scheme requires to be included.

187 The critical enquiry is, however, whether having regard to the language of the relevant provision and the scope and object of the whole statute, it is intended by the legislation that non-compliance with s 62(1)(a) renders the permit wholly invalid.

188 The applicants submit that a failure to comply with s 62(1)(a) constitutes a jurisdictional error which renders the permit invalid. But it does not necessarily follow that non-compliance in respect of the terms of a particular condition should automatically render a permit wholly invalid.

189 The planning permit conditions imposed by the Minister in the first instance comprise 23 pages of detailed prescriptions. The trial judge was correct to conclude that the omission of the post-construction noise monitoring conditions required by the planning scheme was not germane to the grant of the permit, in the sense that the evidence as a whole shows that the Minister imposed conditions directed to the same object but not in the specified form. The omission did not transform the character of the permit.

190 Moreover, when the scheme of the P&E Act as a whole is considered it cannot be concluded that a failure to impose a condition required by s 62(1)(a) is intended to render a planning permit null and void.

191 The P&E Act makes specific provision for rectification of permits in this situation and for the enforcement of the planning scheme.

• Section 71 provides for the correction of mistakes by a responsible authority.

• Section 87(1)(f) provides expressly for the cancellation or amendment of a permit if the Victorian Civil and Administrative Tribunal (‘VCAT’) considers there has been any failure to comply with s 62(1). By reason of s 97M, this section does not apply to a permit granted by the Minister as responsible authority following the exercise of the call in power but it supports the view that non-compliance with s 61 is not intended to render a permit automatically invalid.

• Sections 97I and 97J give the Minister the power to amend a permit granted following the exercise of the call in power (under div 6 of pt 4 of the P&E Act). The amendment power is exercisable on the application of the person who is entitled to use or develop land in accordance with a permit and requires a further public participation process to be undertaken before it may be exercised. It is expressed in general terms. On its face it would enable a failure to comply with s 62(1) of the type in issue to be rectified.

• Section 114 provides for enforcement orders to be made by the Tribunal if the use or development of land will contravene a planning scheme. A responsible authority or any person may apply for such an order. A responsible authority is under a duty to enforce the planning scheme under s 14 of the P&E Act. In turn, s 119(b)(iv)(B) empowers VCAT to make an order ensuring compliance with the planning scheme. The enforcement order may direct any person against whom it is made to do specified things within a specified period to ensure compliance with the planning scheme. This power complements the amendment powers referred to above. It would enable a use or development to be restrained until a permit was brought into compliance with the planning scheme.

192 Underlying the statutory scheme are the objectives of planning in Victoria which include ‘to provide for the fair, orderly, economic and sustainable use, and development of land’ and extend beyond the regulation of land use to the facilitation of appropriate land use and development. Likewise, the objectives of the planning framework in Victoria include the facilitation of development which achieves the objectives of planning in Victoria and planning objectives set up in planning schemes.

193 The provisions of the planning scheme are complex. The provisions of the P&E Act both explicitly and implicitly recognise that from time to time a permit may require correction or amendment in order to bring it into compliance with the planning scheme. Whilst s 87 does not apply to the permit here in issue it reflects a broader scheme within the P&E Act. Conversely, the P&E Act contemplates that in some circumstances it may be appropriate to cancel a permit which does not comply with the scheme or restrain a use or development until a permit is brought into compliance with the scheme.

194 In the event that a permit which does not comply with the scheme is not rectified, the requirements of the scheme are enforceable to prevent the unlawful use of the land pursuant to s 114.

195 The view that an error in the form of a condition imposed upon the grant of a permit is capable of correction or rectification by amendment is further consistent with the objectives of the legislation. Conversely, those objectives do not favour a construction which results in draconian consequences as the result of an incidental error of detail.

196 When the scheme of the P&E Act is considered as a whole it demonstrates that a failure to include a condition prescribed by a planning scheme within a permit does not render the permit wholly invalid. The permit remains potentially capable of rectification either pursuant to s 71 or s 97J in a case such as the present. Until it is rectified however, the commencement of the land use purportedly permitted by it would breach both the planning scheme and the provisions of the P&E Act.

197 We would grant leave in respect of proposed ground 3 but dismiss it.

***Proposed Ground 4 - Was the correction of the permit valid?***

198 Proposed ground 4 of appeal is:

The trial judge erred in concluding … that s 71 of the P&E Act could be exercised to impose the missing mandatory conditions.

