Land and Environment Court
New South Wales

Medium Neutral Citation:	**KEPCO Bylong Australia Pty Ltd v Independent Planning Commission [2020] NSWLEC 38**
Hearing dates:	3 April 2020
Date of orders:	29 April 2020
Decision date:	29 April 2020
Jurisdiction:	Class 4
Before:	Moore J
Decision:	See orders at [115]
Catchwords:	JOINDER - application for judicial review of a determination by the Independent Planning Commission to refuse State Significant Development consent to a proposed coal mine - joinder application by non-party pursuant to r 6.27 of the Uniform Civil Procedure Rules 2005 - whether appropriate to join opponent of the proposed mine as a party to the judicial review proceedings - application for joinder on the basis that it is necessary for the determination of all matters in dispute in the proceedings that the joinder applicant be joined as a contradictor - present sole respondent (the Commission) has filed a submitting appearance - applicant for joinder played a substantial role in opposing the proposed coal mine for which the applicant for judicial review sought State Significant Development consent - necessity for an active contradictor - desirability of permitting joinder on the basis of public interest issues arising from grounds pleaded in support of judicial review proceedings - whether participation as amicus curiae should be considered - applicant for joinder expressly disavows participation as amicus - not appropriate to consider possibility of participation as an amicus - appropriate to order joinder in the public interest - joinder ordered COSTS - judicial review applicant seeks protective costs

order if applicant for joinder joined as a party - consideration of cases cited in support of the making of such a protective costs order - cases cited do not provide support for a protective costs order as the facts and circumstances of the two cases cited are irrelevant to the present circumstances - protective costs order refused.
COSTS - joinder applicant seeks costs of joinder proceedings - presumption that costs follow the event - joinder applicant successful in joinder application - applicant in judicial review proceedings ordered to pay the costs of the applicant for joinder of the joinder proceedings

Legislation Cited:

Environmental Planning and Assessment Act 1979, ss 8.7, 8.8 and 8.12
Land and Environment Court Act 1979, s 20
State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007, cl 14(2)
Trustee Act 1925, s 81
Uniform Civil Procedure Rules 2005, rr 6.24, 6.27, 42.1 and 59.3

Cases Cited:

Arakella Pty Ltd v Paton (2004) 60 NSWLR 334
Armidale Dumaresq Council v Attorney-General (NSW) (No 1) [2007] NSWSC 557
Attorney-General (Cth) v Alinta (2008) 233 CLR 542
Australian Conservation Foundation Inc v Forestry Commission (1988) 19 FCR 127
Australian Institute of Marine and Power Engineers v Secretary, Department of Transport (1986) 13 FCR 124
Australian Paper Manufacturers v Commonwealth (1990) 64 ALJR 530
Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd (1998) 194 CLR 247
Breen v Williams [1994] 35 NSWLR 522
Burnie Port Corporation Pty ltd v Bank of Western Australia Ltd (2002) 1 Tas R 249
Chriss v Williams [1988] NSWCA 22
Forster v Jododex Australia Pty Ltd (1972) 127 CLR 421
Freeman v Attorney-General (NSW) [1973] 1 NSWLR 729
Karimbla Constructions Services (NSW) Pty Ltd v Premier of New South Wales [2019] NSWLEC 76
London Passenger Transport Board v Moscrop [1942] AC 332
Macquarie Bank Limited v Lin [2002] 2 Qd. R. 188
National Trustees Executors & Agency Co of Australasia Ltd v Attorney-General (Vic) [1973] VR 610

Murraylink Transmission Company Pty Ltd v National Electricity Market Management Company Ltd (2003) VSC 51
Nation v Kingborough Council (2003) 12 Tas R 141
Onus v Alcoa of Australia Ltd (1981) 149 CLR 27
Perpetual Trustee Co Ltd v Godsall [1979] 2 NSWLR 785
Pfizer Corp v Commissioner of Patents (2006) 67 IPR 646; [2006] FCA 164
Phelps v Western Mining Corporation Pty Ltd (1978) 33 FLR 327
Priest v West (2011) 35 CLR 225 at [35]
Re Baker [1961] VR 641
Re Great Eastern Cleaning Services Pty Ltd and the Companies Act [1978] 2 NSWLR 278
Ross v Lane Cove Council [2014] 86 NSWLR 34
Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd (1921) 2 AC 438
Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA) (1995) 183 CLR 552
Sinclair v Mining Warden at Maryborough (1975) 132 CLR 473
Sportsbet v State of Victoria [2011] FCA 170
The Queen v Australian Broadcasting Tribunal; ex parte Hardiman (1980) 144 CLR 13; [1980] HCA 13
Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd (2000) 200 CLR 591
United States Tobacco Co. v Minister for Consumer Affairs (1988) 20 FCR 520
Verde Terra Pty Ltd v Environment Protection Authority (No 3) [2018] NSWLEC 161
Wollar Progress Association Incorporated v Wilpinjong Coal Pty Ltd [2018] NSWLEC 92

Texts Cited: Meagher, Gummow and Lehane's Equity Doctrines and Remedies, 5th ed, 2015, pages 632-633

Category: Procedural and other rulings

Parties: KEPCO Bylong Australia Pty Ltd (Applicant)
Independent Planning Commission (Respondent)
Bylong Valley Protection Alliance (Applicant for Joinder)

Representation: Counsel:

Mr R Lancaster SC/Mr D Hume, barrister (Applicant/Respondent on the Motion for Joinder)
Mr T Robertson SC/Ms Rebecca McEwen, barrister

(Applicant on the Motion for Joinder)

Solicitors:

Minter Ellison (Applicant/Respondent on the Motion for Joinder)
Submitting appearance (Respondent)
Environmental Defenders Office (Applicant on the Motion for Joinder)

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TABLE OF CONTENTS

JUDGMENT

Introduction

1 On 18 September 2019, the Independent Planning Commission (the Commission) issued its determination concerning State Significant Development Application 6367. The Commission determined that the proposed development should be refused. To accompany its determination, the Commission also issued its detailed Statement of Reasons for reaching this decision. The nature of the proposed development can be seen from the opening paragraph of the Commission's reasons for determination. That paragraph is in the following terms:

> 1 On 4 October 2018, the NSW Independent Planning Commission (**Commission**) received from the NSW Department of Planning and Environment (**Department**) a State significant development application (**SSD**) 6367 from KEPCO Bylong Australia Pty Ltd (**Applicant**) to develop and operate an open cut and underground coal mine to recover approximately 124 million tonnes (Mt) of run-of-mine (**ROM**) coal at a combined rate of up to 6.5 million tonnes per annum (Mtpa) of ROM coal for a period of 25 years (**Project**).

The Class 4 proceedings

Introduction

2 On 16 December 2019, KEPCO Bylong Australia Pty Ltd (the Company) commenced Class 4 proceedings for judicial review of the Commission's process and determination. The Summons was subsequently amended.

Relief sought

3 The Amended Summons seeks a declaration and an exclusionary remitter order with orders being sought in the following terms:

> 1 In relation to State Significant Development Application No. SSD 6367 (**Development Application**) lodged by the Applicant for the Bylong Coal Project (**Project**) and purportedly determined by the Respondent by way of refusal on 18 September 2019 (**the Refusal Decision**):
>
> (a) a declaration that the Refusal Decision is invalid and of no effect; and
>
> (b) an order remitting the Development Application to the Respondent, constituted by individuals different to those who constituted it in making the Refusal Decision, for re-determination in accordance with law.

