

Our Reference 1148-3# 975

NSW Productivity Commission

c/o ProductivityFeedback@treasury.nsw.gov.au

14 November 2019

Dear Sir/Madam

REVIEW OF INDEPENDENT PLANNING COMMISSIONS


Thank you for the opportunity of providing comment on the draft Terms of Reference for the review of Independent Planning Commissions (IPC's) by the Productivity Commission.

The review has relevance to three existing underground coal mining projects in Wollondilly as well as the Camden Gas Project (which produces coal seam gas). The economic importance of coal mining in terms of contribution to the local and broader economy is recognised. However, the adverse implications of mining operations to the natural and built environment as well as availability of drinking water supplies is of strong concern to Council and the local community.

The Commission is requested to note Council's disappointment over the short public exhibition period and absence of direct notification of the review. These factors have prevented the consideration of the review at a meeting of Council or community input. I request that our submission be considered in this context.

The attached submission supports the review in principle but expresses the view the retention of IPC's are important both in terms of transparency and ensuring an adequate scientific basis for the assessment and review of proposals. A key feature of the submission is a request that 'public interest' be considered in a broad context. In addition to our submission on the draft Terms of Reference, please find attached a copy of a AIAL Forum No 48 paper "*The Public Interest, We Know It's Important But Do We Know What It Means*" by Chris Wheeler, considering the challenges of considering public interest and recommending an approach.

An opportunity to meet or teleconference with the Commission to discuss our submission would be beneficial, especially if Wollondilly Councillors could attend to assist in providing the community view.

Please contact 

 for any enquiries regarding the submission as well as to discuss details of the request meeting with the Productivity Commission.

Yours faithfully



- Encl. 1. Submission on the Review of Independent Planning Commission
2. Recent Council resolutions regarding Thirlmere Lakes
3. Requested Basis of Consideration of Public Interest
4. Mining Operations and Water Catchment Map

Submission on the Review of Independent Planning Commission

This submission provides comments on aspects of the Terms of Reference (ToR) for the review of the Independent Planning Commission (IPC) of relevance to mining projects in the Wollondilly Local Government Area (LGA). The comments are consistent with Council resolutions and previous submissions regarding these projects and NSW Government policies and guidelines.

1) Background Information

(i) Mining applications in the Wollondilly Local Government Area

The Wollondilly LGA contains four existing underground longwall mining projects comprised of the Bulli Seam, Tahmoor Colliery, Dendrobium Colliery and Wollongong Projects. Three of the Projects are located in the Drinking Catchment Area (operating under approvals issued in 1994 and 1996). Areas of the Wollondilly LGA is also covered by the Camden Gas Project which is scheduled to cease operations during 2023. A map showing the location of mining operations and approved coal seam gas wells is presented in Attachment 1. Requested issues for investigation by the NSW Productivity Commission (Commission) by his submission are restricted to these activities.

(ii) Overview of Council and community position regarding

Council recognises the economic benefits of mining to the local and broader economy as well as its importance to employment, (both directly and indirectly), within a local and broader context. A key community value incorporated into Council's Community Strategic Plan in relation to this matter is "*A strong local economy providing employment and other opportunities*". In addition, increased employment opportunities and contribution to local economy have been noted as positive aspects by members of the community during consultation carried out by two separate mining companies in Wollondilly LGA during 2019.

Council does not oppose underground mining provided that impacts to the natural, cultural and built environment are adequately assessed and are scientifically based. Council has; however, taken a proactive approach in advocating for the concerns of the local community over these impacts as well as their management at the State and Commonwealth level. The applicable Council resolutions that define Council's formal position in regard to mining operations and coal seam gas operations is presented in Attachment 2 to this submission. This includes a resolution for advocacy over impacts attributable to mining that have occurred to Redbank Creek (a local waterway). The Commission is requested to note that a research study by Dr Ian Wright from the Western Sydney University that identified significant impacts to the ecological health of this waterway has been noted with strong concern.

The Commission is also requested to note that the potential implications of mining operations within Catchment Drinking Areas for the adequate servicing of water supplies to both current and scheduled future growth in Wollondilly is of significant concern to Council and the local community. The Commission is requested to further note that Council resolved at its meeting on 16th September 2019 in relation to the Dendrobium Colliery to "*Oppose-the expansion of mining operations and formally objects to the proposal until the potential impacts on water sources and supplies are addressed to the satisfaction of Water NSW*".

Informal Council position regarding the Review

A formal Council position on the Review has been prevented as a consequence of the short timeframe of the comments period and apparent absence of formal notification. The

Commission is requested to note the strong disappointment over this matter to be achieved given the high level of community interest of issues likely to be considered as part of the review. It is requested that an opportunity be provided for any resolutions from the next available Council meeting on 9th December 2019 regarding the review to be supplied to the Productivity Commission.

Feedback has been sought from Councillors on the undertaking of the review prior to lodgement of this submission. An informal position which can be provided to the Productivity Commission is that an undertaking of a review is supported as a means of increasing the effectiveness of the IPC and its role within the NSW planning framework for State Significant Development (SSD). There are however strong concerns based on the wording of the Terms of Reference that the review may result in a weakness of the current mission of the IPC *“to deliver a high level of independence, expertise and transparency to the assessment and determination of SSD applications in NSW”*. The informal Council position is therefore that the retention of an Independent Planning Commission is important in terms of transparency and accountability to the local community and ensuring an adequate scientific basis for both SSD applications and Determinations. It is noted that the Minerals and Energy Related Council Association, Council is an active member, at its meeting on 8th November 2019 resolved unanimously that IPC's be maintained.

2) General comments on the Review

(i) Purpose and scope of the Review

The available information over the purpose of the review would appear very limited and restricted to the Terms of Reference (ToR) with associated introductory text. This introduction is noted to state *“the Review will examine, among other things, whether it is in the public interest to maintain an Independent Planning Commission and the operations and processes of the Commission in the State's planning framework”*. The following provides an overview a position on the two broad components of this review based on existing Council resolutions.

(a) Review of whether it the public interest to maintain an Independent Planning Commission

A response by the Commissioner to the interpretation of 'public interest' during the review is requested as a priority. The defining of public interest in more than a localised scale is beyond the scope of this submission. However, it is contended that the consideration of the public interest should occur in a local and national context and that, the document titled *“The public interest we know it's important, but do we know what it means”* available at <http://www5.austlii.edu.au/au/journals/AIAdminLawF/2006/2.pdf>), (Attachment 3), should be used as a guide for the consideration of whether the maintenance of an Independent Planning Commission is in the public interest.

The existence of an independent authority reviewing and approving SSDs has been viewed favourably by the local community in providing transparency and accountability based on feedback received. In relation to this matter, community members have been noted to express support to the integrity and knowledge of members of the IPC but an absence of confidence in the planning system and translation of findings and recommendations of the IPC into Determinations. As an informal position, Council expresses the view that the maintenance of an Independent Planning Commission is in the public interest based on the attached document.

(b) The operations and processes of the Commission in the State's planning framework

Considered adequacy of the planning framework

A range of previous Council submissions have detailed shortcomings in State Significant Framework in providing a sufficiently comprehensive scientific based assessment and determination. The Environmental Assessment Improvement Project initiated by the (now) Department of Planning, Industry and Environment (DPIE) in 2016 has been viewed as positive in addressing in addressing these shortcomings as well as and associated level of community engagement. Council's submission on the Project requested a range of amendments to address these concerns and improve the overall transparency and level of public confidence in the SDD framework. A copy of this submission as well as any other related Council submission can be provided to the Productivity Commission upon request.

Council's submission for the Environmental Impact Assessment Improvement Project also expressed significant shortcomings in the level of scrutiny by the DPIE in all stages of the review and determination process associated with SSD applications. The recent observed improvement in the level of scrutiny and stakeholder engagement has been welcomed. However, significant concerns remain in the level of scrutiny both in the adequacy review prior and subsequent to public exhibition that are viewed as being highlighted by Project Advice issued by the Independent Expert Scientific Committee on the Dendrobium Colliery which identified a range of key areas "*in which additional work is required to better inform the key potential impacts to the condition of waterways and groundwaters*". **It is strongly requested that the Productivity Commission seek viewpoints from members of this Committee given their high level of expertise as part of the review.**

Operation of the Planning Commission within the NSW Planning Framework

It has been the experience of Council Staff that the IPC's provide an important function in providing the necessary independent scrutiny of SSD applications based on all available information. Its maintenance, (updated as deemed as appropriate following the review) is therefore also considered importance given the observed shortcomings in this scrutiny by the planning framework for recent mining applications in the Wollondilly LGA.