199 As we have noted, the permit as granted contained a basket of conditions governing the monitoring of noise going to the achievement of the same objectives as the conditions prescribed by amendment VC149. Thus condition 18 of the permit required a pre-construction noise report in accordance with the New Zealand Standard and condition 22 required a series of post-construction noise reports in accordance with the New Zealand Standard. Conditions 26 and 27 required these reports be prepared by a suitably qualified and experienced acoustic engineer and accompanied by peer review.

200 In order to understand these conditions in context it is desirable to set out the permit conditions relating to the mitigation of noise as a whole.

**NOISE**

In conditions 13-30:

• ‘ancillary infrastructure’ means the terminal station and collector stations.

• ‘the Standard’ means New Zealand Standard 6808:2010, Acoustics- Wind Farm Noise.

• ‘noise sensitive locations’ are locations defined as such in the Standard which existed as at 17 August 2017.

• ‘NIRV’ means EPA Publication 1411: Noise from Industry in Regional Victoria.

• ‘noise sensitive areas’ are locations defined as such in the Glossary in NIRV.

• ‘the first turbine operating’ means the time from which a turbine first commences generating electricity.

• ‘the last turbine operating’ means the time from which the last turbine to be constructed first commences generating electricity.

**Wind Farm Performance Requirement**

13. Subject to condition 14 and condition 18(c)(i), at any wind speed, noise from the operation of the wind turbines, when measured at noise sensitive locations, must comply with the appropriate limits in the Standard at all times.

14. If it is determined that sound from the wind energy facility has a special audible characteristic at any noise sensitive locations, the measured sound level shall have a penalty applied in accordance with the Standard.

15. The limits specified in condition 13 do not apply if an agreement has been entered into with the owner of the noise sensitive location that waives compliance with condition 13. Evidence of the agreement must be provided to the satisfaction of the responsible authority upon request, and be in a form that applies to the land upon which the noise sensitive location is located for the life of the wind energy facility.

**Ancillary Infrastructure Performance Requirements**

16. Subject to condition 17, noise from ancillary infrastructure associated with the wind energy facility must comply with the noise levels for noise sensitive areas in accordance with NIRV at all times.

17. The limits specified in condition 16 do not apply if an agreement has been entered into with the owner of a noise sensitive area which waives compliance with condition 16. Evidence of the agreement must be provided to the satisfaction of the responsible authority upon request, and be in a form that applies to the land upon which the noise sensitive area is located for the life of the wind energy facility.

**Compliance assessment**

*Pre-construction Noise Assessment*

18. Before development starts, a Pre-construction Noise Assessment based on the final turbine layout and turbine model to be installed and the detailed design of the ancillary infrastructure must be submitted to, approved and endorsed by the responsible authority. The endorsed Pre-Construction Noise Assessment must be placed on the project website as soon as practicable.

The Pre-construction Noise Assessment must:

a. be prepared in accordance with the Standard and NIRV, and must demonstrate to the satisfaction of the responsible authority that the facility will comply with the performance requirements specified in conditions 13 and 16

b. must include the collection of background noise monitoring data points over a 6-week period, or at least 4,032 valid data points (whichever is lesser) for each representative site, analysis by 24 hour and night (10 pm to 7 am) only period, and for each time sector analysis for each 45 degree wind rose direction

c. include:

i. a specific acknowledgement that the areas in and around Rokewood that are zoned Township Zone and Low Density Residential Zone are a high amenity area for the purposes of the Standard

ii. an assessment as to whether the high amenity noise limit should apply to these areas and the appropriate threshold wind speed, based on the guidance in Clause C5 .3.1 of the Standard

19. The following data collected during the Pre-construction Noise Assessment must be retained in their original form and made available on request to the responsible authority, any person conducting a noise investigation report under the Noise Management Plan, or for independent review under conditions 26 to 29:

a. background noise monitoring survey data, in their original form as recorded by each individual field sound level meter at each noise sensitive location at which monitoring was undertaken

b. wind speed and direction monitoring survey data, in their original form as recorded for assessment at each noise sensitive location at which monitoring was undertaken.

