IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

Not Restricted

S ECI 2021 00384

THE PEOPLE OF THE SMALL TOWN OF HAWKESDALE INCORPORATED — Plaintiff

v

MINISTER FOR PLANNING — First Defendant

and

GLOBAL POWER GENERATION AUSTRALIA PTY LTD (ACN 130 542 031) — Second Defendant

and

HAWKESDALE ASSET PTY LTD (ACN 643 793 711) — Third Defendant

JUDGE:	Richards J
WHERE HELD:	Melbourne
DATE OF HEARING:	24–25 May 2021
DATE OF JUDGMENT:	20 August 2021
CASE MAY BE CITED AS:	The People of the Small Town of Hawkesdale Incorporated v Minister for Planning
MEDIUM NEUTRAL CITATION:	[2021] VSC 510

ADMINISTRATIVE LAW – Judicial review – Planning permit for development and use of land as wind farm – Request for extension of time for completion of development before expiry of permit – Minister's decision to extend time – Standing of plaintiff – Where plaintiff is an incorporated association – Principles concerning standing – Whether plaintiff has a special interest in the subject matter of the proceeding – Where plaintiff formed association in order to bring proceeding – Whether the association can derive standing from the interests of its members – Plaintiff has no standing – Validity of extension decision – Whether Minister's power in s 69(2) of the *Planning and Environment Act 1987* (Vic) to extend permit

was enlivened – Who requested the extension – Whether Minister had an alternative power to extend permit pursuant to permit condition – Whether Minister's decision affected by error of law on the face of the record – Minister's decision not invalid – Proceeding dismissed – *Planning and Environment Act 1987* (Vic), ss 62, 68, 69.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr A Myers AC QC with Mr S Frauenfelder	DST Legal
For the First Defendant	Ms JE Forsyth SC with Ms C van Proctor	Matthew Hocking, Victorian Government Solicitor
For the Second and Third Defendants	Mr JD Pizer QC with Mr BC Chessell and Mr L Carter	Baker McKenzie

TABLE OF CONTENTS

HER HONOUR:

1 Hawkesdale is a small town in Moyne Shire in south-western Victoria, roughly half way between Hamilton to the north-west and Warrnambool to the south-east. About 250 people live in the town, which is surrounded by farmland. A combined post office and general store services the town and the nearby area. Hawkesdale is a close-knit community, with a P-12 school, a community hall, some sporting facilities, a hotel, a fire brigade, and a scout group.

2 On 21 August 2008, the **Minister** for Planning issued Planning **Permit** No. 20060221-A, which permitted the development and use of land near Hawkesdale as a wind farm with up to 31 wind turbines, each with a maximum height of 121.5 metres. So far, the development has been limited to the installation of three wind monitoring masts, an access road and a fenced site compound. No wind turbines have been built to date, and the land is not currently being used as a wind farm.

3 The Permit has been amended and extended on a number of occasions. On 21 December 2017, the Minister amended the Permit to reduce the maximum number of wind turbines to 26, increase the maximum height of the turbines to 180 metres, and extend the Permit so that it would expire if works were not completed by 29 August 2020. Most recently, on 2 November 2020, a delegate of the Minister approved a request for a further extension of time for completion of the development of the wind farm, to 29 August 2023. The **Extension Decision** was recommended in an **Assessment Report** prepared by an officer of the Department of Environment, Land, Water and Planning (**DELWP**).

4 In this proceeding, an incorporated association called The People of the Small Town of Hawkesdale Incorporated seeks judicial review remedies in respect of the Extension Decision. The **Association** contends that the Extension Decision was invalid because there was no valid request to extend the Permit for the purposes of s 69(1) of the *Planning and Environment Act 1987* (Vic) (**Planning Act**). Alternatively, it argues that the Extension Decision was affected by an error of law on the face of the record. It

seeks orders quashing the Extension Decision, and a declaration that the Permit expired on 29 August 2020. It also seeks an extension of time within which to commence the proceeding, under r 56.02 of the *Supreme Court (General Civil Procedure) **Rules** 2015* (Vic).

5 The proceeding is defended by the Minister, and by the wind farm proponents **Global Power** Generation Australia Pty Ltd and **Hawkesdale Asset** Pty Ltd (together, the **Proponents**). The defendants all take issue with the Association's standing to bring the proceeding, and contend that the Extension Decision was valid and involved no error of law on the face of the record.

6 For the reasons that follow, I have concluded that:

(a) The Association does not have standing to bring the proceeding.

(b) The Minister did not have power to extend the permit under s 69(2) of the Planning Act. The request to extend the Permit was made by Global Power, which did not claim to be 'the occupier of the land' to which the Permit applies for the purposes of s 69(1) of the Planning Act, and so the Minister's power under s 69(2) was not enlivened.

(c) Condition 64 of the Permit was a valid source of an alternative power to extend the Permit, which supported the Extension Decision independently of s 69 of the Planning Act.

(d) The Assessment Report was not shown to contain any error of fact or law.

7 As a result, the proceeding will be dismissed.

Planning Permit No. 20060221-A

8 The Permit was first issued by the Minister as responsible authority on 21 August 2008, under Pt 4, Div 6 of the Planning Act. It allows the use and development of the land described in the Permit for a wind energy facility, and removal of native vegetation.

9 The land to which the Permit relates comprises about 50 separate parcels of privately owned land, as well as a disused railway reserve and two roads and road reserves. The private land is, broadly speaking, owned by four families who live in the Hawkesdale area: the McRae family, the Bennett family, the Tanner family, and the Ware family. **Figure 1** shows the land affected by the Permit, to the south and east of the Hawkesdale township, and the proposed sites of the wind turbines.

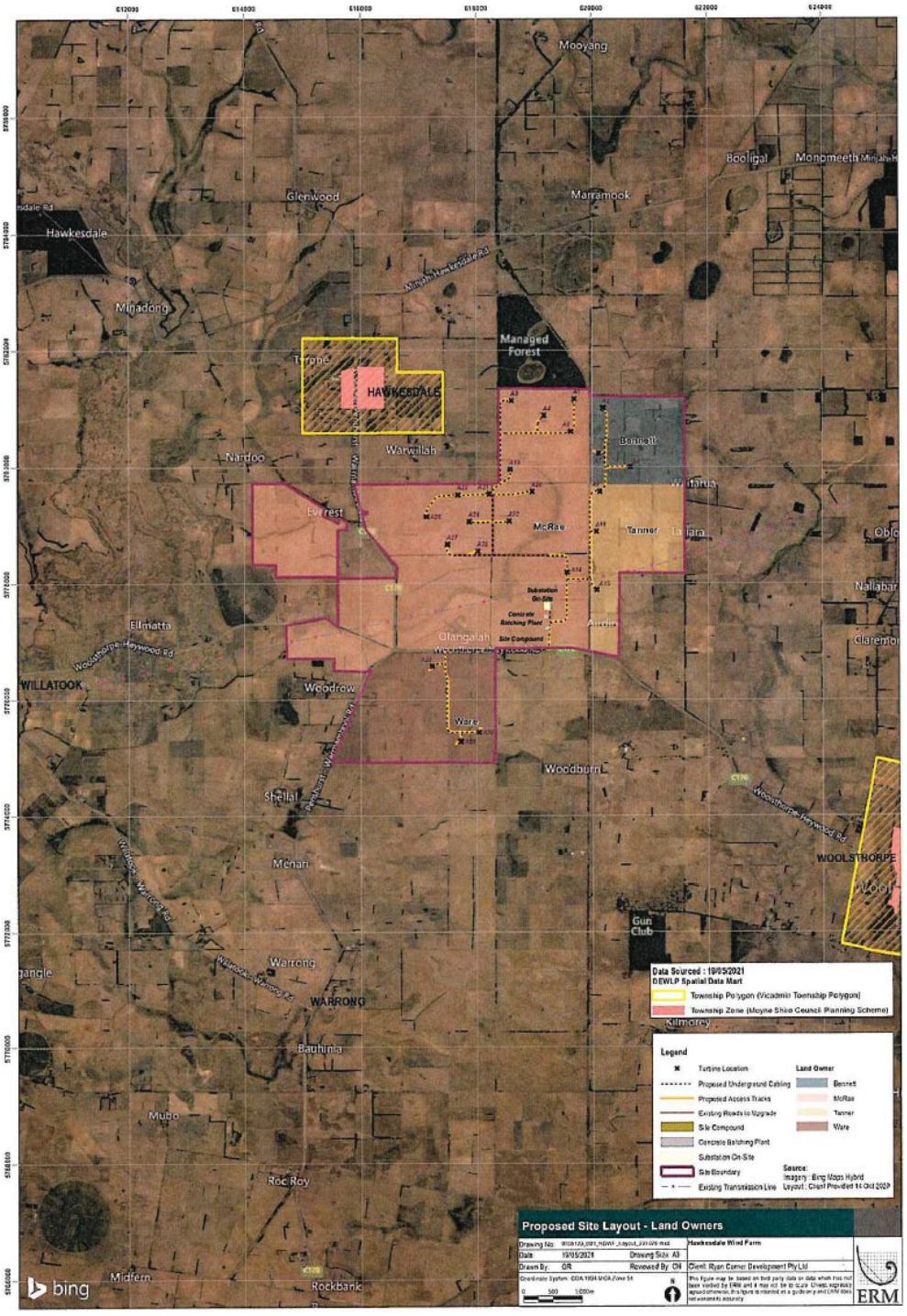

Figure 1: Map of Hawkesdale township and surrounding area.

10 Condition 42 of the Permit requires the operation of the wind energy facility to comply with **New Zealand Standard** 6808:2010, Acoustics – Wind farm noise, in relation to any dwelling existing on land in the vicinity of the facility as at 28 February 2017, to the satisfaction of the Minister. A number of requirements for determining compliance with the Standard are specified.

11 The Permit also contains conditions relating to noise compliance assessment, as follows:

> 43. An independent post-construction noise monitoring program must be commissioned by the proponent within 2 months from the commissioning of the first turbine and continue for 12 months after the commissioning of the last turbine, to the satisfaction of the Minister for Planning. The independent expert must have experience in acoustic measurement and analysis of wind turbine noise. The program must be carried out in accordance with New Zealand Standard 6808:2010 as varied by Condition 42 above. The operator under this permit must pay the reasonable costs of the monitoring program.
>
> 44. The results of the post-construction noise monitoring program, data and details of compliance and non-compliance with the New Zealand Standard must be forwarded to the Minister for Planning within 14 months after the commissioning of any turbine. The results must be written in plain English and formatted for reading by laypeople.
>
> 45. All noise compliance reports must be accompanied by a report from an environmental auditor appointed under the Environment Protection Act 1970 with their opinion on the methodology and results contained in the noise compliance testing plan. If a suitable auditor cannot be engaged, the proponent may seek the written consent of the Minister for Planning to obtain an independent peer review of the noise report instead.

12 Condition 64 of the Permit provides for its expiry, in the following terms:

> **EXPIRY**
>
> This permit will expire if one of the following circumstances applies:
>
> (a) the development is not started within 3 years of the date of this permit:
>
> (b) the development is not completed within 6 years of the date of this permit.
>
> The Minister for Planning as responsible authority may extend the periods referred to if a request is made in writing before the permit expires, or within 12 months afterwards.

13 The Permit includes a table of amendments, as follows:

Date of amendment	Brief description of amendment
15 November 2011	Pursuant to Section 69 of the Planning and Environment Act 1987 this permit was extended so that development must start no later than 15 March 2012.
31 October 2013	Pursuant to Section 69 of the Planning and Environment Act 1987 this permit was extended so that the permit will expire if the development is not completed by February 2016.
09 April 2015	Pursuant to Section 69 of the Planning and Environment Act 1987 this permit was extended so that the permit will expire if works are not completed by 29 August 2019.
21 Dec 2017	Pursuant to Section 97J of the Planning and Environment Act 1987 this permit was amended to increase the height of turbines, reduce the number of turbines, and to modify conditions under the permit. Pursuant to Section 69 of the Planning and Environment Act 1987 this permit was extended so that the permit will expire if works are not completed by 29 August 2020.

14 The amendment made in December 2017 was the outcome of an application made by **Ryan Corner Development** Pty Ltd in February 2017, to amend the permits for the Hawkesdale wind farm and another proposed wind farm at Ryan Corner, some distance to the south-west of Hawkesdale. The Minister referred the objections and submissions received in respect of the amendment application to a panel appointed under Pt 8 of the Planning Act. The Panel held hearings in Port Fairy, a town near both Hawkesdale and Ryan Corner, in August 2017, and provided its report to the Minister on 24 October 2017. The Panel concluded that the amendment application was 'strongly supported by policy' and the project would 'contribute to meeting Victoria's renewable energy commitments and targets'. It supported the proposed amendments to the Permit.[1]

Extension Decision

15 The Extension Decision was communicated in a letter dated 2 November 2020, from Michael Juttner, Manager, Development Approvals and Design, Renewables,

[1] Panel Report: Moyne Planning Scheme Applications to amend Planning Permits 2006/0221 and 2006/0222 Hawkesdale and Ryan Corner Wind Energy Farms dated 24 October 2017.

