



Judgment Summary
Supreme Court
New South Wales
Court of Appeal

7 April 2014

**Warkworth Mining Limited and Anor v Bulga Milbrodale Progress
Association Inc [2014] NSWCA 105**

Bathurst CJ, Beazley P and Tobias AJA

Today the Court of Appeal dismissed an appeal by Warkworth Mining Limited (Warkworth), and cross-appeal by the Minister for Planning and Infrastructure, from a decision of the Land and Environment Court to disapprove Warkworth's application to extend its existing open cut coalmine in the Hunter Valley (the Project).

The Project application, if approved, would necessitate significant physical disturbance of the surrounding area, and would involve mining areas that had been designated as non-disturbance areas and habitat management areas under the 2003 development consent that governed the existing mine. Warkworth Sands Woodland, a unique ecological community not found in any other region of the world, would be particularly at risk. The Project would also have substantial economic benefits for the State's economy.

On 3 February 2012, the Planning Assessment Commission (the Commission), as delegate of the Minister, approved the Project. Bulga Milbrodale Progress Association Inc (the Association), a community group, had opposed Warkworth's application and brought an appeal against the approval to the Land and Environment Court.

Preston J (Chief Judge of the Land and Environment Court), in allowing the Association's appeal, found that the Project would have significant and unacceptable impacts on biological diversity, noise levels and the surrounding communities, which were not outweighed by the substantial economic benefits and positive social impacts that the Project would bring to the State and the region.

On appeal to the Court of Appeal, Warkworth contended that Preston J:

- Denied it procedural fairness by refusing to allow it to adduce further evidence on why the background noise level adopted when setting the noise conditions was appropriate, and by going beyond the matters in issue

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between the parties when making findings about the impact of the Project on fauna;

- Erroneously applied the concept of polycentricity to reject its expert economic evidence, and failed to properly balance all relevant matters when determining whether the Project was in the public interest;
- Failed to address a central aspect of its case, namely, the significant economic benefits and positive impacts of the Project;
- Took into account irrelevant considerations, including proposed measures to avoid impacts on endangered ecological communities that were rejected by Warkworth;
- Failed to take into account relevant legislation, namely the *Mining Act 1992*;
- Failed to take into account relevant considerations, including evidence of natural regeneration of Warkworth Sands Woodland, and conditions proposed by Warkworth to mitigate the risk that the Woodlands would not regenerate; and
- Should have given weight to the Director-General's report and its recommendation for approval as a 'focal point' or 'fundamental element' in his determination as to whether to grant approval to the application.

This last mentioned issue was also the subject of the Minister's cross-appeal.

To succeed on their appeal, it was necessary for Warkworth or the Minister to establish an error of law or a jurisdictional error.

The Court of Appeal held that none of the grounds raised established an error of law, nor did they reveal any jurisdictional error justifying orders in the nature of prerogative relief being granted. The Court therefore dismissed the appeal, the cross-appeal and the summons, leaving Preston J's disapproval of Warkworth's Proposal on foot.