4 The Summons also seeks that the Commission pay the Company's costs of the proceedings.

The grounds pleaded in the Amended Summons

General

5 The Amended Summons pleaded nine separate grounds in support of the relief sought by the Company. It is appropriate to reproduce a list of the nature of each of those grounds and this appears below. However, with the exception of Grounds 3 and 5, it is unnecessary to reproduce the detail in the Amended Summons supporting and particularising the basis upon which each ground is pressed.

(1) Ground 1 - error of law in relation to cl 14(1)(c) of the Mining SEPP;

(2) Ground 2 - failure to perform the duty imposed by cl 14(1)(c) of the Mining SEPP;

(3) Ground 3 - errors of law in relation to cl 14(2) of the Mining SEPP;

(4) Ground 4 - failure by the Respondent to refer the development application to the Minister for Regional Water;

(5) Ground 5 - error of law in relation to the consideration of the public interest;

(6) Ground 6 - failure to perform the duty imposed by cl 14(1)(a) of the Mining SEPP;

(7) Ground 7 - failure to perform the duty imposed by cl 12(a)(ii) of the Mining SEPP;

(8) Ground 8 - errors in relation to the Respondent's conclusion that it lacked evidence on relevant matters;

(9) Ground 9 - irrational finding in relation to alternative supplies of coal.

Grounds 3 and 5 of the Amended Summons

6 As noted, Grounds 3 and 5 require to be reproduced in full as they are matters that were specifically pressed on behalf of the Bylong Valley Protection Alliance Incorporated (the Alliance) as providing what the Alliance submitted were important public interest reasons why it should be joined as a party in order to address the matters there raised. These grounds are therefore set out below.

7 The complete elements of the Amended Summons with respect to Ground 3 are in the following terms:

> **Ground 3 - errors of law in relation to cl 14(2) of the Mining SEPP**
>
> 20 Clause 14(2) of the Mining SEPP provides that, in determining a development application for development for the purposes of mining, petroleum production or extractive industry, the consent authority must consider an assessment of the greenhouse gas emissions (including downstream emissions) of the development, and must do so having regard to any applicable State or national policies, programs or guidelines concerning greenhouse gas emissions.
>
> 21 A policy, program or guideline is "applicable" for the purposes of cl 14(2) only if it is capable of being applied to the task of considering an assessment of greenhouse gas emissions in deciding whether to grant consent to a relevant development.
>
> 22 On 19 June 2018, the Respondent (formerly known as the Planning Assessment Commission) was party to a decision of the Land and Environment Court in which the Land and Environment Court held that:
>
> (a) the NSW Climate Change Policy Framework, including the objective of achieving net zero emissions by 2050 (**the NSW CCP Framework**); and
>
> (b) the Paris Agreement, including Australia's Nationally Determined Contribution under that agreement of a 26-28% reduction in Australia's emissions below 2005 levels by 2030 (**the Paris Agreement**),
>
> were not applicable policies, programs or guidelines for the purposes of cl 14(2) of the Mining SEPP.
>
> **Particulars**
>
> *Wollar Progress Association Incorporated v Wilpinjong Coal Pty Ltd* [2018] NSWLEC 92 at [146]-[150], [183].
>
> 23 In making the Refusal Decision, the Respondent concluded that the following were "applicable State or national policies, programs or guidelines, concerning greenhouse gas emissions" for the purposes of cl 14(2) of the Mining SEPP:
>
> (a) The NSW Climate Change Policy Framework and, in particular, that framework so far as it identifies an objective of achieving net zero emissions by 2050.
>
> **Particulars**
>
> Reasons at [655]-[656], [687], [689].

(b) The Paris Agreement, and Australia's Nationally Determined Contribution under that agreement of a 26-28% reduction in Australia's emissions below 2005 levels by 2030.

Particulars

Reasons at [655], [689].

24 In making the Refusal Decision, the Respondent relied on the conclusions referred to in paragraph 0 adversely to the Applicant.

25 The NSW CCP Framework and the Paris Agreement are not applicable State or national policies, programs or guidelines concerning greenhouse gas emissions for the purposes of cl 14(2) of the Mining SEPP.

26 In making the Refusal Decision, the Respondent:

(a) erred by finding that the NSW CCP Framework was an applicable State or national policies, programs or guidelines concerning greenhouse gas emissions for the purposes of cl 14(2) of the Mining SEPP;

(b) erred by finding that the Paris Agreement was an applicable State or national policies, programs or guidelines concerning greenhouse gas emissions for the purposes of cl 14(2) of the Mining SEPP;

(c) erred in its construction of "applicable State or national policies, programs or guidelines concerning greenhouse gas emissions" for the purposes of cl 14(2) of the Mining SEPP.

8 The complete elements of the Amended Summons with respect to Ground 5 are in the following terms:

Ground 5 - error of law in relation to the consideration of the public interest

30 In determining the development application, Respondent was obliged to consider:

(a) the public interest; and

(b) as an element of the public interest, the principles of ecologically sustainable development (**ESD**); and

(c) as an element of the principles of ESD, the principle of intergenerational equity.

Particulars

Sections 1.3(b) and 4.15(1)(e) of the EP&A Act.

31 Intergenerational equity is the principle whereby the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations.

Particulars

Definition of 'inter-generational equity' in s 6(2)(b) of the POEA Act.

32 In making the Refusal Decision, the Respondent formed the view that the Project was contrary to the principle of intergenerational equity because the predicted economic benefits would accrue to the present generation but the long-term environmental, heritage and agricultural costs will be borne by the future generations.

Particulars

Reasons at [806] and [817].

33 The Respondent erred in forming the view that the Project was contrary to the principle of intergenerational equity because:

(a) the Respondent misapprehended the concept of intergenerational equity and, therefore, the concept of ecologically sustainable development and the public interest; and

(b) the Respondent was obliged to consider, but failed to consider, whether the Project would ensure the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations rather than whether the present or future generation will bear the costs of the Project (or receive the benefits of the Project).

The Commission's position

9 The Commission has filed a submitting appearance save as to costs. The Commission's adoption of this position is consistent with the *Hardiman* principle (*The Queen v Australian Broadcasting Tribunal; ex parte Hardiman* (1980) 144 CLR 13; [1980] HCA 13).

The joinder application

10 On 13 February 2020, the Alliance filed a Notice of Motion seeking to be joined as a respondent to the Class 4 proceedings in order that there be an active contradictor to the matters pleaded by the Company. The orders sought by the Alliance are in the following terms:

> 1 That the Applicant on the motion be joined as a party to the proceedings under rule 6.24 of Part 6, Division 5 of the *Uniform Civil Procedure Rules 2005* (NSW).
>
> 2 An order that the Applicant pay the Applicant for joinder's costs of the motion.

11 The Company opposes the Alliance being joined. As can be seen from my later analysis of the Company's submissions, the Company's fundamental position was that no proper basis existed to permit the Alliance to participate in the proceedings.

12 However, in the alternative, the Company proposed that, if I was to conclude that participation of some sort might be appropriate, the potential existed for the Alliance to apply to be heard as *amicus curiae* (with, by necessary implication, such an application to be made to the trial judge at the commencement of the final hearing).