The importance of their retention within the current framework is considered highlighted by the following recommendations contained in the Final Report of an IPC established for the Hume Project (to the south of Wollondilly):

- *"That the Department give close attention to the practical adequacy of make good provisions during the final assessment process, with an independent review if necessary".*
- *"That the Department should provide an updated and detailed assessment of the public interest, the objects of the Environmental Planning and Assessment Act 1979 and Ecological Sustainable Development within its Final Assessment Report".*

It is requested that the Productivity Commission review the report referred to above as well as all other reports produced by IPC's as part of the review to obtain an understanding of the importance of their functions and current role within the context of the NSW planning framework.

(ii) *Expertise of personnel involved in the review*

It is understood based on available information that the NSW Productivity Commissioner has been appointed to undertake the review. The Resume of the Commissioner is recognised as listing skills and qualifications suitable for managing and overseeing the review. However, there is an absence of any reference to other personnel specifically involved in the Review with the Commissioner. This is of concern given the highly technical issues that will be required to investigate to adequately investigate the functions of IPC's and whether their

retention is in the public interest. It would be appreciated if a list of personnel with their broad relevant experience involved in the review could be provided to Council. **It is considered such information could address these concerns as well as transparency issues associated with the review.**

(iii) *Consultation associated with the review*

The statement on the Productivity Commission website that “*there will be consultation with key stakeholders representing industry, government and community*” is welcomed. However, there is an apparent absence of information the nature and extent of this consultation. It is consequently requested and expected that the review will be undertaken in a collaborative manner with all relevant stakeholders, (including local government), rather than be restricted to an unspecified level of consultation as would appear to be proposed. The holding of a meeting between Council and Productivity Commission representatives would also be appreciated.

In addition, the Productivity Commission is requested to note the strong dissatisfaction over the absence of any detailed public notification and public exhibition given the high level of relevance of issues to be examined by the review to the local community. **It is consequently strongly requested that the Commission undertake an appropriate community engagement program during the review.**

3) Comments on Terms of Reference

The following provides comments and requested issues for investigations on those Terms of Reference Items of relevance to SSD operations in the Wollondilly LGA and Council’s responsibilities in regard to these operations.

Terms of Reference 1: To recommend whether it is in the public interest to maintain an Independent Planning Commission, considering, where relevant, the experience with similar bodies in other common law jurisdictions

The previous section of this submission has expressed the view that the retention of an Independent Planning Commission is important in achieving adequate assessment of impacts as well as providing accountability and transparency. It is contended in accordance with this viewpoint that the socio-economic and environmental implications in removing as well as maintaining IPC’s in detail by the Productivity Commission. The following potential adverse implications in removing IPC’s are consequently requested to be considered by the Productivity Commission as part of its investigation into this ToR item in collaboration with all relevant stakeholders including councils and the local community:

- The potential adverse social, economic and environmental adverse implications as a consequence of removal of the IPC at a local, national and international stage.
- Indirect implications in the removal of IPC’s that include socio-economic implications as a consequence of impacts to water sources from mining operations. Water NSW is noted to have strong objection to the Dendrobium Colliery Project Expansion located in the Sydney Drinking Catchment. Its submission is noted to state “*WaterNSW considers that there is a fundamental problem in the project design as it does not sufficiently take into account a ‘paradigm shift’ in scientific understanding and policy settings that has occurred since the last mine was approved in the Special Areas*”.

Terms of Reference 2: To make recommendations in relation to the Independent Planning Commission’s operations and the mechanisms by which State Significant Development is assessed and determined

(i) *Mechanisms by which State Significant Development is assessed and determined*

A recent improvement in the assessment process and consultation with councils and stakeholders has been observed. However, significant shortcomings in both the assessment and determination of State Significant Developments are considered to remain. The recently released Final Report by the Independent Expert Panel that was established to “provide informed expert advice to the Department of Planning and Environment (DPE) on the impact of mining activities in the Greater Sydney Water Catchment Special Areas” is considered a suitable source to obtain an understanding of these shortcomings.

(ii) *The Independent Planning Commission’s Operations*

Council Staff have had limited direct experience with Independent Planning Commissions following their establishment as part of reforms to the NSW Planning System. A greater level of detailed experience has however been obtained with investigative Planning Assessment Commissions (PAC’s) for local mining projects under the former SSD framework which have noted similarities to IPC’s. The Productivity Commission is requested to note that a common theme expressed at organised Public Hearings was support to the PAC process but a low level of confidence in the translation of the findings and recommendations by the Panels into SSD Determinations was. The following suggestions are provided for consideration by the Productivity Commission as means of addressing this low level of community confidence:

- A Public Hearing be automatically required in circumstances where an IPC is the Determining Authority instead of at the discretion of the Minister as currently occurs.
- A multi-stakeholder agency review and associated Public Hearing by an appropriate IPC be required for SSD applications where the Minister is the Determining Authority

Terms of Reference 3: Identify any proposed changes to the Independent Planning Commission’s current functions, processes for making

(i) *Thresholds for the referral of matters to the Independent Planning Commission*

The current thresholds for the review of SSD applications to the IPC are viewed as being broadly sufficient. However, it is considered that any application associated with any current mining project within the Wollondilly LGA has the potential to significantly impact water resources. A suggested proposed change to the current referral process is therefore that all longwall mining operations automatically be referred to the IPC.

(ii) *The clarity and certainty of policies and guidelines that inform determinations*

There has been an observed need for increased and scientific certainty of policies and guidelines which inform Determinations for longwall mining and coal seam gas projects within the Wollondilly LGA. The addressing of this issue is viewed as important on a range of grounds that include transparency and adequately identifying the public interest in maintaining IPC’s in a broad context. **The following areas of concern where there is a considered need for either changes or new Guidelines and Policies to adequately inform Determinations are provided for consideration and investigation during the review:**

- Potential impacts to water sources from mining operations that include interaction of mine induced fracturing with groundwaters and necessary buffers for longwalls to prevent adverse impacts to the ecological health of waterways. This is viewed as being highlighted by findings of the recently released Final Report by the Independent Expert Panel which stated “*the cumulative impacts of flow losses and the relative significance of these for water supplies as well as the practicalities associated with establishing a robust regional water balance model*” required additional research.

- The scientific basis for the assigning of values to socio-economic and environmental impacts associated with SSD Applications by current guidelines for Benefit Cost Analysis and the associated *Economic Assessment Guidelines*.

In relation to the issue of Determinations, noted expressed concern by stakeholder groups over two recent refusals of SSD Applications by IPC's are shared in principle. Council is supportive of mining provided applications are adequately assessed and sufficiently scientifically based. **It is suggested in accordance with this position that the Productivity Commission investigate suitable procedures that retains provisions for refusal by Determining authorities where considered warranted. It is further suggested that the Productivity Commission also investigate measures and pathways for proponents to address the grounds over which Determination has been refused and resubmit an amended application for Determination consideration.**

- (iii) *The extent to which the Independent Commission should rely upon the assessment report prepared by the Department of Planning, Industry and Environment, taking into account any additional assessments by other Government agencies*

The additional assessments provided by specialist Government Agencies on SSD applications have been viewed as high in quality on a number of grounds including scientific basis and level of constructive comment. However, significant shortcomings in the incorporation of these advices into the Assessment Report have been observed by Council Staff despite recent improvements. Consequently, while this Assessment Report has benefits as a guide for IPC's, the sole or large reliance on the Report by IPC's would be strongly opposed by staff

The Productivity Commission is requested to note the strong concern of staff that scientific research is not listed in the ToR item as an item of information that IPC's should utilise during the assessment of SSD applications. Examples of known important scientific research is the recently released Final Report of the Independent Panel as well as understood related scientific research identifying suitable buffer widths of longwalls from watercourses. The following areas for investigation by the Productivity Commission are recommended to enhance the scientific basis of the assessment and review of SSD applications:

- Improvement of the preparation process of the Assessment Report by the Department of Planning, Industry and Environment that would ensure it incorporates research and specialist advice of relevance to the particular SSD Application.
- Processes to achieve greater scrutiny of Environmental Impact Statements when submitted to DPIE for adequacy review and for their public exhibition to only occur when satisfied that all SSEAR's and supplementary requirements have been adequately addressed.
- An analysis of the adequacy of previous Assessment Reports in providing a sufficient analysis of all environmental, socio-economic issues and incorporation of received specialist advice and received submissions (including councils and community).
- Converse to the above, the potential adverse environmental and socio-economic implications of IPC's in relying on the Assessment Report at the exclusion of other available information.
- Analysis of the environmental and socio-economic direct and indirect impacts of emissions generated from extracted coal in both a local and broader context.