*Near-field Compliance Testing Report*

20. Prior to the last turbine operating, a Near-field Compliance Testing Report must be prepared which describes and assesses the results of the sound power level testing of a representative sample of turbines, including the presence or absence of special audible characteristics and tonal audibility levels, by either:

a. verifying that the measured sound power levels (including any penalties), accounting for test uncertainty, are equivalent to or less than the values adopted as the basis of the Preconstruction Noise Assessment carried out under condition 18; or

b. verifying that predicted noise levels (including any penalties) determined on the basis of the measured sound power level test results are below the noise limits in condition 13 for noise sensitive locations, using the same prediction methodology used for the Preconstruction Noise Assessment carried out under condition 18.

21. If the measured sound power levels or tonal audibility levels are significantly different from the data referenced in the Pre-construction Noise Assessment, the Near Field Compliance Testing Report must address these differences and outline whether additional sound power level testing is warranted to verify and assess the noise emissions of other wind turbines at the site.

*Operating acoustic compliance assessment*

22. A Post-construction Acoustic Compliance Report, prepared in accordance with the Standard and NIRV which demonstrates whether the facility complies with the performance requirements specified in conditions 13 and 16 (including any penalty for special audible characteristics), must be submitted to the responsible authority within:

a. 6 months of the first turbine operating (in respect of demonstrating compliance with condition 13); and

b. 6 months of the ancillary infrastructure commencing operations (in respect of demonstrating compliance with condition 16).

Further Post-construction Acoustic Compliance Reports prepared in accordance with this condition must be submitted to the responsible authority annually from the date of the first report being submitted until the final turbine is operating.

**Noise Management Plan**

23. Before development starts, a Noise Management Plan must be submitted to, approved and endorsed by the responsible authority. The plan must be prepared in consultation with the general public within the vicinity of the project, to the satisfaction of the responsible authority. When endorsed the Noise Management Plan will form part of this permit. The endorsed Noise Management Plan must be placed on the project website for the life of the project.

The Noise Management Plan must specify details of:

a. Near-field Compliance Testing Report, detailing how this testing and report will be prepared in accordance with IEC 61400-11:2012 Wind turbines - Acoustic noise measurement techniques, and which presents the measured turbine sound power level and tonal audibility, including details of the representative sample of turbines to be tested.

b. Post-construction Acoustic Compliance Reports: detailing how these will be prepared in accordance with the Standard and NIRV, to demonstrate whether or not the facility complies with the performance requirements in conditions 13 and 16.

c. Noise Investigation Reports: detailing procedures for when complaints are received in accordance with the endorsed Complaints Investigation and Response Plan (condition 92) or when potential non-compliance with the performance requirements in conditions 13 and 16 is otherwise detected.

d. Noise Remediation Plans: detailing procedures for prompt actions to achieve compliance when non-compliance with the performance requirements in conditions 13 and 16 is found to have occurred.

e. The requirements for each of the documents referred to in condition 23(b), (c) and (d), including what matters they must address, and when they must be submitted.

24. The endorsed Noise Management Plan must be implemented to the satisfaction of the responsible authority. The endorsed Noise Management Plan must not be altered or modified without the written consent of the responsible authority.

25. The endorsed Noise Management Plan, any of the reports referred to in condition 23 and any peer review or peer review report under conditions 27 and 28 must promptly be placed on the Proponent's website.

**Peer review of noise reports and plans**

26. The Pre-Construction Noise Assessment required under condition 18, the Noise Management Plan required under condition 23, and each report and remediation plan required under condition 23, must be prepared by a suitably qualified and experienced acoustician.

27. The Pre-Construction Noise Assessment required under condition 18, Noise Management Plan required under condition 23, acoustic compliance reports required under condition 22 and the noise remediation plan required under condition 23, must be accompanied by a peer review from an environmental auditor appointed under Part IXD of the *Environment Protection Act 1970* verifying that the report or plan is suitable, and meets the requirements of this permit.

28. If requested by the responsible authority, the noise investigation reports required under condition 23(c) must be accompanied by a report from an environmental auditor appointed under Part IXD of the *Environment Protection Act 1970* verifying that the report or plan is suitable, and meets the requirements of this permit.

29. If an auditor appointed under Part IXD of the *Environment Protection Act 1970* cannot be retained for any of the requirements under conditions 27 and 28, written consent of the responsible authority may be sought to provide a peer review from a suitably qualified and experienced independent acoustic engineer instead.

30. The environmental auditor or peer reviewer must be a different author to the author of the report being reviewed and must make an appropriate conflict of interest declaration.