The joinder application hearing

13 Because of the restrictions necessarily imposed as a consequence of the COVID-19 virus pandemic, the hearing of this joinder application was conducted by telephone, with Mr Robertson SC for the Alliance and Mr Lancaster SC for the Company phoning in to a conference call conducted by me from my courtroom.

The Commission's process and reasons for determination

The Alliance's role before the Commission

14 It is clear from an analysis of the Commission's reasons for determination that, although certainly not the only opponent of the Company's proposed mine in the Bylong Valley, the Alliance took a substantial (indeed, apparently, the most substantial) role before the Commission in opposing the mine on its merits.

The Commission's reasons for determination

15 It is unnecessary to traverse, at this point, any detail of the 146-page Statement of Reasons issued by the Commission on 18 September 2019 when it issued its formal determination of refusal. The full terms of these reasons can be read on the Commission's website.

16 It is sufficient to note that these reasons for determination do address matters that are sought to be traversed by the Company in Grounds 3 and 5 earlier reproduced from the Amended Summons.

The potentially relevant statutory provisions

17 For reasons that will be seen from my consideration of the issue of whether joinder should be ordered, I consider that the relevant provisions potentially requiring my consideration are contained in the *Environmental Planning and Assessment Act 1979* (the EP&A Act); State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 (the Mining SEPP) and the Uniform Civil Procedure Rules 2005 (the UCPR).

18 The relevant provisions of the EP&A Act are:

> **4.10 Designated development**
>
> (1) Designated development is development that is declared to be designated development by an environmental planning instrument or the regulations.
>
> (2) Designated development does not include State significant development despite any such declaration.
>
> **8.8 Appeal by an objector—designated development applications**
>
> (1) This section applies to the determination of an application for development consent for designated development (including any State significant development that would be designated development but for section 4.10(2)), being a determination to grant development consent, either unconditionally or subject to conditions.
>
> (2) A person who duly made a submission by way of objection during the public exhibition of the application for development consent (an ***objector***) and who is dissatisfied with the determination of the consent authority to grant consent may appeal to the Court against the determination.
>
> **8.12 Notice of appeals to be given and right to be heard**
>
> (1) The following are entitled to be given notice of an appeal made under this Division—
>
> (a) an objector, in the case of an appeal by an applicant concerning an application for development consent in respect of which the objector has a right of appeal under this Division,
>
> (b) …,
>
> (c) …,
>
> (d) ….
>
> (2) ….
>
> (3) Anyone who is given any such notice of appeal is, on application to the Court within 28 days after the notice is given, entitled to be heard at the hearing of the appeal if not already a party to the proceedings.

(4) ….

19 The relevant provision of the Mining SEPP is:

> **14 Natural resource management and environmental management**
>
> (1) ….
>
> (2) Without limiting subclause (1), in determining a development application for development for the purposes of mining, petroleum production or extractive industry, the consent authority must consider an assessment of the greenhouse gas emissions (including downstream emissions) of the development, and must do so having regard to any applicable State or national policies, programs or guidelines concerning greenhouse gas emissions.
>
> (3) ….

20 The provisions of the UCPR requiring consideration are:

> **6.24 Court may join party if joinder proper or necessary**
>
> (1) If the court considers that a person ought to have been joined as a party, or is a person whose joinder as a party is necessary to the determination of all matters in dispute in any proceedings, the court may order that the person be joined as a party.
>
> (2) ….
>
> **6.27 Joinder on application of third party**
>
> A person who is not a party may apply to the court to be joined as a party, either as a plaintiff or defendant.
>
> **59.3 Commencement and parties**
>
> (1) ….
>
> (2) If a decision to be reviewed arose in the course of a dispute between parties, each party who is interested in maintaining the decision must be joined as a defendant.
>
> (3) ….
>
> (4) ….

The basis advanced by the Alliance for joinder

The Alliance's written submissions

21 Compendious written submissions were provided in support of the Alliance's application for joinder. Set out below is a summary of what was advanced by counsel in support of the application.

22 The Alliance sought to be joined to these proceedings pursuant to r 6.27 of the UCPR. The Alliance advanced three principal propositions in support of its application, with these being that:

(1) Joinder is necessary for the determination of all matters in dispute, since declaratory relief is being sought and this ought not be granted without a proper contradictor. The Alliance submitted that it has sufficient interest to be considered a proper contradictor;

(2) The Alliance is an interested party within the meaning of r 59.3 of the UCPR; and

(3) The Alliance, as a statutory objector, had an interest in the decision under challenge being upheld, as it has expended money, time and resources advancing its case in the public interest which would otherwise be lost if an order for an exclusionary remitter was to be made.

23 During the environmental assessment phase of the proposed development, the Alliance acted as the lead objector. It had the statutory status of an objector. It made oral and written submissions; called evidence from independent scientific experts; and engaged solicitors to provide advice to the Commission.

24 Mr Robertson put that, in Class 4 judicial review proceedings, the criteria for joinder are contained within r 6.24 of the UCPR but are extended by r 59.3. Within the meaning of r 6.24, a party that is not a "necessary" party may still be a party which "ought to be joined": citing *Karimbla Constructions Services (NSW) Pty Ltd v Premier of New South Wales* [2019] NSWLEC 76 at [36]. The criteria in r 6.24 are in the alternative, they are not cumulative.

25 These rules are to be given a liberal construction, consistent with their purposes. Judicial review, being provided in the UCPR at Pt 59, was reformed to a limited extent when s 20 of the *Land and Environment Court Act 1979* (the Court Act) came into effect. Section 20 of the Court Act enables the Court to grant orders in the nature of prerogative writs.

26 These statutory reforms occurred in tandem with the High Court liberalising common law standing rules, such that a plaintiff did not need to have a private right for standing to sue, but would be sufficient if the plaintiff had a special interest in the subject matter of the proceedings: *Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)* (1995) 183 CLR 552 at 558; *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 35-37.

27 The Court should adopt a literal reading of the joinder rules and apply them liberally, and ask whether joinder was necessary to determine all matters in dispute: *Re Great Eastern Cleaning Services Pty Ltd and the Companies Act* [1978] 2 NSWLR 278 at 281B; *Macquarie Bank Limited v Lin* [2002] 2 Qd. R. 188 at [12]-[14], [23]-[26].

28 The courts have thought joinder to be necessary if it would serve a useful purpose in providing a proper contradictor where no resistance to orders sought would otherwise be mounted. The rules of joinder apply to plaintiffs and implicitly apply to defendants.

29 Equity has developed party rules for the remedies of declaration and injunction, which have been adapted to resolve public law disputes. The public law's use of equitable remedies was described as vindicating the public interest in the maintenance of due administration: *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 (*Bateman's Bay*) at [24]. The High Court in

Bateman's Bay observed that the rules surrounding special interest are flexible, and that the nature and subject matter of the litigation will determine what amounts to a special interest.

30 These propositions were later revisited and approved in *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591, with Gummow J explaining, at [92]-[99], that even strangers could enforce public obligations or restrain public wrongs using public law remedies.

31 In the case of a declaration, as is being sought in the present proceedings, Mr Robertson put that, whilst the relief is discretionary and ought not to be laden with rules, a contradictor must participate: *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 (at 437-438) citing *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Pty Ltd* [1921] 2 AC 438 (*Russian Commercial and Industrial Bank*) at 448.