4) Concluding statement

The undertaking of a review of Independent Planning Commissions has not been opposed by this submission in principle. It has however expressed strong concerns based on the wording

of the Terms of Reference that the review may result in a weakness of the current mission of the IPC *"to deliver a high level of independence, expertise and transparency to the assessment and determination of SSD applications in NSW"*. It has also expressed strong disappointment that the deficiencies in notification of the review has prevented the establishment of a formal Council position in the review. The informal position is that the retention of an Independent Planning Commission is viewed as important in terms of transparency and accountability to the local community and ensuring an adequate scientific basis for both SSD applications and Determinations.

ATTACHMENT 1

RESOLUTIONS OF COUNCIL RELATED TO MINING

Resolutions of Council at its meeting of 16th July 2007

1. *That Council make a formal submission and oral presentation to the Inquiry into Coal Mining in the Southern Coalfields.*
2. *That Council's submission stresses Council's opposition to any mining that affects our river systems.*
3. *That Council's submission emphasises the Mine Subsidence Board's responsibility to restore structures damaged as a result of mining activity.*
4. *That the Inquiry increase the pressure on the mining companies and the mining equipment suppliers to develop a method of disposing of the excess material back into the cavity as the mining is taking place.*
5. *That Council calls for the completion of the Maldon Dombarton rail link to transport coal.*
6. *That Council write to the Minister and express our disappointment that the panel hearing is being held in Camden.*
7. *That Council offer its facilities at Wollondilly.*

Resolutions of Council at its meeting of 16 March 2009

1. That Council write to the Minister and Shadow Minister for Mining requesting that Councils be compensated through mining royalties and the Mine Subsidence Board for the additional cost of infrastructure projects.
2. That Council support the Association of Mining Related Councils in their endeavour to get a percentage of the mining royalties for such instances.

Resolution of Council at its meeting of 14 August 2009

1. That Wollondilly Shire Council write to the Minister for Primary Industries and Shadow Minister for Climate Change and Environmental Sustainability expressing its concerns over the recent cracking of Myrtle Creek.

Resolution of Council at its meeting of 19 October 2009

1. That Wollondilly Shire Council write to the Minister for Planning and Shadow Minister for Planning calling for third-party appeals to be allowed for Part 3A processes or that Part 3A be removed from NSW Government Policy.

Resolution of Council at its meeting of 15 November 2010

1. That Council send correspondence to the Minister for Planning requesting that a new Part 3A application be lodged for the Bulli Seam Project, given the significant changes to the original application by the proponent and the flaws in the original exhibition process.

Resolution of Council at its meeting of March 2013

1. That Wollondilly Council write to the Minister of Regional Infrastructure and Services requesting a review of the methodology used to classify the 'tiers' of Mining Affected Communities and expressing its concern at the relegation of Wollondilly's Community to Tier 3, excluding it from any support from the Resources for Regions Programs.

Resolution of Council at its meeting of 11 December 2014

1. That Council write to the Minister for Primary Industries and the Minister for Planning requesting that the impacts on communities and infrastructure from coal mine gas drainage be included in the criteria for Local Government assistance through the Resources to Regions Program.

Resolution of Council at its meeting of 16 March 2015

1. Council convene a meeting with invited community members of Douglas Park and representatives of Illawarra Coal to facilitate a consultation between the parties regarding Illawarra Coal's proposed gas extraction and power plant development in the Douglas Park area.

Resolution of Council at its meeting of 20 July 2015

1. That Council write to the Federal Minister for Environment, the Federal Minister for Agriculture, the NSW Minister for Planning, the NSW Minister for Primary Industries and the NSW Minister for Industry Resources and Energy in regard to the approval of the Shenhua Watermark mine on the Liverpool Plains to:
 - Express dismay regarding the approval of the mine on the Liverpool Plains by the Federal Government given the region's major role in Australia's food production balanced with a vulnerable environment and the unacceptable risk to this balance that the mine may cause.
 - Express its concerns that in a local context, the productive peri-urban areas of Sydney are also being threatened by unsympathetic land uses.

Resolutions of Council at its meeting of 20 July 2015

1. That Council endorse the submission on exhibited components of the draft Integrated Mining Policy.
2. That Council send correspondence to the NSW Minister for Planning that:
 - (a) Acknowledges the benefits in introducing the Integrated Mining Policy.
 - (b) Expresses disappointment that the exhibited Policy has not addressed issues raised in previous Council submissions.
 - (c) Advises that Council is not able to finalise its position until all documents associated with the Policy have been publicly exhibited and submissions received.
 - (d) Stresses the importance of the inclusion of all stakeholders in the notification process.

Resolutions of Council at its meeting of 21 September 2015

1. That Council continue to monitor the Douglas Park Mine Gas Drainage and Power Plant Proposal by South 32 and that Council continue to engage with residents of Douglas Park regarding their concerns about the proposal.

2. That Council throughout the process, advocate on behalf of the community, communicating their concerns to the consent authority, our state member, mining authority, and any other applicable minister/authority.

Resolutions of Council at its meeting of 15 February 2016

- That Council take a proactive role in advocating for the protection of the natural environment from impacts of mining under Redbank Creek.
- That Council write to the State Minister for Planning, the Minister for Environment and the Minister for Resources and Energy expressing its concern that compensation mechanisms for damage to the natural environment from mining impacts is not considered in the function of the Mine Subsidence Board and Council calls for this situation to be reviewed and remedied.
- That Council consider the allocation of resources in the third Quarterly Review to undertake advocacy regarding this issue.

Resolutions of Council at its meeting of 15 February 2016

- That Council take a proactive role in advocating for the protection of the natural environment from impacts of mining under Redbank Creek.
- That Council write to the State Minister for Planning, the Minister for Environment and the Minister for Resources and Energy expressing its concern that compensation mechanisms for damage to the natural environment from mining impacts is not considered in the function of the Mine Subsidence Board and Council calls for this situation to be reviewed and remedied.
- That Council consider the allocation of resources in the third Quarterly Review to undertake advocacy regarding this issue.

Resolutions of Council at its meeting of 21 March 2016

- That Council write to the NSW Minister for Environment and NSW Minister for Resources and Energy requesting:
 - The establishment of on-going funding for investigations and monitoring of the condition of watercourses that are identified as being impacted by subsidence associated with underlying operations.
 - Ongoing funding be made available to local governments, research organisations and community groups upon the lodgement of suitably detailed applications.

Resolutions of Council at its meeting of 16 May 2016

- That Council requests a copy of the report investigating possible non-compliance regarding the conditions of consent for the Bulli Seam Operation Project and the Extraction Plan for long-walls 901-904 from the Department of Planning and Environment Compliance Team and EPA.

- That Council also request information from South 32 as to what their approved setback from the Nepean River is.
- That copies of these requests be forwarded to the Local Member for Wollondilly, Jai Rowell and that a report come back to Council on the responses received.

Resolutions of Council at its meeting of 20 June 2016:

- Write to the relevant Federal and State Ministers, the Federal and State local members, the Greater Blue Mountains World Heritage Area Advisory Committee and UNESCO demanding that action be taken to further investigate the causes of continued water loss from the World Heritage listed Thirlmere Lakes. That this action includes the funding and support of rigorous and detailed research into:
 - The water loss patterns and trends in the past and over current times.
 - Predictive modelling of the consequences to the Lakes's biology and hydrology of continued or prolonged water loss.
 - Targeted investigation into the suggested cause of the water loss in relation to the Tahmoor Mine's operations in the past and future.
 - The potential of engineered options to reinstate and maintain water levels to protect the biodiversity and hydrology of the Lakes.
- That Council, through the oversight of the Minerals and Energy Resource Committee, undertake a facilitated solutions focused forum to investigate and identify solutions to the continued observed water loss from the World Heritage listed Thirlmere Lakes and that Glencore and other key stakeholders associated with the three tiers of government be invited to participate in this forum.