DELWP. The letter was addressed to 'Global Power Generation Australia Pty Ltd', care of Environment Resources Management Australia Pty Ltd (**ERM**), the planning consultant who submitted the request for an extension. It said:

> I refer to the request submitted to the Minister for Planning C/- Department of Environment, Land, Water and Planning (the Department) on 17 August 2020 seeking an extension of time for planning permit 20060221-A for the Hawkesdale Wind Farm.
>
> I advise that this request has been approved under delegation from the Minister for Planning. The development must now be completed by 29 August 2023 or the permit will expire. Please attach a copy of this letter to the planning permit.

16 There was no dispute that Mr Juttner held the necessary delegation from the Minister to extend the time for completion of the development.

17 The request to extend the Permit was the subject of an Assessment Report dated 29 October 2020, prepared by Mitch Connolly, Planner, Renewables in DELWP. The Assessment Report also considered a request to extend time for completion of the Ryan Corner wind farm. After setting out relevant background matters, the Assessment Report summarised the proposal:

> 2. The following information summarises the request for an extension of time:

Date requests were received	17 August 2020		
Applicant	ERM on behalf of Global Power Generation		
Request Summary	The applicant has requested that the expiry date for the completion of the development be extended by 3 years. It is noted that no extension is required for the commencement of the use, which must commence within two years after the completion of the development in accordance with s 68(3)(c) of the Act.		
Request		**Current**	**Proposed**
	Expiry date for completion of development	29 August 2020	29 August 2023

> 3. Condition 64 of permit 2006/0221 (Hawkesdale) … provides for the expiry and extension of the permits as follows:
>
> *This permit will expire if one of the following circumstances applies:*

(a) the development is not started within 3 years of the date of this permit:

(b) the development is not completed within 6 years of the date of this permit.

The Minister for Planning as responsible authority may extend the periods referred to if a request is made in writing before the permit expires, or within 12 months afterwards.

4. The request was received prior to the permits expiring, and can therefore be considered under the extension provisions of these permit conditions.

5. The following specific details of the request has been provided by the applicant:

Item	Reason provided for requesting an extension
Expiry date for completion of development	The applicant has advised that the delays have occurred in the GPG completing the project as a consequence of the following factors: • The Berrybank Wind Farm being a priority for GPG following its success in the Victorian Renewable Energy Action Scheme. • Delays in securing approvals for the external transmission line associated with both Ryan Corner and Hawkesdale Wind Farms. • A separate planning permit application for vegetation removal associated with the transmission lines is currently being sought.
Has development commenced on site?	Yes Minor works commenced on each site in 2012 with access roads being constructed.

18 There followed an assessment of the proposed extension:

Principles for considering an extension of time

6. In Kantor v Murrindindi Shire Council, 18 AATR 285, the Supreme Court, Ashley J held that a Responsible Authority should consider the following matters when exercising its discretion to extend a permit.

- The Responsible Authority should treat the applicant as being obliged to advance some reason or material support of the grant of an extension; and

- The Responsible Authority may rightly consider the following:

Criteria	Assessment
i) Has the request for extension of time been made within the prescribed period?	Yes. The request for extension of time was received on 17 August 2020, which was before the permits expired (29 August 2020).
ii) Have any previous extensions of time been approved for these permits?	Yes. The four previous requests for each permit are detailed in the Background section of this report.
iii) Has the applicant provided adequate reason for the granting of the extensions of time?	Yes. The applicant reports that various factors have delayed the completion of the project since the amendment of the permits in 2017: • The permit amendment process itself (which has resulted in the applicant submitting various documents for endorsement under the amended permit in the years since); • The proponent is presently in the process of seeking planning approval for the removal of native vegetation associated with the construction of power transmission lines to connect the two approved wind farms to the electricity grid; • The proponent's other project at Berrybank being given priority due to the time constraints of the state government's VRET program. With the completion of the Berrybank Wind Farm approaching, the proponent intends to turn their attention to development of these projects. More generally, delays between the planning approval and construction of wind energy facilities have been typical in Victoria over the last decade, owing to: • uncertainty in the national electricity generation market due to continually changing state and Commonwealth energy policy; • improvements in wind turbine technology causing the requirement for the amendment of approvals to allow for more economic installations of fewer, larger wind turbines. The above reasons are adequate justification for the project not having been completed to date.
iv) Has there been any material change in	Minor changes have been made to the Victoria Planning Provisions since the date of the amended permits; these changes would not reduce the probability of a permit being

planning policy that affects the subject site since the date of permit issue? And if so, would the permit be granted under current circumstances?	granted today. Since the grant of the amended planning permits on 21 December 2017 the following relevant amendments have been gazetted: **Amendment VC148** was gazetted on 31 July 2019 to restructure the Victoria Planning Provisions (in particular through the establishment of an hierarchical Planning Policy Framework), make changes to nomenclature and to introduce additional planning permit exemptions. The changes made are largely administrative and policy-neutral. **Amendment VC149**, gazetted on 4 October 2018, which amended Clause 52.32 *Wind Energy Facility* to include the following mandatory application information requirements and mandatory permit conditions: <u>Information requirements</u> • A pre-construction (predictive) noise assessment report demonstrating that the proposal can comply with the *New Zealand Standard NZS6808:2010, Acoustics – Wind Farm* • An environmental audit report of the predictive noise assessment, prepared under Part IXD, Section 53V of the *Environment Protection Act 1970* by an environmental auditor appointed under Part IXD of the *Environment Protection Act 1970*. <u>Mandatory conditions</u> • A post-construction noise assessment report prepared in accordance with the *New Zealand Standard NZS6808:2010, Acoustics – Wind Farm Noise* demonstrating whether the wind energy facility complies with the Standard; • An environmental audit report prepared in accordance with the *Environment Protection Act 1970* to accompany the post-construction noise assessment, confirming the findings of the assessment. **Amendment VC160** was gazetted on 24 January 2020 to correct errors and omissions, clarify the operation of certain provisions, and implement planning reforms for extractive industries, including: • Clause 19.01-2S (Renewable Energy) and Clause 52.32 (Wind Energy Facility) to update references to the revised Policy and Planning Guidelines for Development of Wind Energy Facilities in Victoria (Department of Environment, Land, Water and Planning, March 2019) • Clause 52.32 (Wind Energy Facility) to clarify the operation of the information requirements and mandatory conditions introduced under amendment

	VC149. The amendments to the Clause 52.32 made under amendments VC149 and VC160 came about following the *Independent Inquiry into the Environment Protection Authority* that reported in January 2017. The enquiry found that municipal councils lack the resources and technical expertise to verify compliance of operational wind farms with their permitted noise emission levels. The changes were made to the planning scheme to provide a higher level of assurance to the community and council that new wind farms are operating with the approved noise limits. Importantly, the amendments do not change the noise requirements for wind farms, which continue to require compliance with *New Zealand Standard NZS6808:2010, Acoustics – Wind Farm Noise.* The changes to the planning scheme described above would not reduce the likelihood that a permit for the approved wind farm would issue today were a new application made; however, predictive noise modelling to support the application would be required earlier in the assessment process. Both permits contain conditions requiring a post-construction noise assessment that are similar to the VC149 mandatory conditions.
v) Is there evidence that the applicant is seeking to warehouse the planning permit?	No. There is no evidence that the applicant is seeking to warehouse the planning permit. Since the 2008 approval of the planning permit the applicant has progressed a number of matters in relation to undertaking the development, for example: • Commencing preliminary works on site in 2012 • Amending the permit in 2017 to cater for the use of larger turbines with greater generation capacity • Submitting plans that are required to be endorsed under the permit prior to construction commencing, such as the amended Development Plans endorsed on 26 July 2018 • Applying for a separate planning permit for the removal of native vegetation associated with construction of the associated powerlines For these reasons there is no evidence that the permit holders are "warehousing" the permits in the manner described in Kantor v Murrindindi Shire Council.
vi) With regard to the scale of the proposed works, was the time originally imposed on the	Yes. The time limit originally proposed (being 3 years for commencement and 6 years for completion) was considered to be adequate and is consistent for developments of this scale approved by the Minister for Planning. However, for the reasons given above in relation to delays

permit adequate?	specific to these projects, as well as delays typical to the construction of wind energy facilities in recent years, it is not uncommon for development to take longer.
vii) The probability of a permit being issued should a fresh application be made.	Yes. It is likely that a permit would be issued should a fresh application be made due to the site being appropriately zoned and sited to accommodate such a development, having regard to the relevant controls of the Moyne Planning Scheme at the present time.

19 These considerations were synthesised in the following brief discussion:

> 7. In summary, the applicant has provided sufficient evidence that there is a genuine reason for the delay in the substantial commencement and completion of the approved developments, which relate particularly to the developer's focus on their project at Berrybank and the need for amendments to the planning documentation to facilitate the continued progression of the project towards construction.
>
> 8. There is no evidence the owner is seeking to warehouse, and it is probable that fresh approvals would be issued today should a new application be made, due to the limited change in planning controls that has occurred since the issue of the amended permits in 2017.
>
> 9. Further, despite changes to wind farm planning permit application requirements in the scheme requiring predictive noise assessments earlier in the planning application process, wind farms are still required to comply with New Zealand Standard *NZS6808:2010, Acoustics – Wind Farm Noise*.

20 The Assessment Report concluded with recommendations that the Minister:

(a) grant an extension of time of three years for both permits, so that the development must be completed by 29 August 2023 or the permit will expire; and

(b) write to the permit applicant and Moyne Shire Council to advise of these decisions.

21 The Assessment Report and the recommendations made in it were approved by Mr Juttner, who signed the document on 2 November 2020 – the same day that he wrote to Global Power's planning consultant to advise that the requested extension had been approved.

Planning Act - relevant provisions

22 Part 4 of the Planning Act deals with permits. The Permit was issued by the Minister under Pt 4, Div 6, after exercising the call in power in s 97B. Section 97F provides:

> **Decision of Minister**
>
> (1) After considering the report of the panel (if any), the planning scheme and any matters to be considered under section 60, the Minister may—
>
> (a) grant the permit; or
>
> (b) grant the permit subject to conditions; or
>
> (c) refuse to grant the permit on any ground he or she thinks fit.
>
> (2) Once the Minister has decided in favour of an application, the Minister must issue the permit to the applicant.

23 Section 97J enables the Minister to amend a permit:

> **Decision on amendment**
>
> After considering the report of a panel (if any), the planning scheme and any matters to be considered under section 60, the Minister may—
>
> (a) amend the permit; or
>
> (b) amend the permit subject to conditions; or
>
> (c) refuse to amend the permit on any ground he or she thinks fit.

It was under this power that the Minister amended the permit in December 2017.

24 The powers of the Minister to grant a permit subject to conditions, in s 97F(1)(b), and amend a permit subject to conditions, in s 97J(b), are informed by s 62 of the Planning Act. That section makes provision for the conditions that must, may, and must not be included in a permit. Relevantly here, s 62(2) provides that the responsible authority 'may include any other condition that it thinks fit'.

25 Section 68 of the Planning Act deals with the expiry of a permit:

> **When does a permit expire?**
>
> (1) A permit for the development of land expires if—
>
> (a) the development or any stage of it does not start within the time specified in the permit; or

(aa) the development requires the certification of a plan of subdivision or consolidation under the **Subdivision Act 1988** and the plan is not certified within two years of the issue of the permit, unless the permit contains a different provision; or

(b) the development or any stage is not completed within the time specified in the permit, or, if no time is specified, within two years after the issue of the permit or in the case of a subdivision or consolidation within 5 years of the certification of the plan of subdivision or consolidation under the **Subdivision Act 1988**.

(2) A permit for the use of land expires if—

(a) the use does not start within the time specified in the permit, or, if no time is specified, within two years after the issue of the permit; or

(b) the use is discontinued for a period of two years.

(3) A permit for the development and use of land expires if—

(a) the development or any stage of it does not start within the time specified in the permit; or

(b) the development or any stage of it is not completed within the time specified in the permit, or, if no time is specified, within two years after the issue of the permit; or

(c) the use does not start within the time specified in the permit, or, if no time is specified, within two years after the completion of the development; or

(d) the use is discontinued for a period of two years.

(3A) If a permit for the use of land or the development and use of land or relating to any of the circumstances mentioned in section 6A(2), or to any combination of use, development or any of those circumstances, requires the certification of a plan under the **Subdivision Act 1988**, unless the permit contains a different provision—

(a) the use or development of any stage is to be taken to have started when the plan is certified; and

(b) the permit expires if the plan is not certified within two years of the issue of the permit.

(4) The expiry of a permit does not affect the validity of anything done under that permit before the expiry.