32 A proper contradictor is one whose interests are, by their nature, opposed by the plaintiff, whether or not the plaintiff's interest is in fact opposed by contentions made by that person: *Meagher, Gummow and Lehane's Equity Doctrines and Remedies,* 5th ed, 2015, pages 632-633.

33 The Commission cannot be a proper contradictor because its duty is one of impartiality; a duty demonstrated by its submitting appearance in the proceedings: *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13 at 36. It follows that there is no proper suit until there is a contradictor and, since the Alliance's interests oppose the Company's, it is necessary that the Alliance be joined.

34 The expected "floodgates" argument advanced for the Company has been rejected: see Deane J in *Phelps v Western Mining Corporation Pty Ltd* (1978) 33 FLR 327 at 334.

35 Further, no other potential parties have yet come forward.

36 If an order for exclusive remitter were to be made, then the Alliance would incur wasted monies as the Alliance's submissions would need to be repeated before a differently constituted Commission. A denial of participation at rehearing would furthermore amount to a denial of natural justice to the Alliance.

37 Statutory objectors have standing, and therefore a special interest, in the subject matter of the proceedings: *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473 (*Sinclair*) at 478. Mr Robertson put that if statutory rights of objection can found an application, then it necessarily follows that the objector is a proper party to respond to an application, where the decision-maker cannot. The finding in *Sinclair* was relied upon in *Australian Conservation Foundation Inc v Forestry Commission* (1988) 19 FCR 127 at 131.

38

The fact that a party participated in proceedings below, and made more than mere submissions, may be relevant for establishing a sufficient interest to be joined: *United States Tobacco Co. v Minister for Consumer Affairs* (1988) 20 FCR 520 at 531. Whilst this case was concerned with the test for joining a party that was "interested in a decision" under s 12 of the *Administrative Decisions (Judicial Review) Act 1977*, the test has been analogised with common law standing: *Australian Institute of Marine and Power Engineers v Secretary, Department of Transport* (1986) 13 FCR 124 at 132-133.

39 Where a third party has an interest in the proceedings, which interest will be affected by any declarative relief given, then it ought to be joined as a party: *Burnie Port Corporation Pty ltd v Bank of Western Australia Ltd* (2002) 1 Tas R 249 (*Burnie Port Corporation*); *London Passenger Transport Board v Moscrop* [1942] AC 332 at 345. The third party was joined under a rule equivalent to r 6.24 of the UCPR: *Burnie Port Corporation* at [6].

40 Slicer J considered that it would be difficult to accept that any Parliament intended a court should determine an issue without the benefit of an opposing contradictor where the decision-maker decided to abide the outcome: *Nation v Kingborough Council* (2003) 12 Tas R 141 at 144[10].

41 In cases where a party had a sufficient interest to be joined below in an administrative challenge, then they likewise have a sufficient interest to be joined in any appeal to the administrative determination: *Murraylink Transmission Company Pty Ltd v National Electricity Market Management Company Ltd* (2003) VSC 51 at [13].

42 Rule 59.3(2) of the UCPR requires joinder of each party interested in maintaining the decision where a decision is to be reviewed. Where the public hearing track is selected, the rights of an objector involve party-like rights. Community participation is emphasised in the EP&A Act. The joinder of the Alliance is consistent with the statutory scheme under which the decision was made.

43 Mr Robertson summarised his written submissions as follows:

> In these circumstances, the Alliance is a necessary party within the meaning of UCPR 6.24, as informed by r 59.3. It has interests which are recognised and protected by the relevant planning legislation. Its significant participation in the decision-making process places it in a position to act as a contradictor to assist the court in the proper resolution of the issues.

Mr Robertson's oral submissions

44 Mr Robertson's oral submissions expanded on the matters earlier summarised from the Alliance's written submissions. Save in respect to one matter dealt with below, I mean no disrespect to him in not providing what might be regarded as material repetitive of these submissions as a consequence.

45

However, during the course of his oral submissions, he particularly addressed Grounds 3 and 5 in the Amended Summons, submitting that these provided a significant public interest reason why the Alliance should be joined as a party to the proceedings in order to be able to address them. Relevantly, he said (Transcript, 3 April 2020, page 5, line 48 to page 7, line 10):

> ROBERTSON …. The grounds for challenging the decision are something of a - the third ground, ground 3, says that there was an error of law rather than an error of fact. That may be debatable but nonetheless an error of law in the tribunal identifying - this is para 23 of the pleading - identifying two documents. The New South Wales Climate Change Policy Framework and the Paris Agreement itself of course. Not a treaty. And then Australia's nationally determined contribution under that agreement - I suppose that's three documents - as being applicable state or national policies programs or guidelines concerning greenhouse gas admissions for the purpose of clause 14 subclause 2, the mining set which is para 20 of the pleading states - provides that in determining a VA for mining - the consent authority must consider an assessment of the greenhouse gas admissions including down the street admissions of a development and must do so having regard to any applicable state or national policies et cetera.
>
> That strikes us as a question of the highest public significance. It not only applies to this particular mine, it applies to oil, gas, mining and other forms of extractive industry and it seeks to exclude as a matter of law the consideration of these documents in the context of clause 14, it's probable you could argue they could be considered as a public interest matter under s 4.15(1)(e) of the EPA Act but they have particular resonance in the context of the mining set and given statutory weight by the set whereas of course the public interest criterion in the matters or factors for consideration by decision makers under 4.15 are at large and it's unlikely that a failure to consider document A or document B or document C would amount to a legal error rather than simply a merit consideration. Whereas in clause 14.2 it's said - and this is the theory of the case - that this is a legal error rather than merely an error of fact.
>
> As we said, it's got the highest public significance. If your Honour would look at ground 5, this too is a ground that has the highest public significance. It's a ground relating to whether the tribunal was entitled to take into account the principles or the principle of intergenerational equity. I'm sorry, I'll - perhaps that's not correct. I don't think that it's submitted that it was unable to take intergenerational equity into account. What the claim is at para 32 and 33, is that a legal error was made in forming the view that the project was contrary to the principle of intergenerational equity because of a finding concerning the predicted economic benefits that would accrue to the present generation, but the long-term costs which would be borne by future generations and it's said that's a misunderstanding of the principle of intergenerational equity. That's 33(a), and 33(b) is a makeweight in that argument.
>
> Now, that too is a question of the highest public significance and the outcome of this application if joinder was refused is that on those two grounds - and there's - arguably, evidence could be led by the applicant on them, perhaps must be led, in relation to the intergenerational equity question. In relation to those two grounds of the highest public significance, there should be no contradictor as a party. That strikes us as a matter of significance, not just because the objects of the EPA Act include ESD and support public participation and so on, but because in - it is clear that if this application was successful on either of those two grounds, the decision is not one that is - would be personal to the applicant, but would have profound impacts going well beyond these proceedings.
>
> Your Honour, it's our submission that that, in many cases, especially in this court but in other courts as well, is the consequence of a public law proceeding that it may in fact have consequences that transcend the parties to the proceedings that involve effects on a wide variety of persons and policies, in this case, in the state but possibly also beyond it. Because we now know - well, we do know - that many states, in fact most I think, have ESD principles as part of the decision-making process on development. So any discussion of ESD principles in the context of the costs of future generations being an irrelevancy when..(not transcribable)..current generation is going to be a highly significant decision.