201 Amendment VC149 imposed requirements with respect to some aspects of the same matter in terms which we have set out above. The applicants rely on the fact that the conditions imposed with respect to these matters were not in the prescribed form and contend the problem could not be cured by administrative correction pursuant to s 71 of the P&E Act.

202 On 7 January 2019, Mr Stuart Menzies, a senior departmental officer acting as delegate of the Minister, corrected the permit granted to WestWind in reliance on s 71(1)(a) of the P&E Act to add conditions reflecting the requirements of amendment VC149.

203 The new conditions were as follows:

18. The Pre-construction Noise Assessment must:

…

d. be accompanied by an Environmental Audit Report … The report must verify that the Preconstruction Noise assessment has been conducted in accordance with the Standard and meets the requirements of this permit.

22. A post-construction noise assessment report prepared in accordance with the [New Zealand Standard] demonstrating whether the wind energy facility complies with the Standard, must be submitted to the responsible authority. If the wind energy facility is constructed in stages, additional post-construction noise assessment reports for each stage must be submitted to the responsible authority.

24. Each post-construction noise assessment report must be accompanied by an environmental audit report … The environmental audit report must verify that the acoustic assessment undertaken for the purpose of the post-construction noise assessment report has been conducted in accordance with the [New Zealand Standard].

204 It can be seen that the addition to condition 18 required the environmental audit report which cl 52.32–4 mandated as an incident of the permit application.

205 The post-construction noise condition imposed by the new condition 22 was in the terms prescribed by the planning scheme as amended.

206 The previous condition 22 was retained as condition 23 requiring additional annual post-construction noise monitoring reports beyond those required by the prescribed condition now embodied in condition 22.

207 Condition 24 of the amended permit contained an unqualified requirement for an environmental audit report as required by the planning scheme as amended. In consequence, the more flexible requirement for peer review embodied in the original conditions was also modified so that it no longer applied to post-construction noise assessment reports.

208 Mr Menzies provided a statement of reasons for correcting the permit which included the following:

On 4 October 2018, Amendment VC149 commenced.

Amendment VC149 made two relevant amendments to clause 52.32 of the [planning scheme].

…

Section 71(1)(a) of the [P&E Act] allows a responsible authority to correct a permit issued by the authority if the permit contains ‘a clerical mistake or an error arising from any accidental slip or omission’.

The permit signed by the Minister on 21 December 2018 did not include the two mandatory conditions introduced by Amendment VC149. It also did not specify that the pre-construction noise assessment, required by condition 18 of the permit, be accompanied by an environmental audit report.

The conditions were accidentally omitted because the conditions in the draft permit submitted to the Minister were based on the list of recommended permit conditions included in the [Panel Report] with respect to the planning permit application. The [Panel Report] was prepared and provided to the Minister on 26 September 2018 (i.e. before Amendment VC149 commenced), and the list of conditions in the draft permit was not updated following commencement of Amendment VCl49.

I considered that, as a result, the permit contained an error arising from the accidental omission of conditions required following the commencement of Amendment VCl49.

To correct this error and incorporate the new requirement and the new mandatory conditions into the permit, I amended the permit to include new conditions at 22 and 24, and reword conditions 18, 23 and 29. The numbering of the other conditions in the permit was also updated to reflect the addition of the two conditions.

209 Section 71 of the P&E Act provides:

**71 Correction of mistakes**

(1) A responsible authority may correct a permit issued by the responsible authority (including a permit issued at the direction of the Tribunal) if the permit contains—

(a) a clerical mistake or an error arising from any accidental slip or omission; or

(b) an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the permit.

(2) The responsible authority must note the correction in the register.

210 The primary judge’s Reasons record the submissions made on behalf of the applicants to him.

(a) the text of s 71 suggests that only minor errors can be corrected under this power;

(b) s 71 must be read in the context of the [P&E Act] as a whole, and had a narrow role;

(c) the fact that the power can be exercised by a delegate suggests that s 71 should not be given a sweeping interpretation; and

(d) s 72 was available for applications to amend permits.

