COURT OF APPEAL

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RECORD SHEET

NATURE OF JURISDICTION:	Appeal from the Land and Environment Court of New South Wales (Pearlman CJ)
FILE NO/S:	CA 40314/94; LEC 10314/93
DELIVERED:	4 August 1995
HEARING DATES:	7 and 21 October 1994
PARTIES:	HELMAN V BYRON SHIRE COUNCIL & ANOR
JUDGMENT OF:	Kirby ACJ; Priestley JA; Handley JA
COUNSEL:	
Appellant:	T S Hale
First Respondent: (Byron Shire Council)	B Walker SC
Second Respondent: (Batson Sand)	N A Hemmings QC (Solr)
SOLICITORS:	
Appellant:	Dunhill Madden Butler
First Respondent:	Henningham & Ellis-Jones
Second Respondent:	Allen Allen & Hemsley
CATCHWORDS:	ENVIRONMENT LAW - fauna impact statement - failure to accompany development application and publicly exhibit - whether public exhibition a pre-condition to validity of consent - held: It is. *Pioneer Concrete (Qld) Pty Limited v Brisbane City Council* (1980) 145 CLR 485 appld. APPEAL - challenge to validity of order - whether cures defect - held: It does not. *Calvin v Carr* [1980] AC 574 (PC) appld. LAW REFORM - statutory pre-conditions - consequences of failure - held: Highly desirable that Parliament should make express the consequences of non-compliance with such pre-conditions. *Hatton v Beaumont* [1977] 2 NSWLR 211 (CA) appld.
EX TEMPORE/RESERVED:	Reserved
ALLOWED/DISMISSED:	Allowed
NO OF PAGES:	20

THE SUPREME COURT

OF NEW SOUTH WALES

COURT OF APPEAL

CA 40314/94
LEC 10314/93

KIRBY ACJ
PRIESTLEY JA
HANDLEY JA

4 August 1995

HELMAN V BYRON SHIRE COUNCIL & ANOR

ENVIRONMENT LAW - protected fauna - requirement to accompany development application by fauna impact statement - application accompanied by environmental impact statement only - applicant subsequently supplies fauna impact statement but after public inspection of environmental impact statement concluded - in Land and Environment Court, Pearlman J accepts that applicant failed to comply with requirements for public advertisement but concludes that documents earlier published were adequate for the purpose and the objects of the provisions requiring public exhibition were met - on appeal to the Court of Appeal - held: (1) As the *Environmental Planning and Assessment Act* 1979 did not provide for the consequences of failure to exhibit it was necessary for the Court to impute such consequences to Parliament upon a true construction of the legislation. *Hatton v Beaumont* [1977] 2 NSWLR (CA) and *Tasker v Fulwood* [1978] 1 NSWLR 20 (CA) applied. (2) Having regard to the terms and purposes of the Act and the effect which late lodgment of the fauna impact statement had on by-passing the statutory requirement that the document be available for inspection and consideration by the public, the consent authority was bound to refuse consent

because of non compliance with the essential pre-conditions and the consent purportedly given was invalid. *Scurr v Brisbane City Council* (1973) 133 CLR 242; *Pioneer Concrete (Qld) Pty Limited v Brisbane City Council* (1980) 145 CLR 485 applied.

ENVIRONMENTAL LAW - Land and Environment Court - jurisdiction of Court in Class 1 Proceedings - role and function of Court - whether by appeal to Court objector loses right to challenge the validity of the decision under appeal - held: Such right is not lost nor the invalidity cured by appeal. *Calvin v Carr* [1980] AC 574 (PC) and *Collector of Customs v Brian Lawlor Automotive Pty Limited* (1979) 41 FLR 338 applied.

ENVIRONMENT LAW - Land and Environment Court - condition for consent to development - whether condition lacked certainty and finality - whether condition left for determination by a third party and issue reserved by law to the Court itself - held: (Handley JA) The consent did not lack finality and uncertainty but, as a whole, was complete and final importing compliance with the terms of relevant legislation.

LAW REFORM - statutory pre-conditions - public advertisement of fauna impact statements - failure of Parliament to provide for consequences of non-compliance - necessity for Court to impute consequences - held: Where pre-conditions are imposed it is highly desirable that Parliament should provide for the consequences of non-compliance. *Hatton v Beaumont* [1977] 2 NSWLR 211 (CA) referred to.

STATUTES - construction - whether provisions mandatory or directory - whether requirements of public advertisement pre-conditions to valid consent - construction of legislation - imputed purpose of Parliament. *Guthega Development Limited v The Minister* (1986) 7 NSWLR 353 (CA) considered.

APPEAL - effect of - validity of order under appeal - whether appeal cures suggested invalidity of order - whether still open to appellant to challenge validity or whether appeal affirms order - **held**: It is still open to the appellant to challenge the validity of the order which is the foundation of the appeal. *Calvin v Carr* [1980] AC 574 (PC) applied.

Environmental Planning & Assessment Act, 1979, ss 76, 77, 83, 86, 92, 95, 109, 111, 158.

National Parks & Wildlife Act, 1974, ss 92D, 99, 120.

Land and Environment Court Act 1979, ss 39, 57.

Broadcasting & Television Act 1942 (Cth).

ORDERS

(1) Appeal allowed with costs.

(2) Judgment of the Land and Environment Court of 10 May 1994 and the development consent thereby granted set aside.

(3) In lieu thereof order that Development Application No. 92/0455 made by the second respondent to the first respondent be refused.

THE SUPREME COURT

OF NEW SOUTH WALES

COURT OF APPEAL

CA 40314/94
LEC 10314/93

KIRBY ACJ
PRIESTLEY JA
HANDLEY JA

4 August 1995

HELMAN V BYRON SHIRE COUNCIL & ANOR

JUDGMENT

KIRBY ACJ: I agree with Handley JA in the terms of the concurrence by Priestley JA.

I Certify that the ~~validity~~ is a true copy of the reasons for judgment herein of The Hon. Justice Kirby.

Simon Walker
Associate

Date 4 August 1995

THE SUPREME COURT

OF NEW SOUTH WALES

COURT OF APPEAL

CA 40314/94
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KIRBY ACJ
PRIESTLEY JA
HANDLEY JA

4 August 1995

HELMAN v BYRON SHIRE COUNCIL & ANOR

PRIESTLEY JA: I agree with what Handley JA says concerning the invalidity of the development application in question in this appeal and also with his reasons concerning this court's jurisdiction in appeals in Class 1 proceedings. I therefore agree that the appeal should be allowed.

This conclusion makes it unnecessary to decide the ground of appeal concerning the validity of Condition 53. I express no opinion about this ground.

I agree with the orders proposed by Handley JA.

I Certify that this is a true copy of the reasons for judgment herein of The Honourable Mr. Justice Priestley.

Date 4-8-95 Associate

THE SUPREME COURT

OF NEW SOUTH WALES

COURT OF APPEAL

CA 40314/94
LEC 10314/93

KIRBY P
PRIESTLEY JA
HANDLEY JA

Friday 4 August 1995

HELMAN v BYRON COUNCIL & ANOR

JUDGMENT

HANDLEY JA: This appeal relates to what is known as the Batson Sand and Gravel Quarry which is situated about five kilometres south of Byron Bay. There has been a quarry on the subject land for over fifty years and interests associated with the Batson family have been operating it for about twenty five years. It was common ground that the second respondent, Batson Sand and Gravel Pty Ltd (the Company) had existing use rights over an area of some twenty hectares of the much larger site it owns.

Presumably because of the restrictions on existing use rights introduced by amendments to ss 107 and 109 of the *Environmental Planning and Assessment Act* (the Act) in 1985 the company sought development consent from the Council for an extension of the quarry. This was designated development as defined by s 158 of the Act and Sch 3 of the Regulation. Accordingly, any development application had to be accompanied by an environmental impact statement (EIS). Section 77(3)(d). The trial judge (Pearlman J) found that the proposed development was likely to significantly

affect the environment of endangered fauna so that s 77(3)(d1) applied and the development application should also have been accompanied by a fauna impact statement (FIS) in accordance with s 92D of the *National Parks and Wildlife Act* (Wildlife Act).

On 16 November 1992 the company lodged with the Council a development application which was accompanied by an EIS but not an FIS. The Council, as required by s 84 of the Act and cl 37 of the Regulation gave written notice of the application to adjoining owners and others and caused prescribed notices to be exhibited on the land and advertised in a local newspaper. The application and the documents which accompanied it were available for public inspection until 24 December 1992. The Council received 171 submissions objecting to the proposal and 247 submissions in support. The Company belatedly submitted an FIS in May 1993 and the Council determined the application on 28 May by granting consent subject to conditions.

Objectors, including the present appellant, appealed to the Land and Environment Court (the Land Court) in its Class 1 jurisdiction. Following a lengthy hearing Pearlman J dismissed the appeal and granted consent subject to additional conditions. The appellant appealed to this Court. Under s 57(1) of the *Land and Environment Court Act* (the Court Act) the appeal is confined to questions of law. The appellant relied on two arguments. The first was that the development application was invalid because of failures to comply with what were said to be mandatory requirements of the Act, the Regulation, and the *Wildlife Act*. The second challenged the validity of Condition 53 which required the Company to obtain a licence under s 120 of the *Wildlife Act* to take or kill endangered fauna before carrying out any clearing or quarrying in part of the area. The appellant contended that this involved impermissible delegation to the

Director General of National Parks and Wildlife and the consent was not final.

VALIDITY OF DEVELOPMENT APPLICATION

Section 92D(1)(c) of the *Wildlife Act* provides that an FIS shall include "to the fullest extent reasonably practicable" a full description of the relevant fauna and their habitat, an assessment of the regional and statewide distribution of the species and the habitat to be affected, the effect of the development on the fauna and details of the measures to be taken to ameliorate those effects. The person preparing the FIS must consult with the Director General (s 92D(2) and (3)). A separate FIS is not required where the relevant matters are covered by the EIS (s 92D(4)).

Although the EIS dealt to some extent with the effect of the development on fauna Pearlman J found that it did not sufficiently address the matters in s 92D(1) and there had been no consultation with the Director General. Accordingly a separate FIS was required. The respondents did not challenge these findings. It follows that the development application lodged on 16 November 1992 did not then comply with s 77(3)(d1). This resulted in a further breach because the documents required by s 86 to be available for public inspection did not include a proper FIS.

An FIS was lodged in May 1993 but the Council did not give fresh notices to adjoining owners and others and the application was not readvertised. The application could not be accompanied by the FIS until the latter was lodged, but thereafter it was accompanied by the FIS. See *Wielgus v Removal Review Authority* (1994) 1 NZLR 73 at 77, 79. The same result is reached if one construes s 77(3) as requiring substantial rather than strict compliance. This was achieved when the FIS was lodged but the

Council's obligation in s 86 to have all the documents accompanying the development application available for public inspection was never performed.

In their appeal to the Land Court the objectors challenged the consent on the merits and on legal grounds based on the late lodgment of the FIS. Pearlman J reviewed the relevant provisions of the Act and Regulation and said:-

> "The purpose of those sections is to provide a method by which the public may know of the proposed development and its possible impacts in order that they may then, if they wish, be involved ... in the assessment of the development application".

She then asked herself the following question:-

> "... Did the failure to exhibit the FIS preclude the involvement and participation of the public in the assessment of the development application in conformity with the purpose of the relevant sections?"

She answered her own question as follows:-

> "What was exhibited was the EIS and the October survey. Both documents detailed the quarrying operations which were proposed, the habitats which were intended to be cleared, the potential impact on fauna species, and the proposals for mitigating that impact. It is true that the information was not complete and a more comprehensive examination ... was made in the FIS but that did not mean that the potential fauna impact problems were unable to be perceived ... What sections 84, 86 and 87 require is that the public be alerted to the impacts of the proposed development, and so long as the development application and the documents which did in fact accompany it are adequate for that purpose and are on exhibition, the object of those provisions is met."

She concluded:-

> "All the foregoing is not to say that breach or non-compliance of the provisions of section 77(3)(d1) ... is of no effect at all. If the circumstances exist for the operation of

> subsection (d1) ... then in the absence of a fauna impact statement at the time of determination of the development application, the Council could not, nor could the Court on appeal, determine the development application because the development application would not have been accompanied by the required document. That is not the case here because the FIS was ultimately submitted. The issue here relates only to the absence of the FIS at the time of exhibition. My conclusion is that the failure to exhibit the FIS does not preclude the Court from granting consent to the development application."

Mr Hale, counsel for the appellant, submitted that the findings of the trial judge established that the company failed to comply with s 77(3)(d1) before May 1993 and this denied the public the opportunity Parliament intended it should have of inspecting an adequate FIS. These breaches invalidated the consent and since the Land Court was in the same position as the Council it was bound to refuse the application and it should have allowed the appeal. Mr Walker SC for the Council submitted that the breaches were not such as to require the Council or the Land Court to refuse the application and his submissions were adopted by Mr Hemmings QC for the Company.

The existence of the breaches was not an issue in this Court but the parties were in dispute as to the legal consequences of those breaches Parliament having failed to state clearly what those consequences should be. One recalls, yet again, the statement by Mahoney JA in *Hatton v Beaumont* (1977) 2 NSWLR 211 at 225:-

> "This is another of the cases in which the Court is asked to determine the effect of non-compliance with a statutory provision that something be done ... The function of the Court in such a case as this is to give effect to the intention of the Legislature. This it may do without difficulty where it appears ... that the legislature ... expressed an intention upon the effect to be given to the particular provision. But in most cases, ... , such an intention is not expressed and the Court's task is, by the

> application of the appropriate principles, to divine or impute that intention ... and this frequently leads, not merely to litigation, but also to uncertainty in the day to day operation of the legislation. The administration of the law would be facilitated if, in the formulating of legislation, attention were given as a matter of routine to this question. If this were done ... the cases of the present kind would be, if not avoided, at least greatly reduced in number."

Express provisions of the kind suggested by Mahoney JA, would reduce the cost of and improve access to justice without increased expenditure from Government. The suggestion therefore demands serious consideration. In the present case however the Court must seek an answer by applying the principles in *Tasker v Fulwood* (1978) 1 NSWLR 20 at 23-24:-

> "The problem arises whenever a judicial or executive act, or the act of a litigant, is subjected by statute to the prior performance of conditions. The numerous decisions in this field have been recently reviewed by this Court ... From these sources we take the following propositions:- (1) The problem is to be solved in the process of construing the relevant statute. ... (2) The task of construction is to determine whether the legislature intended that a failure to comply with the stipulated requirement would invalidate the act done, or whether the validity of the act would be preserved ... (3) The only true guide to the statutory intention is to be found in the language of the relevant provision and the scope and object of the whole statute ... (4) The intention being sought is the effect on the validity of the act in question, having regard to the nature of the precondition, its place in the legislative scheme and the extent of the failure to observe its requirement ... (5) It can mislead if one substitutes for the question thus posed an investigation as to whether the statute is mandatory or directory ..."

The effect of non-compliance with statutory conditions governing the lodgment of development applications and the grant of development consent has arisen with some frequency under other legislation but this Court's first task must be to examine the scheme of the Act.

A person may not carry out a development which requires consent unless that consent has been obtained and is in force. (Section 76(2)). Section 77 deals with development applications. Subsection (1) provides that such an application in relation to private land "may be made only by" the owner or a person with his written consent subject to the limited exception in subs (2A). Parliament has prohibited other persons from making such applications and any consent thus obtained would probably be void.

Section 77(3) defines the form and content of such applications. Its requirements are mandatory in terms, being governed by "shall" in each case. However the content of these requirements vary. They include matters of form ("(b) ... made in the prescribed form") and cost ((e) a fee determined by the consent authority or any prescribed fee). They also include matters of substance especially in (d) and (d1) which require certain applications to "be accompanied by" an EIS or FIS. Clause 34 of the Regulation requires an EIS to contain full descriptions of the designated development and the existing environment and to identify and analyse the likely environmental interactions between them and the consequences of carrying out the proposed development. It must also include the measures to be taken to protect the environment, an assessment of their likely effectiveness and other matters. In *Guthega Development v The Minister* (1986) 7 NSWLR 353 at 361 (which dealt with cl 57(2) of the Regulation in the same terms) Samuels JA, who delivered the principal judgment, approved a statement by Hutley JA in *Prineas v Forestry Commission* (1984) 53 LGRA 160 at 163 that:-

> "It would not be too much to say that it is almost impossible to conceive an EIS which literally complies with everything which the regulations require."

In *Prineas* at first instance (1983) 49 LGRA 402 at 417 Cripps J (whose decision was affirmed) said:-

> "The fact that the environmental impact statement does not cover every topic and explore every avenue advocated by experts does not necessarily invalidate it or require a finding that it does not substantially comply with the statute and the regulations."