Resolution of Council at its meeting of 18 June 2018

- That Council write to the NSW Department of Planning and Environment to:
 - I. Welcome the establishment of the Independent Expert Panel for Mining in the Catchment and its composition.
 - II. Requests that no Determinations be used for any mining related application within the Catchment Area until such time that it has received and reviewed the Final Report produced by the Panel.

Resolutions of Council at its meeting of 18th July 2016

- The Executive include the following recommendations in the Business Paper of the next available meeting of the Association with a view to advocate the position of Council and the local community defined by the supplied resolutions:
 - i. The Association provide support to the resolutions of Wollondilly Shire Council regarding concerns over the continued observed water loss from the World Heritage listed Thirlmere Lakes and the conclusions of recent scientific studies regarding this matter.
 - ii. Pursuant to i), Correspondence be sent to the NSW Minister for Resources and Energy (the Hon Anthony Roberts) and the NSW Minister for Primary Industries (the Hon Niall Blair) advising of the support to the resolutions and requesting a prompt response.

Resolutions of Council at its meeting of 17th September 2018

- That Council write to the Minister to request further investigation into the impacts of fracturing and modified flow of Redbank Creek. As identified in Dr Ian Wright's Research Study for Western Sydney University, it is reported that Redbank Creek has the worst pollution from Mine Subsidence in the world. This study identified the rehabilitation of the creek channel and recovery of the creek water quality / ecology is very challenging.
- That Council request that the Minister investigate how the mining company could contribute to the rehabilitation of Redbank Creek.
- That Council workshop how we can advocate to assist Dr Wrights research findings and that we add it to the State Issues Paper.

Resolution of Council at its meeting of 15 October 2018

- That letters be sent to relevant Commonwealth MP's asking the Australian Government to use their Constitutional power and duty to protect water sources within the Drinking Catchment Areas of Avon, Nepean, Cordeaux and Cataract Dams from South 32's Dendrobium coal mining activities.

Resolution of Council at its meeting of 19 November 2018

- That Council send correspondence to the NSW Department of Planning and Environment seeking the reasons for all of the recommendations provided by the Independent Expert Committee for Mining in the Drinking Catchment not being incorporated into the Approval for Longwall 16 dated 30th May 2018.

Resolution of Council of 18th March 2019

- That Council endorse the draft submission on the Tahmoor South Colliery Project Application.
- That Council write to NSW Department of Planning & Environment requesting that the current application be reconsidered due to identified significant shortcomings (detailed in the draft submission).

Resolutions of Council at its meeting of 16 September 2019

1. That Council opposes the expansion of mining operations and formally objects to the proposal until the potential impacts on water sources and supplies are addressed to the satisfaction of Water NSW.
2. That Council endorses the lodgement of a submission to the NSW Department Planning, Industry & Environment (DPIE) on the Project Application and writes to NSW DPIE to:
 - Lodge the submission that advises of Council's position.

- Request the review process and preparation of the Preliminary Issues Report by DPIE commence after the receipt of the report by the Independent Panel for Mining in the Drinking Catchment.
 - Request that impacts of the Project Application on the volumes and quality of potable water supply of the Wollondilly and Macarthur residents for both current population and projected growth (including Growth Areas) be reviewed.
 - Request that a Public Hearing be held as part of the investigation by the Independent Planning Assessment Commission.
3. That Council write to:
- The NSW Minister for Planning & Public Spaces advising of Council's position and request that the consideration of the Dendrobium Project Application not occur until the release of the Report by the Expert Panel.
 - Water NSW supporting their position and submissions regarding mining in Catchment Areas and offering assistance and support to the efforts of Water NSW to protect water supplies for the Greater Sydney Basin.

THE PUBLIC INTEREST WE KNOW IT'S IMPORTANT, BUT DO WE KNOW WHAT IT MEANS

*Chris Wheeler**

The issue

Acting in the *public interest* is a concept that is fundamental to a representative democratic system of government and to good public administration. However, this commonly used concept is, in practice, particularly complex, and presents two major obstacles to governments and their public officials acting in the *public interest*:

- firstly, while it is one of the most used terms in the lexicon of public administration, it is arguably the least defined and least understood – few public officials would have any clear idea what the term actually means and what its ramifications are in practice.
- secondly, identifying or determining the appropriate public interest in any particular case is often no easy task - as Lyndon B Johnson once said: 'Doing what's right isn't the problem. It's knowing what's right'.

The concept – acting in the public interest

The over-arching obligation on public officials

Public officials have an over-arching obligation to act in the public interest. They must perform their official functions and duties, and exercise any discretionary powers, in ways that promote the public interest that is applicable to their official functions.

The primary purpose of non-elected public officials is to serve. Serving the public interest is one of the four dimensions of this primary purpose, the other three dimensions being:

- to serve the Parliament and the government of the day (not applicable to all public officials);
- to serve their employing agency (where applicable), and
- to serve the public as customers or clients.

Associated with each of these four dimensions of service are various conduct standards with which public officials in democratic countries are commonly expected to comply, each with its own objective(s). Experience has shown that there will be times when a public official will need to balance conflicting or incompatible conduct standards or objectives – where the public official has to make a decision that will serve one objective, but not another, or one

* *Deputy NSW Ombudsman. Chris has over 20 years experience in investigations and extensive experience in management and public administration. He has worked in State and local government organisations in NSW and Victoria, and in private legal practice.*

more than another. While there is some flexibility inherent in the various conduct standards with which public officials are commonly expected to comply, the fundamental principle must be that public officials must resolve any such conflicts or incompatibilities in ways that do not breach their obligation to act in the public interest.

This issue was addressed by the Royal Commission into the commercial activities of the government sector in Western Australia (the WA Inc. Royal Commission). In its report the WA Inc. Royal Commission said that one of the two fundamental principles¹ and assumptions upon which representative and responsible government is based is that:

The institutions of government and the officials and agencies of government exist for the public, to serve the interests of the public.²

The Royal Commission noted that this principle (the 'trust principle') '...expresses the condition upon which power is given to the institutions of government, and to officials, elected and appointed alike'. Later in its report, it noted that '[g]overnment is constitutionally obliged to act in the public interest.'³ This mirrored a statement made in a 1987 judgment of the NSW Supreme Court, Court of Appeal that '...governments act, or at all events are constitutionally required to act, in the public interest',⁴ and a statement made in a 1981 judgment of the High Court of Australia that '...executive Government...acts, or is supposed to act, ... in the public interest'.⁵

This does not mean, of course, that what is in the interests of executive government should automatically be considered to be in the public interest.⁶

The two components of the public interest

Acting in the public interest has two separate components:

- objectives and outcomes - that the objectives and outcomes of the decision-making process are in the public interest, and
- process and procedure - that the process adopted and procedures followed by decision-makers in exercising their discretionary powers are in the public interest.

The objectives and outcomes component is the aspect of the public interest most referred to in the literature. The process and procedure component appears to be less discussed, but is just as important. This component would include:

- complying with applicable law (both its letter and spirit);
- carrying out functions fairly and impartially, with integrity and professionalism;
- complying with the principles of procedural fairness/natural justice;
- acting reasonably;
- ensuring proper accountability and transparency;
- exposing corrupt conduct or serious maladministration;
- avoiding or properly managing situations where their private interests conflict or might reasonably be perceived to conflict with the impartial fulfilment of their official duties, and

- acting apolitically in the performance of their official functions (not applicable to elected public officials).

The meaning – trying to define the ‘public interest’

Can the ‘public interest’ be defined?

It is important to draw a distinction between the question and its application – between what *is* the public interest, and what is *in* the public interest in any particular circumstance.

Equivalent concepts to the *public interest* have been discussed since at least the time of Aristotle (*common interest*), including by Aquinas and Rousseau (*common good*) and Locke (*public good*).

Although the term is a central concept to a democratic system of government, it has never been definitively defined either in legislation⁷ or by the courts. Academics have also been unable to give the term a clear and precise definition. While there has been no clear interpretation, there has been general agreement in most societies that the concept is valid and embodies a fundamental principle that should guide and inform the actions of public officials.