26 Section 69 provides for extensions of time. As at 2 November 2020, s 69 provided:[2]

> **Extension of time**
>
> (1) Before the permit expires or within 6 months afterwards, the owner or the occupier of the land to which it applies may ask the responsible authority for an extension of time.
>
> (1A) The owner or occupier of land to which a permit for a development applies may ask the responsible authority for an extension of time to complete the development or a stage of the development if—
>
> (a) the request for an extension of time is made within 12 months after the permit expires; and
>
> (b) the development or stage started lawfully before the permit expired.
>
> (2) The responsible authority may extend the time within which the use or development or any stage of it is to be started or the development or any stage of it is to be completed or within which a plan under the **Subdivision Act 1988** is to be certified.

27 Once a permit is issued under s 97F, the responsible authority specified in the planning scheme becomes the responsible authority for the administration and enforcement of the Planning Act and the relevant planning scheme in respect of the permit.[3] However, the Minister remains the responsible authority in respect of a number of specified matters, including any extension of time under s 69.[4]

Does the Association have standing?

28 A meeting of eight people held on 13 January 2021 resolved to incorporate an association named 'The People of the Small Town of Hawkesdale', with the following purposes:

> 1. To oppose the construction of the Hawkesdale wind farm including but not limited to initiate correspondences or meetings with the operators, mediation or do all things and acts necessary to achieve this purpose.
>
> 2. To prevent the construction of the wind farm being built near the town of Hawkesdale including but not limited to appoint legal representative to initiate legal proceedings against the operator.

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2 Section 69 has since been amended by s 70 of the *Planning and Environment Amendment Act 2021* (Vic), which came into operation on 24 March 2021.

3 Planning Act, s 97H.

4 Planning Act, s 97H(c).

3. To represent the voices of the people of Hawkesdale as the Association deems fit from time to time.

The meeting adopted the model rules for an incorporated association, and elected office bearers. It also resolved to apply for an injunction to stop all work on the Hawkesdale wind farm until all acoustic readings are completed.

29 John Bos, who is the president of the Association, deposed that it was created 'to bring together those who have long been concerned about the development of the Hawkesdale wind farm, so the community members could take action to protect the community from the prospect of having an industrial project of such size and scale so close to their town'.

30 The Association was incorporated on 29 January 2021, under the *Associations Incorporation Reform Act 2012* (Vic). This proceeding was commenced on 17 February 2021, in respect of the Extension Decision made on 2 November 2020.

31 As at 25 March 2021, the Association had 12 members. According to Mr Bos, all of the members of the Association live or work in Hawkesdale and the areas surrounding Hawkesdale in the Moyne Shire. He said that the members 'have come together as a group to invoke the court's protection to challenge the Minister's decision and share legal costs'. I accept that evidence.

32 Mr Bos and his wife Julie are both members of the Association. They have lived in Hawkesdale for 30 years and are active members of the Hawkesdale community. They own two properties in the Hawkesdale township – their home and the post office. Mrs Bos runs the Hawkesdale Post Office and General Store, the only 'shop front' business in Hawkesdale other than the hotel.

33 Robert John McCosh is also a member of the Association, as are his mother Margaret and his father, also named Robert. Margaret McCosh is the Association's secretary and treasurer. The McCosh family has a long association with the township of Hawkesdale and its people. The family farm, 'Banuke', is a 2,000 acre property to the

south of Hawkesdale that has been in the McCosh family since about 1942. Mr McCosh and his five siblings were all educated at the Hawkesdale P-12 college.

34 Mr McCosh and his parents own and operate the farm. His parents live at the farm, and Mr McCosh lives on a separate property nearby. Their properties are close to the southern and eastern perimeter of the proposed wind farm. They are concerned that the noise and visual impacts of the turbines will make their homes uninhabitable, so that they will have to move away from Hawkesdale. They are also concerned that the construction of wind turbines within a short distance from the farm boundary will impede the farm's operations and significantly diminish the farm's value.

35 There was no evidence about exactly where the Association's other members lived or worked, their association with Hawkesdale, or the ways in which they might be affected by the development and operation of the proposed wind farm.

36 It appears that the Association was first formed at the meeting on 13 January 2021. There was no suggestion that it had a previous existence as an unincorporated association, before its members resolved to incorporate at that first meeting.

37 The evidence did not reveal any activities undertaken by the Association, either before or after its incorporation, other than the meeting on 13 January 2021 and the commencement of this proceeding. I accept that Mr and Mrs Bos, and Mr McCosh and his parents have actively opposed the wind farm for many years, including by making representations to DELWP, the Minister, and Global Power, and participating in the public consultation process that preceded the 2017 permit amendment. However, they engaged in this activity as individuals, rather than as representatives of the yet to be formed Association.

38 Mr Bos described a public meeting between concerned members of the Hawkesdale community, representatives of DELWP, and the National Wind Farm Commissioner, in September 2017. At around the same time, he helped to organise a petition objecting to the amendment that was signed by 'almost the entire local Hawkesdale

community'. This activity coincided with the Panel's consideration of the proposed 2017 amendment.[5] Other than the involvement of Mr Bos, I can find no basis to connect that community activity with the formation of the Association in January 2021.

Association's submissions

39 The Association accepted that, to establish its standing to bring the proceeding, it had to demonstrate a 'special interest' in the subject matter of the proceeding – that is, it had to satisfy the general law test for standing set out by the High Court in *Australian Conservation Foundation Inc v Commonwealth* (***ACF v Commonwealth***).[6] The standing of a private person to seek relief in respect of an administrative decision requires consideration of both the statutory context and the practical or legal effect of the decision.[7] The 'special interest' test does not involve rigid criteria; its application requires an assessment of the relationship between the plaintiff and the subject matter of the litigation.[8]

40 The subject matter of the proceeding was identified as 'the legality of the Extension Decision, the effect of which is to permit the development of the Hawkesdale Wind Farm, which would otherwise have been prohibited upon expiry of the Permit'.[9] The Association submitted that its special interest in that subject matter was avoiding the real and substantial practical detriments that its members would suffer were the development to proceed. Those detriments included the visual impact of the turbines on the landscape surrounding members' properties, the noise generated by the turbines, reduction of land values, and the effect of the development of a large-scale industrial project like the wind farm on the ongoing viability of Hawkesdale as a small rural town.

41 The Association argued that its members, as residents and landowners directly

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5 See [14] above.
6 (1980) 146 CLR 493, 530-1 (Gibbs J), 538-9 (Stephen J), 547-8 (Mason J) (***ACF v Commonwealth***).
7 Referring to ***Maguire*** *v Parks Victoria* (2020) 245 LGERA 141, [77], [80].
8 Referring to *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, 42 (Stephen J).
9 **Plaintiff's submissions** dated 23 April 2021, [49].

affected by the Extension Decision, have standing to challenge the legality of the decision. That is because the decision has a practical effect on those members, as demonstrated by the evidence of Mr McCosh and Mr Bos. Further, the Planning Act specifically accommodates the rights of third parties who may be affected by planning decisions. It relied in particular on the recognition in ***Kantor*** *v Murrindindi Shire Council*[10] that the interests of objectors and potential objectors are relevant to the responsible authority's discretion to grant an extension under s 69(2) of the Planning Act.

42 Within the context of the Planning Act, the Association submitted that its representative character, its purpose, and the special interests of its members all justified its claim to standing. It likened its position to that of the residents association in *Ex parte* ***Helena Valley****/Boya Association (Inc)*,[11] which was held by the Full Court of the Supreme Court of Western Australia to have standing to challenge a rezoning decision, even though it was incorporated after the decision was made.

43 Consistent with the approach taken in *Helena Valley*, the Association submitted that it has standing because it is an association 'of a small group of landholders and residents' and has 'a special interest in challenging a planning decision that will cause a real and substantial practical impact on their immediate geographical area, in circumstances where the governing statute specifically accommodates the interests of neighbouring landholders'.[12] It submitted that it was unnecessary for me to address the broader question of whether, as a matter of principle, an organisation might obtain standing because some of its members have a special interest.[13]

44 The Association also claimed that it has standing to challenge the Extension Decision because, if it was unlawfully made, the Association would be deprived of its rights

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10 (1997) 18 AATR 285 (***Kantor***); *Day v Pinglen Pty Ltd* (1981) 148 CLR 289, 299-300.
11 (1990) 2 WAR 422 (***Helena Valley***).
12 Plaintiff's submissions, [89].
13 Referring to *Victorian Taxi Families Inc v Commercial Passenger Vehicles Commission* [2020] VSC 762, [136]-[137]; cf *ACF v Commonwealth*, 531 (Gibbs J).

under the Planning Act to object to a fresh permit application, and appeal an unsatisfactory outcome to the Tribunal. It relied on the reasoning of King CJ in *Australian Conservation Foundation Inc v South Australia (**ACF v SA**)*[14] in support of this argument.

Minister's submissions

45 The Minister disputed the Association's claim to have a special interest in the subject matter of the proceeding on the basis that, as a legal person separate from its members, it must establish a special interest of its own, distinct from the standing of its members. The Minister argued that the Association had no status or acknowledgement as a representative association, and no history of action of any kind in relation to the subject matter of the Extension Decision – decisive factors which he submitted militate against it having standing to bring the proceeding.

46 The Minister accepted that in both *Helena Valley* and ***Environment East Gippsland** Inc v VicForests*,[15] an association incorporated after the relevant decision was found to have standing. He sought to distinguish those cases from the present case, on the basis that, unlike the plaintiffs in *Helena Valley* and *Environment East Gippsland*, the Association had no predecessor entity and no previous history of activity.

47 In addition, the Minister queried whether *Helena Valley* should be followed. He argued that Ipp J's reasoning in *Helena Valley* relied heavily on Jacobs J's first instance decision in *Australian Conservation Foundation Inc v South Australia*,[16] which was not followed on appeal.[17] The Minister submitted that the correct approach was to focus on the nature of the organisation, its historical conduct and its activities in relation to the subject matter of the proceeding.[18]

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14 (1990) 53 SASR 349, 351-360 (***ACF v SA***).
15 (2010) 30 VR 1.
16 (1989) 52 SASR 288.
17 *ACF v SA*. See also *Friends of Elliston - Environment & Conservation Inc v State of South Australia* (2007) 96 SASR 246, [87].
18 Relying on *North Coast Environment Council Inc v Minister for Resources* (1994) 55 FCR 492.

48 On the question of whether an incorporated association could obtain standing from the special interest of its members, the Minister submitted that the better view was that the interests of members of an association are irrelevant.[19] He explained that the authorities that suggest that the interests of members of an association might confer standing on the association are cases in which the plaintiff organisation had a history of acting as a peak representative body, with community or government endorsement.[20] He argued that the Association had no history of representing its members' interests, was not government endorsed or funded, and could not be regarded as a representative body.

49 The Minister submitted that the Association could not claim a special interest based on its right under the Planning Act to object to a fresh planning application, because it did not exist at the time of the Extension Decision. That was the conclusion reached on similar facts in *Concerned Citizens of Canberra v Chief Planning Executive (Planning and Land Authority)*.[21]

Proponents' submissions

50 The Proponents referred to the Court of Appeal's recent consideration of the 'special interest' test for standing, in ***Maguire*** *v Parks Victoria*.[22] Based on that authority, the Proponents submitted that:

(a) it is necessary to assess how the plaintiff's interests are liable to be affected by the exercise of power, because the special interest test requires an intersection between the interest identified by the plaintiff and the decision that is sought

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19 Relying on *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council* (2007) 162 FCR 313, [50]; *Victorian Chamber of Manufactures v The Commonwealth (Prices Regulations)* (1943) 67 CLR 335, 343 (Starke J); *Mid Brisbane River Irrigators Inc v Treasurer and Minister for Trade of State of Queensland* [2014] 2 Qd R 592, [33]-[38].

20 ***Re MacTiernan****; Ex parte Coogee Coastal Action Coalition Inc* (2005) 30 WAR 138, [101] (McLure JA, Pullin JA agreeing); *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2001) 192 ALR 625, [51], [54], [62]-[64] (***NAALAS v Bradley***).

21 (2014) 205 LGERA 278, [339], upheld on appeal in *Concerned Citizens of Canberra Inc v Chief Executive (Planning and Land Authority)* (2015) 214 LGERA 252.

22 (2020) 245 LGERA 141.

to be impugned in the proceeding;[23] and

(b) it is also important to examine the statutory context to assess whether and to what extent the interests of the plaintiff are accommodated in a way that might support standing.[24]

51 Like the Minister, the Proponents argued that a corporation cannot acquire the interests or standing of its members,[25] and noted that the Association did not claim to have standing on that basis. They also noted that the Association did not suggest that its interests, as an incorporated association, were directly affected by the Extension Decision. That was not surprising, they said, because the Association did not exist when the decision was made, it held no property affected by the decision, and had engaged in no activities related to the subject matter of the proceeding.

52 The Proponents said that the Association's claim to standing rested on two 'fundamental pillars'.

53 The first pillar was that every single member of the Association would suffer the detriments that it claimed would result from the wind farm – noise, visual impacts, reduction of land value, and impact on the viability of Hawkesdale as a small rural town. The Proponents argued that this pillar was not established on the evidence.