A FIS must comply with the requirements of s 92D(1) of the *Wildlife Act* "to the fullest extent reasonably practicable". This imposes a high but not absolute standard. This language may be contrasted with similar language in s 111(1) of the Act which requires a determining authority to examine and take into account "to the fullest extent possible" all matters affecting or likely to affect the environment by reason of a proposed activity. This obligation was considered in *Guthega Development v The Minister* at 366 where Samuels JA said:-

> "... it can scarcely be read literally and without some modification of its terms ... some element of reasonableness must be introduced and may be achieved by reading the section as if the word 'reasonably' was inserted before 'possible'. This is the conclusion to which Cripps J came and ... he read the expression 'to the fullest extent possible' as incorporating 'a concept of reasonableness and practicability. The purpose of section 111 is to impose upon determining authorities an obligation to consider to the fullest extent reasonably practicable matters likely to affect the environment'".

It can be seen that Parliament adopted this very language when enacting s 92D.

Mr Walker submitted that the construction of s 77(3)(d1) contended for by the appellant would invalidate most, if not all, development applications governed by that requirement because it would not be possible in practice for a developer to comply with the standards required by s 92D(1). This argument should be rejected. The requirements for an FIS are similar to those for an EIS and were adopted by Parliament in 1991 when the proper approach to the requirements for an EIS was well established. The Courts

have insisted on substantial compliance without being over technical or astute to find fault. The authorities and the relevant principles were reviewed by Pearlman J in *Schaffer v Hawkesbury CC* (1992) 77 LGRA 21 at 30-31. As Stein J held in *Leatch v National Parks* (1993) 81 LGERA 270 at 278-280 the same approach should be adopted to an FIS.

A consent authority receiving an FIS must forward it to the Director (sic) of National Parks and Wildlife (s 77(4A)). Where a planning instrument provides that a development consent shall not be granted without the concurrence of a Minister or public authority, s 78 requires the consent authority to forward the application to the Minister etc and notify the applicant. Sections 79, 80, 81 and 82 deal with the action to be taken by the Minister etc. and the consent authority in relation to such an application. Section 83 then provides that a consent granted without the concurrence of or the conditions required by the Minister etc. "shall be void". This gives legislative effect to the views of this Court in *Parramatta City Council v Palmyra Freeholds Pty Ltd* (1974) 2 NSWLR 83 in preference to contrary dicta by Jacobs J in *AG v BP (Australia) Ltd* (1964) 83 WN (Pt 1) (NSW) 80 at 87.

Section 84(1) defines the duty of a consent authority which receives an application in relation to designated development. It "shall" forthwith give notice to adjoining owners and affected public authorities and cause notice of the application to be exhibited on the land and advertised. Subsection (4) provides that the notices required by subs (1) "shall" be in or to the effect of any prescribed form and "shall" contain such matters as may be prescribed. These are contained in cll 37-39 of the Regulation which are mandatory in form ("shall").

Section 85 enables a consent authority to dispense with compliance with s 84 where a development application is amended or

replaced by a new application differing in either case in only "minor respects". The power is a narrow one which is only available where the consent authority has previously "complied in all respects with" s 84. Section 86 enables any person within the notification period to inspect the application and accompanying documents, and the consent authority is clearly under a duty to permit such inspection.

Section 87(1) enables any person within the notified period to make a written submission to the consent authority. Any submission so lodged "shall" be sent as soon as practicable after the notified period to the Secretary of the Department. Section 88 then provides:-

> "(1) A consent authority shall not determine a development application to carry out designated development otherwise than in accordance with this section.
>
> (2) Subject to section 86A a consent authority may determine the application:
>
> > (a) where no objection has been made under section 87(1) - at any time after the expiration of the period specified in a notice under section 84(1); or
> >
> > (b) where objection has been taken under section 87(1) at any time after the expiration of the period of 21 days following the date upon which a copy of that objection is forwarded to the Secretary in accordance with section 87(3)."

The section operates in conjunction with s 90 which requires a consent authority in determining a development application to take into consideration a large number of matters including (s 90(1)(p)) any submission under s 87. Parliament evidently considered that this duty was so important that a consent authority should not proceed to a decision until the time for lodgment of objections had expired and twenty one days had elapsed after

their transmission to the Secretary. These provisions demonstrate the importance Parliament attached to the objection procedure.

Section 92 requires the consent authority to notify the applicant of its determination and s 95 requires notification to objectors. Clause 45 of the Regulation requires such notifications to be given on the same day. Under s 98 a dissatisfied objector may appeal to the Court within twenty eight days after notification of the determination was given. If the consent authority gives public notice of the granting of the consent in the manner prescribed (cl 50A of the Regulation) the validity of the consent cannot be questioned except in legal proceedings commenced in the Court within three months.

What conclusion should the Court draw from this scheme as to the consequences which Parliament intended should result from such non-compliance with s 77(3)(d1) and s 86 as occurred in the present case?

The leading case in this area is undoubtedly *Scurr v Brisbane City Council* (1973) 133 CLR 242. The High Court was there concerned with s 22 of the *City of Brisbane Town Planning Act* which provided that the Council "before deciding" a relevant application "shall" cause public notice of the application to be given setting out "particulars of the application" and stating that objections could be lodged with the Council within a specified time. Stephen J, who delivered the principal judgment, considered (251-2) that the purpose of the legislation was to ensure that the Council had the benefit of the views of objectors before making a decision on the application, that objectors were entitled to make their views known, and if dissatisfied to appeal. Achievement of these purposes depended on the giving of public notice of relevant applications. At 255-6 he said:-

> "The legislation employs mandatory language, makes the giving of public notice a condition precedent to any

> consideration of the application by the Council and ... is wholly dependant upon the giving of public notice for the attainment of its objects ... I have found the particulars ... to be inadequate ... the Council here proceeded to a determination of the application without either strict or substantial compliance with relevant statutory requirements and the formation of its proposal to grant the application has thereby been vitiated."

His Honour proceeded to consider the effect of non-compliance (there being no express provision dealing with this matter) and concluded that the Local Government Court should have rejected the application. In my opinion *Scurr's Case* is directly relevant, although the defects in this case are different. Section 77 imposes on applicants, in mandatory terms, obligations in the nature of conditions precedent which are directed to achieving the purposes identified by Stephen J. Section 88 prohibits a consent authority from determining a development application until after the close of the period for objections. As in *Scurr's Case* compliance with the statutory requirements is "a condition precedent to any consideration of the application by the Council".

In the result, late lodgment of the FIS by-passed the statutory requirement that such a document be available for inspection and consideration by the public. Compliance would have enabled relevant and better informed objections to be lodged. While the decision maker had the benefit of an appropriate FIS, the objectors had no opportunity to consider it or make submissions based on it. In the result there has been something akin to a denial of natural justice.

Section 83 is an express provision for the avoidance of consents where a necessary concurrence has not been obtained. Mr Walker argued that the absence of a similar provision indicated that Parliament did not intend that non-compliance with the present requirements should avoid a consent. The High Court has advised caution in adopting such an approach

to the construction of legislation. See *Houssein v Under Secretary* (1982) 148 CLR 88 at 94 and *O'Sullivan v Farrer* (1989) 168 CLR 210 at 215. The situation covered by s 88 required clarification because of the existing case law but there was no such requirement in relation to the sections relevant in this case. Indeed the Act appears to have been framed in order to attract the principles in *Scurr's Case.*

Decisions since have confirmed the construction adopted in *Scurr's Case.* See *Pioneer Concrete v Brisbane CC* (1980) 145 CLR 485 at 506, 514, 517 and especially at 518 where Wilson J said:-

> "Substantial compliance with the Act and ordinances is a condition precedent to jurisdiction to grant consent in relation to - the contents of the application ... ; the advertisement of the application ... ; and service of notice of the application on abutting owners ... The imperative underlying my conclusion ... is the importance of a faithful adherence to the provisions of the Act and ordinances so that the interests of all parties concerned ... are protected."

Decisions on the Act have established that substantial compliance with provisions of this nature including the obligation to prepare or submit an EIS, is a condition of validity. See *Prineas v Forestry Commission* (1983) 49 LGRA 402 at 415, 418; (1983) 3 NSWLR 282; *Guthega Development v Minister* (1986) 7 NSWLR 353 at 360; *Penrith CC v Waste Management Authority* (1990) 71 LGRA 376 at 380, 389; *Schaffer Corporation v Hawkesbury CC* (1992) 77 LGRA 21 at 29-30; *Gemstead v Gosford CC* (1993) 78 LGERA 395; and *Curac v Shoalhaven CC* (1993) 81 LGERA 124.

The judge held that substantial compliance had been achieved and invalidity was avoided because the FIS was available to the Council before it made its decision, and all objections had been fully considered on their merits in the appeal.

"Byron Council and the developer are apparently not prepared to admit this, ignoring the Court's judgement and the numerous additional conditions added by Her Honour," said Mr Parkhouse.

"Unfortunately, Her Honour included a condition which is clearly not appropriate and she appears to have set the standard for Fauna Impact Statements at a new low. The appeal will allow these matters to be considered by a higher Court," he said.

Mr Parkhouse said that if the appeal was successful, the Batson's quarry approval would be set aside and the case would have to be re-considered by the Land and Environment Court, in line with the Court of Appeal's judgement.

"A win in the Court of Appeal should set a standard for Fauna Impact Statements, and may compel the Land and Environment Court to refuse the current application and order a fresh Development Application to be prepared, " he said.

"If that happens the company must ensure that all relevant reports and supporting information are of a proper standard and are available to the public for the required periods of time"

... ends.

N.B. 20 July 1994 is the first date for call-over in this Appeal before the Court of Appeal, Supreme Court, Queens Sq., Sydney.

For more information phone: Mr Terry Parkhouse 065 690 771 h.
Mr Ian Cohen - Broken Head Protection Committee 066 877 248 h.

OCCASION: *AUSTRALIAN INTERNATIONAL DEVELOPMENT ASSISTANCE BUREAU (AIDAB) PAPUA NEW GUINEA-AUSTRALIA AID FORUM*

VENUE: *MICHAEL'S RESTAURANT*
EAGLE STREET
BRISBANE

DATE: *MONDAY, 29 NOVEMBER, 1993*

TIME: *7.00PM*

*****

NORTH COAST ENVIRONMENT COUNCIL Inc.

NEWS RELEASE

Wednesday
9 June 1994

BATSON'S QUARRY CASE APPEAL HAS 'DEEP' SUPPORT

Issues of significance for the north coast generally and the whole state were at stake in the recent judgement on the Batson's quarry case, by Justice Marla Pearlman, said the President of the North Coast Environment Council Inc., Mr Terry Parkhouse.

"These issues include proper standards for fauna impact statements; recognising real and avoidable threats to endangered species; the public's right to timely, accurate information, and the proper roles for local councils and the Land & Environment Court in considering for approval, large-scale, long-term development proposals with major environmental impacts," he said.

Mr Parkhouse said that a member of the Broken Head Protection Committee had lodged an appeal on Friday 3 June 1994, asking that the NSW Court of Appeal rule on two questions of law relevant to these issues, relied on by Chief Justice Pearlman in approving Batson's quarry. These questions are whether :

1. a Fauna Impact Statement under s.92D NPW Act needs to be publicly exhibited as a mandatory pre-requisite for a council or the Court to make a decision on a development likely to significantly affect endangered species;

2. the Court's approval of the sand mine is certain or final given that, Condition A53 (which 'quarantines' part of the proposed mine site pending the preparation of a formal Fauna Impact Statement and its review by NPWS) reserves to another time and another authority a matter which the consent authority should have decided at the time of approval.

The appeal has been mounted by Mr Peter Helman, as a member and on behalf of the Broken Head Protection Committee (BHPC).
Mr Helman and BHPC were parties to the proceedings in the Land and Environment Court. BHPC is a member of the North Coast Environment Council Inc.

"North Coast Environment Council believes that further legal action is appropriate on this case, via an appeal to a superior court, because Her Honours judgement decision has raised more important issues than it has resolved, and if left unchallenged, will have an effect well beyond one quarry in Byron shire, with far greater consequences," said Mr Parkhouse.

Mr Parkhouse said that Justice Pearlman had found that Byron Council's original approval of the quarry had not complied with law. He said that the legal action had also revealed Council's subsidy to the quarry, from a four year 'holiday' on road repair contributions due to Council, estimated to be worth $150,000.

Peter: Re: Batsons Quarry News Release

Can you fax to:

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NBN " 513 669
PRIME " 514 828

Papers BYRON ECHO ?
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imposed by international agreements (eg. Agenda 21, Convention on Biological Diversity), intergovernmental agreements (eg. Intergovernmental Agreement on the Environment, National Forest Policy Statement, National Strategy for Ecologically Sustainable Development), and various laws (eg. Endangered Species Protection Act).

The National Forest Policy Statement requires that a *"comprehensive, adequate and representative reservation system to protect old-growth forest & wilderness values will be in place by the end of 1995"* for public lands and by 1988 for private lands.

Prime Minister, Paul Keating, also gave the committment in his 1992 "Statement on the Environment" to *"the development of a national comprehensive system of parks and reserves"*, with a Government policy that *"all major ecosystems be surveyed and that a comprehensive, adequate and representative system of reserves be established progressively by the year 2000."*

As clearly recognised by the Resource Assessment Commission's Forest and Timber Inquiry, the abysmal research effort into the forest environment and the impact of activities upon it precludes an adequate assessment being undertaken. The same inadequacies are apparent for all ecosystems. Management to maintain biodiversity is still largely based on guesswork and superstition, rather than science. Conservation of natural ecosystems and processes is hampered by our ignorance of species requirements and interactions. This ignorance is due to a failure to expend significant resources on gaining the required knowledge upon which to make informed and justifiable decisions.

Ecologists have been consistently emphasising the need for research while at the same time there has been a continual reduction in research funding. Of the numerous species whose survival is threatened by human activities only a very few have been subjected to detailed studies. Our knowledge of the basic biology, habitat requirements and distribution of the vast majority of threatened species is so lacking that it is not possible to minimise threatening processes or develop conservation strategies.

To enable Australia to establish a comprehensive, adequate and representative reserve system, maintain as much of our biodiversity as possible and manage our ecosystems on an ecologically sustainable basis it is essential that we begin to collect the basic data on life histories, habitat requirements and distribution of native species. It is imperative that there be a greatly expanded survey and research effort into native species and ecosystems, because without it there is no possibility of meeting commitments with any credibility.

PROPOSAL

It is proposed that the Federal Government establish an Ecosystem Research Fund to provide a source of funding for individuals, consultants, post-graduate students and institutions to undertake surveys and research that will assist the design of regional reserve systems, maintenance of biodiversity and/or the development of ecologically sustainable management practices.

It is recommended that $30 million per annum be allocated to the fund to assist in undertaking an audit of Australia's wildlife and researching species' and communities' requirements, to fill in the many gaps in existing knowledge of australia's unique biological heritage. The fund should finance surveys of flora and fauna thoughout Australia.

The basic requirements for such surveys are that they:

(i) use agreed systematic, standardised and site based methodologies so that the data generated is appropriate for computer data bases and consistent across Australia;

(ii) include sites that are permanently marked to enable monitoring on a regular basis; and,

(iii) aim to cover all groups of plants and animals (eg. including invertebrates and fish) or target significant species.

The fund should also finance research on key native species, communities, habitats and conservation requirements.

NORTH COAST ENVIRONMENT COUNCIL Inc.

NEWS RELEASE

Wednesday
9 June 1994

BATSON'S QUARRY CASE APPEAL HAS 'DEEP' SUPPORT

Issues of significance for the north coast generally and the whole state were at stake in the recent judgement on the Batson's quarry case, by Justice Marla Pearlman, said the President of the North Coast Environment Council Inc., Mr Terry Parkhouse.

"These issues include proper standards for fauna impact statements; recognising real and avoidable threats to endangered species; the public's right to timely, accurate information, and the proper roles for local councils and the Land & Environment Court in considering for approval, large-scale, long-term development proposals with major environmental impacts," he said.

Mr Parkhouse said that a member of the Broken Head Protection Committee had lodged an appeal on Friday 3 June 1994, asking that the NSW Court of Appeal rule on two questions of law relevant to these issues, relied on by Chief Justice Pearlman in approving Batson's quarry. These questions are whether :

1. a Fauna Impact Statement under s.92D NPW Act needs to be publicly exhibited as a mandatory pre-requisite for a council or the Court to make a decision on a development likely to significantly affect endangered species;

2. the Court's approval of the sand mine is certain or final given that, Condition A53 (which 'quarantines' part of the proposed mine site pending the preparation of a formal Fauna Impact Statement and its review by NPWS) reserves to another time and another authority a matter which the consent authority should have decided at the time of approval.

The appeal has been mounted by Mr Peter Helman, as a member and on behalf of the Broken Head Protection Committee (BHPC). Mr Helman and BHPC were parties to the proceedings in the Land and Environment Court. BHPC is a member of the North Coast Environment Council Inc.