The *public interest* has been described as referring to considerations affecting the good order and functioning of the community and government affairs for the wellbeing of citizens. It has also been described as the benefit of society, the public or the community as a whole.

In its 1979 report on the then draft Commonwealth Freedom of Information Bill, the Australian Senate Committee on Constitutional and Legal Affairs described the public interest as, ‘...a convenient and useful concept for aggregating any number of interests that may bear upon a disputed question that is of general – as opposed to merely private – concern’.⁸

The Committee also said that the:

... ‘public interest’ is a phrase that does not need to be, indeed could not usefully, be defined... Yet it is a useful concept because it provides a balancing test by which any number of relevant interests may be weighed one against another. ...the relevant public interest factors may vary from case to case – or in the oft quoted dictum of Lord Hailsham of Marylebone ‘the categories of the public interest are not closed’.⁹

The meaning of the term has been looked at by the Australian courts in various contexts. In one case the Supreme Court of Victoria said:

The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well being of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals...¹⁰

In another case the Federal Court of Australia said:

9. The expression ‘in the public interest’ directs attention to that conclusion or determination which best serves the advancement of the interest or welfare of the public, society or the nation and its content will depend on each particular set of circumstances...

10. The expression ‘the public interest’ is often used in the sense of a consideration to be balanced against private interests or in contradistinction to the notion of individual interest. It is sometimes used as a sole criterion that is required to be taken into account as the basis for making a determination. In other instances, it appears in the form of a list of considerations to be taken into account as factors for evaluation when making a determination...

11. The indeterminate nature of the concept of 'the public interest' means that the relevant aspects or facets of the public interest must be sought by reference to the instrument that prescribes the public interest as a criterion for making a determination...¹¹

The dilemma faced by those trying to define the public interest was summed up in another case in the following few words:

The public interest is a concept of wide meaning and not readily limited by precise boundaries. Opinions have differed, do differ and doubtless always will differ as to what is or is not in the public interest.¹²

The term was referred to in the following more colourful, but pragmatic, terms by an American commentator:

Plainly the 'public interest' phrase is one of those atmospheric commands whose content is as rich and variable as the legal imagination can make it according to the circumstances that present themselves to the policy maker (under the supervision of the courts of course).¹³

It could have been this term that Lewis Carol was thinking of when he had Humpty Dumpty say:

'When I use a word... it means just what I choose it to mean – neither more nor less.'¹⁴

What is not in the public interest?

To understand the purpose or objective of the concept, in some ways it is easier to distinguish the public interest from what is not. For example the *public interest* can be distinguished from:

- *private interests* of a particular individual or individuals (although as discussed later there are certain private 'rights' viewed as being in the public interest)
- *personal interests* of the decision-maker (including the interests of members of their direct families, relatives, business associates, etc) - public officials must always act in the public interest ahead of their personal interests and must avoid situations where their private interests conflict, might potentially conflict, or might reasonably be seen to conflict with the impartial fulfilment of their official duties
- *personal curiosity* – ie, what is of interest to know, that which gratifies curiosity or merely provides information or amusement¹⁵ (to be distinguished from something that is of interest to the public in general)¹⁶
- *personal opinions* - for example, the political or philosophical views of the decision-maker, or considerations of friendship or enmity
- *parochial interests* – ie, the interests of a small or narrowly defined group of people with whom the decision-maker shares an interest or concern; and
- *partisan political interests* - for example the avoidance of political/government or agency embarrassment.¹⁷

These can be categorised as 'motivation' type issues that focus on the private, personal or partisan interests of the decision-maker (and possibly also those of third parties).

What does the 'public' mean?

Most attempts to describe what is meant by the 'public interest' refer to the 'community', 'common' good or welfare, 'general' welfare, 'society', 'public' or the 'nation'. However, the issue of what constitutes the 'public' in 'public interest' has largely been unexplored.

When addressing this issue, academic commentators and judicial officers have taken it as a given that the 'public interest' relates to the interests of members of the community as a whole, or at least to a substantial segment of them - that it should be distinguished from individual, sectional or regional interests¹⁸. At the other end of the spectrum it is also widely accepted that the 'public interest' can extend to certain private 'rights' of individuals - rights that in many societies are regarded as being so important or fundamental that their protection is seen as being in the public interest, for example privacy, procedural fairness¹⁹ and the right to silence.

However this conceptualisation of the public interest fails to identify and address an important implication. In my view the public interest must also be able to apply to the interests of groups, classes or sections of a population between those two ends of the spectrum. The 'public' whose interests are to be considered can in practice validly consist of a relatively small group, class or section of a total population.

The size and composition of the 'public' whose interests should in practice be considered in relation to any particular decision or outcome will be dependent on, or at least be strongly influenced by, such factors as the:

- *legal context* - the jurisdiction and role of the decision-maker;
- *operational context* - the issues to be addressed and the decision to be made;
- *political context* - whether the decision-maker is a representative of a group, class or section of the public that has, or is perceived by the decision-maker to have, a particular interest in and views about the decision to be made, eg, the decision-maker's political party and/or electorate (maybe better described as the political 'reality'); and
- *personal context* - whether the decision-maker has strong personal, philosophical or political views on the issue, or is subject to the direction of, or whose continued employment or career prospects are dependent on, the support of a person with such views on the issue.

While this last factor in particular is actually contrary to the whole concept of the 'public interest', the practical impact of human nature on decision-making cannot be ignored.

Sub-groups of a total population that could be considered to be the relevant 'public' whose best interests need to be considered by a decision-maker might be geographically based, ie, the residents of a particular area. This can be seen most clearly in a Federal system of government such as Australia, for example:

- in relation to the exercise of a discretionary power at the national level, the 'public' could refer to all residents of Australia;
- for a state public official, the 'public' whose interests are relevant will primarily be the residents of that state; and
- for a local public official, the 'public' would primarily be the residents of the local area.

Decision-makers at different levels of government, or in equivalent but separate levels of government (eg, separate state or local councils), will therefore have different views as to the 'public' that is relevant to their decision. One consequence of this is that they can have very different, but equally valid, views as to what constitutes the 'public interest' in relation to the same issue.

In the local government context another consequence would be that decisions made by elected local councils relating to the development of their area can be expected to be largely based on a perception of the public interest which is focussed primarily on the interests of their constituents (the rate payers) of that area, and possibly to a lesser extent on the interests of people employed by rate payers, working in or leasing premises owned by rate payers, or visitors who use goods and services supplied by rate payers. While legislation could require local elected decision-makers to consider a broader public interest extending beyond their council boundaries, given that their electorate is the local residents, it is arguable that such a requirement may have little effect in practice. In recognition of this parochial approach by local councils, the body that has planning approval powers for major developments in the CBD of Sydney has been structured to include representatives of both the local council and the state government.

Sub-groups of a total population that could be considered to be the relevant 'public' whose best interests need to be considered by a decision-maker might also include groups or classes of the general population. For example indigenous people, farmers, school students, first home buyers, residents of an area (particularly objectors) close to a proposed development, etc (certain decisions made for their benefit could be seen as being in the 'public interest'). As another example, while anti-discrimination legislation would be in the general public interest, the inclusion of each category of discrimination or each requirement to prevent a particular type of discrimination, that affects a specific group of the population, could be argued to be primarily in the interests of that group.

The possibility of an interest of a section of the public being in the 'public interest' was acknowledged in at least one court case, where the High Court of Australia said that:

The interest of a section of the public is a public interest but the smallness of the section may affect the quantity or weight of the public interest so that it is outweighed by [another public interest]. It does not, however, affect the quality of that interest.²⁰

Apart from this weight issue, in practice the interests of a small section or sector of the public may not be considered to be in the 'public interest' if they are seen as being contrary to the interests of the broader 'public'. Conversely, certain basic 'rights' or interests of minorities are seen in many societies as sufficiently important for their protection to be seen as in the 'public interest', even if the protection of those interests does not advance the interests of the majority, or may even run counter to them.

Is there a hierarchy of interests?

While decision-makers can be expected to be significantly influenced by their perception of the group, class, or section of the population that constitutes the 'public' whose interests they must consider, this does not mean that broader or higher public interests will be ignored.

