Question 1

"**Table 3-2 of the Department's Assessment Report identifies six other approved hard rock quarries within the Hunter Region that could provide significant volumes of quarry material to the regional market and which also have more direct access to the State Road network. Given the impacts of increased truck movements associated with the proposed Martins Creek Quarry project along the local road network why is this project essential to meet regional market demand? "**

1.1 **The Department's October 2022 Assessment**

22. In addition to the existing Martins Creek Quarry, there are six other approved hard rock quarries ***with the capacity to provide significant volumes of high strength aggregates and construction materials within the Hunter Region****. A breakdown of production rates and total available resources from these quarries is presented in Table3.2 .*

Table 3-2 Approved Hunter Region hard rock quarries and production rates

Quarry	*Production (tpa)*	*Resource (Mt)*
Martins Creek Quarry	*449,000*	*Unspecified***
Karuah Quarry	*500,000*	*11.2*
Karuah East Quarry	*1,500,000*	*29*
Seaham Quarry	*800,000*	*3.3*
Allandale Quarry	*2,000,000**	*Unspecified*
Brandy Hill Quarry	*1,500,000*	*78.1*
Teralba Quarry	*1,200,000*	*22*
Total	*7,949,000*	*>143.6*

**EPL limits production to 2,000,000 tpa*

*** Daracon estimates up to 22 Mt of remaining resource could be extracted under the Project* *(emphases added)*

1.2 But only two months later, on 19 December 2022, in its Response to the Commission's question, the Department says

> *"While it is difficult to quantify the amount of hard rock material required to service the regional market over the next few years, it is clear that the recent influx of State Significant Development (SSD) applications for hard rock quarries in the region (see Table 2) points to a strong regional demand for this material. However, the Department considers that it would be inappropriate to pre-judge the extent to which any of these applications could contribute to improving material supply until they have been subject to a comprehensive merit-based assessment in accordance with the requirements of the Environmental Planning and Assessment Act 1979 (EP&A Act). Accordingly, these applications cannot be relied upon to address any regional shortfall in hard rock material in the short to medium term. Anecdotally, the Department is also aware that several of the existing hard rock quarries in the region are unable to keep up with current demand. Further evidence of this material shortage is provided in Daracon's response. Please refer to pages 9 to 14 in Attachment A. (emphases added)*

In other words, while in October we are told that there are 6 other hard rock quarries that have the capacity to provide significant volumes of material, the Department then maintains that it is difficult to quantify the quantity over the *next few years* and then *short and medium term* and not responding to the question for whole of the term, relying upon

- anecdote (hearsay) to establish its awareness,
- SSD applications (all of which it would have known about in December), and
- Umwelt's further submission in its annexure A.

1.3 Which, if any, Departmental submission is capable of safe acceptance?

1.4 What reliable evidence is there that the Department has made its own independent enquiries about regional market demand, short term, medium and long term, for hard rock quarry product?

1.5 To my knowledge, SSD applicants Stone Ridge Quarry, Eagleton Quarry and Karuah South quarries have almost immediate access to the Pacific Highway, and do not traverse residential/village areas.

1.6 With respect, the Department has not answered the question: why is this project essential to meet regional market demand, given the impact of increased truck movements along the local road network?

2.1 Umwelt's Additional Information (December 2022) outlines the region's other 6 quarries and their products in para 3.1 purporting to strategically justify the expansion embodied in the Project.

2.2 No mention is made of the SSD applications referred to by the Department.

2.3 In respect of the Karuah East Quarry and Seaham Quarry, the date May 2023 is when the supply will be available or the taking of orders – a date only 3 months away.

2.4 The Project is promoted as the regionally significant resource that can solve future supply constraints "with access to main road and rail transport."(p14).

However the assertions in its paragraph on p.14

"Further, it is noted that two of the quarries listed in Table 3.2 in the Department's Assessment Report rely on road haulage on local roads being Brandy Hill Quarry and Teralba Quarry. Neither quarry has direct access to the State Road network and also transport product through residential areas in order to access State Roads."

require some perspective.

Brandy Hill Quarry transports its product through lightly populated rural areas until

- either the fringe of Raymond Terrace is reached and the Pacific highway is only minutes away; or
- Bolwarra Heights is reached - the same locality where the Martins Creek Primary Truck route intersects.