"North Coast Environment Council believes that further legal action is appropriate on this case, via an appeal to a superior court, because Her Honours judgement decision has raised more important issues than it has resolved, and if left unchallenged, will have an effect well beyond one quarry in Byron shire, with far greater consequences," said Mr Parkhouse.

Mr Parkhouse said that Justice Pearlman had found that Byron Council's original approval of the quarry had not complied with law. He said that the legal action had also revealed Council's subsidy to the quarry, from a four year 'holiday' on road repair contributions due to Council, estimated to be worth $150,000.

draft 2

NEWS RELEASE - Monday 6 June 1994

BATSON'S QUARRY CASE APPEAL WELCOMED

Issues of significance for the north coast generally and the whole state were at stake in the recent judgement on the Batson's quarry case, by Justice Marla Pearlman, said the President of the North Coast Environment Council Inc., Mr Terry Parkhouse.

"These issues include proper standards for fauna impact statements; recognising real and avoidable threats to endangered species; the public's right to timely, accurate information, and the proper roles for local councils and the Land & Environment Court in considering for approval, large-scale, long-term development proposals with major environmental impacts," he said.

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"North Coast Environment Council believes that further legal action is appropriate on this case, via an appeal to a superior court, because Her Honours judgement decision has raised more important issues than it has resolved, and if left unchallenged, will have an effect well beyond one ~~sand mine~~ quarry in Byron shire, with far greater consequences," said Mr Parkhouse.

Mr Parkhouse said that Justice Pearlman had found that Byron Council's original approval of the quarry had not complied with the relevant Acts. He said that the legal action had also revealed Council's subsidy to the quarry, from a four year 'holiday' on road repair contributions due to Council, estimated to be worth $150,000.

"Byron Council and the developer are apparently not prepared to admit this, ignoring the Court's judgement and the numerous additional conditions added by Her Honour," said Mr Parkhouse.

"Unfortunately, Her Honour included a condition which is clearly not appropriate and she appears to have set the standard for Fauna Impact Statements at a new low. The appeal will allow these matters to be considered by a higher Court," he said.

Mr Parkhouse said that if the appeal was successful, the Batson's quarry approval would be set aside and the case would have to be re-considered by the Land and Environment Court, in line with the Court of Appeal's judgement.

"A win in the Court of Appeal should set a standard for Fauna Impact Statements, and may compel the Land and Environment Court to refuse the current application and order a fresh Development Application to be prepared, " he said.

"If that happens the company must ensure that all relevant reports and supporting information are of a proper standard and are available to the public for the required periods of time"

40314 of 94

... ends.

For more information phone Mr Terry Parkhouse 065 690 771 h.

Note: 20 July Supreme Ct. Appeal Queen Sq.

The Centre welcomes the commencement of formal environmental planning for these three Nature Reserves and the opportunity for public input into public asset management by a public authority.

However, concern is expressed at the delay in the commencement of these public planning processes, and the carrying out of various works in several of the Nature Reserves, over a period of years, in the absence of any formal planning instrument e.g. track contructions in Broken Head, picnic tables & road construction etc in Brunswick Hds NR's).

The Centre supports the provision of relevant information to the public to inform and assist in making decisions about natural resource management.

Regrettably, the Centre believes that the information provided in this Draft Plan of Management for the 3 Byron Nature Reserves is not satisfactory for natural resource management.

PETER HELMAN
PO Box 706 Byron Bay NSW 2481
Phone 066 853474 Fax 066 853720

Fax To John Corkhill
Big Scrub Environmnet Centre

Fax No 066 222 676

Date 2 June 1994

Message

John
Seven pages to follow being application for legal aid by Peter Helman and attached documents for use as basis for press release.

Local support BHPC, Beacon, BEC, regional NCEC, NEFA?, State NCC?, ACF? (both supported earlier calls for Commission of Inquiry, May 92

PETER HELMAN
PO Box 706 Byron Bay NSW 2481
Phone 066 853474 Fax 066 853729

1 June 1994

Managing Director
Legal Aid Commission of NSW
Fax 02 219 59 35

Dear Sir

I wish to apply for legal aid to assist in covering the costs of a public interest application to the Court of Appeal.

The proceedings to be appealed were heard in the Land and Environment Court of New South Wales (No. 10314 of 1993) on the 7, 8, 9, 10, 11, 14 March, 5, 6, and 7 April 1994. The applicants in this matter were Broken Head Protection Committee and Peter Helman v Byron Council, First Respondent and Batson Sand and Gravel Pty Ltd Second Respondent.

The matter was decided by Justice Pearlman on 10 May 1994. A copy of the judgement is being sent by courier.

It is anticipated that an application will be lodged with the Court of Appeal on Friday 3 June 1994. A letter from Counsel Mr T Hale and a draft Notice of Appeal setting out the grounds of appeal are attached.

Her Honour found that the respondents had breached or failed to comply with s.77(3)(d)(i) of the Environmental Planning and Assessment Act and s.92D of the National Parks and Wildlife Service Act.

On behalf of a local environmental group I have already invested a year of work in this matter and her Honours' findings support the reason why the application was made to the Land and Environment Court.

However, an area of public interest arises from the uncertainty that her Honours' judgement has placed both the procedure and consideration of Fauna Impact Statements (FIS). And the likelihood that this finding could lead to further confusion and uncertainty in the consideration of development applications if the habitat of an endangered species is under consideration. It is a matter of public interest that these areas of uncertainty are resolved to.

i allow the development application process to continue without confusion
and

ii to ensure that adequate consideration is given to the assessment of the impacts of development on the habitats of endangered species

iii to permit exhibition and allow public participation in the EIS process as originally envisaged by the relevant Acts

It is clear from Mr Hales advice that I am the only person who can lodge an appeal in this matter. I wish to lodge an appeal on the ground of public interest.

I wish to apply for legal aid for this important planning and environmental public interest test case, to:

i cover part of the costs of preparing the appeal, $3,000
(It is estimated that this costs in this appeal will be around $8,000)

ii an indemnity against costs under s 47 of the Legal Aid Commission Act

Could you please fax me, as matter of urgency, advice that this application has been received and a legal aid application form. The completed form will be returned as soon as possible.

Your faithfully

Peter Helman

Peter Helman

FAX IN

T.S. Hale
Selborne Chambers
6th Floor
174 Phillip Street
Sydney, NSW. 2000
Telephone 233 7510
Facsimile 233 3902
DX 382

30 May 1994

Mr John Whitehouse
Messrs. Dunhill Madden Butler
Solicitors
DX 254 SYDNEY

Dear John,

RE: BROKEN HEAD PROTECTION COMMITTEE AND PETER HELMAN v. BYRON COUNCIL AND BATSON SAND AND GRAVEL PTY LTD

I enclose a draft Notice of Appeal which I have prepared.

We should keep the Grounds of Appeal to a minimum and I believe that to set out properly expose the arguments to be developed.

I have included as one of the orders sought that the court of appeal itself might order consent be refused. I do not see any realistic likelihood of them doing this even if they find the court has no power to grant consent in the circumstances. I rather suspect they will simply remit the matter back to the Land & Environment Court.

I suggest a Notice of Motion is filed for expedition. The orders to be sought in the Notice of Motion simply are:

"1. That the hearing of this appeal be expedited.

2. That the costs of motion be costs in the appeal."

Since it is a Notice of Motion to the Court of Appeal the appellant will be called the "claimant" in the Notice of Motion and the respondents to the Notice of Motion will be called "opponents".

The application will need to be supported by an affidavit setting out the reasons for urgency.

You will see I have included only one appellant namely, Peter Helman. I appreciate that in the Land & Environment Court there were two applicants one of which was entitled "Broken Head Protection Committee". But that Committee is an unincorporated Association with no legal status. The Court of Appeal most certainly will not permit a non legal entity to be an appellant. Assume the appeal fails and order for costs is awarded against the appellants: how can these be recovered against a non legal entity?

As I confirmed in conference, in my opinion there are good prospects of success on the appeal.

Yours faithfully

T S HALE

IN THE LAND AND

ENVIRONMENT COURT

OF NEW SOUTH WALES

No. 10314 of 1993

PETER HELMAN

Appellant

BYRON COUNCIL

First Respondent

BATSON SAND AND GRAVEL PTY LTD

Second Respondent

In the Court Below:

BROKEN HEAD PROTECTION COMMITTEE AND PETER HELMAN

Appellants

BYRON COUNCIL

First Respondent

BATSON SAND AND GRAVEL PTY LTD

Second Respondent

NOTICE OF APPEAL

Messrs. Dunhill Madden Butler
Solicitors
DX 254 SYDNEY

The proceedings appealed from were heard on 7, 8, 9, 10, 11 and 14 March; 5, 6 and 7 April, 1994 and were decided on 10 May, 1994.

The appellant appeals from the whole of the decision of Justice Pearlman.

Grounds:

1. Having found that the respondents had breached or failed to comply with s.77(3)(d)(i) of the Environmental Planning & Assessment Act and s.92D of the National Parks & Wildlife Act, 1974, her Honour erred:

(a) in not holding that the court had no power to grant consent to the second respondent's application for development consent for a designated development;

(b) in holding that she had power to grant the development consent and then granting development consent.

2. Condition A53 imposed by her Honour was imposed in breach of the Environmental Planning & Assessment Act, by reason of its lack of certainty and finality and it leaves for determination by a third party an issue which her Honour should have determined.

Orders sought

1. The appeal be allowed.

2. The judgment of her Honour of 10 May, 1994 be set aside together with the grant of development consent referred to in that judgment.

3. In lieu of the orders made by her Honour an order that:

(a) development application no. 92/0455 made by the second respondent to the first respondent be refused: or

(b) the proceedings be remitted to the Land & Environment Court for determination in

accordance with the decision of the Court of Appeal.

3. Costs of the appeal.

(complete formal parts in accordance with form 60)

LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES

RECORD OF HEARING

CORAM: Pearlman J

NUMBER: 10314 of 1993

MATTER: **BROKEN HEAD PROTECTION COMMITTEE**

and

PETER HELMAN

Applicants

v

BYRON COUNCIL

First Respondent

BATSON SAND AND GRAVEL PTY LIMITED

Second Respondent

KEYWORDS: Development application - designated development - extractive industry - sandstone quarry - objector appeal - whether open for objectors to challenge validity of the development application.
Fauna Impact Statement - requirements - failure to exhibit - sufficiency of fauna survey - result of non-exhibition when FIS later furnished to council.
Amendments to EIS - whether development as proposed differs significantly from the development application.
Merit issues - water quality - impacts on flora and fauna - requirement for a buffer zone - noise - design controls - visual impact - necessity of the resource.

HEARING DATES: 7, 8, 9, 10, 11, 14 March 1994
5, 6, 7 April 1994

JUDGMENT: Reserved

JUDGMENT DATE:	10 May 1994	
APPEARANCES:	**Applicants:**	Mr J F Whitehouse, Solicitor
	First Respondent:	Mr M G Craig QC
	Second Respondent:	Mr N A Hemmings QC
SOLICITORS:	**Applicants:**	Dunhill Madden Butler
	First Respondent:	Henningham & Ellis-Jones
	Second Respondent:	Allen Allen & Hemsley
NO OF PAGES:	50	

IN THE LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES

No 10314 of 1993
Coram: Pearlman J
10 May 1994

BROKEN HEAD PROTECTION COMMITTEE

and

PETER HELMAN

Applicants

v

BYRON COUNCIL

First Respondent

BATSON SAND AND GRAVEL PTY LIMITED

Second Respondent

JUDGMENT

Introduction

Byron Bay is, to some, a lush coastal paradise. To others, such as the Court during the opening week of this hearing, it is a place of unremitting torrential downpour. To all, however, it is the location of the Batson Sand and Gravel Quarry.

That quarry is the subject of this appeal. The Broken Head Protection Committee and Peter Helman, the applicants in these proceedings, being objectors who are dissatisfied with the determination of Byron Council ("the council") to grant consent to a development application in respect of the quarry, appeal to the Court under s 98 of the Environmental Planning and Assessment Act 1979 ("the EP&A Act").

On 16 November 1992, the second respondent, Batson Sand and Gravel Pty Ltd ("the company"), lodged with the council a development application (ex "H" doc 1) and an environmental impact statement ("the EIS", ex "G"). The development application sought consent for the expansion of quarrying operations, which is designated development as specified in sch 3 of the Environmental Planning and Assessment Regulation 1980 ("the Regulation").

The development application, and those of its accompanying documents as were then in the council's possession, went on public exhibition until 24 December 1992. In response the council received 171 submissions objecting to the proposal and 247 submissions in support (ex "M").

The council determined the application on 28 May 1993 by granting consent subject to conditions (ex "K").

I propose, after considering the legal and merit issues which were raised, and for the reasons set out in this judgment, to dismiss this appeal, and to grant consent to the development application subject to conditions.

The site

The quarry is located between Suffolk Park and Broken Head, about five kilometres south of Byron Bay. The quarrying operations are presently carried out on approximately 20ha of land owned by the company or persons associated with the company. The purpose of the development application is to obtain development approval to extend the quarry operations over a further 11.5 ha of land so owned.

The land the subject of the development application ("the site") which comprises both the existing quarry area of 20ha, and the proposed extension of 11.5ha, is part of a larger parcel of land owned by the company and its associated interests. The title of the larger parcel ("the Batson land") is described as lot 1 DP 123302, lot 2 DP 700806, lots 1 - 6 DP 245836, lot 4 DP 802745 and lot 1 DP 184443.

The site is traversed from north to south by Broken Head Road. The site is adjacent on the east to Taylors Lake Road and is about 500 metres from the western boundary of Taylors Lake; slightly further to the east is the Pacific Ocean. On the south, to the west of Broken Head Road, the site is adjacent to a creek, which was referred to during the hearing as Midgen Creek, although it may in fact be an unnamed creek draining into the Newrybar drain catchment.

Zoning and existing use rights

The whole of the Batson land is within five zones under the Byron Local Environmental Plan 1988 ("the Byron LEP" - ex "C") - Zone No 1(a) (General Rural Zone), Zone No 1(d) (Investigation Zone), Zone No 1(e) (Extractive Resources Zone), Zone No 7(b) (Coastal Habitat Zone), and Zone No 7(d) (Scenic/Escarpment Zone). The site is, however, within four of those zones. A portion of the site on the west is zoned 7(d) as is that area of the site which is traversed by Broken Head Road. A portion of the site in the north east is zoned 1(d), and a portion in the north is zoned 1(a). The remainder of the site, and by far the greater part of it, is zoned 1(e). Extractive industry is permissible with consent in zones 1(a), 1(d) and 1(e), and prohibited in zone 7(d).

It was common ground in the proceedings that the company has existing use rights in respect of the 20ha of the Batson land where quarrying is currently carried on. Quarrying has been taking place on the Batson land for about 50 years, certainly since before the existence of planning legislation operative in the Byron Shire, and interests associated with the Batson family have been quarrying on the Batson land for approximately 25 years. That part of site which is zoned 7(d) is wholly within the area the subject of existing use rights.

The proposed development

The EIS sets out the operations which are proposed to be carried out on the site. In summary, they involve the following features:

1. The company will continue to produce the products which it currently offers, being concrete and asphalt sand, brickies loam, road base and filling, and pebbles. Those products are obtained by ripping and bulldozing, and there is no necessity for blasting. Some of the extracted material is stockpiled for sale as road base, while the majority of extracted material is processed through a mobile dry processing plant or a fixed wet processing plant.

2. The company proposes to manage the quarrying operations by dividing the site into three management areas which have been designated as areas C, E and W in the EIS. Each of those management areas will be further divided into operation cells which will be quarried sequentially and progressively over a period of 36 years. The bulk of the extraction over the first 25 years will be carried out in the management areas located east of Broken Head Road.

3. It is intended that at any one time the surface area cleared and exposed would be limited to 5ha east and 5ha west of Broken Head Road. Those 10ha at any time will include the quarrying areas active at the time as well as all other areas connected to the active quarry including the areas where the wet and dry processing plants are located, the sedimentation ponds and haul road.

4. As a consequence of restricting surface area clearance to 10ha as I have described, the company intends temporarily to rehabilitate areas not required for quarrying in the short term.

5. A two-lane underpass will be designed and constructed under Broken Head Road, providing for vehicular access from one side of the site to the other. This would reduce to two the number of entry/exit points to the quarry - there are currently

six of such points off Broken Head Road.

Legal Issues

Two legal issues and a number of merit issues were raised in these proceedings. I deal with the legal issues first, but before considering each of them, I turn to a preliminary point as to the Court's jurisdiction which was raised by Mr Hemmings QC on behalf of the company.