In practice it can be seen that there is in effect a hierarchy of interests, for example the high level shared *values* of a society²¹ would, where relevant, be the foundation for decision-making by public officials at all levels of that society. These shared values would include respect for significant private 'rights'.

The next level down of the hierarchy would be general public interests (for example the protection of the urban environment, the interests of the residents of a local government area, or the provision of social welfare for persons in need). At the base of the hierarchy would be private interests (for example the interests of an objector to a local development proposal or issues about a person's entitlement to social welfare benefits).²²

It could be argued that the decision-making process in the public interest would involve decisions made at each level of the hierarchy not being contrary to an interest ranked at any higher level.

So what does the term mean?

In my view the meaning of the term, or the objective of or approach indicated by the use of the term, is to direct consideration away from private, personal, parochial or partisan interests towards matters of broader (i.e. more 'public') concern.

While the meaning of the 'public interest' stays the same, the answer to the question what is 'in' the public interest will depend almost entirely on the circumstances in which the question arises. In fact it is this 'rich and variable'²³ content which makes the term so useful as a guide for decision-makers.

The application – identifying and assessing relevant public interests

Identifying relevant public interests

Making an assessment as to how the *public interest* applies in a particular circumstance can be thought of as a three stage process:

- firstly, identification of the relevant population – the 'public' whose interests are to be considered in making the decision;
- secondly, identification of the 'public interests' applicable to an issue or decision
- thirdly, an assessment and weighing of each applicable 'public interest', including the balancing of conflicting or competing 'public interests'.

As discussed earlier, the **first step** for the decision-maker is to be clear about which people, or which group, class or section of the general population is the relevant 'public' (or 'publics' if several different groups, class or sections are involved) whose best interests must be considered in making the decision.

The **second step** for the decision-maker is to identify the public interests that should guide the exercise of their discretionary powers. In other words, (non-elected) public officials exercising discretionary powers must determine the specific public interest objective or objectives that apply to their role (and/or that of any employing agency). This is done by reference to three sources of information:

- *Primary sources:*
 - the objects clauses in legislation, or in the absence of such provisions the spirit (intention) of legislation identified from the terms or provisions that establish either a public office or agency, or its functions, from explanatory memoranda or from relevant second reading speeches;

- the terms of legislation that establish a public office or agency and/or give it functions and powers; or
- any regulations, rules or by-laws that set out the functions and powers of a public official, public office or agency; and
- any procedural requirements that the public official is required by law to comply with in making the decision (including procedural fairness).
- *Secondary sources:*
 - government, council or board policy²⁴
 - plans or policies:
 - made by or under statutory authority; or
 - approved by the Executive Government, a Minister, or a council or board; or
 - approved by a relevant agency or authorised public official.
 - directions given by Ministers within the scope of their authority.
- *Tertiary sources* (if none of the above sources answer the question):
 - agency strategic/corporate/management plans;
 - agency procedure manuals and delegations of authority; or
 - as perhaps a last resort, statements of duties for the decision-maker's position.

Options for assessing the public interest

The **third step** for a decision-maker is to assess and apply weightings/levels of importance to the identified public interests over and above the three sources of information referred to earlier, options available for making assessments as to what is in the public interest and the relative weightings to be given to competing or conflicting public interests would include:

- the revealed majority views or opinions of the public;
- the views of the elected representatives of the people; or
- an objective assessment by an impartial person of the public interests likely to apply.

In practice, basing assessments and decisions as to what is in the 'public interest' on the revealed majority opinion of the 'public' is not a workable option:

- often the 'public' does not have the full picture or may be misinformed
- a matter could be in the "public interest" even if it is not reflected by the revealed preferences or opinions of the majority, eg, an issue about which the public is unaware or unconcerned

- a matter could be in the 'public interest' even if it is contrary to the revealed preferences or opinions of the majority, eg, tax increases for public purposes, and
- there are matters where the 'ends' are clearly supported by the majority (eg, improved defence), but the means are not (eg, tax issues).

Basing assessments on the views of the elected representatives of the people is a far more appropriate and workable option. One way of looking at a democratic system of government is that it provides a process through which conflicting points of view of what constitutes the 'public interest' can be identified and considered in the development of policy and the making of decisions. A fundamental rationale for the parliamentary process of debate, for example, is to allow the community's elected representatives to assess competing interests and make informed decisions that are in the public interest.

At the risk of oversimplification, a complicating factor is that while the starting point for public officials to assess the public interest would usually be to identify what the public **needs** (ie, what is in the general interests of the public), the starting point for many politicians would usually be to identify what the public **wants** (ie, what are the likely views of the electorate). However, in a world of increasingly professionalised party-politics, parties and governments place increasing resources and effort behind attempting to shape and influence what the public might appear to want, in ways that are conducive to their own electoral prospects. The theory of democratic responsiveness has to be reconciled with the reality of the ways in which legislators generally, and Ministers in particular, can shape conceptions of the public interest to suit what might also be their own shorter term and more private interests.

In an ideal world, decisions as to what is in the public interest might be made by a decision-maker who is rational, dispassionate/disinterested and altruistic.²⁵ However, in the real world we can only hope to approximate this ideal. This may be achieved through such means as healthy, open public debate on issues of genuine 'public interest' contention; effective use of academic and non-government expertise in transparent processes that throw light on issues of contention; the contributions of an independent but responsible news media; and most importantly, an apolitical and professional public sector, prepared to formulate its own reasoned interpretations of the public interest and present these back to government, even though it must necessarily ultimately act in accordance with the lawful instructions, and be guided by the views, of the elected representatives of the people.

Unfortunately, in practice open public debate is often hampered by a number of factors, including excessive (if not obsessive) government secrecy; news media not always acting responsibly; contract employment of senior public officials and the ease with which some can be removed, which does not foster the giving of frank and candid advice to Ministers; and fact that the growth over time in influence (and numbers) of the personal staff of Ministers has not been balanced by increased levels of accountability.

Balancing conflicting or competing public interests

In practice, a decision-maker will often be confronted by a range of conflicting or competing public interest objectives or considerations. As part of the third step, decision-makers also need to balance any such conflicting or competing public interests. Such a weighing up and balancing exercise is usually based on questions of fact and degree.²⁶

As was noted in the *McKinnon* case:

¹² The public interest is not one homogenous undivided concept. It will often be multi-faceted and the decision-maker will have to consider and evaluate the relative weight of these facets before reaching a final conclusion as to where the public interest resides. This ultimate evaluation of the public interest

will involve a determination of what are the relevant facets of the public interest that are competing and the comparative importance that ought to be given to them so that 'the public interest' can be ascertained and served. In some circumstances, one or more considerations will be of such overriding significance that they will prevail over all others. In other circumstances, the competing considerations will be more finely balanced so that the outcome is not so clearly predictable. For example, in some contexts, interests such as public health, national security, anti-terrorism, defence or international obligations may be of overriding significance when compared with other considerations.²⁷

Where there are conflicting or competing public interests, it may be possible to address them through compromise or prioritisation. Sometimes it may be more appropriate to choose the 'least worst' option – the decision that causes the least harm rather than the most good. While there may be circumstances where public interest objectives are entirely incompatible, where one must be chosen at the expense of the other, in practice it is more likely that there will be degrees of incompatibility between various objectives.

Every policy decision, such as a decision to build a road or to approve a development application, requires a weighing up and balancing of interests, at least to some extent. In most cases there will be winners and losers. The decision-maker needs to consider all of those who may be affected as individuals but more importantly how the community at large may be affected.

The kinds of conflicts or incompatibilities that often arise include:

- where a decision would advance the interests of one group, sector or geographical division of the community at the expense of the interests of another – such a decision can be in the public interest in certain circumstances, for example, granting resident parking permits near popular destinations may be in the public interest even though it inconveniences non-residents, because it helps to ensure residents are not overly inconvenienced by people visiting nearby areas
- where a decision may affect people beneficially and detrimentally at the same time – for example a decision to improve public safety by operating CCTVs on every street corner may improve security but also may restrict the privacy of individuals
- where two government organisations are responsible for advancing different causes which both provide some benefit to the public – for example, it is likely that in many respects a body responsible for protecting the natural environment and a body responsible for harvesting forestry products have equally valid but conflicting views about the public interest
- where a decision requires a balancing of one public interest consideration over another – for example in the NSW FOI Act there are balancing tests that the Parliament has seen fit to impose in relation to certain exemption clauses, ie, that either disclosure of the documents in question would, on balance, 'be in the public interest', or 'be **contrary** to the public interest' (emphasis added).