54 The second pillar was that a representative body may have standing where all of its members have a special interest in the subject matter of the proceeding. This pillar was based on *Helena Valley*, which the Proponents also submitted should not be followed. They suggested that the law in Western Australia may have 'run ahead' of

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23 *Maguire*, [76].

24 *Maguire*, [77].

25 Relying on *ACF v Commonwealth*, 531 (Gibbs CJ), applied in: *Lock the Gate Alliance Ltd v Minister for Natural Resources and Mines* [2019] 1 Qd R 1, [45]; *Mid Brisbane River Irrigators Inc v Treasurer and Minister for Trade of the State of Queensland* [2014] Qd R 592, [32]; *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council* (2007) 162 FCR 313, [50]; *Defence Coalition against RCD Inc v Minister for Primary Industries and Energy* (1997) 74 FCR 142, 150*; Right to Life Association (NSW) Inc v Secretary, Department of Human Services & Health* (1995)56 FCR 50, 63 (Lockhart J).

the principles laid down by the High Court in *ACF v Commonwealth*.[26]

55 The Proponents also invited me to reject the Association's contention that the statutory context was strongly in favour of its claim to standing. While accepting that the Planning Act generally accommodates the rights of third parties who may be affected by planning decisions, the Proponents said that was not the case in relation to a decision to extend a planning permit. Section 69 of the Planning Act does not give third parties any right to notice of an application to extend a permit, or to challenge any decision to extend it. The Proponents argued that *Kantor* did not decide otherwise.

56 In summary, the Proponents submitted that the Association had not established a special interest in the subject matter of the proceeding because:

(a) it was incorporated nearly three months after the Extension Decision, has a very limited membership, and no history of involvement in major issues that affect the residents and ratepayers of Hawkesdale;

(b) beyond the conduct of this proceeding, there was no evidence that it had undertaken any activities such as making representations on any issue on behalf of its members or the residents of Hawkesdale;

(c) the Association's interests, as an incorporated association, are unaffected by the Extension Decision; and

(d) it had not established that all of its members would have standing, nor had it established that it was a representative body that might derive standing from the interests of its members.

Consideration

57 As all parties accepted, the standing of a private person to seek judicial review of an exercise of public power depends on that person having a special interest in the subject

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[26] Referring to *Re MacTiernan*, [6]-[8] (Wheeler JA).

matter of the proceeding, beyond a 'mere intellectual or emotional concern' or a strongly felt belief that the law should be observed.[27] The Court of Appeal has recently summarised the relevant principles in *Maguire* and ***VicForests*** *v Kinglake Friends of the Forest Inc*,[28] as follows.

(a) The special interest test is flexible, and its content in a given case depends on the nature and subject matter of the litigation. There is no precise formula as to what amounts to a special interest in the subject matter of a particular proceeding; the application of the test is fact and context specific.[29]

(b) A 'special interest' sufficient to invoke the Court's jurisdiction to supervise the exercise of public power is not limited to the legal, proprietary or financial interests that are protected by the private law.[30]

(c) The requirements of standing serve to keep the exercise of judicial power within proper bounds, namely the resolution of legal controversies between parties who are affected by the outcome.[31]

(d) The special interest test requires an intersection between the interest identified by the plaintiff and the subject matter of the proceeding. It is necessary to assess how the plaintiff's interest may be affected by the matter in respect of which it seeks relief.[32]

(e) The statutory context is important. It will be relevant whether and to what extent the statute accommodates the plaintiff's interest, and how it intersects with that interest. However, the statutory context does not control standing: a 'plaintiff may have standing to challenge the exercise of power because of its

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27 *ACF v Commonwealth*, 530-1 (Gibbs J), see also *Maguire*, [63].
28 [2021] VSCA 195 ***(VicForests)***.
29 *Maguire*, [64]; *VicForests*, [61].
30 *Maguire*, [65]; *VicForests*, [60](c).
31 *Maguire*, [66]-[67]; *VicForests*, [31].
32 *Maguire*, [76]; *VicForests*, [60](d).

practical or legal effect'.[33]

58 I accept the Association's characterisation of the subject matter of this proceeding as the legality of the Extension Decision. The practical effect of the Extension Decision is that there is still planning permission for the wind farm to be built and operated. Had the Permit not been extended, it would have expired, and the wind farm could not have been developed without a fresh planning permit.

59 The Association itself has no legal, proprietary, or financial interest that might be affected by the Extension Decision. Some of its members do have such an interest. The evidence was that five of the Association's members live, work and own property in Hawkesdale. While a legal, proprietary, or financial interest is not essential to standing, I do not know enough about the interests of the other seven members of the Association to make a finding that they would all have had standing in their own right.

60 The fact that some members of the Association have a special interest in the subject matter of the proceeding does not, of itself, compel the conclusion that the Association itself has that interest. It is a legal entity separate from its members, and cannot acquire standing merely because some of its members may possess it.[34]

61 That is not to say that the interests of the members of an incorporated association are irrelevant to the question of its standing. To the contrary, in *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)*,[35] the High Court was satisfied that the applicant union had standing because of the special interest of its members, as a class, in the legislation the union sought to challenge.[36] It is to say that, usually, more is required.

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33 *Maguire*, [77]-[80]; see also *VicForests*, [60](e).

34 *ACF v Commonwealth*, 531 (Gibbs CJ).

35 (1995) 183 CLR 552 (***SDA***).

36 The respondent Minister did not rely on the fact that the union was an association, and argued that the union had the same interest as its members. The Court held that the union had standing based on that concession. See *SDA*, 558-9.

62 A good deal more was present in *Helena Valley*, in which Ipp J concluded that the incorporated plaintiff had standing:[37]

> In my view, the representative character of the Association, its history, the purpose for which it was formed and the special interests of its members, when taken together, entitle it to apply for prerogative relief.

This conclusion appears to me to be a straightforward application of the special interest test to the facts of that case. The plaintiff was first formed as a progress association in the 1950s, had a longstanding concern to preserve the rural character of the Helena Valley and Boya areas, and a history of representing the interests of ratepayers and electors in the area. In the context of the decision to rezone land in the Helena Valley from Rural to Urban, the conclusion that the plaintiff association had standing seems unexceptional.

63 Since the application of the special interest test is always fact and context specific, a conclusion on the facts of one case does not dictate the conclusion to be reached on the facts of another. There are a number of matters that are necessary to consider in determining whether incorporated plaintiffs have standing – 'their constituent documents, as well as other matters, including their purpose, activities, and scale'.[38] It may also be relevant that an organisation has acted as a representative body, and that it has been recognised by government or others to speak on behalf of its members or to have expertise on a particular subject.[39] The conclusion in a particular case will depend on the totality of the evidence, and no single factor is likely to be determinative.

64 Importantly, in the case of an incorporated plaintiff:[40]

> … a distinction may be drawn between merely holding beliefs (or having a mere emotional or intellectual concern), and the taking of concrete steps to give effect to those beliefs. The latter demonstrates a commitment that distinguishes the person or entity from other members of the community and

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37 *Helena Valley*, 437 (Ipp J).
38 *VicForests*, [21].
39 See, e.g., *SDA*, 558-9; *NAALAS v Bradley*, [62]-[63]; *North Coast Environment Council v Minister for Resources* (1994) 55 FCR 492, 513.
40 *VicForests*, [76] (citations omitted).

> may give rise to a 'special interest' in securing compliance with regulatory requirements. In the context of environmental protection, the commitment may be shown by the conduct or support of research, community engagement, interaction with the regulator, participation in the development of regulatory controls, the development of expertise and knowledge, political lobbying or other conduct. Such conduct would reveal that the person or entity is not just an 'intermeddler', 'crank' or 'busy body'. It may allay concerns that the entity will not be in a position to carry through the litigation. In this context, the distinction between beliefs and action is both logical and coherent, and consistent with the purpose of the standing rule.

65 In this case, there is no evidence of any activity by the Association to represent its members' interests or pursue its objects, other than its commencement and pursuit of this proceeding. It has written no letters, made no submissions, held no public meetings, and had no interactions with DELWP, the Minister, or the Proponents. While Mr Bos has done a number of these things, he did them in his own name and not as President of the yet to be formed Association.

66 The Association claimed to be acting as a representative not only of its members' interests, but of those people in Hawkesdale whose financial interests may be damaged by the wind farm. The difficulty with this claim is that there was no evidence that the Association had ever actively represented its members or anyone else.

67 I would not have been concerned that the Association was not incorporated at the time of the Extension Decision, if it had a prior existence as an unincorporated association. However, the evidence revealed no such history. The plain fact is that the members of the Association came together 'as a group to invoke the court's protection to challenge the Minister's Decision and share legal costs'.[41] In other words, the Association was formed in order to be a vehicle for this litigation.

68 The statutory context of the Planning Act does, as the Association submitted, accommodate the rights of third parties who may be affected by planning decisions to be heard before decisions are made. Generally, a planning authority must give wide

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41 Supplementary affidavit of John Bos dated 25 March 2021, [9].

notice of its preparation of an amendment to a planning scheme, and must receive and consider public submissions about the amendment.[42] Public submissions may be referred to a panel, appointed under Pt 8 of the Planning Act, for consideration, hearing, and report.[43] Similarly, a responsible authority must give notice of an application for a planning permit,[44] 'any person who may be affected' may object to the grant of a permit,[45] and the responsible authority must consider all objections and other submissions it has received before making a decision.[46] The threshold for making an objection under s 57(1) is far easier to satisfy than the general law special interest test.[47] Any person who has objected to the grant of a permit may apply to the Victorian Civil and Administrative Tribunal for merits review of a decision to grant the permit.[48]

69 However, once a permit has been granted by the responsible authority, the Planning Act is significantly less accommodating of the interests of third parties. Relevantly here, it does not provide for third parties to receive notice of a request to extend a permit, either under s 69 or by way of secondary consent, and it does not contemplate that third parties might have standing to challenge a decision to extend time.

70 *Kantor* does not support the Association's contention that the statutory context accommodates the standing of third parties in relation to a decision whether to extend a permit. Justice Ashley's list of matters relevant to the discretion to extend a permit under s 69 included whether there had been any change in planning policy. His Honour explained that consideration of that matter 'shows, indirectly, concern for any persons who objected to the grant of the permit at the outset; or who would, if fresh application for a permit was being made, be potential objectors'.[49] It is only if there has been a change in planning policy that the ability of affected third parties to object

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42 Planning Act, ss 17-22.
43 Planning Act, ss 23-27.
44 Planning Act, s 52.
45 Planning Act, s 57(1).
46 Planning Act, s 60(1)(c).
47 *Boerkamp v Guy* (2014) 202 LGERA 17, [69]-[70].
48 Planning Act, s 82. See also Planning Act, s 82B.
49 *Kantor*, 38.

to a permit application becomes relevant to whether to extend the permit. This indirect concern for the position of objectors and potential objectors does not somehow extend the entitlement in s 57 of 'any person who may be affected' to object to a permit application to an entitlement to object to a request to extend a permit under s 69.

71 The Association might have been better placed to demonstrate a special interest in the subject matter of the proceeding if it had existed at the time the 2017 amendment was under consideration, and had objected to the amendment and participated in the Panel process. Concrete steps taken at that time on behalf of people in Hawkesdale, within the framework of the Planning Act, to give effect to the Association's purposes might have given rise to a special interest in subsequent decisions in relation to the Permit.[50] However, the Association did not exist then, even as an unincorporated association, and so was unable to rely on its past activities to show some commitment that distinguished it from the public at large.

72 Finally, I do not accept that the Association has a special interest because it could object to a fresh permit application.[51]

73 In *ACF v SA*, the Full Court of the Supreme Court of South Australia held that the Australian Conservation **Foundation** had standing to seek declarations that the procedures prescribed by the *Planning Act 1982* (SA) applied to the proposed development of a tourist resort in the Flinders Ranges National Park. That was because the Foundation had rights of representation and appeal under the *Planning Act 1982* (SA). The special interest that justified standing was 'the interest which a person, seriously desirous of exercising those rights, has in preserving them by preventing the development from proceeding without compliance with the process

50 *VicForests*, [76], quoted at [64] above.

51 Assuming, without deciding, that the Association would be a 'person affected' and could object under s 57 of the Planning Act to a new application for a permit to develop and operate a wind farm near Hawkesdale.

which enables the rights to be exercised'.[52]

74 This case is quite different from the factual and statutory context considered in *ACF v SA*. Here, the Minister decided to extend a permit that was first granted in 2008, and had been amended in 2017 following public notification, receipt of submissions, and a Panel hearing and report. The processes under the Planning Act were followed in relation to the grant and amendment of the Permit, at which stage third parties were able to (and did) exercise their rights to oppose the proposed development of the wind farm. The Association did not take part in those planning processes because it had not yet been formed, not because the processes were bypassed. The reasoning in *ACF v SA* therefore does not assist it.[53]

75 I conclude that the Association does not have standing to seek judicial review of the Extension Decision. The objects of the Association and the interests of at least some of its members in opposing the construction of the wind farm do not amount to a special interest on the part of the Association in the subject matter of the proceeding.