Mr Hemmings contended that the applicants could not challenge the validity of the company's development application in respect of which development consent was granted by the council as these are class 1 proceedings. Their right of appeal arises out of s 98 of the EP&A Act, under which they can appeal if dissatisfied with the determination of the development application by the council. That right of appeal is predicated on there being a development application, and the applicants cannot, in these proceedings, make a claim the consequence of which would be that there was no development application. If the applicants wish to challenge the development consent on the basis of there being no development application, then they must bring proceedings under s 123 of the EP&A Act, in class 4 of the Court's jurisdiction.

However, I do not understand the applicants' claim to be that the development application was null and void. Their claim is rather that the Court, in exercising its function of determining the development application on appeal under s 39 of the Land and Environment Court Act 1979, cannot grant development consent because the requirements of the EP&A Act in relation to the development application have not been satisfied. For the purpose of these proceedings, it matters not whether the development application was valid or invalid when the council made its determination. It did make a determination, and the Court's jurisdiction is properly invoked under s 98 of the EP&A Act to entertain an appeal from that determination by way of rehearing. In exercising that function, the Court may properly entertain issues going to the legal requirements for a valid development application (see *Schaffer Corporation Ltd v Hawkesbury City Council* (1992) 77 LGRA 21 at 28ff and the cases there cited).

(1) Failure to exhibit the FIS

The applicant contended that development consent could not now be granted by the Court because the provisions of s 84 of the EPA&A Act had not been complied with. The basis for this contention is as follows:

1. Section 77(3)(d1) of the EP&A Act requires that, where the application is in respect of a development which is likely to significantly affect the environment of endangered fauna, it shall be accompanied by a fauna impact statement in accordance with s 92D of the National Parks and Wildlife Act 1974 ("the NP&W Act").

2. This development is a development which is likely to significantly affect the environment of endangered fauna.

3. The development application was accompanied by the EIS which referred, in section 3.9, to the impact of the proposed development on flora and fauna; and the EIS incorporated by reference a flora and fauna survey dated October 1992 prepared by Bartrim & Martin Biological Studies (ex "H" doc 6 - "the October survey"). The October survey was not, so it is contended, a fauna impact statement in accordance with s 92D of the NP&W Act.

4. Section 84(1) of the EP&A Act requires, where the proposed development is designated development, that notice of the development be published. Section 84(4) requires that notice to contain such matters as are prescribed. The matters which are prescribed appear in reg 37 of the Regulation, which requires the notice to state that the development application "... and the documents (including the environmental impact statement) accompanying the application ..." may be inspected within a specified period of not less than 30 days of the date on which the notice was first published.

5. A notice as required by s 84 was published, specifying a period of exhibition of 33 days expiring on 24 December 1992.

6. At the time of public exhibition of the development application and accompanying documents, there was no fauna impact statement available for inspection.

7. A fauna impact statement ("the FIS") in accordance with s 92D was prepared in May 1993.

The applicants' argument depends for its accuracy on four things - a finding of fact that the proposed development was likely to significantly affect the environment of endangered species; a finding of fact that the October survey was not a fauna impact statement in accordance with s 92D of the NP&W Act; a finding of fact that the EIS (including the October survey) did not address the matters specified in s 92D(1) of the NP&W Act so as to obviate the requirement for a separate fauna impact statement under s 92D(4); and the conclusion that, as a matter of law, the failure to have a fauna impact statement available for public inspection following notice in accordance with s 84(1) is fatal to the grant of development consent by the Court.

I shall deal with each of these things in turn, but, in summary, I have concluded, for the reasons which follow, that a fauna impact statement was required, and that it was furnished to the council before the council made its determination. It was, however, not available during the period of public exhibition, but that does not preclude the Court from now granting consent to the development application.

Was the development likely to significantly affect the environment of endangered species?

The meaning of the words "likely" and "significantly" in the context of s 77(3)(d1) of the EP&A Act was considered by Stein J in *Oshlack v Richmond River Council and Anor* (22 December 1993, unreported). With respect, I adopt what his Honour said at p

20:

> "A body of law has developed in relation to the interpretation of Part 5 of the Act and the meaning of "likely" and "significantly": ... In the context of Part 5 "likely" has been held to mean a "real chance or possibility" and "significantly" to mean "important", "notable", "weighty" or "more than ordinary"... I see no reason why these constructions should not be imported into the similarly worded provisions of ss 4A, 77(3)(d1) and 90 (1)(c2). The same statute is involved and similar approaches are dictated ..."

In determining whether there is likely to be a significant affect on the environment of endangered species, the matters set out in s 4A of the EP&A Act must be taken into account. They are:

> "(a) the extent of modification or removal of habitat, in relation to the same habitat type in the locality;
> (b) the sensitivity of the species of fauna to removal or modification of its habitat;
> (c) the time required to regenerate critical habitat, namely, the whole or any part of the habitat which is essential for the survival of that species or fauna;
> (d) the effect on the ability of the fauna population to recover, including interactions between the subject land and adjacent habitat that may influence the population beyond the area proposed for development of activities;
> (e) any proposal to ameliorate the impact;
> (f) whether the land is currently being assessed for wilderness by the Director of National Parks and Wildlife under the Wilderness Act 1987;
> (g) any adverse effect on the survival of that species of endangered fauna or of populations of that fauna."

Section 6.2.4 of the October survey dealt with each of these matters in turn, although without coming to a final conclusion as to whether there was likely to be a significant affect. The October survey did disclose, however, some impacts which would, in my opinion, be "likely" to be "significant" in the meaning of those words as set out in *Oshlack*. The first of these related to the removal of habitat. The October survey pointed out that, of the area of 11.5 ha intended to be removed sequentially over the life

of the quarry, an area of 7.7 ha of wet sclerophyll forest would be affected. Secondly, the October survey referred to the sensitivity of the species to be affected, and drew particular attention to the short term impact on populations of the carpet python and Queensland blossom bat in the area, noting, however, that in the long term these species would colonise elsewhere or their habitat would be restored. Thirdly, the October survey noted that regeneration of habitat would take a number of years, that understorey regrowth and some heathland development would be expected to be present within ten years, but that replacement of mature trees would take decades.

Although not determinative of the issue, it is useful to note that the National Parks and Wildlife Service ("National Parks") took the view that there was likely to be a significant impact on the environment of endangered species and recommended to the council that a fauna impact statement be obtained. On pp 5 and 6 of its letter to the council of 15 January 1993 (ex "L"), National Parks listed a number of endangered species which it claimed had been recorded within or in the immediate vicinity of the study area encompassed by the October survey but which were not listed in the October survey, and then, at p 7, National Parks said:

> "... Given the extensive clearing nature of the proposed operations, the increased fragmentation of habitat that would be caused, the lengthy period required for regeneration of critical habitat and the probable deposition of sediment over large adjoining areas of critical habitat the Service considers the proposed activity would have significant impacts on all the endangered fauna listed above, with the possible exception of the Osprey."

It is true that the National Parks' opinion was after the event; the development application was lodged in November 1992. But most of the matters upon which it based its opinion were set out in the October survey, and those matters would reasonably lead, in my opinion, to a conclusion that there was a real possibility that the proposed development would have an important or more than ordinary affect on the environment of endangered fauna.

I find, therefore, that the proposed development is likely to significantly affect the environment of endangered species, and that a fauna impact statement prepared in accordance with s 92D was required to accompany the development application in accordance with s 77(3)(d1).

Was the October survey a fauna impact statement?

Section 92D(1) of the NP&W Act specifies five matters which must, "to the fullest extent reasonably practicable" be included in a fauna impact statement. Section 92D(2) requires the person preparing the fauna impact statement to consult with the Director-General of National Parks, and in preparing the statement, to have regard to any requirements notified to him or her by the Director-General in respect of the form and content of the statement.

The October survey was called a "flora and fauna survey". Ms A S Martin, who prepared it, stated that she had done so in accordance with the Endangered Fauna (Interim Protection) Act 1991, and she appended to the October survey, as appendix 1, the full text of s 92D. Prior to carrying out the field work for the purpose of the October survey in June through to August 1992, Ms Martin consulted with the local office of National Parks. She spoke to Mr G Holloway, who recommended that she assess the impact of the existing development, that she consider the potential impact upon the Taylors Lake area, and that she consider whether koala and long-nosed potoroo were likely to be affected.

However, in January 1993, which was after the time for exhibition of the development application and accompanying documents had expired, National Parks advised the council of its opinion that the October survey was not a fauna impact statement in accordance with s 92D. In an undated letter at about the same time, the Director of National Parks notified Ms Martin of his requirements in accordance with s 92D(2).

The only conclusion to be drawn from these facts is, in my opinion, that the October survey cannot be a fauna impact statement in accordance with s 92D because Ms Martin had not consulted with the Director-General, and had not complied with his requirements at the time when the October survey was prepared. It is true that Ms Martin did consult with National Parks, but the recommendations which she received from Mr Holloway were not, in form or in substance, "requirements" of the Director-General.

Did the EIS address the matters set out in s 92D(1)?

A formal fauna impact statement may not be required if the provisions of s 92D(4) of the NP&W Act operate. That subsection, so far as relevant, provides as follows:

> "(4) Despite sections 77 (3)(d1) ... of the Environmental Planning and Assessment Act 1979, if an environmental impact statement has been prepared pursuant to that Act which addresses the matters set out in subsection (1), no separate fauna impact statement is required."

This raises the question - did the EIS address the matters set out in s 92D(1)? If so, then it could be argued that there was no obligation to consult with the Director-General and to comply with his requirements under subs (2) because that subsection is not referred to in subs (4). Mr Whitehouse, for the applicant, submitted that subs (4) is merely a procedural subsection which avoids the need for two documents, but does not obviate the obligation to comply with subs (2), or, for that matter, to include in the statement "to the fullest extent practicable" the matters specified in subs (1). I am inclined to the view that Mr Whitehouse's submission is correct, but I do not need to express a final conclusion on the point, because I have concluded that, even on the more liberal interpretation contended for by Mr Hemmings for the company, the EIS did not address the matters set out in subs (1).

The EIS incorporated the October survey by reference, and it is legitimate, therefore, to have regard to the October survey to determine if the EIS addressed the matters which subs (1) specifies. In my opinion, the October survey fails to address the matters which are specified in sub-paragraphs (i) and (ii) of s 92D(1)(c). They are as follows:

> "(i) a full description of the fauna to be affected by the actions and the habitat used by the fauna;
>
> (ii) an assessment of the regional and statewide distribution of the species and the habitat to be affected by the actions and any environmental pressures on them;"

In the October survey, six endangered species were identified, and the likelihood of affect upon them and their habitat was considered. However, in the FIS which was finally prepared, a further seven endangered species were identified by Ms Martin for consideration as to the likelihood of affect upon them. There was disagreement between the experts as to the precise number of endangered species which were potentially affected; Ms Martin identified 13, and Mr P G Parker and Dr H E Parnaby, who were called on behalf of the applicants, gave a greater number. It does not matter, for the purpose of the point that I am now considering, precisely how many endangered species were potentially affected; what matters is that the October survey did not contain a full description of even those that the FIS subsequently identified.

In addition, the October survey did not contain an assessment of the regional and state wide distribution of the endangered species which it did identify.

Again, although not determinative of the issue, the National Parks took the view that the October survey could not be construed as being or equating to a fauna impact statement by reason of its deficiencies (letter for 15 January 1993, ex "L").

My conclusion, therefore, is that the October survey could not be said to have addressed the matters required by s 92D(1)(c)(i) and (ii) of the NP&W Act, and thus a separate fauna impact statement was required.

The effect of the failure to exhibit a fauna impact statement

I have concluded, for the foregoing reasons, that a fauna impact statement prepared in accordance with s 92D of the NP&W Act was required to accompany the EIS, in order to satisfy the requirements of s 77(3)(d1) of the EP&A Act. At the time of lodgement of the development application, and during the period of exhibition pursuant to s 84 of the EP&A Act, the council did not hold a fauna impact statement. In May 1993, this non-compliance with s 77(3)(d1) was corrected - the FIS was lodged, and it was in the hands of the council on 28 May 1993, when the council determined the development application by granting consent subject to conditions. What is the legal effect of these facts?

A number of preliminary things must be said, about which there is really no contest in this case. In the first place, in determining a development application, the council, and the Court on appeal, are required to take into consideration whether there is likely to be a significant effect on the environment of endangered species (EP&A Act s 90(1)(c2)). Secondly, the Court, exercising its jurisdiction to determine a development application on appeal, must make its decision on the facts and law as they exist at the date of the hearing - *Sofi v Wollondilly Shire Council and Anor* (1975) 31 LGRA 416. The Court has, as at the date of hearing, and the council had, as at the date of its determination, an FIS before them, and the Court is, and the council was, able to consider the likelihood of significant affect on the environment of endangered species in the light of the facts disclosed by that FIS. Thirdly, the procedural requirements as to exhibition were followed in this case, in that sufficient time for exhibition was allowed, and the development application and the accompanying documents which the council had in its possession were exhibited.

What is at issue is the failure to exhibit the FIS. The determination of that issue requires a consideration of the scope and purpose of ss 84, 86 and 87 of the EP&A Act. Those sections must be considered generally in the light of s 5(c) of the EP&A Act, which stipulates that one of the objectives of the EP&A Act is "to provide increased opportunity for public involvement and participation in environmental planning and

assessment". The sections I have mentioned, amongst others in the EP&A Act, implement that objective in relation to designated development. Thus s 84 requires the giving of notice of a development application to owners of adjoining and affected land, and to public authorities and to the public generally, by exhibition of the notice on the subject land and by publication in a newspaper. Section 86 permits members of the public to inspect the development application and accompanying documents. Section 87 allows any person to make a submission to the consent authority during the period of exhibition, and any such submission must be taken into account by the consent authority in determining the development application (s 90(1)(p)). The purpose of those sections is to provide a method by which the public may know of the proposed development and its possible impacts, in order that they may then, if they wish, be involved and participate in the assessment of the development application (see *Ballina Environment Society Inc v Ballina Shire Council* (1992) 78 LGERA 232 at 238 - 240 and *Curac v Shoalhaven City Council and Anor* Stein J, 24 September 1993 unreported at pp 5 - 6).

The issue for determination may then be stated in another way - did the failure to exhibit the FIS preclude the involvement and participation of the public in the assessment of the development application in conformity with the purpose of the relevant sections? The involvement and participation of the public might be negated if there was no opportunity for the public to become aware of the potential impact of the proposed development upon endangered species. In my opinion, that was not the case here. What was exhibited was the EIS and the October survey. Both documents detailed the quarrying operations which were proposed, the habitats which were intended to be cleared, the potential impact on fauna species, and the proposals for mitigating that impact. It is true that the information was not complete and a more comprehensive examination of the species which might potentially be affected and the possible impact upon them was made in the FIS. But that did not mean that the potential fauna impact problems were unable to be perceived.

A useful comparison might be made with the requirements for the content of environmental impact statements. In *Schaffer* at 31, I collected together those requirements from the relevant authorities. Thus I set out amongst others the

requirements that an environmental impact statement must be sufficiently specific to direct a reasonably intelligent and informed mind to the possible environmental consequences of a proposed development, and that it must alert the public to the inherent problems of the proposed development. By analogy, the same requirements apply to the documents which must be made available to the public in conformity with s 84 of the EP&A Act. They must direct the minds of reasonably intelligent and informed members of the public to the possible environmental consequences, and alert them to the inherent problems. It is only by doing so that proper public involvement and participation can be achieved.

My conclusion as to the scope and purpose of ss 84, 86 and 87 of the EP&A Act puts out of contention the technical argument that the reference to documents "accompanying" the development application in s 86 and reg 37 of the Regulations means the documents referred to in s 77(c)(d) and (d1), so that if any one of those documents is not on exhibition, the requirements of s 84 and reg 37 have not been complied with. That argument relies on form over substance. What ss 84, 86 and 87 require is that the public be alerted to the impacts of the proposed development, and so long as the development application and the documents which did in fact accompany it are adequate for that purpose and are on exhibition, the object of those provisions is met.

The position would have been different, of course, if there had been no reference to fauna impact in the EIS, or if the EIS and the October survey had not been as extensive as they were. In such a case, it would not have been possible for the public to be alerted to potential fauna impact and the departure from the statutory requirements would have made it impossible for the council, or the Court on appeal, to make an informed determination of the development application.

All the foregoing is not to say that breach or non-compliance of the provisions of s 77(3)(d1) of the EP&A Act is of no effect at all. If the circumstances exist for the operation of subs (d1), that is, that there is likely to be a significant affect on the environment of endangered species, then, in the absence of a fauna impact statement at

the time of determination of the development application, the council could not, nor could the Court on appeal, determine the development application, because the development application would not have been accompanied by the required document. That is not the case here because the FIS was ultimately submitted. The issue here relates only to the absence of the FIS at the time of exhibition.

My conclusion is that the failure to exhibit the FIS does not preclude the Court from granting consent to the development application.