The Company's position on joinder

The Company's written submissions

46 The Company provided written submissions explaining its opposition to the Alliance's application to be joined. At [6] and [7], the Company's submissions set out four propositions that it submitted constituted the reasons advanced by the Alliance in support of its application. The Company's submissions also set out, following this analysis, the Company's responses to these propositions from its analysis. The Company's propositions and the responses are reproduced below:

> 6 Although BVPA's submissions are lengthy, BVPA's case on why it must be joined reduces to four propositions:
>
> (a) BVPA was an objector before the IPC and that is sufficient to render a person a necessary party;
>
> (b) BVPA expended money in the course of the IPC's decision-making which might be wasted if the decision is set aside;
>
> (c) BVPA would have had standing to challenge the decision had consent been granted and, therefore, BVPA must be a necessary defendant;
>
> (d) if BVPA is not joined, there will be no contradictor.
>
> 7 KEPCO's position is as follows.
>
> (a) BVPA is not a person whose joinder is necessary. BVPA's interests are not directly affected by the relief sought. That BVPA objected to the grant of consent and incurred money in objecting to the consent does not make BVPA a necessary party.
>
> (b) BVPA's joinder is not necessary to ensure that there is a contradictor, since BVPA might be permitted to make submissions against the claim as an amicus.
>
> (c) A statutory objector is not a person who "must" be joined under UCPR 59.3(2). Were that so, every objector must be joined to the present proceedings (and, presumably, BVPA's proposition would apply to all proceedings for judicial review in Class 4). UCPR 59.3(2) is directed to judicial review of decisions made following quasi-adversarial proceedings with discrete, identifiable parties (such as decisions of NCAT).
>
> (d) There is a fundamental difference between whether a person has standing to commence proceedings (as an applicant / plaintiff) and whether a person is a necessary party. The class of persons with standing to commence proceedings is broader than the class of necessary parties. That is well- established on High Court authority.
>
> (e) KEPCO does not object to BVPA being granted leave to appear as amicus. In particular, KEPCO does not object to BVPA appearing to make submissions as contradictor against KEPCO.
>
> (f) If BVPA is to be joined as a party, it should be on the condition that it bear its own costs. A condition of this kind is conventionally attached if a party is joined to appear as contradictor.

Mr Lancaster's oral submissions

47 Mr Lancaster relied, primarily, on his written submissions as the basis upon which he submitted that I ought to reject the application for joinder. Instead, he used his oral submissions to refute the arguments proffered by the Alliance. Mr Lancaster put that the argument that the two pillars of the oral submissions given by Mr Robertson involved setting up "straw men" to be knocked down.

48

The first “straw man” was that without the Alliance being joined as a party to the proceedings there would be no contradictor. Asserted as “palpably not correct”, Mr Lancaster highlighted the potential for the Alliance to appear as amicus. An amicus, he said, is able to cross-examine and adduce evidence, but only by discretion and not as of right.

49 I raised with him the potential for KEPCO to seek to adduce additional, new evidence. Mr Lancaster conceded that new evidence might well be sought to be adduced, though “in very limited scope”. However, he submitted that an amicus could fulfil the role and function of contradictor in this case.

50 The second “straw man” was the expansive interpretation advanced for the Alliance of the rules of standing under *Bateman’s Bay*. Mr Lancaster submitted that such rules are not material to the question of joinder under r 6.24 of the UCPR. *Bateman’s Bay* makes clear that there is a distinction between the tests for standing and for joinder.

51 He noted that there are two limbs for the test for joinder under r 6.24 of the UCPR.

52 In relation to the first limb, a party that “ought to be joined” is one with which the orders sought will have a direct effect on their rights and liabilities. It is not sufficient to suffer indirect or consequential effects: *Sportsbet v State of Victoria* [2011] FCA 170. An interest in the outcome of the litigation is not sufficient to maintain an action: *Australian Paper Manufacturers v Commonwealth* (1990) 64 ALJR 530. The rights of the Alliance are insufficient and cannot fall within the first limb of r 6.24 of the UCPR.

53 The basis for the Alliance’s application, as a necessary party under the second limb of the UCPR, relied upon its interest in obtaining a particular outcome of the dispute, as it had spent time and money on preparing reports for the decision-making process before the Commission. It was the Alliance’s submission that, if the matter was remitted before a differently constituted Commission, those resources would have been lost. Such an argument does not demonstrate why there would be any real material prejudice to the Alliance, as they could readduce the expert reports and the transcript of the first Commission proceedings.

54 This places the Alliance in the same position as 1,200 other persons or entities that made submissions during the decision-making process. The Alliance has no interest that is special, in a legal sense, under the authorities for joinder, nor under r 6.24 of the UCPR.

55 Any assertion that r 6.24 of the UCPR ought to be interpreted more flexibly in the Land and Environment Court (the Court) as opposed to the Supreme Court should be rejected: *Ross v Lane Cove Council* [2014] 86 NSWLR 34. If the Alliance was permitted as a necessary party, under r 6.24 of the UCPR, then the thousands of objectors present in the proceedings would likewise need to be joined; a conclusion that is “absurd”.

56 Returning to the role of a contradictor, Mr Lancaster reaffirmed the acceptability of the Alliance appearing as amicus. Any issues with evidence would be able to be dealt with by the trial judge, as a matter of discretion. Since the proceedings are for judicial review, it was unlikely that any further evidence would be needed.

57 The assertion that the Alliance had an elevated position above other objectors is not sustainable on analysis, even with the species of relief sought.

58 In response to Mr Robertson's written reply submissions, Mr Lancaster drew the Court's attention to the flexibility of the role of an amicus: *Breen v Williams* [1994] 35 NSWLR 522 at 523.

The Alliance's reply submissions

59 The Alliance provided written reply submissions and Mr Robertson also replied orally to the Company's position advanced in its written and oral submissions. The Alliance's reply position is summarised below.

60 Contrary to the Company's submissions at [4], the Alliance relies on both the "necessary" and "ought to be joined" limbs of the test in r 6.24 of the UCPR. There is often an overlap between these two tests: *Karimbla* at [36]. Furthermore, relief is not sought pursuant to r 59.3 of the UCPR. Rather, the appropriate mechanism for joinder is r 6.27. However, r 6.27 is informed by r 59.3, because this is a matter to which Pt 59 would apply: r 59.1. These rules are to be adapted to be consistent with the practice of the Court, which may differ from the Supreme Court: *Chriss v Williams* [1988] NSWCA 22; *Verde Terra Pty Ltd v Environment Protection Authority (No 3)* [2018] NSWLEC 161 at [53].

61 The Company, in asserting that the Alliance had not pointed toward any right to be joined, failed to address the Alliance's status as an objector and the lead participant in the proceedings before the Commission. These are integral considerations for effects on its legal rights. Contrary to the Company's submissions, the Alliance is not asserting that its commercial interests or convenience are necessary for joinder. Rather, the Alliance advances its prior and unique participation as a basis for establishing that it is a "necessary" party. The Alliance's participatory rights were exercised in the proceedings before the Commission and hence it has a right to defend the outcome here.