76 The proceeding could be dismissed on that basis alone. However, the remaining issues were fully argued, and should be determined for completeness.

Was the extension request made by 'the occupier of the land'?

77 It was common ground that the exercise of the power under s 69(2) of the Planning Act to extend time was conditioned on a request having been made pursuant to s 69(1) or 69(1A), and that a request by the owner or the occupier of the relevant land was a jurisdictional fact necessary to enliven the power in s 69(2).

78 The Association contended that the power in s 69(2) was not enlivened, because the request to extend the Permit was not made by the owner or the occupier of the land to which the Permit applies. Rather, it was made by Global Power. Although the

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52 *ACF v SA*, 354-5 (King CJ).

53 See, to similar effect, *Concerned Citizens of Canberra v Chief Planning Executive (Planning and Land Authority)* (2014) 205 LGERA 278, [339], upheld on appeal in *Concerned Citizens of Canberra Inc v Chief Executive (Planning and Land Authority)* (2015) 214 LGERA 252, [239].

issue loomed large in this case, recent amendments to the Planning Act mean that it is unlikely to arise in future. From 24 March 2021, a request under s 69(1) may also be made by 'another person with the written consent of the owner'.[54]

79 Global Power did not claim to be the occupier of any of the land to which the Permit applies. Its position was that the request for an extension was made by another company, Ryan Corner Development, a company created as a 'special purpose vehicle' to develop the wind farm.[55] The Proponents maintained that, when Ryan Corner Development requested the extension, it occupied the site compound and three fenced off areas containing the wind monitoring masts, and so was an occupier of land to which the Permit applies for the purposes of s 69(1) of the Planning Act.

80 A threshold question is whether Ryan Corner Development asked for the extension. The Association maintained that the request was made by Global Power, not Ryan Corner Development. The Proponents argued that the request was made by both Global Power and Ryan Corner Development, or alternatively by Global Power as agent for Ryan Corner Development. The Minister made no submissions on this question.

The request

81 On 17 August 2020, Fiona Koutsivos of ERM sent an email to 'Development Approvals' at DELWP, headed 'Extension of Time Request Planning Permit 2006/0221 (Hawkesdale WF)'. The email from ERM read:

> To whom it may concern,
>
> This application relates to Planning Permit 2006/0221 (Hawkesdale WF) and seeks an extension of time to the completion date of the current Permit.
>
> The application package has been provided in the below link:

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54 Planning Act, s 69(1), as amended by s 70 of the *Planning and Environment Amendment Act 2021* (Vic) on 24 March 2021.

55 On 24 November 2020, Ryan Corner Development transferred the bundle of rights associated with the development of the Hawkesdale wind farm to another special purpose vehicle, **Hawkesdale Asset** Pty Ltd (ACN 643 793 711). On the second day of the trial I ordered that Hawkesdale Asset be joined as a defendant to the proceeding.

[*link provided*]

The application documents include:

- Extension of Time Cover Letter
- Hawkesdale Environmental Audit (note that this will also be lodged with the EPA, pending any preliminary comments from DELWP)
- Marshall Day Acoustics Noise Assessment 2015
- Marshall Day Acoustics Noise Assessment 2017
- Marshall Day Noise Compliance Test Plan 2018
- Marshall Day Background Noise Monitoring 2020
- Topography Map
- Hawkesdale Amended Permit

We have had trouble in the past lodging through Permits Online for this specific permit. Therefore, no application form has been included. If you would like me to fill something out, please send this document through. We note that there is no Extension of Time Request Form on the Planning Vic website.

Also, could you please send through an invoice with the application fee details and this will be processed.

82 The **cover letter** included in the application package was on ERM letterhead, and was addressed to DELWP Development Approvals and Design. It read:

> **RE: Planning Permit No: 2006/0221 (Hawkesdale Wind Farm) – Land in Hawkesdale, generally described as Lot 1 TP 414357L Vol 08444 Fol 791 (Request to Extend the Permit)**
>
> Environment Resources Management Australia Pty Ltd (ERM) continues to act on behalf of Global Power Generation (GPG) in relation to the above matter.
>
> By way of background, Permit No 2006/0221 was issued by the Minister for Planning in accordance with the Moyne Planning Scheme on 21 August 2008
>
> This permit allows:
>
> *'Use and development of land for a Wind Energy Facility'.*
>
> The construction of the wind farm commenced on 5 March 2012 which involved the construction of the eastern access and drainage pipes on [Woolsthorpe]-Heywood Road, construction of other access tracks and associated drainage pipes, and the compaction of a site compound gravel platform.

> On 21 December 2017, the expiry date for the completion of works was extended to 29 August 2020.
>
> …
>
> A copy of the permit is included in Appendix A of this submission for ease of reference.
>
> Condition 64 of the permit states:
>
> > *This permit will expire if one of the following circumstances applies:*
> >
> > *a. The development is not started within three years of the date of this permit.*
> >
> > *b. The development is not completed within six years of the date of this permit.*
> >
> > *The Minister for Planning as responsible authority may extend the periods referred to if a request is made in writing before the permit expires, or within 12 months afterwards.*
>
> Pursuant to Section 69 of the Planning and Environment Act 1987, we hereby request an extension of time pursuant to Condition 64 of the permit. We propose that the permit completion date be extended by three years, allowing for development to be completed by 21 August 2023.

83 The cover letter then provided information and made submissions addressing the *Kantor* considerations relevant to a request to extend a planning permit. The submissions referred to 'GPG' as the proponent of the Hawkesdale, Ryan Corner and Berrybank wind farms. The letter concluded with a request that the application be considered concurrently with an application to extend the permit for the Ryan Corner wind farm. There was no reference to Ryan Corner Development in the cover letter.

84 ERM had sent a draft of the cover letter to Global Power's Technical Manager and Director, Guillermo Alonso Castro for his review. **Mr Alonso** responded on 29 July 2020, providing his input in a marked up version of the draft. His input did not include any suggestion that the request should be made on behalf of Ryan Corner Development as well as Global Power.

85 There were some references to Ryan Corner Development in the other documents in the application package. The four reports prepared by Marshall Day Acoustics were addressed to Ryan Corner Development, and described it as the proponent of the

Hawkesdale wind farm. The most recent of those reports, dated 5 August 2020, said in the introduction that:

> Ryan Corner Development Pty Ltd (RCD), a subsidiary of Global Power Generation Pty Ltd (GPG), are developing the wind farm, and commissioned the background noise survey …

The environmental audit report dated 17 August 2020 was also said to be prepared for Ryan Corner Development. The executive summary recorded:

> Ryan Corner Development Pty Ltd (RCD), a subsidiary of Global Power Generation Australia Pty Ltd (GPG) is proposing to construct a [Wind Energy Facility] at the site.

This was repeated in the background information set out in the body of the audit report.

86 As already noted,[56] the delegate's letter of 2 November 2020 communicating the Extension Decision was addressed to 'Global Power Generation Australia Pty Ltd', care of ERM.

Relationship between Global Power and Ryan Corner Development

87 Mr Alonso has been employed by Global Power as its technical manager since July 2010. He has been a director of both Global Power and Ryan Corner Development since 28 October 2014 and a secretary of both companies since 20 July 2016. Mr Alonso provided a detailed explanation of the relationship between Global Power and Ryan Corner Development in his affidavits dated 3 March 2021 and 14 April 2021. The following findings are based on those affidavits, and Mr Alonso's evidence given during cross-examination and re-examination.

88 Global Power was incorporated on 9 April 2008 under the name Union Fenosa Wind Australia Pty Ltd. It changed its name to 'Global Power Generation Australia Pty Ltd' on 10 April 2017. Its majority shareholder is Global Power Generation SA, a Spanish company. Global Power has a portfolio of eight wind farm projects in Australia,

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56 See [15] above.

including the Hawkesdale and Ryan Corner wind farms in south-west Victoria.

89 It has been Global Power's practice to incorporate a special purpose vehicle for each wind farm project, usually as soon as a planning permit has been obtained for the development. Despite having a separate company for each project, it is Global Power's practice to manage each project up to the point where it is preferable for a single company to operate the project. Up to that point, Global Power continues to conduct tasks in relation to the project.

90 Since April 2008, there have been three special purpose vehicles for the Hawkesdale wind farm project:

(a) first, Hawkesdale Development Pty Ltd (ACN 130 543 145), which was involved in the project from around 30 June 2008 to 1 January 2013. That company was deregistered in January 2014;

(b) second, Ryan Corner Development, from about 1 January 2013 to 24 November 2020; and

(c) third and currently, Hawkesdale Asset, which was incorporated on 25 August 2020, and has been the special purpose vehicle for the Hawkesdale wind farm project since 25 November 2020.

91 Global Power, Ryan Corner Development and Hawkesdale Asset have the same four directors.

92 During the period that it was the special purpose vehicle for the Hawkesdale wind farm project, Ryan Corner Development had no employees. It was the licensee under licence agreements with the various owners of the land to which the Permit relates, and was invoiced for and paid licence fees under the licence agreements. It owned the three wind monitoring masts.

93 On 4 December 2019, Global Power and Ryan Corner Development entered into a written 'Corporate Services Agreement', by which Ryan Corner Development (the

'Principal') appointed Global Power (the 'Supplier') to provide the following services:

> (a) management of the Principal's corporate affairs, including health safety and environment to the extent relevant to the nature of the Services;
>
> (b) management of the Principal's assets and liabilities;
>
> (c) cash management of the Principal (including without limitation, management of drawdowns and payments);
>
> (d) updating financial models in accordance with any financing arrangements, and produce an operational model to demonstrate movement of cashflows, budgets etc. as and when required;
>
> (e) management and tracking of the budget for the Project, including but not limited to any Contingency Fee;
>
> (f) preparation of reports for the board of the Principal;
>
> (g) managing payments and receivables under the Project Documents and incidental to Relevant Approvals;
>
> (h) maintenance, administration and monitoring of all bank accounts;
>
> (i) management of the Principal's financial accounts and reporting requirements;
>
> (j) management of any additional administration, accounting, taxation, auditing, procurement, health and safety and environmental services; and
>
> (k) any other corporate services requested by the Principal and agreed to by the Supplier during the Construction Period for the Project.

94 By clause 4 of the Corporate Services Agreement, Ryan Corner Development appointed Global Power as its agent to the extent reasonably required to, and for the sole purpose of, providing the agreed services.

95 On 29 June 2020, Global Power and Ryan Corner Development signed a 'Construction Management Services Agreement', by which Ryan Corner Development (the 'Principal') appointed Global Power (the 'Supplier') to provide construction management services, including:

> (k) management and follow-up on any variations to the Principal Documents relating to extensions of time under any Project Document and unscheduled maintenance and additional costs under the [Wind Turbine Supply and Install Contract] and [the Engineering, Procurement and Construction Contract - Balance of Plant Works]

(including obtaining consents from any relevant third party, and where necessary a Project Financier, in relation to such variations)

96 The definition of 'Project Documents' included the Permit.

97 Clause 4 of the Construction Management Services Agreement provides:

> **Appointment as agent**
>
> 4.1 The Principal appoints the Supplier as its agent for the duration of the Term of this Agreement to:
>
> (a) undertake the Project;
>
> (b) negotiate and act on behalf of the Principal in each Project Documents negation or amendment and/or Relevant Approval;
>
> (c) exercise and enforce the Principal's rights in respect of each Project Document;
>
> (d) perform the Principal's obligations under each Project Document; and,
>
> in each case, to the extent reasonably required to, and for the sole purpose of, providing the Services to the Principal in accordance with this Agreement.
>
> 4.2 The Supplier accepts and agrees to the appointment made under clause 4.1.

98 Asked how Global Power disclosed to third parties that it was acting on behalf of a subsidiary, Mr Alonso explained that this was usually done through invoicing. Third parties would be informed about the specific company they should invoice. Mr Alonso's evidence was that Global Power had directed ERM to invoice Ryan Corner Development for work done in relation to the Hawkesdale wind farm project.

99 Mr Alonso exhibited to his affidavit copies of fee proposals dated 5 May 2015 from ERM to Ryan Corner Development, in relation to the application to amend the permits for the Hawkesdale and Ryan Corner wind farms, and a separate application for a permit for a sub-station to serve both wind farms. These fee proposals were accepted in an email from the Project Development Manager of Global Power[57] on 30 June 2015,

[57] At that time Global Power was still called Union Fenosa Wind Australia Pty Ltd.

which also provided billing details for Hawkesdale services. While the scope of work done by ERM on the Hawkesdale wind farm has gone beyond that set out in the 5 May 2015 fee proposals, the additional work has been charged at the rates agreed at that time. Global Power would instruct ERM to perform additional work, and ERM would then invoice Ryan Corner Development for the work done.