(2) Amendments to the development proposal

The second legal issue raised by the applicants is that, in one respect, the proposed development has been so changed that it should be re-exhibited in accordance with s 84 of the EP&A Act.

The change to which the applicants refer is the proposal to spread gypsum as a flocculant on the surface of the water in the settling pond which is to be located on the site to the west of Broken Head Road. The purpose of the spreading of gypsum is to cause suspended solids to precipitate prior to discharge of the water, which will flow into Midgen (or the unnamed) Creek.

The proposal to use gypsum in this manner is set out in section 5.2.7.1 of a draft plan of management (ex "A3") ("the draft management plan") which was prepared by the company's consultants, R W Corkery & Co Pty Ltd, in January 1994. It is part of the stipulations which appear in the final plan of management (ex "A5") ("the final management plan"). It is based on the recommendations of the company's engineering consultant, Ray Sargent and Associates Pty Ltd, as set out in its December 1993 report (ex "A4"), which in turn arose out of a requirement of the Environment Protection Authority (the "EPA"). In a letter (dated 26 March 1992 although clearly from its contents, 1993 is meant - ex "L") the EPA stated that "... [A]ny water which must be discharged, will as referred to in the EIS, require treatment with clarifying chemicals such as gypsum, lime or polyelectrolyte to reduce turbidity."

When the council granted development consent in May 1993, it imposed a condition requiring the company to furnish a plan of management to the council within one year from the date of consent. The company elected, presumably in connection with the preparation for the hearing of this appeal, to furnish a plan of management now. The draft management plan and the final management plan were lodged with council prior to the hearing, and were available for perusal by the various experts who gave evidence in the proceedings.

Initially, when the EIS was prepared, Ray Sargent & Associates furnished a report (ex "H" doc 3) which did not specify the addition of a flocculant to the water in the western settling pond. In order to satisfy the water discharge criteria of the EPA, the EIS, adopting the initial recommendations of Ray Sargent & Associates, proposed enlargement of the storage capacity of the current western settling pond to increase retention time and hence reduce turbidity by natural coagulation and settling. On p 5 of ex "H" doc 3, Ray Sargent & Associates expressed the opinion that it would be better to avoid the use of flocculants, in view of potential downstream effect, if satisfactory water quality could be achieved without them.

In these circumstances, the applicants contended that a significant operational step was not referred to in the EIS and its accompanying documents which went on exhibition. They also contended that none of those documents, nor the later report of Ray Sargent & Associates (ex "A4"), nor the draft management plan nor the final management plan contained an examination of the consequences of spreading gypsum on the surface of the water. Mr R J Sargent, giving oral evidence, expressed the opinion that the addition of gypsum has the effect of raising the pH level of water, although he was not prepared to concede that the water would change from slightly acidic to slightly alkaline (T 9/3 p 31). In his oral evidence, Dr J B Croft, an environmental consultant called on behalf of the applicants, stated that the introduction of gypsum to the water would be the introduction of something which is alkaline to something which he thought was "strongly acidic" (T 5/4 p20).

This situation, so the applicants contended, fails the test for re-advertisement propounded by Hope JA in *Parkes Developments Pty Ltd v Cambridge Credit Corporation Ltd and Anor* (1974) 33 LGRA 196. In that case, his Honour quoted with approval the relevant test propounded by the trial judge in the proceedings there on appeal, namely, that the test is whether the changes are such that a reasonably minded potential objector might reasonably entertain objections to the proposed development as amended. In this case, so this argument went, the downstream users of Midgen Creek might reasonably entertain objections to the amended development proposal.

The issue which arises for determination is whether, as a consequence of the operational procedure which is now proposed, the proposed development is substantially different from that described in the development application. It is similar to the issue which the trial judge faced in *Parkes*, and it must not be lost sight of in these present proceedings. It was in order to determine if there was a "substantially different" application that the trial judge applied a test which is based on a reasonably minded potential objector. Hope JA in the *Parkes* appeal at p 204 drew attention to the balance which is required to be achieved between, on the one hand, the immense administration problems and endless delays which would result from requiring readvertisement as a consequence of any material variation, and, on the other, the frustration of the apparent purpose of readvertisement if approval could be given to significant variations without notice.

The question of whether there is now a substantially different development than the one proposed in the development application is a matter of fact and degree, bearing in mind the nature of the amendment, the balance between administrative problems and the purpose of advertisement to which Hope JA adverted, and the possibility that the entire environmental assessment process might start again (*BHP Ltd v Blacktown City Council and Ors* Cripps J 18 April 1989, unreported).

Bearing those matters in mind, I do not think it could be said in this case that the proposed development is now substantially different from what was proposed in the development application. The EPA recommended the use of gypsum as a flocculant; it is a minor matter in the overall development taking into account that most of the water

is intended to be-recirculated and used on the site; and Dr Croft's concern was really that the effect of the use of gypsum had not been assessed, which is a matter of merit for the Court to take into account.

Merit Issues

I turn now to consider the issues of merit.

(1) Water pollution control

The water management system, designed to control water pollution in respect of the site, is set out in a number of documents. It was dealt with in the EIS as amplified in a report from Ray Sargent & Associates (ex "H" doc 3). The system was further refined by the consulting engineers in a further report (ex "A4") and set out in the draft management plan and the final management plan.

The water management system comprises the following principal elements:

1. Diversion drains, embankments and dispersion channels are to be installed in order to direct "clean" runoff (ie water meeting appropriate discharge criteria) away from active or disturbed quarry areas, and away from temporary and final rehabilitated areas until those areas have sufficient surface stabilisation so that runoff from them is "clean" (which is estimated to take approximately two years).

2. Runoff which contains a high level of suspended solids will be contained in an on-site water processing circuit designed to re-use that water for the wet processing plant, for the control of dust on haul roads and within the active quarry area, and for irrigation of temporary and final rehabilitated areas.

3. In order to prevent discharge of sediment-laden water towards Taylors Lake, water in the eastern settling pond will, when that pond has filled to a certain level, be pumped across the site to the western settling pond, where the on-site

water process circuit is to be situated.

4. As I have earlier mentioned, if turbidity in the western settling pond is high, gypsum as a flocculant will be spread across the surface of the water to remove suspended solids prior to discharge.

These elements are intended to be achieved by a system comprising an eastern settling pond, a western settling pond, silt traps on the east and west of the site, and various water processing ponds.

The first concern of the applicants in relation to water impact was that water containing an unacceptable level of suspended sediment would discharge from the site into the swamp and wetlands east of the site, and into the northern arm of Taylor's Lake. They drew attention to the environmental significance of Taylors Lake and its environs. Mr D Leadbitter, a biologist specialising in fisheries, and Associate Professor P Adam, an ecologist, both gave evidence as to the adverse impact of sediment on the lake and its environs, stating that it would hasten the process of infilling, would reduce photosynthetic capacity and have a harmful effect on aquatic life. They asserted that the water management system proposed by the company would not mitigate this impact. The applicants, moreover, pointed to the fact that the pumping of water from the eastern settling pond to the western settling pond, being manual and not automatic, was not assured, and that the design of the capacity of the eastern settling pond to a 1 in 10 storm event was inadequate.

Similarly, NSW Fisheries in a letter dated 5 March 1993 addressed to the council ("ex "L") expressed concerns about the turbidity of runoff and its impact on aquatic flora and fauna in the area of Taylors Lake to the east, and Tallows Creek to the north.

The EPA in its March 1993 letter to the council (ex "L") found the design of silt traps and the settling ponds to be adequate, but suggested the re-use and recycling of waste water, and the treatment of any waste water which is to be discharged in order to reduce turbidity and to ensure minimal change to pH levels.

Evidence which addressed the concerns which were raised was given by a number of witnesses. Mr P J Porritt, the council's development engineer, submitted a report (ex "P") and gave oral evidence. He was of the opinion that conditions of consent could be imposed to ensure the implementation of the water management programme set out in the draft management plan, and that programme would be sufficient to control any adverse impact of sediment-laden water from the site. His evidence was supported by the evidence of Mr J P Hogan, the council's senior environmental health officer, who also furnished a report (ex "O") and gave oral evidence. In his opinion, the water management programme, reinforced by appropriate conditions of consent, would result in water quality which would be acceptable in downstream areas such as Taylors Lake.

Mr J V Schmidt, a regional environment officer of the Department of Water Resources, in his statement of evidence (ex "V") and later in oral evidence, furnished the opinion that the EIS had adequately addressed the issues of likely impact on surface and groundwater quality and the overall impact on the integrity of the water environment.

On the subject of sediment control and erosion, Mr H B Hungerford, the district soil conservationist with the Soil Conservation Service of the Department of Conservation and Land Management, gave a statement of evidence (ex "R") and oral evidence. His principal concern was with what he described as "coarse" sediment which would naturally settle (to distinguish it from "fine" sediment or suspended colloidal clay, control of which is properly the province, in his opinion, of the EPA). He outlined four principles with which he considered the site should comply - first, maintenance or replanting of vegetation cover, secondly, control of run-off, thirdly, retention of settlable material on-site; and fourthly, effective maintenance. In his opinion, the water management system set out in the EIS and the draft management plan fulfilled these principles and met his department's objectives in respect of sediment and soil erosion control.

Two other pieces of evidence need to be mentioned. Firstly, the EPA in its 26 March 1993 letter to the council (ex "L") recommended that waters in the settling ponds should be managed to ensure that only "rare storm events (eg 1 in 10 years storms)" would

result in direct discharge from the site. In giving evidence in chief, Mr R J Sargent stated that, depending upon the pumping out of the eastern settling pond, it had the capacity to cope with a greater than 1 in 10 year storm event.

Secondly, the council has proposed (as set out in ex "AE") a condition of consent that would set a standard for water discharge. It is proposed to stipulate that the water contain 50mg or less per litre of non-filterable residues, and be free from oil and grease. The council also proposed a number of other conditions in relation to water and drainage, all designed to ensure the implementation and maintenance of the water management system specified in the EIS and the draft management plan.

I am satisfied with the proposals set out in those documents. I take into account the evidence of the council officers and the soil conservationist, who considered the water management system to be satisfactory, subject to appropriate conditions of consent. I note the standard of design adopted for the eastern settling pond as recommended by the EPA and its capacity to meet a higher standard. Mr Helman conceded in cross-examination that the water management system would improve water quality, but both he and Dr Croft had doubts about implementation of the system. Appropriate conditions of consent can be imposed to ensure its implementation so that the possible adverse impacts adverted to by Mr Leadbitter and Associate Professor Adam can be avoided.

The second concern of the applicants related to the possibility that water discharged into Midgen Creek would have a raised level of alkalinity resulting from the spreading of gypsum upon the water in the western settling pond. Mr Sargent gave evidence that the rate of gypsum to be used was 50-100 mg/litre, and that the amount that was likely to be used per annum was six to ten tonnes. As I have already noted, he stated in cross-examination that gypsum has the effect of changing the pH level of water towards alkalinity, whereas, according to Mr Helman, the water in the location was slightly acidic. Dr Croft expressed concerns about this effect.

I am prepared to accept that the spreading of gypsum will raise the alkaline level of the water in the western settling pond, but I take into account that the use of gypsum was a requirement of the EPA, designed to reduce turbidity. Its purpose is accordingly to beneficially affect turbidity, and I am not prepared to refuse to grant consent on the ground that it is to be used. As to any potentially deleterious effect of its use, I take into account that the council proposed the imposition of a condition of consent which would require all water discharged from the site to meet a standard in relation to its pH level, which would be a level that varies by no more than 0.5 from the receiving waters measured at a location to be specified by the council in consultation with the EPA. That would, in the light of the concerns expressed by the applicants, be a proper condition to impose.

(2) Impact on Flora and Fauna

The EIS was accompanied by a flora and fauna survey carried out by Bartrim & Martin Biological Studies (ex "H", doc 6 to which I have earlier referred as "the October survey"). An amended survey was subsequently prepared (ex "J" doc 2 - the "May survey") which expanded the October survey through additional field surveys, incorporated reference to further species, and appended a separate bat survey. The "study area" to which the October survey and the May survey refer covered the whole of the Batson land and land slightly beyond its boundary.

Flora

The October survey identified five main vegetation types on the site, being wet sclerophyll forest, rainforest, swamp forest, heathland and natural regeneration. Within these types, the October survey identified ten groupings, or units, of distinct vegetation communities. It identified five species of regional, state or national conservation significance. It considered the conservation status of the units which were identified, and rated the overall conservation significance of the study area as "moderately high".

The impact of the proposed development upon flora was discussed in the May survey. The conclusion was that the clearing of a further 11.5 ha of vegetation over a period of 20 -30 years would affect five of the identified units - unit 1 (blackbutt open -/ closed forest), unit 5 (scribbly gum/wallum banksia (No "1") low open (heath) - woodland/shrubland), unit 8 (brush box closed - forest), unit 9 (regenerating rainforest (closed - scrub with emergents), and unit 10 (closed grassland/rehabilitation vegetation). Of these, unit 1 will be the most affected.

However, the chief conclusions of the May survey were, first, that no known specimens of rare or endangered plant species occur within the area of the proposed extension of the quarry; secondly, that no impact on plant species of conservation significance is proposed and most other species will be better protected than under the manner in which the quarry currently operates; thirdly, that no clearing of vegetation communities which are not well conserved state wide and regionally will be carried out; and fourthly, that the clearing of 11.5 ha of bushland will have a significant impact at a local level, but the impact will be mitigated in the long term by the rehabilitation procedures which are proposed.

The May survey proposed a number of mitigating measures. These included placing strict control on clearing in the restricted areas of operation, maintenance of a buffer zone around the quarry area, creation of an artificial wetland on the north boundary in the vicinity of the eastern settling pond, implementation of the proposal to manage the quarry in cells and to limit actual operations to 5ha (on the eastern side of the site), temporary and final rehabilitation, retention of mature seed trees where possible, restricted site access and constant monitoring.

The October survey and the May survey were criticised by Mr Parker in a document entitled "An Environmental Assessment of Lands at Brooken Head" (ex "3"). Mr Parker described both surveys as "simplistic" in their identification of ten vegetation communities, Mr Parker describing "17 associations in 11 alliances". Mr Parker also reported finding several more nationally important species not identified in the October survey or the May survey.

Mr Parker's report described a greater range of communities, and identified more species (some of which are rare or threatened) than did Ms Martin, the author of the October survey and the May survey. But generally Mr Parker in his report did little more than criticise the methodology and conclusions of the October survey and the May survey and his report merely emphasised the complexity of flora on the Batson land and surrounding environs.

In a further report (ex "10"), Mr Parker criticised the draft management plan (ex "A3"). A significant aspect of this further report is Mr Parker's identification (fig 2) of seven "core conservation" areas. Those areas, which collectively cover a very large portion of the Batson land (and accordingly a large part of the site) are based on the 17 vegetation associations which were outlined in his earlier report. His opinion was that it was important to preserve these core areas.

I prefer Ms Martin's evidence for two reasons:

(i) Ms Martin's studies are more independent in comparison with those of Mr Parker. His residence adjoins the site, giving him a more direct interest in the outcome of the development application. I make it clear that it is this fact alone which gives Mr Parker a degree of partiality - I do not rely on the various challenges which were made to Mr Parker's professional detachment. His expert report furnished for a subdivision of land in Suffolk Park adjacent to Taylors Lake and questions put to Dr Croft in cross-examination were used to attempt to demonstrate a lack of impartiality in Mr Parker's professional work. I do not think that a general lack of impartiality was established, but I believe that, in comparison with Ms Martin's opinions, Mr Parker's opinions should be given less weight;

(ii) Mr Parker's recommendations would result in sterilisation of major parts of the site, which, in the light of the 1(e) zoning under the Byron LEP, would be difficult to justify without clear, uncontroverted evidence of irreparable harm. In saying this, I do not accept the council's submission that the 1(e) zoning has the

effect of pre-ordaining the use of the site. The consent of the council is required for development upon the site, and that necessitates a consideration of all relevant impacts as s 90(1) of the EP&A Act stipulates.

Ms Martin's conclusions, and the mitigating measures which are proposed, are sufficient, in my opinion, for me to conclude that development consent should not be refused on the grounds of flora impact.

Fauna

The evidence of the potentially adverse affect of the proposed development upon fauna was adduced by a number of experts. Ms Martin furnished four reports. The first, the October report, was a study of flora and fauna in respect of the Batson land and environs, and it accompanied the EIS. The second report (ex "J" doc 1) contained a brief response to matters raised by National Parks, and a third report (ex "A6") contained Ms Martin's responses to evidence furnished by other experts. Her main report, the May survey, was prepared, so far as fauna is concerned, to comply with the requirements of s 92D of the NP&W Act, and amounts to a formal fauna impact statement within the terms of that Act.

The May survey included (as an appendix) a report prepared by Mr G A Hoye on the potential effect of the development on bats.