62 The Alliance concedes that its costs before the Commission alone are insufficient for mounting a case for joinder. However, the Alliance relies on the public law character of the proceedings and the role of the Alliance in the statutory context to establish the necessity of its participation as a party.

63 The appointment of the Alliance as amicus would be inappropriate where the Alliance is in fact a necessary or proper party.

64 He noted that the Company submitted that the role of amicus would adequately fill the role of contradictor in these proceedings: *Priest v West* (2011) 35 CLR 225 at [35]; *Attorney-General (Cth) v Alinta* (2008) 233 CLR 542 (*Alinta*).

65 Mr Robertson submitted that neither case assisted the company. In *Priest v West*, leave to appear as amicus was refused because the party who wished to participate could not assist on any identified issue. In *Alinta*, an amicus was appointed in a case of narrow statutory construction in the appellate jurisdiction of the High Court, where there was no chance of additional evidence being adduced. Both are to be contrasted with the present proceedings.

66 Both parties are in agreement that the question of whether there is or is not a contradictor is relevant to r 6.24 of the UCPR.

67 Mr Robertson advanced the propositions that:

(1) The role of amicus is at discretion and not by right;

(2) Amici do not participate in the evidentiary phase of the trial; and

(3) Amici have no right of appeal,

as reasons why the Alliance could not adequately perform in these proceedings as amicus. The fact that community groups have, in some cases, been appointed as amici does not assist the enquiry of whether an amicus would provide a proper contradictor in this case. Since the Company has already evinced an intention to adduce further evidence, the role of contradictor cannot properly be filled by an amicus.

68 The Company's submissions in relation to r 59.3 of the UCPR is a "floodgates" argument, asserting that, if the primary submissions of the Alliance were accepted, then any person who objected would need to be joined as a party. Furthermore, "floodgates" arguments do not provide an answer to the meaning of statutory language. The focus ought to be on the language of rr 6.24 and 6.27 of the UCPR as informed by r 59.3.

69 The Alliance does not advance the argument that all statutory objectors in all circumstances will be necessary parties pursuant to rr 6.24 and 6.27. The Alliance position is set apart from other objectors by the extent of its involvement in the proceedings before the Commission.

70 Mr Robertson drew attention to passages from the Company's submissions in regard to r 59.3, emphasising that there is no existing case law on this provision. In this context, the Company's submission that the provision ought to be read down to limit its operation to "discrete, identifiable parties" should be rejected.

71 Contrary to the Company's submissions, the law of standing is helpful in assisting cases of public law joinder. The authorities on standing are of no assistance in private law joinder, but are of importance in identifying the interest which must be directly

affected for joinder purpose in public law:

> They assist in identifying the interest in the subject matter of the suit which would be sufficient to identify a person who ought to be added as a party.

Consideration

Introduction

72 I turn to address the question of whether the Alliance should be joined as a party pursuant to r 6.24(1) of the UCPR in circumstances where, despite the Company seeking to canvass the possibility of the Alliance participating at trial in an amicus role, that prospect was expressly disavowed on behalf of the Alliance. It is to be noted that r 6.27 of the UCPR provides the basis by which the Alliance can apply to be joined pursuant to r 6.24.

73 Although the Alliance raised the question of support being provided for its application for joinder by r 59.3 of the UCPR, it is unnecessary, for the reasons set out below, to consider this proposition as there is an appropriate and sufficient basis for joinder pursuant to r 6.24(1) to order joinder.

74 However, had it been necessary to consider whether r 59.3 provided assistance to the Alliance, I would have held that it did not. This is because, in its terms, that rule deals with matters which arose in the course of the dispute between parties where, here, there is presently no dispute between the Company and the Alliance as parties - what the Alliance here seeks to do is to accrue to itself such a status rather than presently holding it.

Joinder on the basis that a contradictor is necessary

75 It is tempting to grant the Alliance joinder based on the simple proposition that, when declaratory relief is sought in proceedings such as this, it is desirable that there be a contradictor - a contradictor with the full range of rights attendant upon participation as a party (see submission earlier at [31]).

76 However, proper consideration of what was said by Gibbs J in *Forster v Jododex* at 437-438 leads me to caution in adopting the broad proposition put by Mr Robertson as to be derived from this. What Gibbs J said was:

> It does, however, seem to me that the Scottish rules summarized by Lord Dunedin in *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* (1921) 2 AC 438, at p 448 , should in general be satisfied before the discretion is exercised in favour of making a declaration :
>
> > "The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, some one presently existing who has a true interest to oppose the declaration sought."

77

It seems to me that, in its proper context, the passage quoted by Gibbs J, from *Russian Commercial and Industrial Bank*, in using the expression "true interest" does so in a fashion consistent with the use of the words "each party who is interested", as used in r 59.3 of the UCPR. This is clear from a reading of the full reasons in the decision of the Court of Appeal in *Russian Commercial and Industrial Bank.*

78 For the reasons explained above, I am satisfied that this rule is not able to be engaged in support of the Alliance's application for joinder in these proceedings.

The "floodgates" argument

79 It is sufficient to note that the "floodgates" risk posited by the Company is to be answered appropriately by three observations. The first is that, although there were many who participated in opposition to the Company's proposed mine during the Commission's process, none of those individuals or entities (other than the Alliance) has sought, to date, to take any role in these judicial review proceedings. Although the floodgates might be opened, there is no evidence that the consequence of doing so is even a minute trickle flowing through them as a result.

80 Second, the role taken by the Alliance in the Commission's processes was, as I have earlier noted at [14], a significant one, not only in a pure advocacy sense but also as to the extent of the expert material marshalled by the Alliance in support of its opposition to the proposed mine. My reading of the material in evidence before me, concerning the Commission's processes, makes it clear that there is no other potential party who could seek to be joined in these proceedings and, in that eventuality, point to as significant a relevant participation in the Commission's processes.

81 Finally, on this point, if some further applicant for joinder was to emerge as a consequence of me making the Alliance a party to these proceedings, the additional hurdle would lie in the path of such a potential party of explaining why, there now being an effective and well-prepared contradictor in the field, it would be appropriate to permit an additional contradictor to be joined. The Alliance's "first mover" position of being joined as a party provides a powerful (but not necessarily determinative) defence for the Company in the event that some future additional applicant for joinder was to emerge.

Public interest issues

82 Although the above general propositions, I am satisfied, provide a sufficient basis to grant the Alliance's application to be joined as a party, there is a significant (and more powerful) reason to do so. This is the desirability, in the public interest, of having a contradictor able to participate fully and respond to several of the grounds pleaded by the Company in its Amended Summons.

83 During the course of his oral submissions (earlier extracted at [45]), Mr Robertson particularly adverted to Grounds 3 and 5 pressed by the Company in its Amended Summons. Those grounds (and the particulars pleaded in support of them) were earlier set out at [7] and [8]. Each of these grounds as pleaded raises, for the reasons outlined by Mr Robertson, significant matters of broad public interest.

84 Only two matters arising from these grounds warrant specific mention as providing a basis for joinder of the Alliance. First, should the Company, as a broad proposition, seek leave to adduce additional evidence (including evidence relating to these grounds) and such leave was to be granted (a position which cannot be excluded but upon the merits of which I express no view), it would be desirable for the trial judge to have the advantage of appropriate responsive evidence to such material. It is clear from the extent of the Alliance's participation in the Commission's processes that it would be well-placed (and likely best placed) as a party to assist the Court in that fashion.