211 His Honour further recorded the following textual arguments advanced on behalf of the applicants:

The plaintiffs also relied on textual arguments in submitting that only minor errors may be corrected under s 71:

(a) the reference to ‘accidental slip or omission’ in s 71(1)(a) takes colour from the expression ‘clerical mistake’ to which it was joined;

(b) the nature of the ‘error’ that can be corrected takes colour from the cause of the error which enlivens the power, namely ‘any accidental slip or omission’; and

(c) s 71(1)(a) can be contrasted with s 71(1)(b) which specifically refers to ‘material’ miscalculations and mistakes. This suggests that s 71(1)(a) mistakes and errors are of a more immaterial or trivial quality.

212 Reference was made to a decision of VCAT in which it was held that corrections purportedly made pursuant to s 71 in that case did not seek to remedy clerical mistakes or accidental slips or omissions. Rather, the corrections had ‘the effect of amending the requirements of the conditions.’

213 In response, the Minister submitted that:

(a) the key distinction was whether the error arose from an accidental slip or omission or was the product of a deliberate omission;

(b) the test for whether a mistake or omission is accidental is that stated by Lord Herschell in *Hatton v Harris*; viz if the matter had been drawn to the Court’s attention would the correction at once have been made;

(c) an omission or mistake will only be treated as accidental if it is a matter upon which no real difference of opinion exists;

(d) the slip rule does not apply if the proposed amendment requires the exercise of an independent discretion or an evaluative judgment; and

(e) the slip rule ‘does not permit reconsideration, let alone alteration, of the substance of the result that was reached and recorded’.

214 The Minister further responded to the applicant’s textual arguments in support of the proposition that only minor errors can be corrected under s 71:

(a) s 71(1)(a) contained alternative expressions ‘clerical mistake’ and ‘error arising from any accidental slip or omission’ which were separate and discrete. The error is not qualified or confined by, and does not ‘take colour’ from the words ‘clerical mistake’. It is only qualified by the fact that it must have arisen from any accidental slip or omission;

(b) there is nothing in the language of s 71(1)(a) that confines an ‘error’ to one that is insubstantial; and

(c) the word ‘material’ in s 71(1)(b) does not confine s 71(1)(a). The qualification that the mistake must be ‘material’ in s 71(1)(b) avoids the situation where immaterial mistakes are raised for correction by responsible authorities.

215 The Minister sought to distinguish the decision of VCAT in *Shangyi Vision Pty Ltd v Whitehorse City Council* to which the applicants had referred, on the basis that it involved changes to the permit conditions which were wide-ranging. He further referred to decisions of VCAT in which the responsible authority successfully relied on s 71(1) to amend a permit to include mandatory conditions and to correct a permit to accord with requirements of a referral authority (in consequence of which the responsible authority was bound to include such requirements). Section 62(1)(a) refers to such conditions required to be included by a referral authority as being in the same category as conditions required by a planning scheme.

216 The primary judge identified the purpose of s 71(1)(a) as being to empower the responsible authority to rectify a miscarriage in the granting of a permit that may have occurred by reason of a clerical mistake or an accidental slip or omission.

217 His Honour went on to address authorities relating to the exercise of the slip rule by superior courts including the following: *Sands & McDougall Wholesale Pty Ltd (in liq) v Commissioner of Taxation (Cth) [No 2]*; *Hatton v Harris*; *Barrell Insurances Pty Ltd v Pennant Hills Restaurants Pty Ltd*; *Gould v Vaggelas*; *Gamboni v Bendigo &Adelaide Bank Ltd [No 2]*; *Woodley v Transport Accident Commission; Flint v Richard Busuttil & Co Pty Ltd*; *Newmont Yandal Operations Pty Ltd v J Aron Corporation & Goldman Sachs Group Inc*.

218 He drew attention to the observations of Lord Herschell in *Hatton v Harris* that an error may be regarded as arising from an accidental omission in circumstances where it cannot be doubted that the correction would have been made at once had the omission been drawn to the attention of the judge who made the order. As his Honour stated, the test formulated in *Hatton v Harris* has been applied on many occasions.

219 The primary judge then concluded that the terms of s 71 are not confined to a minor mistake.

Given the purpose of the power in s 71(1)(a), the plaintiffs’ submissions that the power is confined to minor errors only cannot be accepted. It would be nonsensical if a minor error in a planning permit could be corrected but a major error fell outside the scope of the power even though it was a result of an accidental slip or omission.

220 Nor, his Honour held, are the words ‘an error arising from an accidental slip or omission’ coloured by the prior reference to clerical mistake.