On behalf of the applicants, Mr Parker furnished three reports, ex "3", ex "10" and ex "13". Dr Parnaby furnished a report in relation to the impact upon bats (ex "7").

The expert evidence conflicted in regard to the two main issues relating to fauna - first, as to the number of endangered fauna recorded or likely to be found on the site; and secondly, as to the impact of the proposed development on those fauna.

"Endangered" fauna are those species listed as threatened or as vulnerable and rare in sch 12 of the NP&W Act. At the time Ms Martin commenced her study, the version of sch 12 which was in force was the version as at 28 February 1992. That version was amended on 18 December 1992.

Mr Parker and Dr Parnaby were of the opinion that a greater number of endangered species were recorded or likely to be found on the site than the number identified by Ms Martin and Mr Hoye. The common ground was, however, that there were at least 13 endangered species likely to be found on the site, and accordingly that the overall wildlife conservation significance of the site could be rated as high to very high. Ms Martin was of the opinion, however, that the significance of the site varied between the locations within it, and that the areas of highest significance were the south eastern corner of the site, and a sector west of Broken Head Road.

As to the impact of the proposed development upon endangered species, the experts again differed considerably. Ms Martin's opinion was that there was the possibility of an adverse impact on endangered species of bats likely or possibly to be found in the south eastern corner of the site, where also the long-nosed potoroo might possibly be found, although she doubted that the potoroo was likely to occur. Mr Hoye identified four endangered species of bat as occurring on the site and a further six species as likely to occur, but recommended that more survey work be carried out, principally in the south eastern corner of the site and adjacent to the haul road on the western side of Broken Head Road. Mr Parker considered that there would be a likely adverse impact upon the potoroo, again in the south east corner of the site, but that there would also be likely adverse impacts upon rainforest birds and upon bats which foraged and roosted on other parts of the site, principally in the littoral rainforest area in the north of the site. Dr Parnaby considered that there would be an adverse impact upon bats throughout the site because of the clearing of mature blackbutt trees, the hollows of which are a preferred nesting area of some bats, and which are likely to take decades to regenerate.

There is no doubt from the evidence that there is a potential for adverse impact on some endangered fauna. One of the areas in which that impact might occur is the area of littoral rainforest in the north of the Batson land. However, that area is not included within the site, and there will accordingly be no direct impact on endangered fauna in that area.

The other two significant areas in relation to endangered fauna are in the south east corner of the site, which is the area adjacent to Taylors Lake, and also a portion of the western part of the site. Those locations are marked as "Area recommended not to be disturbed" on plan 2.4 in the final management plan. That recommendation has led the council to propose, and the company to accept, the imposition of a condition of consent which would "quarantine" both areas. It has also led the company to propose a relocation of the haul road, as indicated on ex "A9", which would leave standing a significant community of mature trees, potentially a habitat for bats. I discuss the wording of the proposed condition later in this judgment, but, for the present purpose of assessing the impact of the proposed development upon endangered fauna, I am of the view that the condition will, if imposed and implemented, mitigate adverse impact. The applicants contended that such a condition of "quarantine" of the area pending further survey only defers the impact; but the condition which is proposed would prohibit clearing and quarrying until a licence under s 120 of the NP&W Act has been granted. If no such licence is granted, no clearing or quarrying will take place in the specified areas; if a licence is granted, it will only be after further bat and potoroo studies have been carried out, a fauna impact statement has been prepared and the other procedures required by s 120 have been satisfied.

(3) Buffer zone

The applicants contended that development consent ought to be refused because the proposed development has sought to use as a buffer zone lands adjoining that part of the site which is zoned 1(e) under the Byron LEP, rather than containing impacts from the quarry within that part of the site so zoned.

This submission derives from one of the objectives of land zoned 1(e) which is specified in the Byron LEP. Under cl 1(c) of the relevant zoning table in the Byron LEP it is stipulated that one of the objectives of zone 1(e) is "... to include land within the zone necessary to provide a buffer area around extractive resources ...".

It was argued by Mr Whitehouse, for the applicants, that impact from water, sediment and noise will extend outside the land zoned 1(e).

I agree with Mr Craig QC, for the council, who submitted that implementation of such an objective could not have been intended to require that there never be any impact whatsoever outside the site, because, for example, the proposed development must generate additional traffic on roads outside the site, the waterways upon the site must contain water which is expected to flow from the site, and there must inevitably be a noise impact external to the site boundary. What is intended to be implemented by the objective is to contain unacceptable impacts from the proposed development within the site.

I am satisfied that the major impacts of the proposed development will be contained within the land zoned 1(e). Thus, the proposals for control of water pollution to which I have already referred involve sedimentation measures which will be carried out on land within that zone. Similarly, sources of noise from the site will principally be from excavation and from the operation of the wet and dry processing plants, but the major noise impact from those sources will also be contained within that part of the site zoned 1(e), by reason of the location of those sources within the site and noise attenuation measures.

In my opinion, therefore, development consent should not be refused on this ground.

(4) Noise

An initial noise assessment report was prepared by Richard Heggie & Associates Pty Ltd and accompanied the development application (ex "H" doc 5). It was followed by three other reports from the same expert, exs "A1", "A10", and "A11". On behalf of the applicants, Mr P A Jelliffe furnished expert reports on noise impact, exs "4", "14" and "16".

It is clear that the existing noise levels on the site are moderately high, principally due to the combination of noise from road traffic on Broken Head Road, and from the ocean to the east, as well as from the quarrying operations of extraction, haulage, and wet and dry processing. The company intends, in these circumstances, to adopt a number of measures to mitigate noise impact, which are set out in the draft management plan. They include the fitting of mufflers to all mobile equipment, limitation on the gradients of haulroads within the site, limitation on daily operating hours, as well as quarrying in such a manner so as to obstruct noise through natural topographic barriers or the active quarry face, and the construction of earth bunds and acoustic barriers. In particular, in the first three years of operation, bund walls or acoustic barriers will be constructed to certain specified designs and at certain locations on the site.

Mr Jelliffe was satisfied generally with the noise assessment and attenuation measures proposed by the company in relation to the site. He was, however, principally concerned with the noise impact on the property of Mr E Bogic, which is located to the southwest of the site.

Both Mr R A Godson (who is a partner in Richard Heggie and Associates) and Mr Jelliffe were of the opinion that the appropriate noise standard for the residence to be located on Mr Bogic's property was an L_{A10} (average maximum) level of 43dBA, based on the measured L_{A90} (ambient background) level of 38dBA plus 5dBA as recommended by the relevant noise guidelines of the EPA.

Mr Jelliffe, however, had two further concerns with the noise impact upon Mr Bogic's property. He believed that the standard of L_{A10} of 43dBA could not be achieved, and he was even more concerned with the noise impact of the quarry at the boundary of Mr Bogic's property. His view was that the owner of adjacent property was entitled to enjoy the amenity of his whole property, including its garden and surrounding area, and that a standard should be set for the boundary.

The company argued that Mr Bogic, who gave evidence of his concerns as to noise impact, purchased his property and set about developing it when the quarry was in operation and could not now be heard to complain about existing noise levels. In any event, if a standard of L_{A10} of 43dBA were to be set for any proposed residence on Mr Bogic's property, it would mitigate noise impact upon his property.

I take into account the shared opinion of both noise experts that this standard of L_{A10} of 43dBA is an appropriate one, and I take into account that it could be set in place by a condition of consent. I think it unrealistic to require a noise standard to be set in relation to the boundary of Mr Bogic's property, taking into account that the area most sensitive to noise impact upon that property is undoubtedly the location of any residence to be built upon the property, and the fact that the most useable part of that property for gardening and other similar amenity is likely to be the higher part of Mr Bogic's property adjacent to the residence, since that part of the property which adjoins the Batson land falls extremely steeply to the east.

In all the circumstances that I have set out, I consider that potential noise impact does not provide a ground for refusal of development consent.

(5) Design and Operational Controls

The applicant contended that development consent ought to be refused because of three aspects of the way that the proposed development is designed to operate.

The first of these aspects related to the proposal that quarrying will be controlled on the site by limiting all active areas to 5 ha east of Broken Head Road and 5 ha west of that road. The applicant contended that this proposal is unlikely to be achieved in practice. In giving evidence on behalf of the applicant, Dr Croft in his reports (exs "1", "9" and "12") drew attention to the heterogeneous nature of the geology of the site which in the past has allowed the company to supply a range of products to the market. He expressed doubt that the company will confine its quarrying activities to 5 ha on each side of the road, given that demand for construction material is likely to increase in the Byron Shire in the future, and given the fact that the company in the past has had to utilise 20ha in order to meet the market demand for a range of products. The applicants also expressed concern that the history of past activities on the site gave no confidence that the company would be likely to exercise the control and discipline required to meet design proposals such as this limitation of the area of active quarrying.

I do not think that the applicant's concern about the limitation of the active quarrying area to 5ha on each side of Broken Head Road should lead to refusal of development consent. I accept the submission of the council and the company that aspects of operational design such as this can properly be controlled by conditions of consent. I also take into account that quarrying operations on the site have been largely uncontrolled in the past, and that the operation of the quarry in the future, if consent were to be granted subject to conditions, would be an improvement on current operations if those conditions were adhered to by the quarry operator. Moreover, in circumstances where conditions of consent would require ongoing monitoring by the council, through the furnishing of consecutive plans of management, it does not seem to me to be appropriate to rely upon the company's past performance as a ground for refusing development consent. The company, after all, made the development application and is to be presumed to be committed to adhering to those conditions in accordance with the law. The company will be operating in a vastly changed situation, and its past performance is no indication that it will fail to meet the requirements of that changed situation.

The next aspect of operational design which concerned the applicant was the proposal for temporary rehabilitation of the site. As described in the draft management plan, the company proposes to re-establish vegetative cover on areas which will be subject to further disturbance as the site is developed towards its final configuration. It stated that the purpose of temporary rehabilitation is to limit exposed quarry surface at any one time, in the interests of minimising erosion, dirty water generation and potential visual impact.

Dr Croft described the proposals for temporary rehabilitation on p 14 of his first report (ex "1") as "... technically and financially onerous and ultimately unworkable in practice". He contended that rehabilitation is both complex and costly, and criticised the draft management plan in leaving uncertain and open the actual extent to which temporary rehabilitation is to be undertaken.

Mr Hungerford, however, in his statement of evidence (ex "R"), concluded that temporary rehabilitation was one of the measures which has more recently improved problems of erosion and sedimentation control on the Batson land. In giving oral evidence, Mr Hungerford said that temporary rehabilitation, if carried out in accordance with the EIS and the draft management plan, would be a desirable practice on the site, and his department would support the concept.

Again, I am not persuaded that development consent ought to be refused because temporary rehabilitation of parts of the site may be unlikely to be carried out. I accept that temporary rehabilitation will contribute to the control of erosion and discharge of sediment, as Mr Hungerford concluded. It is a measure which ought to be imposed on the company as a condition of development consent.

The third aspect of operational design which concerned the applicants was the final landform of the site upon the completion of proposed extraction at the end of the proposed 36 year life of the quarry. The EIS described the final landform as comprising in effect two amphitheatres, one on each side of Broken Head Road, with slopes varying from 1:3 (vertical:horizontal) (ie about 18^0) to 1:50 to 1:200

(vertical:horizontal). There would remain on the site the proposed underpass under Broken Head Road.

The applicants were concerned at the steep gradient of the slopes. Dr Croft was of the opinion that slopes of a gradient of 1:3 was too steep for successful rehabilitation due to problems in stabilisation.

In contrast, in giving oral evidence, both Mr Hungerford, and Mr B F Olds, an inspector of mines from the Department of Minerals and Energy, were of the opinion that a final batter angle of 18^0 would not lead to problems of revegetation (T 8/3 p 8). Mr Hungerford believed that such slopes could be vegetated successfully if the company adhered to the procedures outlined in the EIS and the draft management plan (T 8/3 p 14).

Once again, it is a question of conditions of consent being imposed which would require the company to keep to the regime outlined in those documents, and I am prepared to accept, for the reasons which I outlined in relation to temporary rehabilitation, that the company should be given the opportunity to adhere to those conditions, notwithstanding that its past performance in environmental control may have been somewhat inadequate.

(6) Visual Impact

In giving evidence in chief, Mr Helman expressed concern that the proposed development currently has and would continue to have an adverse visual impact at locations such as Cape Byron, the ridge at Coopers Shoot, and the adjacent residential area of Suffolk Park (T 11/3 p 21).

I note the evidence of Ms I S Kalnins, the council's planning officer, as appears in her report (ex "N") and her oral evidence (T 8/3 pp 50-52), that the visual impact of the site upon the escarpment at Coopers Shoot would be in the vicinity land owned by Mrs K Misner, upon which development consent for the erection of a residence has been granted. However, I am satisfied from Ms Kalnin's evidence and from the photo

montage which was tendered (ex "AA"), that the visual impact at this location is not significant.

I am satisfied, however, that the site can be seen from Cape Byron (it was well within view when the Court visited Cape Byron as part of the site inspection). In addition, I accept Mr Helman's evidence that the site will have some visual impact at other locations.

I note that measures are intended to be adopted which will lessen any adverse visual impact. At present 20ha of the Batson land is disturbed; it is intended that in the future the active quarrying area will be limited to 10ha. Moreover, it is intended to temporarily rehabilitate areas of the site which will not be required for active quarrying in the short term, and there are proposals for final rehabilitation.

In these circumstances, I do not consider that development consent ought to be refused on the ground of adverse visual impact.

(7) Proximity of the Site to Residential and Tourist Areas

Adjacent to the site on the north is the township of Suffolk Park, and to the south east is land zoned 2(t) under the Byron LEP representing the Broken Head tourist area.

In cross-examination, Ms Kalnins conceded that the site lay approximately 160 metres from Suffolk Park, and about 300 metres from the Broken Head tourist area (T 8/3 p 70). She was satisfied, however, that the topography of the site, the operational system set out in the EIS, and the proposed conditions of consent would ameliorate any impact on Suffolk Park and the tourist area.

I accept Ms Kalnin's opinion, and I take into account the measures which are proposed to mitigate impact on land adjoining the site, such as the restriction of quarrying activity to 10ha at any one time. Development consent should not be refused on this ground.

(8) No Pressing Need for the Resource

The applicants contended that, in balancing the potential need for the resource which the site produces against the potential environmental impact, the Court should take into account that the quarry has a useful life without the necessity for development consent and that there may be now or in the future other regional sources for the products which the quarry produces.

The applicants base this contention on the evidence given by Mr K Batson, a director of the company. In cross-examination, Mr Batson conceded that, if development consent were to be refused, the company would have available, within the area covered by its existing use rights and with adequate batters, sufficient material for about another 13 years. That period could be even longer if mining was extended vertically downwards, as Mr Batson put it, "to China" (T 9/3 p 16).

The applicants also contended that the availability of alternative sources has not been fully explored. In the Department of Planning's draft urban planning strategy for the north coast (ex "F"), reference was made to a study to identify all significant existing and potential extractive resources in the region, which study is being undertaken by the Department of Mineral Resources. In giving oral evidence on behalf of the Department of Mineral Resources, Mr J W Brownlow stated that the study had commenced but has not yet been completed (T 7/3 p 75).

There was, however, evidence that the quarry was a significant regional source of extractive materials. In his statement of evidence (ex "Q"), Mr Brownlow said that the quarry "... is the only known, regionally significant resource of its type, and therefore maximum utilisation of this resource is essential". He identified the site as part of an isolated remnant of Ripley Road sandstone. He said that the site was unusual in the locality due to the pebbly quartz sandstone composition of the deposit, the size of the deposit, friability (ie crushability) of the material, its proximity to roads and markets, and its suitability for quarry development. In giving oral evidence, Mr Brownlow identified three matters taken into account by industry in assessing the suitability of

extractive material - cost, specifications for end use, and consistency of the product. Mr Brownlow's opinion was that the site rated very well on each of these matters, and was accordingly a preferred industry source (T 7/3 pp 78 - 79).

Mr Brownlow gave evidence as to alternative sources but was of the opinion that none of them for a variety of reasons amounted to an adequate replacement, and he instanced such reasons as limited range of products, smaller reserves, adverse environmental impact, poor road access and distance from markets.

Evidence was given on behalf of the Roads and Traffic Authority ("RTA") by Mr G K Kearns, a geotechnical services manager. In his statement of evidence (ex "S"), he outlined the way in which the quarry's products met RTA specifications, and were accordingly suitable sources of material. Although he conceded in cross-examination that the RTA was not directly involved in searching for new deposits (T 8/3 p 5), his opinion in his statement of evidence was that material from the quarry has been on occasion transported considerable distances because it was difficult to obtain alternative suitable material.