Teralba Quarry transport does briefly encounter residential areas but is only minutes away from either MR217, or alternatively a little longer westward through rural areas to the M1.

The Martins Creek Quarry's product transported by road does not have direct access to State Roads. The Karuah Quarries do, and the Seaham Quarry's access is only a stone's throw from the Pacific Highway. Neither traverses residential or commercial areas.

Conclusion

The Commission has correctly stated in its Question: the other quarries do "have more direct access to the State Road network." Other quarries referred to, coupled with the favourable resolution of some of the pending SSD applications, will assist in meeting any strong regional market demand.

Question 2:

If the Commission grants consent to the Application, and considering the proposed works to be undertaken to the rail siding, are there reasons why it should not impose a condition requiring a greater portion of product (recommended condition A15) to be transported by rail? If so, what are these reasons?

1.1 The Department has accepted Daracon's position inasmuch as Daracon "has adequately demonstrated that rail transportation of quarry products is severely constrained…" so that 650tpa is to be transported by rail "subject to market demands and network availability."(p4).

1.2 There is no evidence that the Department has made its own independent enquiries to confirm or otherwise the correctness of the information submitted on behalf of the applicant on this issue.

1.3 The First Plateway Report issued on or about 22/6/15, is a thorough report and its conclusion deals with the delivery of railway ballast by rail and the limitations of the quarry's ability "to increase the rail distribution of aggregates within its current distribution area."(6.1).
Its recommendations related to the supply of railway ballast and the future expansion of markets would be assisted by extending the sidings to allow for longer trains.

1.4 The Second Plateway Report (25/05/21) concluded, i.a. that while there was "currently no feasible opportunity to use rail logistics to expand the local and regional market currently served by Martins Creek Quarry…Distribution into the Sydney market via the SADA appears to be viable" and gave several reasons for so concluding, adding "to make this operation commercially viable the rail facilities at Martins creek Quarry require expansion and rail and loading operations need to be carried out 24/7to ensure that reliable train cycles can be achieved." It "recommended that the practice of evening and night time train loading be available which should enable the productivity of rail ballast and associate quarry product distribution to increase."(p45).

1.5 Umwelt, in its Additional Information Report (Dec 22),states that "Without an approval in place, Daracon has been unable to confirm the quantum of future rail markets…Daracon seeks approval to transport up to 1.1Mtpa by rail, in anticipation of potential future market and rail logistics potential to continue to increase the volume transported by rail, over time."(p16).

1.6 Compare the Department's proposed condition A10:
"The Applicant must not transport more than 1.1million tonnes of quarry products in total from the site in any calendar year, including a maximum of 500,000 tonnes by road."

1.7 Also compare the Department's statement in its response to this Question 2:
"With consideration of the recent road haulage reductions proposed by Daracon, the Project now seeks approval to transport upto 450,00 tpa of quarry products by road out of a total production rate of 1.1Mtpa with the balance to be transported by rail subject to market demands and network availability." (p4).

(emphases added)

Conclusion

1.8 The sale of product by rail is for an area beyond the “region” and is a vital State significant potential market. The applicant has available a unique regional rail transport ability, and it should be utilised to its fullest potential.

1.9 Other quarries in the region have or will have in the next few months/years, available resource to go a long way to meet local and regional demand, avoiding adverse impacts such as would be visited upon the Paterson, Bolwarra Heights, East Maitland communities along the primary road route sought to be used by the applicant to transport its products.

Question 3

CEAL Limited v. Minister for Planning & Ors[2007] NSWLEC 302 ('CEAL')

The question has been put to the Applicant in terms

> Whether the Commission should or should not adopt the reasoning adopted by the Court in relating to
> - the number of truck movements,
> - the haulage route, and
> - people living along the haulage route.

In so doing the Commission has properly recognised the overriding principle that"all development applications should be treated on their merits."

The CEAL decision was given by Jagot J (as she then was, now of the High Court) assisted by Commissioner Watts of the Land and Environment Court.

Reasoning by a Decision Maker

Any decision by a court, tribunal or commission, whether it be in planning or not, is mostly derived from the consideration of

- the particular facts of the case to establish the material facts and characteristics; then
- by inductive, deductive reasoning and/or reasoning by analogy (having regard to the reasoning of one case with the facts or reasoning of a similar case); and then
- the legal principles that appear to have direct bearing on that exercise.