Complying with statutory public interest tests

The situations addressed in legislation are often so complex that it is not possible for the legislature to comprehensively cover all matters that should be taken into account by decision-makers. In such circumstances it is not uncommon for legislation to identify a number of public interest type issues or matters to be considered by decision-makers in exercising their discretionary powers, and then to add a general 'catch-all' public interest test. As the majority in the High Court of Australia said:

...the expression 'in the public interest', when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable...'.²⁸

In NSW, over 190 Acts require that the *public interest* be considered when implementing the Act or in making particular administrative decisions under the Act.²⁹ The form of words used in Acts includes the 'the public interest', 'in the public interest', 'contrary to the public interest', 'inconsistent with the public interest', 'necessary in the public interest', and 'serve the public interest'.

Statutory public interest tests usually seem to fall into one of the following three categories:

1. whether something should be done or permitted to be done (ie, whether something is 'in the public interest')
2. whether something should not be done or not permitted to be done (ie, whether something is 'contrary to the public interest'), and
3. a 'catch-all' consideration over and above various specific considerations set out in the statute (ie, decision-makers must consider the 'public interest').

As noted earlier, in practice the nature and scope of the *public interest* considered relevant by a decision-maker in complying with such a statutory test will be significantly influenced by the nature and scope of the decision-maker's powers, jurisdiction, etc.

There are provisions in two NSW Acts (the *Freedom of Information Act*, s.59A and the *Local Government Act*, s.12(8)) which are designed to assist decision-makers in determining whether certain actions would be contrary to the public interest. Given the impossibility of properly defining the public interest, both do so by specifying matters that are considered to be irrelevant to such an assessment, for example that disclosure/inspection of documents:

- could cause embarrassment to the government/council
- could cause a loss of confidence in the government/council, or
- could cause a person to misinterpret or misunderstand the information contained in the document because of an omission from the document or for any other reason.

While most statutory public interest tests relate to regulatory or approval provisions or schemes, another type relates to the availability of rights or protections. For example most of the whistleblower legislation in Australasia contain public interest type tests for determining whether a disclosure is protected. These Acts either refer specifically to 'public interest disclosures'³⁰ or state that disclosures that comply with the Act are made in the 'public interest'.³¹

In relation to each of these Acts, the agency or person who receives a disclosure must make a decision as to whether or not it is protected by the Act (ie, a disclosure made in the public interest). Whether or not such protection is available can have serious implications for the person making the disclosure. One difficulty associated with the public interest tests in whistleblower legislation is that, given the different contexts in which they are operating, whistleblowers and the recipients of their disclosures can and often do have very different conceptions of how important or significant a matter must be to be in the public interest.

Distinguishing between the public interest and the merits of the case

A clear distinction must be drawn between whether, on the one hand a decision was made in the public interest, and on the other the merits of the decision. Alternatives open to a decision-maker could all be in the public interest, but one might have greater merit than the other. This assessment of merit could be validly based on a range of criteria including any set out in statute, the policies or priorities of the government of the day or the agency concerned, the availability of resources, public pressure, etc.

In practice, in a number of circumstances the issue will not be whether a decision-maker has correctly identified the public interest, or has made an error in balancing competing public interests, as there will not be any clearly 'right' or 'wrong' answer. The relevant questions will actually be whether a decision was the 'best' decision in terms of the merits, ie, the correct (when there is only one decision) or preferable (when a range of decisions are available) decision based on the information available to the decision-maker. For example, in deciding how to allocate surplus government funds between two or more options, each of which is in the public interest (eg, between health, education or law and order), whatever decision is made will be 'in the public interest'. In this context, the primary questions that could arise would relate to the merits of the decision to put extra funding into one area and not another, and/or the appropriateness of the decision-making process.

The proof – demonstrating that the correct decision has been made

Having said that, in many circumstances public discourse will focus on whether the appropriate public interest has been correctly identified or whether there has been an appropriate balancing of conflicting public interests. At one end of the spectrum will be circumstances where the appropriate public interest considerations are clear from the terms of the relevant legislation. At the other end of the spectrum will be circumstances where there are conflicting public interests that are either very finely balanced or where the appropriate weighting to be applied to each is unclear.

As a generalisation it can be said that decisions made at either end of the spectrum are more easily supportable or defensible than decisions made in the grey area in between – at one end because the 'right' answer is clear and at the other end because there is clearly no 'right' answer and therefore the decision-maker has far more room to move.

Where a decision is contentious or otherwise significant, it should be expected that it is likely to lead to the expression of contrary views and active debate as to the merits. Such an outcome does not mean that the decision was wrong, only that the merits of the decision are being tested in ways that are entirely appropriate in our society. In such circumstances it is important to ensure that any such debate focuses on the merits of the decision and not the conduct or propriety of the decision-maker or the decision-making process. Where decisions are being made in this grey area, it is particularly important for public officials to be able to demonstrate that their decision was made on reasonable grounds, including which public interest issues were considered and the reasons why a particular interest was given precedence.

The more significant or contentious an issue, the greater the importance of ensuring that the basis for the decision is properly documented. For example, where a decision or a course of action is being considered by some third party, be it an interest group, opposition MPs, journalists, regulators, watchdog bodies, tribunals or courts, if the basis for a decision is properly documented this supports the credibility of the decision-maker and the decision-making process in the eyes of that third party, even if there is disagreement with the merits of the decision made. This generally increases the chances that any debate will focus on the merits of the decision and not the conduct of the decision-maker.

Proper documentation also helps to achieve a second important goal in this context. Properly documenting a decision helps ensure that there was adequate rigour in the assessment process, for example, helping to ensure that all relevant factors are taken into consideration and helping to highlight circumstances where decision-makers find themselves wanting to skate over certain difficult or inconvenient issues, or where they are experiencing some difficulty in explaining (or rationalising) the basis on which a decision was made.

Conclusion

Most commentators appear to have taken the view that it is not possible to effectively define the concept of the *public interest*. In my view, it is possible to determine what is meant by the *public interest* if a distinction is drawn between the concept and its application.

The *public interest* is best seen as the objective of, or the approach to be adopted, in decision-making rather than a specific and immutable outcome to be achieved. The meaning of the term, or the approach indicated by the use of the term, is to direct consideration and action away from private, personal, parochial or partisan interests towards matters of broader (ie, more 'public') concern.

The application of the concept is a separate issue and the answer to the question 'what is in the public interest?' will vary depending of the particular circumstances in which the question arises.

There are two separate components of the public interest – the process/ procedure component and the objectives/ outcomes component. In relation to the objectives/ outcome component, identifying what is in the public interest in any given situation is a primary obligation on public officials who are exercising discretionary powers. This is no simple task and in practice involves:

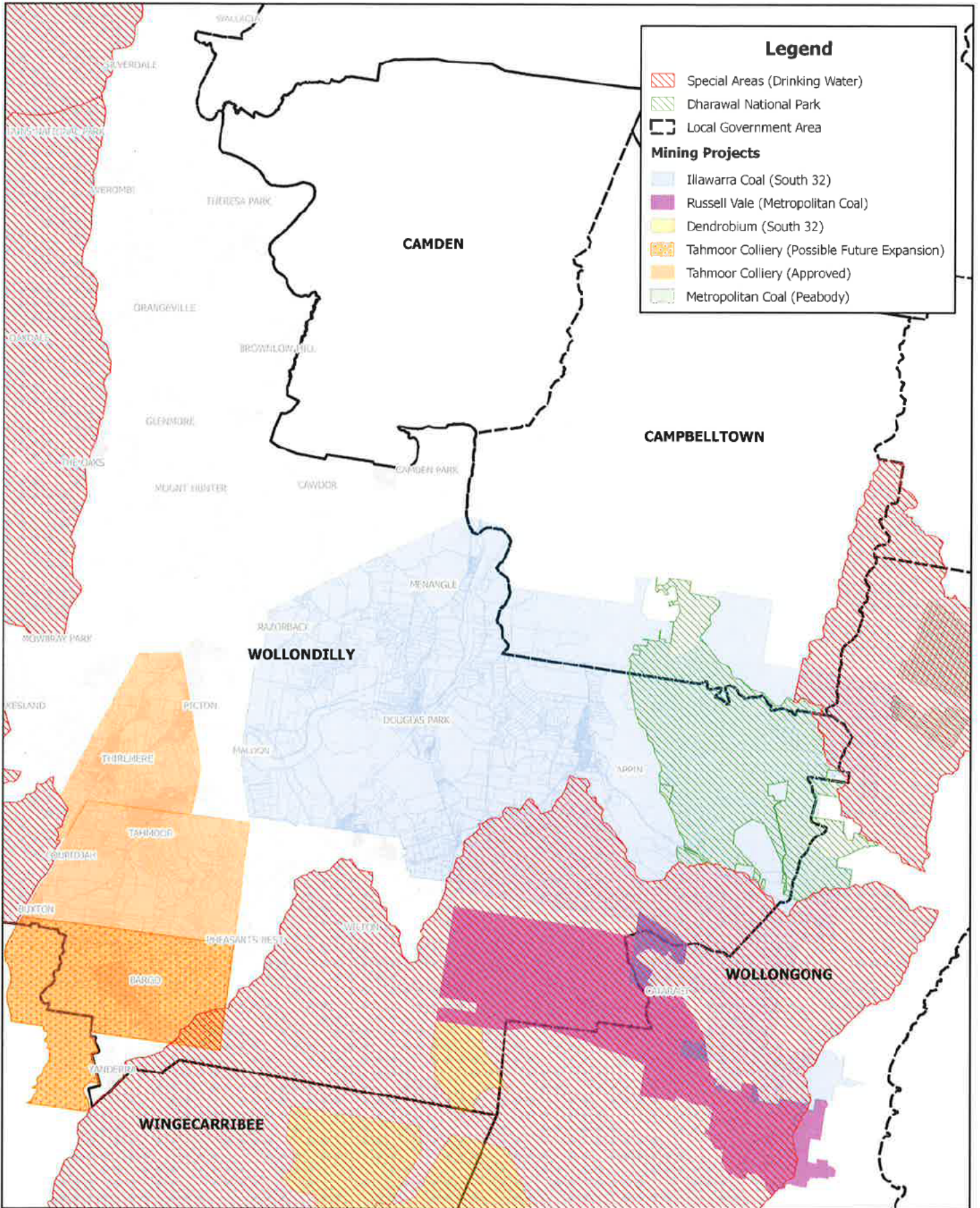
- who should be considered to be the relevant public?
- what are the relevant *public interest* issues that apply?
- what relative weightings should be given to various identified public interests and how should conflicting or competing public interests be addressed?

While in many cases there will be no clear answer to each of the questions, what is important is that a conscientious attempt is made to find appropriate answers, and that the decision-maker is able to demonstrate that the appropriate approach was followed and all relevant matters were considered.

Endnotes

- 1 The other fundamental principle was: 'It is for the people of the State to determine by whom they are to be represented and governed'.
- 2 In Volume 1, Chapter 1, at 1.2.5.
- 3 above at 3.1.5.
- 4 Per McHugh JA in *Attorney General (NT) v Heinemann Publishers Pty Limited* (1987) 10 SLWLR 86 (at p191) – the SpyCatcher Case.
- 5 Mason J in *Commonwealth of Australia v John Fairfax and Sons Ltd & ors* (1981) ALJR 45 (at p49).
- 6 See Note 5.
- 7 Attempts have been made in some Acts to define public interest, eg, s.24 *Surveillance Devices Act 1998* (WA) states that the public interest 'includes the interests of national security, public safety, the economic wellbeing of Australia, the protection of public health and morals and the protection of the rights and freedoms of citizens.' In some Acts there are also definitions of public interest information, eg, SA *Whistleblowers Protection Act 1993*.

- 8 At 5.25.
- 9 At 5.28.
- 10 Appeal Division of the Supreme Court of Victoria in *Director of Public Prosecutions v Smith* [1991] 1 VR 63 (at 75), per Kaye, Fullagar and Ormiston JJ.
- 11 Full Court of the Federal Court of Australia in *McKinnon v Secretary, Department of Treasury* [2005] FCA FC 142 per Tamberlin J (at 245).
- 12 *Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health* (1995) 128 ALR 238 per Lockhart J.
- 13 Glen O Robinson, 'The Federal Communications Act: An Essay on Origins and Regulatory Purpose', in *A Legislative History of the Communications Act of 1934* 3, 15-16 (Max D Paglan ed., 1989) (at 16).
- 14 Lewis Carroll, *Through the Looking-Glass* (1872)
- 15 *Director of Public Prosecutions v Smith* [1991] 1 VR 63 (at pp73-75), *R v Inhabitants of the County of Bedfordshire* (1855) 24 L.J.Q. B.81 at (p84) and *Lion Laboratories Limited v Evans* [1985] QB 526 (at p537)
- 16 *Re Angel and Department of Arts, Heritage & Environment* (1985) 9 ALD 113 (at 114).
- 17 A specific factor referred to in some NSW legislation, for example the *Freedom of Information Act*, s.69A, and the *Local Government Act*, s.12(8) and a matter referred to by Mason J in *Commonwealth of Australia v John Fairfax & Sons Ltd and ors* (1981) 55 ALJR 45 at (p49).
- 18 *Assessing the public interest in the 21st Century: A framework*, Leslie A. Pal and Judith Maxwell, December 2005, External Advisory Committee on Smart Regulation.
- 19 Per Mason CJ in *Attorney General (NSW) v Quin* (1990) 64 ALJR 627 and Lord Keith in *Glasgow Corporation v Central Land Board* [1956] SC(HL) 1 at p25.
- 20 In *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473 (at p487) per Jacobs J
- 21 For example, those relating to freedom, fairness, justice, health, safety, security, etc.
- 22 From a societal perspective, such a hierarchy could be seen in some ways as almost the reverse of Maslov's Hierarchy of Needs pyramid.
- 23 See note 11.
- 24 Or in the Australian Federal context, Statements of Expectation and Intent approved by the relevant Minister (in the Commonwealth context per Uhrig, *Review of the Corporate Governance of Statutory Authorities and Office Holders*, June 2003)
- 25 'The public interest may be presumed to be what men would choose if they saw clearly, thought rationally, acted disinterestedly and benevolently', per Lippmann, Walter, *Essays in the Public Philosophy*, Boston: Little Brown, 1955.
- 26 Per Mason CJ, Wilson and Dawson JJ said in the *Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia* (1987) 61ALJR 39.
- 27 Per Tamberlin J in *McKinnon v Secretary, Department of Treasury* [2005] FCA FC142.
- 28 *O'Sullivan v Farrer* (1989) 168 CLR 210, per Mason CJ, Brennan, Dawson & Gaudron JJ (at 217).
- 29 Such Acts include the *Defamation Act 1974*, *Evidence Act 1995*, *Environmental Planning and Assessment Act 1979*, *Freedom of Information Act 1989*, *Local Government Act 1993*, *Occupational Health and Safety Act 2000*, *Ombudsman Act 1974*, *Police Act 1990*, *Privacy and Personal Information Protection Act 1998*, *Protected Disclosures Act 1994*, *Public Sector Employment and Management Act 2002*, and *Teaching Service Act 1980*.
- 30 *Public Interest Disclosure Act 1994* (ACT), *Whistleblowers Protection Act 1994* (Qld), *Whistleblowers Protection Act 1993* (SA), *Public Interest Disclosures Act 2002* (Tas), and *Public Interest Disclosure Act 2003* (WA).
- 31 *Protected Disclosures Act 2000* (NZ), *Protected Disclosures Act 1994* (NSW)



Mining Operations in Relation to the Drinking Catchment



© LPI Department of Finance and Services, Randwick, Sydney, 2705. www.lpi.nsw.gov.au.
 While every care is taken to ensure the accuracy of this product, Wollondilly Shire Council and the Local / State / Federal Government departments and Non-Government organisations whom supply datasets, make no representations or warranties about its accuracy, reliability, completeness or suitability for any particular purpose and disclaims all responsibility and all liability (including without limitation, liability in negligence) for all expenses, losses, damages (including indirect or consequential damage) and costs which you might incur as a result of the product being inaccurate or incomplete in any way and for any reason.
 Bulk Seam Project Dates: 18th 2014