100 Mr Alonso accepted that the cover letter from ERM of 17 August 2020 did not state that Global Power was requesting an extension of the Permit on behalf of Ryan Corner Development. He thought that the supporting documentation accompanying the letter made it clear that Ryan Corner Development was the developer of the project. Although Mr Alonso could not speculate on DELWP's understanding of who was making the request, he knew the relationship between the two companies and believed that Global Power was acting as an agent of Ryan Corner Development.

Association's submissions

101 The Association submitted that the plain and obvious reading of the cover letter is that the request for an extension was made by Global Power. It pointed out that Ryan Corner Development was not mentioned in the letter, and was identified only in the supporting documents as a recipient of noise assessment and other reports.

102 The Association argued that the various matters relied on by the Proponents to show that the request was made by Ryan Corner Development could not overcome the plain and obvious reading of the cover letter. It relied on the fact that the delegate and others at DELWP understood that Global Power had requested the extension. It also relied on a letter from the Proponents' solicitors, Baker McKenzie, dated 19 January 2021, in which they clarified that the entity that applied to the Minister for an extension of time for the Permit was Global Power.

103 The only conclusion open on the evidence was, the Association submitted, that Global Power made the request for the extension. Whatever undisclosed agency arrangements might have been in place between Global Power and Ryan Corner Development were said to be irrelevant, because the responsible authority must be

able to assess who has made the request on the face of the materials submitted to it.

Proponents' submissions

104 The Proponents submitted that the identity of the person who asked for the Permit to be extended was a matter for the 'Court to determine, as a matter of construction of the application form, and having regard to any other relevant material'.[58] They acknowledged that the extension request could have identified the applicant with greater precision, but submitted that the proper conclusion to be drawn from all of the relevant material was that the request was made on behalf of both Global Power and Ryan Corner Development.

105 The Proponents relied on the following matters.

(a) The application to amend the Permit made in February 2017 was made by ERM on behalf of Ryan Corner Development. The application form noted pre-application meetings with Mr Juttner and other DELWP planning officers on 7 September 2015 and 2 May 2016. Ryan Corner Development was identified as the applicant in submissions made to the planning panel appointed in relation to the proposed amendment, in August 2017.

(b) ERM's cover letter of 17 August 2020 referred to 'Global Power Generation' and 'GPG', and not explicitly to 'Global Power Generation Australia Pty Ltd'.

(c) The references to actions of 'GPG' in the cover letter describe actions taken by a number of different entities within the GPG group in relation to the development of the Berrybank, Ryan Corner and Hawkesdale wind farms. Given the interconnected nature of the group's corporate structure, it was convenient to describe the various entities as a group. In that context, the Proponents submitted that the references to 'GPG' in the cover letter were best understood as references to Global Power and the relevant special purpose vehicle.

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58 *Wajnberg v Raynor* [1971] VR 665, 669.

(d) Other documents in the application package clearly identify Ryan Corner Development as the entity that was proposing to construct the Hawkesdale wind farm. The environmental audit report and the acoustic reports were addressed to Ryan Corner Development, and identified it as the developer of the wind farm.

(e) In September 2020, ERM lodged a separate application for a permit to remove native vegetation to facilitate the development of a transmission line to connect the Ryan Corner and Hawkesdale wind farms to the terminal station. The cover letter stated that ERM 'continues to act on behalf of Ryan Corner Development Pty Ltd C/- Global Power Generation Australia Pty Ltd (GPG)'.

(f) ERM had been engaged by Ryan Corner Development, not Global Power, to provide services in respect of the Hawkesdale wind farm project. The Proponents submitted that ERM did not have authority to request an extension on behalf of Global Power, other than in its capacity as agent for Ryan Corner Development.

106 The Proponents argued that no reliance could be placed on DELWP addressing the decision letter to Global Power, care of ERM, or on Baker McKenzie's letter of 29 January 2021 identifying Global Power as the entity that requested the extension. They submitted that it is a matter for the Court to determine who made the request, based on the evidence before it.

107 Alternatively, the Proponents submitted that the references to 'Global Power Generation' and 'GPG' in the extension letter could be understood as references to Global Power acting in its capacity as agent for Ryan Corner Development. They pointed out that applications for planning permits are commonly made by agents.[59] It was clear that, by 17 August 2020, Global Power had been appointed by Ryan Corner Development to act as its agent in relation to the Hawkesdale wind farm

[59] Relying on *Nguy v Whitehorse City Council* [2009] VCAT 75, [10].

project. The Proponents submitted that the material before the Court revealed that Global Power was acting as Ryan Corner Development's agent, and in no other capacity.

Consideration

108 Given that a request by the owner or the occupier of the relevant land is a jurisdictional fact necessary to enliven the power in s 69(2) of the Planning Act, it is important that a request to extend a permit identifies clearly who is making the request. The cover letter did exactly that. It commenced by stating that ERM continued to act on behalf of 'Global Power Generation (GPG)' in relation to the Permit. The assessor, the delegate, and even Global Power's solicitors all understood that ERM had requested the permit extension on behalf of Global Power. I have reached the same conclusion.

109 I accept that the Construction Management Services Agreement authorised Global Power to act as Ryan Corner Development's agent in matters relating to the Permit. However, that did not preclude Global Power from itself requesting an extension of the Permit.

110 The Proponents invited me to read the application as a whole, which I have done several times. The cover letter, which provided relevant factual background and made detailed submissions addressing the *Kantor* considerations, made no reference to a group of companies. It was expressed as a request made on behalf of a single entity – Global Power – that was seeking to develop three separate wind farms: Berrybank, Ryan Corner, and Hawkesdale. The following three extracts from the letter make this plain.

111 First, the explanation given for the delay in constructing the Hawkesdale wind farm included Global Power's focus on the Berrybank wind farm, which was nearing completion. Under the heading 'Statement of facts and reasons for the extension request', the letter said:

> The extension of time is required because of a number of time delays associated with the project which have pushed back completion of the works. The biggest

> delay was the permit amendment process that occurred in 2017. Since then some minor works have progressed.
>
> However, the main priority for GPG has been dealing with the Berrybank Wind Farm which was successful in the Victorian Renewable Energy Auction Scheme. Now that the Berrybank Wind Farm is underway and on track for completion, attention can be focused on accelerating the completion of the Hawkesdale Wind Farm.
>
> …

This is an explanation of Global Power's priorities, not those of Ryan Corner Development, which had no association with the Berrybank wind farm.

112 Second, the submissions made as to whether the proponent was seeking to warehouse the Permit identified Global Power as the proponent. The submissions read:

> The proponent is not seeking to warehouse the permit. As discussed above, GPG's main focus was on the Berrybank Wind Farm considering that the project was successful in the Victorian Renewable Auction 2018. The focus was on ensuring full planning compliance and the commencement of works. Now that Berrybank Wind Farm is on track for completion, GPG can focus on other projects such as Hawkesdale.

113 Third, it was submitted that the Permit did not impose an economic burden on Global Power:

> The permit is not considered to be an economic burden on the proponent. GPG have been focusing their efforts on the Berrybank Wind Farm project which was successful under the Victorian Renewable Auction 2018. This project is now underway which has allowed for Hawkesdale Wind Farm to be the next priority.

114 The cover letter contrasts with other documents submitted by ERM in relation to the Hawkesdale wind farm, which carefully named Ryan Corner Development as the applicant. The application to amend the Permit dated 28 February 2017 identified Ryan Corner Development as the applicant, and was signed by ERM 'for Ryan Corner Development Pty Ltd'. On 21 September 2020, ERM made a separate application for a permit to remove native vegetation in order to construct the transmission line for both the Hawkesdale and Ryan Corner wind farms, identifying its client as Ryan Corner Development. This indicates to me that ERM was aware of Ryan Corner Development's role in the Hawkesdale wind farm project, and took care to identify it

as the applicant when appropriate. It also indicates that the omission of any reference to Ryan Corner Development in the cover letter to the extension request was not an oversight on ERM's part.

115 In addition, Mr Alonso reviewed a draft of the cover letter before it was sent, and made a number of changes to the draft. It is apparent from the marked up draft that Mr Alonso returned to ERM on 29 July 2020 that his review was careful and considered. The changes he made or suggested included changing 'landowner' to 'proponent' in several places, including in the submission about the economic burden of the Permit. Despite the care with which he reviewed the letter, and his evident grasp of the detail of the Hawkesdale wind farm project, Mr Alonso did not change or query the way in which the cover letter identified the proponent.

116 I place more weight on Mr Alonso's contemporaneous review of the cover letter than I do on his after-the-fact assertions that Global Power was acting as Ryan Corner Development's agent in instructing ERM to seek the permit extension. I do not accept that the fee proposals provided by ERM to Ryan Corner Development in May 2015, for work to be done in relation to the amendment application, precluded ERM from taking instructions directly from Global Power more than five years later. The evidence did not include any invoices sent by ERM to Ryan Corner Development for its work on the extension application.

117 The fact that the environmental audit and the acoustic reports were addressed to Ryan Corner Development, and refer to it as the entity proposing to construct the wind farm, does not displace the clear language of the cover letter. Read with the cover letter, the reports are consistent with Global Power being the proponent for the Hawkesdale wind farm. Rather than suggesting that Global Power was requesting the extension as agent for its principal, Ryan Corner Development, the acoustic reports identify Ryan Corner Development as a subsidiary of Global Power.

118 I conclude that ERM asked for the Permit to be extended on behalf of Global Power as the leading proponent of the Hawkesdale wind farm project. The request was not

made by Global Power in its capacity as agent for Ryan Corner Development, or on behalf of both companies.

119 Global Power did not claim to have been an occupier for the purposes of s 69(1) of the Planning Act. The request to extend the Permit submitted on its behalf on 17 August 2020 did not enliven the Minister's power in s 69(2) to extend the Permit.

120 It is therefore not necessary to determine whether Ryan Corner Development was 'the occupier of the land' to which the Permit applies. There remains the question of whether the Minister had a separate, independent power to extend the Permit, under condition 64 of the Permit.

Was there an alternative power to extend the permit?

121 Condition 64 of the Permit provided that the Permit would expire if the development was not started within 3 years or completed within 6 years of the date of the Permit. It further provided:

> The Minister for Planning as responsible authority may extend the periods referred to if a request is made in writing before the permit expires, or within 12 months afterwards.

122 As noted, the Permit had been extended on a number of occasions previously. The amendments noted on the Permit were:

Date of amendment	Brief description of amendment
15 November 2011	Pursuant to Section 69 of the Planning and Environment Act 1987 this permit was extended so that development must start no later than 15 March 2012.
31 October 2013	Pursuant to Section 69 of the Planning and Environment Act 1987 this permit was extended so that the permit will expire if the development is not completed by February 2016.
09 April 2015	Pursuant to Section 69 of the Planning and Environment Act 1987 this permit was extended so that the permit will expire if works are not completed by 29 August 2019.
21 Dec 2017	Pursuant to Section 97J of the Planning and Environment Act 1987 this permit was amended to increase the height of turbines, reduce the number of turbines, and to modify

	conditions under the permit. Pursuant to Section 69 of the Planning and Environment Act 1987 this permit was extended so that the permit will expire if works are not completed by 29 August 2020.

123 The cover letter requested an extension of the Permit under both s 69 of the Planning Act and condition 64 of the Permit. The Assessment Report also referred to condition 64, and concluded:

> The request was received prior to the permits expiring, and can therefore be considered under the extension provisions of these permit conditions.

124 The Minister and the Proponents contended that the Extension Decision was supported by condition 64 of the Permit, even if the power in s 69(2) of the Planning Act was not enlivened. It is convenient to begin with their submissions, before turning to the Association's arguments to the contrary.

Defendants' submissions

125 The Minister started with the proposition that, if the delegate purported to act under a non-existent power, but there was an alternative power available and all conditions for its exercise had been satisfied, the Extension Decision was a valid exercise of the alternative power.[60] He submitted that condition 64 provided a separate independent power to extend time, consistent with the past practice of the Minister to include secondary consent provisions in permits that provide different timeframes for extension requests than those in s 69, and allow persons other than an owner or occupier to request an extension.[61]

126 The Minister relied on the reasoning of Emerton J in *Kingston City Council v* ***Transpacific*** *Waste Management Pty Ltd*,[62] in which her Honour rejected arguments by the Council that s 69 was the only source of power to extend a permit and that a permit

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60 Relying on *Lockwood v Commonwealth* (1954) 90 CLR 177, 184; *Harris v Great Barrier Reef Marine Park Authority* (1999) 162 ALR 651, [14]; *Eastman v Director of Public Prosecutions (ACT)* (2003) 214 CLR 318, [124] (Heydon J); *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1, [34] (French CJ, Hayne, Kiefel and Bell JJ).

61 Referring to *Naroghid Wind Farm Pty Ltd v Minister for Planning* [2013] VCAT 675, [92], [98]-[99].

62 (2013) 196 LGERA 156 (***Transpacific***).

condition could not confer any 'secondary consent' power to extend time.[63] Likewise in this case, the Minister submitted, condition 64 is a valid condition, which serves a valid planning purpose.