The High Court case of **Dietrich v R [1992] HCA 57; (1992) 177 CLR 292 (13 November 1992)** reflects these principles. **Justice Brennan** said at

"10. Sir Owen Dixon commended ((80) "Concerning Judicial Method", (Yale 1955), in Jesting Pilate, (1965), pp 153, 154, 157.), as the methodology for judicial development of the common law, "high technique and strict logic". That method guarantees the authority and acceptability of any change in the common law made by the courts. The "strict logic" of which Sir Owen Dixon spoke includes, of course, inductive as well as deductive logic for strict logic is part of the methodology of change. The classic example is to be found in Lord Atkin's speech in Donoghue v. Stevenson ((81) [1931] UKHL 3; (1932) AC 562, at p 580.) where, perceiving the theme common to earlier cases, he reasoned to a unifying principle which, once articulated, governed the host of cases that followed. Inductive reasoning leads to the expression of a normative principle which prescribes with some particularity the character of the facts to which the principle applies. The principle must be more precise than a value or concept, else its content is left for contention in later cases ((82) See Gala v. Preston [1991] HCA 18; (1991) 172 CLR 243, at pp 262-263.). Analogical reasoning is the handmaid of strict logic in developing the common law ((83) See per Lord Simon of Glaisdale in Lupton v. FA and AB. Ltd. (1972) AC 634, at pp 658-659.). When a legal rule or result is attached to certain relationships or phenomena, the perception of similar characteristics in another relationship or phenomenon leads to the attachment of a similar legal rule or result. Unless the analogy

> is close, the applicability of the legal rule or result to the supposedly analogous relationship or phenomenon is doubtful. It is fallacious to apply the same legal rule or to attribute the same legal result to relationships or phenomena merely because they have some common factors; the differences may be significant and may call for a different legal rule or result. Judicial technique must determine whether there is a true analogy. The present case brings out the point."

The applicant's submission, in paragraph 7 in an appended advice, refers to the Commission's acknowledgement of the principle of consideration of an application on its merits and continues

> "Whilst the IPC has acknowledged this principle in its Request, it would be erroneous for the IPC to give consideration to the CEAL Decision in its assessment of the Application."

The advice cites ***Woolcott Group Ltd v. Rostry Pty Ltd*** **[2016] NSWLEC 1113,** a decision by a commissioner of the Court.

The Reasoning in CEAL

A reading of that case reveals that its structure, paragraphs A-D, led to establishing the material facts, with paragraph D dealing with the impacts on the village of Bugonia and paragraph E with a discussion on the facts.

As to E: Discussion.

Importantly, in CEAL

63 "… The potential for a particular development to generate traffic along particular roads, and the environmental consequences of that potential are relevant considerations under s 79C(1)… If, for example all or most of the quarry traffic were ultimately to converge on on destination (which is not the case here), I can see no reason why the potential environmental impacts of that convergence would not be a matter a consent authority may or must consider under s 79C(1), depending on the particular facts. The extent of the obligation under s 79C(1) to consider the likely impacts of development is dictated by the consent authority's view about the extent of the impacts."

The Subject Application

The reasoning in CEAL was derived from the relevant material facts determined by the Court.

The reasoning in this application will depend upon the material facts determined by the Commission.

It is axiomatic that the reasoning in this application will not be the same as in CEAL simply because the material facts established by the Commission will differ from that case.

It may transpire that the established and determined facts here lead to a similar conclusion as in CEAL. But the reasoning could never be the same, and it should not be adopted.

However and with the greatest respect, some would think it is a long bow to assert that "… it would be erroneous for the IPC to give consideration to the CEAL Decision in its assessment of the Application."

This statement is repeated in Umwelt's Additional Information at para 3.2, second paragraph.

Decision-makers give consideration to other cases when their facts and applied legal principles assist the decision-maker to arrive at a final determination.