Mr T Prior, who is the regional manager in the Grafton office of the Department of Planning, gave evidence as to the planning background in relation to the site (ex "U"). He stated that it was a matter for the Department of Mineral Resources to identify significant resource sites, but once it had done so, it was appropriate to zone those sites to reflect their significance, and that the 1(e) zoning of the majority of the site was appropriate in the circumstances.

The Court's attention was also drawn to passages in the 1987 report of Commissioner Simpson following a public hearing into submissions made in respect of a draft local environmental plan for the Byron Shire (ex "AC"). Those passages reflected Commissioner Simpson's concurrence with the opinion held by the council at the time (and still held, according to Ms Kalnin's evidence) that the quarry was a resource of regional significance, the major part of which is appropriately zoned 1(e).

I am satisfied from the evidence that the extractive material produced from the quarry is regionally significant and that currently there are no adequate replacement sources for it. Whether or not adequate replacement sources may be found in the future is mere speculation and is not, in my opinion, a factor to be weighed in the balance between utilisation of a significant current resource and environmental impact.

I accept Mr Batson's evidence that there may be some years of reserves available in the quarry, but that fact must be weighed against the proposal to quarry the site for another 36 years, which would make the resource available for a considerably longer period.

I am also concerned with the "China option", as it became known during the hearing. The prospect of continued exploitation of the quarry downwards, in exercise of existing use rights, complying only with relevant departmental demands, but otherwise uncontrolled, is a significant factor. Whether or not the "China option" would require the company to comply with Pt V of the EP&A Act, the opportunity now exists to improve the regime under which a regionally significant resource is exploited, balancing the orderly and economic use of land against protection of the environment.

Should development consent be granted?

I have come to the conclusion that development consent ought to be granted, subject to appropriate conditions of consent. I have weighed up the potentially adverse environmental consequences of the proposed development against the regional significance of the site and the reserves available on the site for exploitation. I have taken into account all the matters which the applicants have raised, but, as I have said, given an appropriate regime for mitigating impact and ongoing supervision by the council, I have concluded that the balance weighs in favour of the company being permitted to continue to operate the quarry.

It is, however, essential that the quarry should be operated subject to council control and subject to compliance with the operational systems and mitigating measures identified in the EIS and related documents. That could be achieved by conditions of consent, which

I now turn to consider.

Conditions

The council and the applicants exchanged versions of the conditions of consent which each would seek to have imposed if the Court were to grant development consent. I was informed that some discussion about these versions took place between the parties during the hearing. Ultimately the council tendered a document (ex "AE") containing 65 conditions which were acceptable to the company, except that the company desired a variation to condition 65 as set out in ex "A14". In response, the applicants raised concerns with some of the proposed conditions, and suggested additional ones, which were set out in ex "17" or in ex "22".

I have examined all the conditions which were proffered by the council in ex "AE". I am satisfied that those which were not in dispute are appropriate conditions to impose, and I do not propose to comment upon them in this judgment. I will, however, deal with each disputed condition in turn:

Condition B

This condition was part of the council's original consent to the development application, and it required the consolidation of all titles of all lots in the Batson land into one lot under one title. The council later abandoned the condition, presumably at the instigation of the company, for which its implementation would be likely to involve some financial burden. The applicants sought its reinstatement, on the ground that, without it, at the end of the life of the quarry, the lots could be disposed of without council consent, which would prevent the council from controlling the final landform and ameliorating any impacts of the quarry.

I do not think, however, that it is necessary to impose this condition in order properly to control the impact of the proposed development. That development will, in accordance with condition A, be carried out pursuant to the EIS, the draft management plan, the

final management plan and the water management plan ("the EIS and related documents"), all of which relate to the site as a whole and not to the individual lots. That would be sufficient to prevent fragmentation of the quarrying activities if ownership of individual lots passed out of the hands of the company, because if fragmentation occurred it would prevent the company complying with the current development consent and be likely to require a fresh development application. Moreover, the greater part of the quarrying activity will take place on only two of the ten current lots (on lot 1 in DP 184443 on the east of Broken Head Road, and lot 1 in DP 123302 on the west of that road - plan 1.3 in the final management plan) and they are the largest lots. Upon the cessation of the quarrying activity, no part of those larger lots could be disposed of without subdivision approval, and hence the council would substantially have the opportunity for control which the applicants envisage in relation to a consolidated title.

Condition C2

This condition, in summary, requires a biennial review of the EIS and related documents to be submitted to the council. The applicants' concern was that, instead of requiring each such review to receive the approval of the council, the condition merely requires the council's planning manager to be satisfied that the works performed or to be performed satisfactorily conform with the EIS and related documents. This, according to the applicants, is a much narrower role for the council, and is inadequate.

Mr Craig, for the council, responded to this concern by submitting that the condition permits the appropriate expert council officer to oversee the development to ensure that it conforms with the concept and proposals which the development consent contemplates, and that it is unnecessary for actual approval of the council to be given to the myriad of minor details at each stage of the life of the consent.

I think that the condition as drafted is appropriate, and I am prepared to impose it, subject only to two typographical changes, which are to delete the word "and" at the end of subclause (iii) and to insert it at the end of subclause (ii) and to delete the number

"iv" from the last line.

Condition C5

This condition relates to contributions required to be paid by the company pursuant to s 94 of the EP&A Act. In the condition as originally imposed by the council, the payment of those contributions was stipulated not to commence for four years. In the condition as ultimately proffered by the council, payment is stipulated to commence 14 months from the date of consent.

The applicants contended that payment ought to commence forthwith upon the grant of consent, the contributions being required for the maintenance of roads, which are in use in connection with the quarry right now and will continue in use immediately from the date of consent.

Mr Craig submitted that the rationale for the selection of a 14 month period was to bring the quarry into conformity with other quarries in the Byron Shire. This flows, he submitted, from the operation of SEPP 37. Most quarries in the Byron Shire were, he suggested, within SEPP 37, and hence may continue to operate, subject to some limitations, until they have registered under the provision of pt 3 of the policy, and thereafter during the moratorium period specified in the policy, which is a period of two years after the registration period, and which now has 14 months to run. This quarry has, so he informed the Court, registered in accordance with the provisions of SEPP 37, and should, like any other quarry relying on existing use rights and registration under SEPP 37, be entitled to be in the same position as if it had submitted a development application at the end of the moratorium period.

I reject Mr Craig's submission in relation to this condition. The fact is that the company has elected to make a development application now, and upon consent being granted, the company will be able to operate under that consent from the date of the consent, and will not be required to rely upon whatever benefits and limitations derive from pts 2 and 4 of SEPP 37 (see cl 23 of SEPP 37). The fact that other quarry

operators in the Byron Shire may currently be operating under SEPP 37 and therefore are not yet required to make s 94 contributions is, in my opinion, quite irrelevant. It is appropriate that the company make contributions to the maintenance of roads from the time it receives development consent which will permit it to expand its quarrying operations. I propose therefore to impose the condition, but to amend the draft as currently proposed so that payment of contributions shall commence from the grant of consent.

Condition C6

This condition relates to the installation of erosion and sedimentation measures. In the original condition imposed by the council when it granted consent, that installation was required to take place "prior to commencement of operations". That phrase has been omitted from the condition now proffered by the council.

The applicants objected to the omission of the time limit, but the council pointed to the ambiguity of the words in a situation where quarrying activity is already carried out on the site. The council drew the Court's attention to the fact that it would be both impractical and unreal to require the cessation of current quarrying activities until erosion and sedimentation measures were in place. It would be reasonable, the council contended, that those measures be installed in accordance with the EIS and related documents, and in accordance with any requirements of the EPA, if the EPA requires the company to obtain a licence pursuant to condition C7, as well as in accordance with the time limit of 12 months specified in condition C14 for the installation of pollution control structures.

I agree with the council's submission. It is appropriate to impose this condition without the addition of the phrase that the applicants sought.

Condition C20

This condition imposes an obligation upon the company to prevent the discharge of water from the disturbed quarry area east of Broken Head Road to the Taylors Lake catchment, except in storm events greater than a 1 in 10 year frequency.

The applicants had two concerns with this condition. The first relates to the 1 in 10 year storm event. The applicants have proposed that the standard be set at a 1 in 100 year frequency. I have earlier referred to the fact that this standard of 1 in 10 was suggested by the EPA in its letter to the council of 26 March 1993 (ex "L"). It is reasonable, therefore, to impose that standard.

The applicants' other concern arising from this condition was with the dimensions and capacity of the western settling pond, because that is the pond into which overflow from the eastern settling pond is to be pumped in accordance with the draft management plan. I note however that condition C17 (as to which there is no dispute) is intended to ensure that the settling ponds be of sufficient volume to produce water of the standard which is specified in condition C8, and plans for the settling ponds are required to be submitted to the council's development engineer for approval.

In the light of these matters, I do not think the condition should be altered.

Condition C24

The purpose of this condition is to mitigate noise impact at the nearest approved residence, which is likely to be the residence which has been approved for Mr Bogic's land (ex "AD"). The condition sets a standard not to exceed an L_{A10} of 43dBA or a level which is 5dBA above ambient background noise, whichever is the greater.

Once again, the applicants had two concerns. The first concern related to the standard of 5dBA above ambient background noise. They pointed to the fact, correctly in my view, that this is a "movable feast" type of condition, and fails to relate to the

recommendation of the company's own expert, Mr Godson, who thought that a noise level not exceeding an L_{A10} of 43dBA would be appropriate at the residence on Mr Bogic's land. I propose to impose a condition which will set that standard at Mr Bogic's approved residence, and to omit reference to the alternative level of 5dBA above background.

The applicants' other concern, to which I have already adverted in this judgment, was that noise impact at the boundary of the property of Mr Bogic should be monitored and an appropriate standard set. The applicants submitted that that standard ought to be background plus 5dBA, and if the company was unable to meet that standard, it ought to be obliged to acquire the adjoining land or undertake noise attenuation measures which would be satisfactory to the adjoining owner.

As I earlier stated, I think that the appropriate point on Mr Bogic's land where noise impact should be restricted is the location of his approved residence, it being the most sensitive point of impact. I do not propose, therefore, to impose any condition which would relate to noise control measures at the boundary of Mr Bogic's land.

Condition C26

This condition is intended to control the hours of operation of the quarry.

The applicants requested more limited hours than those proposed, but I think that the suggested hours are not inappropriate.

The applicants objected to the proviso which would allow maintenance of plant and equipment to be carried out at any time. I agree that the width of this proviso might lead to some unreasonable impact, and I propose to limit maintenance to any time except between 8.00 pm and 6.00 am.

Lastly, the applicants took issue with that part of the condition which prohibited operation of the quarry on Sundays and on any of four specified public holidays (Christmas Day, Boxing Day, Good Friday and Easter Monday), and they queried whether the prohibition should not extend to every public holiday. Mr Craig submitted that the four days were specified in order to adopt a more modern approach of not being rigidly confined to statutory public holidays. Whilst I applaud the sentiment of working on less significant public holidays, I recognise that this condition is designed to restrict days of quarry activity so as to allow neighbouring residents to enjoy the amenity of their residences, especially when they are not required to go to work. On that basis, there can be no good reason to confine the days of closure only to the four religious holidays. I propose to reinstate reference to all statutory public holidays.

Condition C28

The council intended to delete this condition, which originally specified that, prior to any clearing, catch drains were to be constructed along downslope boundaries. The reason for its deletion, so the council submitted, was that the requirement was already part of the draft management plan and the final management plan, and would have to be implemented pursuant to condition A, which requires the company to carry out the proposed development in accordance with the provisions of those plans.

I am satisfied that the diversion drains which are contemplated in sections 5.2.4 and 5.2.5 of the draft management plan are sufficient to make the original condition redundant.

Condition C36

This condition, like condition C28, was omitted, so the council asserted, because it was already covered by the provisions of the draft management plan and the final management plan.

However, unlike condition C28, condition C36 is a much more general provision, which requires the encouragement of rainforest regeneration in suitable areas in the western sector of the study area. It is not unlike condition C35 which requires the re-establishment of wet sclerophyll forest and rainforest communities in any suitable areas, but I note that condition C35 was not omitted.

The difference between condition C35 and condition C36 is that condition C36 provides that regeneration should follow two requirements - that it be in accordance with accepted rainforest regeneration practices and that it be carried out in consultation with National Parks. In view of the provisions of condition C39, which requires all rehabilitation measures to be carried out under the direction of a qualified plant ecologist, I consider that these two requirements may be omitted from the condition, but that it ought otherwise be imposed.

Condition C53

I have already referred to a proposal of the company to quarantine two sensitive areas on the site, until further investigation of endangered species of bat and potoroo are carried out. This condition is intended to implement that proposal.

Three corrections must at once be made to the draft condition. It omitted any reference to the long-nosed potoroo; it is quite clear that this species was intended to be the subject of investigation in the quarantined areas, and insertion of a reference to it was immediately conceded by Mr Craig. Secondly, the draft condition referred to a prohibition on "major" clearing, whereas it seems obvious that all clearing must be prohibited in the quarantined areas unless and until the events contemplated by the condition have come to pass, and so much was conceded by Mr Hemmings. Thirdly, the condition as presently drafted prohibits quarrying in the quarantined areas until a licence under s 120 of the NP&W Act has been obtained. I think that that prohibition should extend to "clearing" as well as "quarrying", and I propose to amend the condition accordingly.

However, the fundamental objection of the applicants to the clause is, they claimed, that it merely defers development and impact upon the quarantined areas until the requirements of National Parks have been satisfied.

In my opinion, however, the condition operates to impose more than mere deferral. It may result in the quarantined areas never being the subject of clearing and quarrying, because the Director-General of National Parks may never issue a licence under s 120 of the NP&W Act to take and kill protected fauna. If those areas do become part of the active quarry, then they will do so only after the requirements of s 92B of the NP&W Act in relation to the issue of a licence under s 120 have been observed, which includes the preparation of a fauna impact statement, the public exhibition of that fauna impact statement, and consideration by the Director-General of the matters specified in s 92B.

The condition seems to me to be an eminently suitable condition to impose, given that more investigation of the potoroo and bats is required, that the quarantined areas are those regarded by the company's experts as the two most sensitive areas, and that the National Parks is the appropriate authority to determine the significance of those areas so far as concerns the environment of endangered fauna.

Additional conditions

The applicants sought the imposition of some additional conditions.

The first of these related to the establishment of a community environment committee (which is referred to in condition 64 of ex "17"). I am not persuaded of the need to establish a committee comprised of representatives of various government departments as well as of the Broken Head Protection Committee and Byron Environment and Conservation Organisation (Beacon). I agree with Mr Craig's submission that the government departments cannot be compelled to join such a committee. Furthermore, I have no evidence from which to conclude that the other two named organisations are truly representative of the community, whereas the council is the elected body charged with the public duty of ensuring compliance with the law. It is the council's duty to

monitor compliance by the company with conditions of consent, and there is ample opportunity for the public generally to be made aware of what has been done or is proposed on the site by the requirement in condition C2 for public exhibition of the biennial reviews.

The applicants also pressed for a 1 in 100 year storm event frequency to be inserted in condition C20, and, in relation to condition C24, for noise impact to be measured at the boundary of adjacent properties as well as a requirement for the company to acquire adjacent land if the required noise standard could not be met. I have dealt with these issues in considering conditions C20 and C24 and there is no need to repeat my earlier remarks in relation to them.

Earlier in this judgment, I noted that Mr Parker had identified, in ex "10", seven core conservation areas. The applicants pressed for a condition excluding these areas from the development consent. As I earlier noted, the parts of the site which are included in these areas are extensive, and exclusion of them from the development consent would result, in my opinion, in sterilisation of major parts of the site, which I believe is unwarranted on the expert evidence which has been adduced.

Next, the applicants sought the imposition of a condition (numbered 63 in ex "17") which would require the provision by the company of a bond in the amount of $250,000 as a guarantee of the performance of environmental and revegetation requirements. The council opposed the imposition of such a condition, arguing that there was no evidence before the Court upon which to determine if such a bond was necessary, and, if so, how much it should be. I agree with that submission and I do not propose to impose such a condition.

Condition 65 of ex "17" sought to require the company to engage a full-time environmental officer to supervise the undertaking of revegetation and the implementation of environmental controls. In the light of condition C39 (which requires rehabilitation measures to be carried out under the direction of a qualified plant ecologist) and the general supervisory role which the conditions of consent impose upon

the council, I do not think the engagement of a full-time environmental officer is warranted.

The applicants expressed concern at the 36 year life of the quarry, arguing that a condition should be imposed limiting the duration of development consent to a shorter period of either 15 years, as set out in condition 62 in ex "17", or 21 years, being the normal term of mining leases. The proposed development is predicated, in the EIS and related documents, on a quarry life of 36 years, and I cannot see any cogent reason why that period should be reduced. I note, however, that the conditions of consent as proffered do not expressly refer to a term of 36 years, although it is implied by virtue of the requirement that the development be carried out generally in accordance with the EIS and related documents. I consider that a condition stipulating such term should be imposed, and I propose to impose condition C66 accordingly.