85 As a party, the Alliance would have a right to do so; as an amicus, it could only do so if permitted as an exercise of the trial judge's discretion.

86 Second, there is the specific point pleaded in Ground 3 that the Commission had made a determination concerning the breadth of its obligations under cl 14(2) of the Mining SEPP by having regard to the Paris Agreement and to the New South Wales Climate Change Policy Framework (the New South Wales Government's policy of zero net emissions by 2050). The Company pleads that this was an error of law. The Company proposes that these documents do not fall within the rubric of matters potentially called up by that provision of the Mining SEPP. The Company relies for this proposition on the decision by Sheahan J in *Wollar Progress Association Incorporated v Wilpinjong Coal Pty Ltd* [2018] NSWLEC 92.

87 As earlier set out, Mr Robertson indicated that the Alliance wished to oppose adoption of such a proposition. I am not to be taken to be expressing any view on this aspect of the Company's pleadings. However, this is, in itself, potentially a matter of significant public interest.

88 These two matters of a more specific nature fortify me in my view that it is appropriate that the Alliance be joined as a party to the proceedings pursuant to r 6.24(1) of the UCPR, as its participation as a party is necessary to the determination of all matters in dispute in these proceedings.

The Alliance's status under the EP&A Act

89 Given that I have reached the broad conclusion that the Alliance should be joined as the Second Respondent for the reasons set out above, it is not necessary for me to consider whether or not, in some fashion, rights which might accrue to the Alliance,

pursuant to ss 8.8 and 8.12 of the EP&A Act (had the Company's proceedings been merit ones rather than judicial review ones), should provide any additional support for the purposes of this joinder application.

The costs' position for the substantive hearing

Introduction

90 Having concluded that it is appropriate that the Alliance be joined as the Second Respondent in the proceedings, it is now necessary to address the question of whether or not the Company should be protected from the potentiality of a costs order in favour of the Alliance if the Company fails in these Class 4 proceedings. This arises as a consequence of the Company submitting that there should be a protective order in the Company's favour that would preclude the Alliance from seeking its costs if the Alliance is successful at trial. I now turn to address this issue.

The Company's position

The Company's written submissions

91 The Company explained, in its written submissions, why it proposed that the Alliance should not be able to seek a costs order in its favour if the Alliance is successful in its opposition to the Company's suit. The Company addressed this in its written submissions in the following terms:

> 58 Alternatively, if BVPA is joined, it should be on the condition that it not seek costs if it be successful.
>
> 59 A condition of this kind has conventionally been imposed where a party has been given leave to join as a contradictor: see *Pfizer Corp v Commissioner of Patents* (2006) 67 IPR 646, [2006] FCA 164 at [21], [40] (Bennett J) (***Pfizer***); *Armidale Dumaresq Council v Attorney-General (NSW) (No 1)* [2007] NSWSC 557 at [10]-[11] (Young CJ in Eq) (***Armidale***).
>
> 60 In *Pfizer*, the party seeking joinder had undertaken that it would not seek costs if joined and successful: at [21]. Her Honour, Bennett J, said (at [40]):
>
> > 40 It seems to me that the course most likely to achieve a just resolution of the disputes between the parties with minimum costs, delay and use of Court time is to permit Spirit to be joined in these proceedings. Both Spirit and the Commissioner have pointed to factual matters that were relevant to the Commissioner's decision and which were not able to be challenged before her. The Commissioner submits and I accept that she is not an adequate or appropriate contradictor of those matters. With the undertaking that has been given by Spirit about costs, Pfizer has not established any unfairness if Spirit is joined.
>
> 61 In *Armidale*, Young CJ in Eq said:
>
> > 9 Pulling all these strings together, it would seem to me that where one has a charity with a particular local focus and the Attorney- General is leaving it in the hands of the Court to decide and the charity is for the benefit of the public in that particular locality that the Court ought to examine the views of those in the locality who have strong feelings.
> >
> > 10 There is a limit to this. Those strong feelings should not be allowed to increase the costs nor to delay the matter unduly. However, despite what Ms Mahony for the trustees says, I cannot see how their intervention at this stage

could delay the matter unduly. **The applicant must, however, be responsible for its own costs and also for any increases in the costs caused as a result of its participation.**

11 Accordingly, on condition that in any event the applicant is responsible for its own costs and will understand that it may be responsible for an order for costs against it for any additional costs caused by its intervention, it may be added as a party. (emphasis added)

62 The condition reflects the proposition that a person who joins to assist the Court as a contradictor should not cause any increase in costs risk for the existing parties.

Mr Lancaster's oral submissions

92 Mr Lancaster also addressed, in his oral submissions, the proposition that this cost regime protective of the Company should apply. These submissions encompassed not only the protective position on costs if the Alliance is joined but also the question of the costs' position that should, in the Company's submission, apply if the Alliance is joined as the Second Respondent. He said (Transcript, 3 April 2020, page 24, lines 34 to 49):

> LANCASTER … If your Honour finds, as we submit, that allowing the alliance to participate as amicus is the appropriate course and as we said in our submissions at para 46, the usual rule should be applied which is that an amicus neither receives nor pays legal costs.
>
> We've referred to Basten J in the Hunter Valley Coal Mine case of recent times. If your Honour is against us on the motion and denies that we join, in my submission, as we say in paras 58 to 62 of our written submissions, that should be on the condition of joinder that it not seek costs if it happens to be successful upon all points or some points. Your Honour, that doesn't seem to be actively opposed by the alliance. When I say that, it immediately is joined, but it's supported in principle because it's a third parties decision coming along and wishing to take an active role in respect of the support of the decision. It should note too, the cost risks if the applicant is .. (not transcribable).. that we be joined as a party rather than simply participate as an amicus that would not involve that cost risk for us one way or the other.

93 After a short exchange, during which Mr Robertson made it expressly clear that the question of participation as an amicus was not a matter sought by the Alliance or sought by the Alliance to be canvassed by me in these joinder proceedings, Mr Lancaster said (Transcript, 3 April 2020, page 26, lines 5 to 7):

> LANCASTER: All right, well, could I just say then in respect of costs, if your Honour is against us and the alliance is joined, then we do seek that condition that I mentioned, that it not seek costs.

The Alliance's position

94 The Alliance's written reply submissions did not address the position advanced for the Company that it should have costs' protection if the Alliance became the Second Respondent and the Company failed at trial.

95 However, in his oral submissions in reply, Mr Robertson made it clear that the Alliance was, if successful on the joinder motion, seeking its costs for this interlocutory step.

96 Mr Robertson also made it expressly clear that, with respect to the substantive hearing (if joined), the Alliance would be seeking its costs if it succeeded at trial. He also made it clear, by implication, that, if the Alliance was not successful at trial, it would be

seeking a protective position against an adverse costs order because it was acting in a public interest advocacy fashion in opposing the Company's position.