127 Anticipating the Association's argument that the general power in s 62 of the Planning Act to include conditions on permits is limited by the specific power in s 69 to extend a permit, the Minister submitted that there is no evident intention in the Planning Act that s 69 should cover the field in relation to permit extensions. He characterised s 69 as a facilitative provision, that enables certain classes of persons to ask for a permit to be extended, regardless of what the permit itself provides. There is no conflict between the two provisions, and there is therefore no need to read down the power in s 62 to include any condition that the responsible authority thinks fit. Rather, ss 68 and 69 provide the default position for expiry and extension of a permit, including where a permit is silent on those matters.

128 In support of this argument, the Minister referred to the objective in s 4(1)(f) of the Planning Act – that is, to facilitate development in accordance with the objectives of planning – and the comprehensive process involved in obtaining a planning permit under the Planning Act. The Minister pointed to the facilitative construction of other provisions of the Planning Act preferred by the Court of Appeal in ***Cumming*** *v Minister for Planning*,[64] and urged the same approach to the construction of ss 62 and 69.

129 The Proponents made submissions to like effect.

Association's submissions

130 The Association queried whether the Minister could validly rely on the general power in s 62(2) to insert a condition in the Permit that dispensed with the jurisdictional fact in s 69(1) that a request to extend a permit must be made by the owner or occupier of

63 *Transpacific*, [70]-[71].
64 (2020) 245 LGERA 164, [195], [222]-[224] (***Cumming***).

the land to which the Permit relates. It submitted that an orthodox application of the *Anthony Hordern* principle[65] indicated that he could not.

131 The Association relied on the summary of that principle by Gummow and Hayne JJ in *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom*:[66]

> [I]t must be possible to say that the statute in question confers only one power to take the relevant action, necessitating the confinement of the generality of another apparently applicable power by reference to the restrictions in the former power. In all the cases considered above, the ambit of the restricted power was ostensibly wholly within the ambit of a power which itself was not expressly subject to restrictions.

132 The power in question here was characterised as a power of 'the executive government of a State to grant exclusive rights to exploit the resources of the State',[67] such as rights to use and develop land. The Association submitted that, where a statutory regime confers such a power, conditions imposed on its exercise must be observed. It referred to the observations of the majority in ***Forrest & Forrest*** *Pty Ltd v Wilson* – that a less stringent approach 'might imperil the honest and efficient enforcement of the statutory regime', by allowing non-compliance with a legislative regime to be overlooked or excused by officers of the executive government.[68]

133 The Association contended that the Planning Act confers only one power to extend a permit, the power in s 69(2), which is qualified by the jurisdictional conditions imposed by s 69(1). Those conditions are mandatory and cannot be dispensed with 'by means of convenient executive fiat'.[69]

134 It argued that *Transpacific* should be distinguished, on the basis that the permit condition in that case allowed an extension of time to complete a use – a type of extension that was not addressed in the Planning Act. That essential feature of Emerton J's reasoning was absent in this case, where condition 64 deals with the same

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65 Referring to ***Anthony Hordern*** *and Sons Pty Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1, 7 (Gavan Duffy CJ and Dixon J).

66 (2006) 228 CLR 566, [59].

67 ***Forrest & Forrest*** *Pty Ltd v Wilson* (2017) 262 CLR 510, [64] (Kiefel CJ, Bell, Gageler and Keane JJ).

68 *Forrest & Forrest*, [65].

69 Plaintiff's reply submissions dated 14 May 2021, [97].

circumstance as the power in s 69(2) – that is, an extension of time to commence or complete a development.

Consideration

135 Condition 64 of the Permit enables the Minister to extend the time allowed for the completion of the development, if a request is made in writing before the Permit expires, or within 12 months afterwards. If it was a valid permit condition, then it was a separate and independent power to extend the Permit, regardless of whether the power in s 69(2) of the Planning Act was enlivened. Both the extension request and the Assessment Report identified and relied on condition 64 as a power to extend the Permit.

136 Even if there had not been express reliance on the power in condition 64, the conditions for its exercise were met – the request was made in writing, before the Permit expired. If condition 64 was valid, the extension of the Permit could have been supported by this alternative power.[70] The Association did not submit otherwise.

137 The Association did not directly impugn the validity of condition 64 in this proceeding. The argument that the condition was not supported by the power in s 62 of the Planning Act was first raised in the Association's reply submissions, in response to the defendants' reliance on the condition as an alternative source of power. I do not accept the argument, for the following reasons.

138 The *Anthony Hordern* principle, relied on by the Association, is that:[71]

> When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power.

139 This principle of statutory construction assists in reconciling some conflict or

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70 *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1, [34] (French CJ, Hayne, Kiefel and Bell JJ).

71 *Anthony Hordern*, 7 (Gavan Duffy CJ and Dixon J). See also *Minister for Immigration and Multicultural and Indigenous Affairs v* ***Nystrom*** (2006) 228 CLR 566, [59] (Gummow and Hayne JJ).

repugnancy between a general and a specific provision. Whether there is a conflict between the two provisions that must be reconciled depends on the text, context and purpose of the particular statute.[72] Here, neither text, context or purpose indicate any conflict between s 62(2) and s 69 of the Planning Act, and there is no difficulty with giving them an overlapping effect.

140 As to the text of s 62(2), it provides that a responsible authority 'may include any other condition that it thinks fit'. A list of specific conditions follows in paragraphs (a) to (m), which do not include a condition as to the expiry and extension of the Permit. However, it is an inclusive list, and the power to include 'any other condition' is not expressed to be 'subject to this Act' or any other limitation.

141 Sections 68 and 69 are not expressed in terms that limit or restrict any other power in Pt 4 of the Planning Act.[73] Section 68 in particular contemplates that a permit may specify the time within which a development must start and be completed, and provides a default position where no time is specified in the permit.[74]

142 Contextually, the fact that s 69 follows immediately after s 68 indicates that the two provisions are to be read together. That is, the power in s 69(2) to extend a permit complements the powers in s 68 to specify when a permit expires. The connection between the two provisions suggests that s 69 is also a default provision – that is, it provides a mechanism to extend a permit in addition to anything that may be provided in the permit.

143 The overall context of Pt 4 is a comprehensive scheme for applications for, objections to, referral and consideration of, and decisions regarding whether to grant, permits. As the Minister submitted, the permit process can be time consuming, onerous, and costly for all concerned. In that context, the power in s 69 to extend a permit, like the

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72 *Nystrom*, [2] (Gleeson CJ), [54], [59], [69]-[70] (Gummow and Hayne JJ), [162]-[169] (Heydon and Crennan JJ); *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, [50] (French CJ), [84]-[85] (Gummow, Hayne, Crennan and Bell JJ), [236] (Kiefel J).

73 Sections 68 and 69 are set out at [25] and[26] above.

74 Planning Act, s 68(1)(a)-(b), (3)(a)-(b).

power in s 71 to correct a mistake in a permit, enables the time and resources invested in a permit granted under Pt 4 to be preserved.

144 As to purpose, the objectives of planning in Victoria include facilitating development in accordance with the other objectives of planning.[75] This supports reading the provisions of Pt 4 of the Planning Act in a facilitative rather than restrictive way, as the Court of Appeal did in *Cumming* in relation to the correction power in s 71.[76]

145 It is consistent with that objective for permits to include, as they often do, secondary consent conditions that allow for minor amendments to approved plans, without the need to apply for an amendment to the permit under Pt 4, Div 1A of the Planning Act.[77] Similarly, it facilitates development for an incorporated document in a planning scheme to provide for the control to be extended by the planning authority, without requiring a further planning scheme amendment.[78]

146 I do not consider that the line of authority referred to in *Forrest & Forrest*,[79] concerning parliamentary control of the disposition of Crown land by the executive, has any application here. The Planning Act provides a planning framework for the use and development of land in Victoria, regardless of ownership. It does not provide for the disposition of any interest in Crown land, or the right to exploit mineral resources owned by the Crown or any other 'resources of the State'. Those matters are the subject of other legislation in Victoria, such as the *Land Act 1958* (Vic) and the *Mineral Resources (Sustainable Development) Act 1990* (Vic).

147 Unlike the object of the provisions considered in *Forrest & Forrest*,[80] there is no clear policy imperative for limiting the ability to request a permit extension to the owners and occupiers of the land to which the permit applies. The Planning Act contemplates

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75 Planning Act, s 4(1)(f). See also s 4(2)(e).
76 *Cumming*, [222]-[224].
77 *Transpacific*, [62].
78 *Tok Holdings Pty Ltd v Minister for Planning* [2021] VSC 470, [149].
79 *Forrest & Forrest*, [64]-[65].
80 Discussed in *Forrest & Forrest* at [82]-[90].

that a permit may be granted on the application of a person who is neither an owner or an occupier.[81] In that context, it is hard to see why Parliament would want to restrict requests for permit extensions in the way contended by the Association. The recent amendment of s 69 to allow 'another person with the written consent of the owner' to ask for an extension indicates that no such restriction was intended.

148 I am conscious that *Transpacific* was decided on the narrower basis that s 69 did not provide for the extension of time for completion of the permitted use, and so could not have been intended to exclude power to include a permit condition to that effect. However, Emerton J's conclusion that s 69 is not the only source of power to extend time under a planning permit is consistent with the conclusion I have reached, by a different path of reasoning, in this case.

149 Condition 64 was a valid permit condition that enabled the Minister to extend the time for completion of the development, independently of the power in s 69 of the Planning Act. The extension of the Permit granted by the delegate was therefore supported by the power in condition 64, even though the power in s 69(2) had not been enlivened.

Was the Extension Decision affected by an error of law on the face of the record?

150 The second ground on which the Association challenged the Extension Decision was error of law on the face of the record.

151 The Assessment Report noted that there had been some changes to relevant planning policies since the Permit was amended in December 2017, but concluded that 'these changes would not reduce the probability of a permit being granted today'.[82] The Association contended that this conclusion involved an error of law on the face of the record. This contention was based on a submission that the Assessment Report represented the delegate's reasons for decision, and was incorporated in the record by s 10 of the ***Administrative Law Act*** *1978* (Vic).

152 The Minister disputed that the Assessment Report formed part of the 'record', arguing

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81 Planning Act, s 48.

82 **Assessment Report** dated 29 October 2020, 6.iv, set out at [18] above.

that the delegate had not adopted the contents of the Assessment Report as his reasons for decision, and had not been asked to provide a statement of reasons under s 8 of the Administrative Law Act. It is not necessary to resolve this issue because, for the reasons that follow, I do not consider that the Assessment Report discloses any error of fact or law in relation to the likely impact of the changes to planning policies.

Planning policy changes

153 Clause 52.32 of the Moyne Planning Scheme applies to land proposed to be used and developed for a wind energy facility. The requirements for an application for a permit to use and develop land as a wind energy facility are set out in cl 52.32-4.

154 In December 2017, when the Permit was amended, cl 52.32-4 required an application for a permit to include a written report including an assessment of:

> the noise impacts of the proposal prepared in accordance with the New Zealand Standard NZS6808:2010, Acoustics – Wind Farm Noise, including an assessment of whether a high amenity noise limit is applicable, as assessed under Section 5.3 of the Standard.

155 The decision guidelines in cl 52.32-5 required the responsible authority to consider, as appropriate:

- The State Planning Policy Framework and the Local Planning Policy Framework including the Municipal Strategic Statement and local planning policies.
- The effect of the proposal on the surrounding area in terms of noise, blade glint, shadow flicker and electromagnetic interference.
- The impact of the development on significant views, including visual corridors and sightlines.
- The impact of the facility on the natural environment and natural systems.
- The impact of the facility on cultural heritage.
- The impact of the facility on aircraft safety.
- *Policy and Planning Guidelines for Development of Wind Energy Facilities in Victoria* (Department of Environment, Land, Water and Planning, November 2017).
- The New Zealand Standard NZS6808:2010, Acoustics - Wind Farm Noise.

156 By October 2020, when the application to extend the Permit was being assessed, the application requirements prescribed in cl 52.32-4 had been amended by **Amendment VC149** to the Victoria Planning Provisions. The requirement for an application to include a written report containing an assessment of the noise impacts of the proposal remained. There was an additional requirement for the application to be accompanied by the following information:

> **Mandatory noise assessment**
>
> - A pre-construction (predictive) noise assessment report demonstrating that the proposal can comply with the New Zealand Standard NZS6808:2010, Acoustics – Wind Farm Noise, including an assessment of whether a high amenity noise limit is applicable under Section 5.3 of the Standard.
>
> - An environmental audit report of the pre-construction (predictive) noise assessment report prepared under Part IXD, Section 53V of the *Environment Protection Act 1970* by an environmental auditor appointed under Part IXD of the *Environment Protection Act 1970*. The environmental audit report must verify that the acoustic assessment undertaken for the purpose of the pre-construction (predictive) noise assessment report has been conducted in accordance with the New Zealand Standard NZS6808:2010, Acoustics – Wind Farm Noise.