221 His Honour then concluded that there was an accidental slip or omission by the Minister as a matter of fact.

In the present case, applying the test in *Hatton v Harris*, it is indisputable that if the omission had been brought to the Minister’s attention when the permit was granted the permit conditions would have been inserted immediately.

There is no doubt that the Minister made an accidental slip or omission by failing to impose the mandatory conditions required by Amendment VC149. If the requirements of Amendment VC 149 approved by the Minister on 4 October 2018 had been brought to his attention on 21 December 2018 when he granted the permit, he would have inserted those conditions.

The explanation given for the oversight is that the permit conditions approved by the Minister were based on the conditions recommended in the panel report of 26 September 2018, and were the conditions before the Minister when he made the Minister’s assessment on 20 October 2018.

The explanation is credible and highly likely. By an oversight, the Minister overlooked the need to impose two conditions that he was required to impose.

There is no reason to doubt the explanation given in the first correction statement of reasons by the Minister’s delegate. If the Minister had been alerted to the missing conditions when he granted the permit, he would have made sure that they were included.

222 The applicants now submit that the primary judge erred in two respects. First, it is submitted that because separate specific provision is made for the amendment of permits pursuant to s 87 of the P&E Act in circumstances where there is a failure to comply with s 62(1) of the P&E Act, it follows s 71 should be read down to exclude such amendments.

223 We do not find this submission persuasive. A situation may be readily hypothesised where the precise language of a condition prescribed by the planning scheme was not utilised but it was plain this was due to an accidental word-processing or other administrative error. Surely such an error could be rectified pursuant to s 71.

224 Further, we accept the Minister’s submission that the P&E Act does not demonstrate an intention that s 71 and s 87(1)(f) are mutually exclusive. The better view is that ss 71, 72 and 97J are powers which fall to be exercisable by the responsible authority. Sections 85(1)(e) and 87 give VCAT powers to vary conditions on review and to amend conditions on further application. Each power is to be given effect in accordance with its own terms and each is intended to operate independently. There is no conceptual difficulty with giving remedial provisions an overlapping effect.

225 Section 87(4) of the P&E Act is consistent with this analysis. It provides:

Nothing in this Division affects the power of a responsible authority to amend a permit under Division 1A.

226 The real question raised by this proposed ground of appeal is the second basis of complaint by the applicants of error, namely whether the power to correct under s 71 extends to a case such as the present. In this respect the applicants submitted that the Minister intended to grant the permit that was granted and added the prescribed conditions because, as an afterthought, it subsequently occurred to departmental staff that the conditions did not accord with the planning scheme.

227 We do not accept this characterisation of the Minister’s decision-making processes. The Minister’s substantive decision was to grant a permit for the wind farm having regard to the net community benefit which would result. For the reasons we have explained, we are satisfied that he did so, in part, having regard to the provisions of cl 52.32-5 of the planning scheme. The inclusion of the prescribed conditions was necessary to give effect to this primary decision. There was no discretion in this respect. The conditions initially imposed directly addressed the subject matter of the prescribed condition and had the same object, namely ensuring compliance with the New Zealand Standard by way of post-construction compliance reports. An accidental error occurred however in failing to properly adopt the terms of the conditions prescribed by the planning scheme.

228 The primary judge was correct to conclude that had the matter been drawn to the decision-maker’s attention, the correction would at once have been made at the time of the grant of the permit.

229 The correction of ancillary noise monitoring conditions to comply with requirements prescribed by the planning scheme falls squarely within the terms of s 71. The correction was made to address an accidental slip and omission.

230 As the Minister submits, this analysis accords with a proper understanding of the way in which superior courts apply the slip rule. However, it is not necessary, in order for s 71(1)(a) to be engaged, that the case falls within the slip rule applied by the courts. The provision applies according to its own terms.

231 Moreover, it seems to us that the detailed complexity of the conditions imposed (reflecting the scale and significance of the development in issue) demonstrates the need to give a broad construction to the remedial provision to ensure that it has practical efficacy in the wide range of circumstances in which it may potentially fall to be applied.

232 We will grant leave to appeal with respect to proposed ground 4 of appeal but dismiss it.

***Conclusion***

233 In summary, leave will be refused on proposed ground 2 of appeal. Leave will be granted on proposed grounds 1, 3, 4 and 5 of appeal but the appeal is dismissed.

- - -

**APPENDIX 1**

**APPENDIX 2**