There were four other conditions sought by the applicants which are set out in ex "22". The first of them sought to limit the quarry production to the production of the previous year plus two per cent of that production. Although Dr Croft had concerns that the company's projected production was seriously under-estimated in terms of time and demand, I am not persuaded that the impact of such under-estimation, assuming it to be correct, should require limitation on the company's production.

Secondly, the applicants sought a requirement that rehabilitation will be undertaken such that, after two years, water run-off from temporary and final rehabilitation areas will satisfy EPA requirements. I am satisfied that this is already covered by conditions C7 and C8.

Thirdly, the applicants sought a requirement for regular ecological studies of the water quality in Midgen Creek. Similarly, I am satisfied that the water and drainage controls which are imposed by conditions C6 to C21 will be adequate for the purpose of sedimentation control and water quality, and no additional investigation other than imposed by those conditions is required.

Lastly, the applicants were concerned about the impact of dust from the quarry, and sought the imposition of a condition requiring the cessation of the operation of the dry processing plant until it had been satisfactorily demonstrated that dust was not a health hazard for operators. Dr Croft gave some evidence about the impact of dust, but I am not satisfied that there is a significant impact from dust, and I do not propose to impose this condition.

Orders

In accordance with the foregoing, my formal orders are:

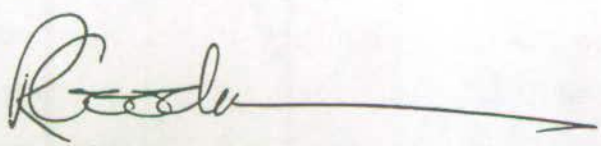
1. The appeal is dismissed.

2. Development consent is granted to the use for the purpose of a quarry of land at Broken Head, being lot 1 DP 123302, lot 2 DP 700806, lots 1 - 6 DP 245836, lot 4 DP 802745 and lot 1 DP 184443, and known as the Batson Sand and Gravel Quarry, in accordance with development application No 92/0455 and subject to the conditions annexed hereto and marked "A".

3. The exhibits may be returned.

I make no order as to costs.

I HEREBY CERTIFY THAT THIS AND THE PRECEDING 49 PAGES ARE A TRUE AND ACCURATE RECORD OF THE REASONS FOR JUDGMENT HEREIN OF THE HONOURABLE JUSTICE M L PEARLMAN AM.



Associate

ANNEXURE "A"

CONDITIONS

Broken Head Protection Committee and Peter Helman
v
Byron Council Batson Sand and Gravel Pty Limited

A. Development being generally in accordance with the EIS dated 13 November 1992, the proposed Plan of Management for the Suffolk Park Sand Quarry prepared by R W Corkery & Co Pty Ltd, numbered 314/2, dated January 1994, the Plan of Management dated 01.02.94 and the Water Management Plan for Batson's Quarry Suffolk Park prepared by Ray Sargent & Associates Pty Ltd, dated 10 December 1993, (the last three (3) documents are included in the expression "the Plan of Management") as modified by any conditions of consent.

B. No condition.

C. The following conditions are to be complied with at all times:

1. The Plan of Management is to be kept at the site and Council offices at all times of operation and shall be available at the Council offices for public inspection.

2. Extraction of sand and gravel to be in accordance with the Plan of Management which is to be reviewed biennially by the owner and the report of each such review is to be submitted to the Council's Planning Manager for the purpose of satisfying him or her that the works performed or to be performed satisfactorily conform with the EIS and the Plan of Management. The biennial reviews are to include:

   (i) details of the past two years' operations, environmental control measures and rehabilitation works;

(ii) details of compliance with conditions of development consent; and

(iii) a schedule of works including extractive operations, environmental control and rehabilitation proposed to be undertaken over the ensuing two year period.

Council shall make such reports available for public inspection at the Council offices.

3. Compliance with the Schedule for Implementation of Controls and Safeguards outlined in Table 4.1 on Page 100 of the Environmental Impact Statement except as otherwise modified by any conditions of consent.

4. The applicant shall prepare for consideration and approval of the Council's Planning Manager within six (6) months of the date of consent, proposals for monitoring of noise control, water quality and discharges, rehabilitation, erosion and dust control and environmental damage mitigation practices identified in documents referred to in Condition A.

5. The applicant will pay or procure a payment to the Council of a contribution under Section 94 of the Environmental Planning and Assessment Act 1979 for road pavement damage at the rate of $0.30 per tonne of all materials transported from the quarry and in respect of the said contribution the following provisions shall apply:

(i) the said contribution will be calculated and paid monthly the first payment calculated from the date of this consent to be paid one month from the date of this consent, and thereafter on the corresponding day of each month;

(ii) the said contribution shall be indexed and adjusted annually as and from the date the consent becomes effective, in accordance with the Consumer Price Index applicable to each year;

(iii) on or before the 14th day of each month for the duration of the consent, the applicant will deliver or procure delivery to the Council of a true certified copy of weighbridge dockets or other returns or records showing the true quantities of extracted materials transported from the property during the immediately preceding month together with the contributions as calculated in (ii) above;

(iv) Council has the right to inspect and have the original records relating to any of the extracted material, including numbers and types of trucks, trailers and load quantities transported from the property, audited by any person nominated by its internal accountant at any time when he may by written request so require;

(v) Council will pay all of the said contribution payments into a specially identified trust account for payment towards the rehabilitation, restoration, repair and/or maintenance of Broken Head Road from the Shire boundary to Bangalow Road, Bangalow Road from Byron to Bangalow, Tennyson Street, Marvel Street, Fletcher Street, Lawson Street, Shirley Street, Ewingsdale Road from Shirley Street to the Pacific Highway and Midgen Flat Road from Broken Head Road to the Shire boundary.

Water/Drainage

6. Erosion and sedimentation control measures are to be installed to prevent the release of sediments or contaminated water from the site in accordance with the Plan of Management.

7. The applicant/owner will obtain and keep current a licence from the Environment Protection Authority to discharge any wastewater from the quarry if so required by the Environment Protection Authority.

8. Standards for wastewater discharge will be:

   (a) 50mg or less per litre of non filterable residues;

   (b) free from oil and grease;

   (c) a pH which varies by no more than 0.5 from the receiving waters measured at a location to be specified by the Council in consultation with the Environment Protection Authority.

9. No condition.

10. A floating inlet will be fitted to any pump used to discharge from ponds in order to minimise the entrainment of any settled sediments.

11. The settling ponds will be desilted regularly to maintain the designed wastewater capacity.

12. Sedimentation controls must be established and maintained on the subject site to ensure sand, silt and clay does not enter downstream drainage systems.

13. Erosion controls must be in place prior to disturbance of vegetated areas, including any temporary rehabilitated areas.

14. Pollution control structures are to be in place and operative within 12 months of the date of this consent.

15. Settling ponds and silt traps must be designed and certified as adequate by a practicing Civil Engineer.

16. Silt traps must be designed to be of sufficient volume to trap the run-off and to settle the coarse fines from a 1 in 10 year storm event prior to its release to the settling pond. Plans to be submitted to Council's Development Engineer for approval prior to work commencing.

17. Settling ponds must be of sufficient volume to produce discharge water of a standard as specified in Condition C8. Plans for settling ponds to be submitted to Council's Development Engineer for approval prior to work commencing.

18. The processed water pond must be of sufficient volume to provide adequate water for the operation of the wet processing plant. Plans to be submitted to Council's Development Engineer for approval prior to work commencing.

19. Settling ponds and processed water pond will be maintained with a minimum water volumes to provide adequate water for quarrying operations and a maximum flood storage. Plans to be submitted to Council's Development Engineer for approval prior to work commencing.

20. No water from the disturbed quarry area east of Broken Head Road, except for water from storm events greater than a 1 in 10 year frequency, will be discharged to Taylors Lake catchment.

21. The applicant will obtain a licence from the Department of Water Resources to divert or carry out works upon the bed or banks of any creeks if so required.

Noise/Visual Impact

22. To minimise noise and visual impact, a minimum 3m high barrier is to be constructed and maintained between the active quarry and any nearby approved residence in accordance with the Plan of Management and the EIS.

23. The following visual controls are to be imposed throughout the extended quarry operations:

(a) the area of active quarry surface at any one time is to be a maximum of 5ha east and 5ha west of Broken Head Road. The active quarry surface area is defined as the faces that are subject to active quarrying, exposed cleared areas in the working area to be quarried, silts drying area, product and raw material stockpiles, the area of the dry and wet processing plants and associated stockpiles and haulage roads between cells;

(b) maintain a minimum 15m wide landscape buffer, in addition to any cleared area for a fire break, adjacent to the project site boundary and undertake quarry operations behind that buffer zone;

(c) construct and vegetate any bund walls as identified in the documents referred to in Condition A;

(d) undertake progressive rehabilitation throughout the course of the operations in accordance with documents referred to in Condition A;

(e) ensure that stockpiles are not visible from Broken Head Road;

(f) limit the extent of clearing to be undertaken to the minimum required for the ensuing year's quarrying operation; and

(g) undertake native tree and shrub planting and subsequent maintenance to supplement existing vegetation adjacent to Broken Head Road, Taylors Lake Road and Natural Lane in accordance with documents referred to in Condition A.

24. The development is to be conducted such that levels of noise emitted from active quarry operations when measured at the nearest approved residence to such operations will not exceed L_{A10} of 43dB(A).

25. No condition.

Hours of Operation

26. Hours of operation shall be from 7.00 am - 6.00 pm, Monday to Friday, 7.00 am - 4.00 pm Saturday inclusive provided that maintenance of plant and equipment can be carried out at any time except between the hours of 8.00 pm and 6.00 am. The owner/operator shall ensure that trucks do not arrive on the site prior to 6.30 am, Monday - Saturday. There shall be no operation on Sundays or on any statutory public holiday.

Vegetation/Soil Management

27. Clearing of vegetation will occur during the months July - September only.

28. No condition.

29. Windrowed timber from clearing operations is not to encroach within the designated buffer areas.

30. Topsoil stockpiles to be a maximum of 1.5m in height. Subsoil stockpiles to be a maximum of 3m in height.

31. Stockpiles of soil intended for rehabilitation and retained for a period greater than one month are to be sown with grass and/or leguminous species to reduce erosion and prevent downstream sedimentation.

32. A 3m-5m earthen bund temporary wall or stockpile is to be constructed approximately 40m north-east of the dry processing plant to minimise noise between the residential area of Suffolk Park and the quarry operations. The temporary wall/stockpile is to be removed only when the reduction in the quarry floor height will effectively act as a noise barrier.

33. An artificial wetland will be created on the north eastern boundary in the vicinity of the existing sedimentation dam in the final quarrying stage. This dam will incorporate wetland species in accordance with the Plan of Management.

34. As each cell ceases work operations, rehabilitation of the cell is to commence in accordance with the Plan of Management and the work necessary to achieve revegetation must be completed within 2 months from the cessation of extraction within that cell.

35. Wet sclerophyll forest and rainforest communities are to be established in areas assessed as suitable by a qualified plant ecologist and approved by the Council's Planning Manager.

36. Rainforest regeneration is to be encouraged in suitable areas in the western sector of the study area.

37. Site access is to be restricted in rehabilitating areas so that such areas are not damaged by activities such as trail bike riding, horse riding or the like.

38. Where feasible (ie along edges where some clearing may be optional) mature seed trees, particularly rainforest species should be retained.

39. Rehabilitation measures must be carried out under the direction of a qualified plant ecologist.

40. A monitoring programme must be implemented by the applicant/owner to obtain data on pre-quarrying and post-quarrying vegetation composition and structure. This is to enable assessments of the aims and progress of rehabilitation works to be made throughout the life of the project. Such a monitoring programme is to incorporate on-going consultation with the Council's Planning Manager and be reported in the biennial Plan of Management reviews.

Roads/Underpass/Traffic

41. Construction of the underpass and the two accesses on to Broken Head Road within two (2) years of this approval including shake down areas or tyre wash areas at the end of the bitumen seal. These shake down areas or tyre wash areas to be connected to the sedimentation ponds.

42. Submission of detailed engineering drawings of the underpass, shake down areas or tyre wash areas and exit/entry points for Council approval prior to works commencing.

43. Upon completion of the underpass and the two accesses in accordance with Condition C41 the applicant/owner will cease the existing vehicular access points from Broken Head Road to the site. Within two (2) months from completion of the underpass, the applicant/owner will commence the work necessary to rehabilitate all existing access points not then in use.

44. All existing accesses to be sealed for a minimum of 50 metres from the edge of the existing seal in Broken Head Road in accordance with Council drawings 909/1 and shake down areas and/or tyre wash areas constructed at each access point to prevent quarry material being carried on to Broken Head Road. These shake down areas and/or tyre wash areas are to be connected to an adjacent silt

trap. Plans to be submitted to the Council's Development Engineer for approval within three (3) months of this approval and the works completed within three (3) months of the plans being approved.

45. The applicant/owner will maintain the warning signs "trucks entering" along Broken Head Road at the northern and southern property boundaries.

46. Upon completion of the underpass all quarry traffic moving from east to west and vice versa is to travel via the underpass with only left turn traffic movements on to and off Broken Head Road.

47. Submission of a works as executed plan of the underpass for approval of Council's Development Engineer.

48. All works to be designed and constructed to at least the minimum requirements of Council's Specifications for Engineering Works.

49. Only product trucks (ie commercial semi-trailers or rigid bodied tip trucks) will be used in Area C. Specialised haulage trucks for raw materials' transport are not to be used in Area C at any time unless the noise generated by the use of such trucks satisfies current permissible limits or standards.

50. Final slope of batters along the haul road will be 1:3 or less and be fully stabilised, topsoiled and revegetated.

51. All loads leaving the quarry premises must be covered in order to minimise the effects of dust on the surrounding area.

Fauna

Mitigation of Impacts on Fauna:

52. No condition.

53. Bat and potoroo surveys are to be undertaken prior to any clearing in the areas shown on Plan 2.4 of the approved Plan of Management, dated January 1994 and identified as "Area recommended not to be disturbed" subject to the deviation of the haul road and associated works marked on the plan which is Exhibit A9 in these proceedings, in order to determine the extent of use of the habitat areas by any rare or endangered species as identified under the Endangered Fauna (Interim Protection) Act 1991. The surveys are to be forwarded to Council in order to enable it, through consultation with the NSW National Parks and Wildlife Service, to determine the need for a licence under Section 120 of the National Parks and Wildlife Act 1974. If a licence is required, then no clearing or quarrying is to proceed in the abovementioned areas until a licence has been issued.

54. Care is to be taken at all times to restrict disturbance to the minimum area required so that adverse effects on habitat and associated fauna are minimised.

Quarry Area

55. Subject to undertaking the work referred to in Section 2.4.6. of the EIS and Table 3.2 of the Plan of Management, clearing for quarry expansion is to commence on the western side of Broken Head Road only when Cell E1 has been fully extracted down to 14m AHD, Cell E4 down to 13.5m AHD and when Cells E2 and E3 have reached an extraction depth of 15m AHD.

56. The area of active quarry within Area C to be a maximum 0.5ha.

57. Extraction depth limits for each given cell are to generally be in accordance with Extraction Depth Limit shown on the Schedule to this consent.

58. No quarrying is to occur in Area C within a distance of 10m of the driveway to the existing dwelling located on Lot 1 DP 563373, Broken Head Road, Suffolk Park.

Operational Safeguards

59. Trade waste from the site is to be disposed of only in the manner acceptable to the Council's Development Control Manager.

60. Installation of a septic treatment system adjacent to the new wet processing plant subject to meeting Council's requirement for wastewater disposal.

Archaeology

61. Quarry operations are not to disturb any archaeological sites which may be found or identified over proposed extended quarry operations without prior consultation with NSW National Parks and Wildlife Service and their approval.

Bushfire

62. No burning of stockpiled material.

63. No placing of stockpiled materials within 30m of existing vegetation.

64. All bushfire hazard reduction methods and requirements are to be prepared in consultation with and to the satisfaction of Council's Fire Control Officer.

Existing Use Rights

65. Save in respect of the land currently zoned 7(d) under the Byron Local Environmental Plan 1988 which land will be used pursuant to the EIS and the Plan of Management in accordance with these conditions of consent, the applicant/owner will surrender any right conferred under Division 2 of Part 4 of the Environmental Planning and Assessment Act 1979, in respect of the whole or any part of the land the subject of this consent.

Duration of Consent

66. This consent shall lapse 36 years after the date of commencement.

MAXIMUM LIMIT OF EXTRACTION SCHEDULE

EXTRACTION CELL	EXTRACTION DEPTH LIMIT (M/AHD)
E1	14
E2	15
E3	14
E4	13.5
W1	33
W2	32
W3	34
W4	33
C1	13.5
C2	13.5
C3	13.5