157 In addition, a new cl 52.32-5 provided for the inclusion of a mandatory condition in a permit, as follows:

> **Mandatory condition**
>
> If a mandatory noise assessment must accompany an application under Clause 52.32-4, any permit or amended permit issued with respect to that application must include the following conditions:
>
> - A post-construction noise assessment report prepared in accordance with the New Zealand Standard NZS6808:2010, Acoustics – Wind Farm Noise demonstrating whether the wind energy facility complies with the Standard, must be submitted to the Responsible Authority. If the wind energy facility is constructed in stages, additional post-construction noise assessment reports for each stage must be submitted to the Responsible Authority.
>
> - Each post-construction noise assessment report must be accompanied by an environmental audit report prepared under Part IXD, Section 53V of the *Environment Protection Act 1970* by an environmental auditor appointed under Part IXD of the *Environment Protection Act 1970*. The environmental audit report must verify that the acoustic assessment undertaken for the purpose of the post-construction noise assessment report has been conducted in accordance with the New Zealand Standard NZS6808:2010,

Acoustics – Wind Farm Noise.

158 There had also been minor amendments to the decision guidelines, now set out in cl 52.32-6, in particular to update the reference to the March 2019 version of DELWP's *Policy and Planning* ***Guidelines*** *for Development of Wind Energy Facilities in Victoria*. The list of factors for the responsible authority to consider, as appropriate, had been amended to read:

- The Municipal Planning Strategy and the Planning Policy Framework.
- The effect of the proposal on the surrounding area in terms of noise, blade glint, shadow flicker and electromagnetic interference.
- The impact of the development on significant views, including visual corridors and sightlines.
- The impact of the facility on the natural environment and natural systems.
- The impact of the facility on cultural heritage.
- The impact of the facility on aircraft safety.
- *Policy and Planning Guidelines for Development of Wind Energy Facilities in Victoria* (Department of Environment, Land, Water and Planning, March 2019).
- The New Zealand Standard NZS6808:2010, Acoustics - Wind Farm Noise.

Association's submissions

159 The Association's argument focused on the new requirement that a permit application be accompanied by both a pre-construction (predictive) noise assessment report, demonstrating that the proposal can comply with the New Zealand Standard, and an environmental audit report of the pre-construction noise assessment report. It submitted that this requirement might reduce the likelihood of a permit being granted, either because the responsible authority might accept the results of the noise assessment itself, or because the responsible authority or objectors might identify deficiencies or errors in the noise assessment.

160 The Association gave some examples of the way it said that the requirement for an audited, pre-construction noise assessment might affect the outcome. It might demonstrate that the proposed layout of the turbines could not comply with the New

Zealand Standard. Or the audit might indicate that the methodology employed in the noise assessment was flawed, and could not be relied upon. Or the noise assessment might not identify the correct noise limit for the area surrounding the wind farm, in circumstances where the proper application of the high amenity noise limit remains unsettled.[83] These examples illustrated, the Association submitted, why the delegate was wrong to conclude that the new requirement for an audited pre-construction noise assessment did not reduce the probability that a wind farm permit would be granted.

161 The Association characterised this error as a misunderstanding of the legal significance of Amendment VC149. It submitted that, rather than descending into the facts, and making a finding of fact about whether the environmental audit report submitted by Global Power met the new requirement, the delegate instead took a threshold approach based on his understanding of the legal effect of the amendment. His legal understanding was incorrect and therefore his assessment was affected by an error of law.

162 Neither the November 2017 nor the March 2019 version of the Guidelines was in evidence. The Association did not rely on any change to the Guidelines and accepted that there had been no change to the requirement for wind farms to comply with the New Zealand Standard.

Minister's submissions

163 The Minister submitted that the delegate made no error, because it was clear from the content of the Assessment Report that he understood that Amendment VC149 had introduced a mandatory application requirement for an audited pre-construction noise assessment report, and that the same noise control standard would continue to apply. Further, he characterised the question of whether the new requirement would reduce the likelihood of a permit being granted as a question of fact, not a question of law. That finding was open to the delegate; it was a matter for him what significance

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83 Referring to *Naroghid Wind Farm Pty Ltd v Minister for Planning* [2019] VCAT 800, [217]-[227].

he ascribed to the new requirement.

164 In addition, the Minister pointed out, the requirement for a pre-construction noise assessment was not new. At the time of the 2017 amendment, the application requirements in cl 52.32-4 of the Moyne Planning Scheme included an assessment of the noise impacts of the proposal prepared in accordance with the New Zealand Standard.

165 The Minister argued that the Assessment Report quite properly distinguished between the application requirements and the standards to be met. He submitted that the additional requirement for an environmental audit report did not 'raise the policy bar' but rather provided 'more detail on how policy objectives are to be met'.[84]

Proponents' submissions

166 The Proponents submitted that the Association's contention was based on a flawed premise: that Amendment VC149 introduced a new requirement that a permit application be accompanied by a pre-construction (predictive) noise assessment. In fact, the amendment simply replicated a pre-existing application requirement. There was therefore no error in the delegate's finding that it was probable that a fresh approval would be issued today, due to the limited change in planning controls since the amendment of the Permit in 2017. That was a finding of fact that was open to be made, which could not be impugned on judicial review.

167 The same response was made to any reliance placed by the Association on the fact that Amendment VC149 introduced a new application requirement for an audit report of the pre-construction noise assessment report. While this change was only indirectly addressed in the Assessment Report, the conclusion that it was not material was open to be made.

Consideration

168 The author of the Assessment Report correctly identified that minor changes had been

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[84] Referring to *Transpacific Waste Management Pty Ltd v Kingston City Council* [2012] VCAT 693, [51].

made to the Victoria Planning Provisions since the date of the amended permit, and accurately summarised those changes.[85] Significantly, he noted that there had been no change to the noise requirements for wind farms, which still had to comply with the New Zealand Standard.

169 As was explained in the Assessment Report, the amendments to cl 52.32 were made in response to the findings of the 2017 report of the **Independent Inquiry** into the Environment Protection Authority. The relevant part of the Independent Inquiry's report was in evidence, and provides useful context about the purpose of the amendments:

> **10.4.1 Applying EPA tools to emerging land use planning issues - Wind farms**
>
> We propose amending the existing *Policy and Planning Guidelines for Development of Wind Energy Facilities in Victoria* (the wind energy guidelines), to require the use of statutory environmental audit when an assessment of wind farm noise is required as part of the wind farm approval processes and for compliance purposes.
>
> Stakeholders expressed a range of concerns about wind farms: from local government dealing with the assessment of environmental issues; from communities concerned about potential health impacts of existing wind farms; and from the renewable energy industry concerned about challenges to the wind farm industry and its long term viability.
>
> Submissions raised specific proposals for the EPA to have an enhanced role in relation to wind farms. The Clean Energy Council and the Municipal Association of Victoria suggested the EPA licence wind farms. Submissions from community members opposed to wind farms also proposed that the EPA should have a primary role in wind energy regulation.
>
> In Victoria, the land use planning system has been the established mechanism for regulating the approval and permitting of wind farms, and management of compliance issues. This approach is consistent with the objectives of land use planning as set out in the *Planning and Environment Act 1987*, including '... to provide for the fair, orderly, economic and sustainable use, and development of land (section 4(1)(a))'.
>
> The land use planning system is designed to manage conflicts between competing land uses, including potential amenity and other impacts of proposed developments. For wind farms, a range of issues fall within the bounds of routine land use planning decision making:

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85 Assessment Report, 6.iv, set out at [18] above.

- landscape and visual amenity
- ecological and heritage issues such as bird and bat strike
- land clearing
- hazards and risks such as aircraft safety
- social issues such as shadow flicker, blade glint and night lighting.

Most of these issues relate to wind farm design and siting, and are therefore best addressed through the planning system. The wind energy guidelines set out the standards for wind farms. The guidelines are applied to decisions on planning permits for wind farms, and include standards for operational wind turbine noise. The relevant planning authority (usually the council) is responsible for ensuring compliance with the planning permit. Where appropriate, the EPA provides technical support to planning authorities.

We consider the current approach could be reframed, to provide a higher level of assurance to the community on risk assessment, and to deal with the challenges council planners face on technically assessing wind turbine noise impacts (one of the main issues associated with operational wind farms).

We consider the EPA could more effectively deploy its expertise. Specifically, the statutory environmental audit system should be employed to provide authoritative, independent and expert advice to local government, both at the time of applications and to support compliance.

We propose amending the wind energy guidelines to require that where an assessment of wind farm noise compliance is required, proposed or existing wind farm operators must obtain an assessment and verification of wind farm noise compliance undertaken by an EPA appointed auditor. Consistent with the requirements that currently apply to assessment of risk from potentially contaminated land, the statutory environmental audit would be undertaken by the proponent of the wind farm as part of their planning application. And the audit would be on the public record.

The statutory audit process, which the EPA oversees, provides an authoritative sign-off on compliance when operations commence. We also propose that the EPA prepare specific guidance for wind farm noise assessment, and that DELWP and the EPA develop a protocol to determine when compliance reviews should be conducted, including to address currently operating wind farms. …

…

We consider that consistent use of statutory environmental audits will address many of the issues and concerns raised in submissions, including:

- the requirement for 'independence' (Wind Industry Reform Victoria submission, p. 3) and concerns about 'improper compliance testing' (Peter Mitchell submission, p. 1)
- concerns that local government does not have the skills, expertise or

equipment (Alex Serrurier submission, p. 2; AGL Energy submission, p. 6; Pacific Hydro Australia submission, p. 6; and Trustpower Australia submission, p. 3)

- the need for clear protocols on responding to noise complaints and transparent processes that will address community concerns (Wellington Shire Council submission, p. 3; Moreland City Council submission, p. 7; Latrobe City Council submission, p. 2; Wodonga City Council submission, p. 2; City of Boorondara submission, p. 3).

The submission from the Municipal Association of Victoria noted that using the EPA-appointed auditor would work to '... remove any doubt regarding a wind farm's compliance with relevant noise standards.' We note that there is already an arrangement in place between the Municipal Association of Victoria (on behalf of local government) and the EPA to access auditors on a fee-for-service basis.

170 Recommendation 10.5 of the Independent Inquiry was to:

> Amend the existing *Policy and Planning Guidelines for Development of Wind Energy Facilities in Victoria* to require a statutory environmental audit of noise be undertaken for approval and compliance.

171 It is apparent from this context that the purpose of the changes to cl 52.32 made by Amendments VC149 and VC160 was, as described in the Assessment Report, 'to provide a higher level of assurance to the community and council that new wind farms are operating with the approved noise limits'. The noise limits prescribed by the New Zealand Standard had not changed, nor had the requirement for a noise assessment report to be provided with an application for a permit.

172 I am not persuaded that there was any error in the conclusions in the Assessment Report that the changes to cl 52.32 'would not reduce the probability of a permit being granted today' and 'would not reduce the likelihood that a permit for the approved wind farm would issue today were a new application made'. The requirement for a noise assessment report was not new. The new requirement for an audit of the noise assessment report to be provided with a permit application did not make it less likely that a permit would be granted. To the contrary, a noise assessment that has been subjected to an authoritative, independent audit is *more* likely to satisfy the responsible authority that the proposed wind farm can operate within the noise limits set by the New Zealand Standard.

173 For completeness, I consider that the findings made in the Assessment Report about the likely effect of the amendments on a new permit application were findings of fact that were open to be made.

174 The Association has not established any error of fact or law in the Assessment Report. It follows that it has not made out its second ground.

Disposition

175 The Association sought an extension of time within which to commence the proceeding, under r 56.02(3) of the Rules. The Extension Decision was made on 2 November 2020, and the proceeding was not commenced until 17 February 2021, nearly seven weeks after the expiry of the 60 day time limit prescribed by r 56.02(1). The Association contended that there were special circumstances that warranted an extension, because its members were not aware that the Permit had been extended until after the event, and their attempts to obtain confirmation of the Extension Decision and the reasons for it were stymied by the defendants.

176 If the proceeding had been commenced by a member of the Association in February 2021, I would have been inclined to extend time under r 56.02(3). The defendants were on notice that the Extension Decision was contested by some members of the Hawkesdale community, they were slow to provide information about the Extension Decision, and they did not claim to have suffered any prejudice by reason of the short delay in commencing the proceeding. Had those been the circumstances, the justice of the case would probably have favoured extending time. However, the proceeding was brought by the Association, which has not established that it has standing to seek the relief claimed. For that reason, its claims must be dismissed and there is nothing to be gained by extending time.

177 I will make an order dismissing the proceeding, and will hear the parties on the question of costs.

CERTIFICATE

I certify that this and the 59 preceding pages are a true copy of the reasons for judgment of Justice Richards of the Supreme Court of Victoria delivered on 20 August 2021.

DATED this twentieth day of August 2021.

.....
Associate