97 Mr Robertson said (Transcript, 3 April 2020, page 29, lines 22 to 42):

> ROBERTSON … As to costs, your Honour, we will seek costs if we succeed in this application. If we succeed at trial, we will seek costs. If we fail at trial, we will resist costs on the grounds that our participation in the trial, if we're joined, is in the public interest, and it would be extraordinary for the court to make a pre-emptive order that would deprive us of the right to submit at the appropriate time that the costs should follow, either 42.1 of UCPR, that is follow the event, or if the event is adverse to us, that we should be immunised from an order for costs because of the nature or character of the participation that we take in the proceedings. Questions of costs will be judged, amongst other things, by our conduct, or misconduct, or the extent to which the applicant should be compensated.
>
> But I can't let Mr Lancaster's comment go without remarking that our participation in the proceedings places the applicant in no worse position so far as costs is concerned, than it would've expected the moment for it commenced proceedings. Most people expect that when they sue, they have an opponent, and what we are offering is the role of an opponent, and if that is the predicate for the commencement of most litigation in this country, then the making good of that predicate is not a reason for the court, pre-emptively, to diverge from the usual course of leaving costs to the conclusion of the proceedings where they might properly be assessed.

Consideration

98 As can be seen from the Company's written submissions earlier quoted, reliance is placed on the decisions in *Pfizer Corp v Commissioner of Patents* (2006) 67 IPR 646, [2006] FCA 164 (*Pfizer*) and *Armidale Dumaresq Council v Attorney-General (NSW) (No 1)* [2007] NSWSC 557 (*Armidale*) in support of the proposition I should exclude any potential costs' claim by the Alliance.

99 It is clear that each of these decisions relied upon by the Company did not seek to propound any proposition of general principle as to circumstances in which such a costs' protective order should be made. Each of the cases turned on its particular facts and circumstances, facts and circumstances which, in my view, have no relevance to the present position. I explain below why I draw this conclusion.

100 In *Pfizer,* Bennett J set out at [15] the nature of the commercial interests that had led the second respondent in those proceedings to have sought joinder in that litigation.

> 15 Spirit's commercial interests are affected by the expiry of the term of the patent. If Pfizer is successful in its appeal, the date of expiry of the patent will be 10 months later than the date proposed by the Commissioner. The evidence is that this could mean a loss of profit to Spirit in the order of $5.5 million.

101 Protection of a significant commercial interest as a basis for joinder is entirely dissimilar to the circumstances here arising. Protection from costs' exposure to a commercial competitor is also quite different a proposition. I do not consider that this case provides any assistance to the Company for the proposition it here advances.

102 In *Armidale*, Young CJ in Eq set out, early in his judgment at [2], the nature of the first respondent (it being a charitable trust as can be seen) and, in [3], the nature of the party seeking joinder and the circumstances in which that joinder was being sought.

Those paragraphs from his Honour's judgment appear below:

> 2 The trust concerned is a charitable trust which was set up in the 1930s to allow a valuable collection of paintings to be exhibited in the Armidale area. The general thrust of the application is that it is no longer financially viable to keep the whole collection in the Armidale area unless there is an infusion of funds and that the most appropriate way of having an infusion of funds is for one of the most valuable paintings to be sold as to one half to the Art Gallery of New South Wales. The funds being received will allow paintings to be continued to be exhibited in the Armidale area, including the valuable painting, for a viable period of the year. The Attorney-General neither consents to nor opposes that application.
>
> 3 The applicant, the Friends of the Old Teachers College, Armidale Inc, consists of people who appear to oppose the suggestion. They have a rather vague idea of how much money can be raised otherwise to keep the collection of paintings in the Armidale area and they wish their views to be considered by the Court.

103 There are two factors which, in my view, make this decision of no assistance in the present circumstances. The first is that the trust that was the subject of the challenge was a charitable one and, clearly from the terms of the judgment, one of limited means. Second, it is also clear that the applicant for joinder in those proceedings had not, apparently, lucidly advanced any proposition of any specificity that would enable the trust to resolve the financial difficulties in which it found itself.

104 Although his Honour cited five cases in his decision, they all dealt with matters engaging s 81 of the *Trustee Act 1925* (or its Victorian equivalent) (engaged also in the proceedings then before his Honour), relevantly a provision in the following terms:

> **81 Advantageous dealings**
>
> (1) Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or disposition, or any purchase, investment, acquisition, expenditure, or transaction, is in the opinion of the Court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the instrument, if any, creating the trust, or by law, the Court—
>
> (a) may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, including adjustment of the respective rights of the beneficiaries, as the Court may think fit, and
>
> (b) may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.

105 In each instance, matters of judicial discretion concern the powers of trustees required to be considered. A reading of the reasons for decision in each of the five cases cited in *Armidale* (*Arakella Pty Ltd v Paton* (2004) 60 NSWLR 334; *Freeman v Attorney-General (NSW)* [1973] 1 NSWLR 729; *National Trustees Executors & Agency Co of Australasia Ltd v Attorney-General (Vic)* [1973] VR 610; *Perpetual Trustee Co Ltd v Godsall* [1979] 2 NSWLR 785; *Re Baker* [1961] VR 641) discloses none was dealing with any application for joinder (let alone any contested application).

106 The five decisions also make it clear that no protective costs order was sought in any of these matters. Indeed, to the extent that issues of costs were dealt with in any of them, what could be expected to be conventional costs orders in the circumstances of that case were in fact made.

107 It is clear that what his Honour did in *Armidale* was an idiosyncratic response to the particular circumstances of the matter with which he was dealing. Protecting a charitable trust which was in straitened financial circumstances was clearly a reasonable and pragmatic position to take under those circumstances. His Honour's decision advanced no proposition of broad principle. *Armidale* provides no support for the costs protective position sought for the Company through this joinder application.

108 In these proceedings, there is nothing to suggest that the Company is an entity without significant means and it is also readily to be assumed that it does not operate for any remotely charitable purpose.

109 In addition, the actions of the Alliance in its participation in the process before the Commission certainly did not demonstrate, on my reading of the Alliance's Commission submission material in evidence in Exhibits A and B in this joinder application, that there was any vagueness about the material advanced in opposition to the Company's proposed mine.

110 It is also clear from this evidence that, as earlier noted, the Alliance played a significant role in the process before the Commission that led to the Commission determining that it was appropriate to refuse the Company consent to developing its proposed mine.

111 The more general proposition of principle concerning joinder is that, when a person or entity is joined as a respondent to proceedings, it is joined for all purposes. Joinder in such circumstances includes the risk of exposure to a costs order if the result of the trial is adverse to the party so joined.

112 On the other hand, if the party so joined is successful at trial, in the ordinary course that event would result in some costs order in favour of the joined party (and this would likely be the position in these proceedings given that the other respondent, the Commission, has filed a submitting appearance).

113 As a consequence, the proposition that there should be some protective costs order made in favour of the Company is rejected.

Costs

114 In Class 4 proceedings, the presumption is that costs, in the ordinary course, follow the event (r 42.1 of the UCPR). There is nothing in the conduct or the outcome of these interlocutory proceedings that would mandate any departure from this presumption. It is therefore appropriate to order that the Company pay the Alliance's costs of this joinder application.

Orders

115 It therefore follows that the orders of the Court are:

(1)

Pursuant to r 6.24 of the Uniform Civil Procedure Rules 2005, the Bylong Valley Protection Alliance is joined as the Second Respondent;

(2) The application by the Applicant for a protective costs order is refused;

(3) The Applicant is to pay the Second Respondent's costs of its joinder application as agreed or assessed; and

(4) The exhibits are returned.

****

Decision last updated: 29 April 2020