Note the cases considered in **Dietrich.**

In CEAL, consideration was given to these 9 cases

BP Australia Ltd v Campbelltown City Council (1994) 83 LGERA 274 ;
Goldberg v Waverley Council [2007] NSWLEC 259;
New Century Developments Pty Ltd v Baulkham Hills Shire Council (2003) 127 LGERA 303;
North Sydney Council v Ligon 302 Pty Ltd (1996) 185 CLR 470 ;
Patrick Autocare Pty Ltd v Minister for Infrastructure, Planning and Natural Resources [2004] NSWLEC 687;
Pioneer Concrete (Qld) Pty Ltd v Brisbane City Council and Ors (1980) 145 CLR 485;
Sydney City Council v Ipoh Pty Ltd (2006) 149 LGERA 329;
Telstra Corp Ltd v Hornsby Shire Council (2006) 146 LGERA 10;
Weal v Bathurst City Council (2000) 111 LGERA 181.

As an example of "consideration" in that case:

22 Section 79C(1) provides that in "…determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application…". This obligation has been understood as involving a process in which the consent authority is bound "to take into consideration the relevant considerations, to weigh them one against the other, and to determine what, in the light of those considerations, should be done" (BP Australia Ltd v Campbelltown City Council (1994) 83 LGERA 274 at 279. See also Weal at [80] – [81]).

23 In Weal, it was clear that the development the subject of the grant of consent would create potential noise impacts. That potential led the council to impose the deferred commencement condition, which the majority in the Court of Appeal held rendered the consent invalid. In this case, all variants of the applicant's option (b) assume that the road upgrade will not be part of the development the subject of an initial grant of consent. Accordingly, the principles in Weal do not dictate rejection of option (b), but the obligations imposed by s 79C(1) must nevertheless be discharged having regard to the particular circumstances of the proposed development.

In **Gloucester Resources Limited v Minister for Planning [2019] NSWLEC 7**
Preston CJ considered and cited

Abley v Yankalilla District Council (1979) 22 SASR 147; (1979) 58 LGRA 234
Aldous v Greater Taree City Council (2009) 167 LGERA 13; [2009] NSWLEC 17
Australian Conservation Foundation v Latrobe City Council (2004) 140 LGERA 100; [2004] VCAT 2029
Border Power Plant Working Group v Department of Energy 260 F Supp 2d 997 (SD Cal, 2003)
BP Australia Ltd v Campbelltown City Council (1994) 83 LGERA 274
Broad v Brisbane City Council [1986] 2 Qd R 317
Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited (2013) 194 LGERA 347; [2013] NSWLEC 48
Coast and Country Association of Queensland v Smith [2015] QSC 260
Coast and Country Association Queensland Inc v Smith [2016] QCA 242
Commonwealth v Tasmania (1983) 158 CLR 1; [1983] HCA 21
Gippsland Coastal Board v South Gippsland Shire Council (No 2) [2008] VCAT 1545
Gray v Minister for Planning (2006) 152 LGERA 258; [2006] NSWLEC 720
Hancock Coal Pty Ltd v Kelly (No 4) (2004) 35 QLCR 56; [2014] QLC 12
Harris v Scenic Rim Regional Council (2014) 201 LGERA 12; [2014] QPEC 16
Hub Action Group v Minister for Planning (2008) 161 LGERA 136; [2008] NSWLEC 116
Hunter Environment Lobby Inc v Minister for Planning [2011] NSWLEC 221
Massachusetts v Environmental Protection Agency 549 US 497 (2007)
Mid States Coalition for Progress v Surface Transportation Board 345 F 3d 520 (8th Cir, 2003)
Minister for Environment and Heritage v Queensland Conservation Council (2004) 139 FCR 24; [2004] FCAFC 190
Minister for Planning v Walker (2008) 161 LGERA 423; [2008] NSWCA 224
Montana Environmental Information Centre v US Office of Mining 274 F. Supp 3d 1074 (D Mont, 2017)
Myers v South Gippsland Shire Council (No 1) [2009] VCAT 1022
Myers v South Gippsland Shire Council (No 2) [2009] VCAT 2414
Northcape Properties Pty Ltd v District Council of Yorke Peninsula [2007] SAERDC 50
Northcape Properties Pty Ltd v District Council of Yorke Peninsula [2008] SASC 57
Rainbow Shores Pty Ltd v Gympie Regional Council [2013] QPELR 557; [2013] QPEC 26
Re Sydney Harbour Collieries Co (1895) 5 Land Appeal Court Reports 243
San Juan Citizens Alliance v United States Bureau of Land Management 326 F Supp 3d 1227 (D N M, 2018)
Sierra Club v Federal Energy Regulatory Commission 867 F 3d 1357 (DC Cir, 2017)
Taralga Landscape Guardians Inc v Minister for Planning and RES Southern Cross Pty Ltd (2007) 161 LGERA 1; [2007] NSWLEC 59
Telstra v Hornsby Shire Council (2006) 67 NSWLR 256; (2006) 146 LGERA 10
The State of the Netherlands v Urgenda Foundation 200.178.245/01, 9 October 2018
Urgenda Foundation v The State of the Netherlands C/09/456689/HA ZA 13-1396, 24 June 2015
Warkworth Mining Ltd v Bulga Milbrodale Progress Association Inc (2014) 200 LGERA 375; [2014] NSWCA 105
WildEarth Guardians v US Bureau of Land Management 870 F 3d 1222 (10th Cir, 2017)
Wollar Property Progress Association Inc v Wilpinjong Coal Pty Ltd [2018] NSWLEC 92.

For an example of "consideration" in that case

686. However, the fact that the coal resource is in the location of the Gloucester valley does not mean that the resource there must be exploited, regardless of the adverse impacts of doing so. A development that seeks to take advantage of a natural resource must, of course, be located where the natural resource is located. But not every natural resource needs to be exploited.

687. A dam can only be located on a river, but not every river needs to be dammed. The environmental and social impacts of a particular dam may be sufficiently serious as to justify refusal of the dam. The proposed hydroelectric dam on the Gordon River in south western Tasmania (later inscribed on the World Heritage List) is an example of a dam with unacceptable environmental and social impacts (considered in the Tasmanian Dams Case, Commonwealth v Tasmania (1983) 158 CLR 1.)

688. Seaside residential development can only be built at the seaside, but not every seaside development is acceptable to be approved. For example, the likely impact of coastal processes and coastal hazards on coastal development, including with climate change, may be sufficiently serious as to justify refusal of the coastal development, as the various courts and tribunals decided in Northcape Properties Pty Ltd v District Council of Yorke Peninsula [2007] SAERDC 50, upheld on appeal [2008] SASC 57; Gippsland Coastal Board v South Gippsland Shire Council (No 2) [2008] VCAT 1545; Myers v South Gippsland Shire Council (No 1) [2009] VCAT 1022; Myers v South Gippsland Shire Council (No 2) [2009] VCAT 2414; and Rainbow Shores Pty Ltd v Gympie Regional Council [2013] QPELR 557; [2013] QPEC 26.

Conclusion

An adoption of the reasoning in CEAL should not be undertaken for the reasons above expressed.

Facts determine the reasoning, and the facts in each case will be unique.

Consideration of CEAL, and other case law is permissible if the relevant material facts established by the Commission satisfy the dicta of Brennan J in **Dietrich:**

When a legal rule or result is attached to certain relationships or phenomena, the perception of similar characteristics in another relationship or phenomenon leads to the attachment of a similar legal rule or result. Unless the analogy is close, the applicability of the legal rule or result to the supposedly analogous relationship or phenomenon is doubtful. It is fallacious to apply the same legal rule or to attribute the same legal result to relationships or phenomena merely because they have some common factors; the differences may be significant and may call for a different legal rule or result. Judicial technique must determine whether there is a true analogy.

On the other hand, the Commission may form the view that CEAL needs not be referred to at all. In any event, the Commission may be minded to seek legal advice on the question.

Question 4

Given the predicted frequency of truck movements and the characteristics of the towns and residential development along the proposed haul route, the development could result in long-term impacts on the amenity and character of these communities. Noting the 25-year life of the proposal, how have intergenerational factors been measured and what are the probable outcomes of these impacts over the life of the project?

In its October 20232 Report the Department raises the principles of ESD under the heading **"G2-- Demonstration of 'Avoid, Mitigate, Offset' for MNES."** (MNES : Matters of National Environmental Significance). In sub **G4 –Additional EPBC considerations,** ESD is given consideration and the Department "considers that, subject to the recommended conditions of consent, the Project could be undertaken in a manner that is consistent with the principles of ESD."

But the whole of **Section G** relates to the Commonwealth Act, the Environment Protection and Biodiversity Conservation Act 1999 **dealing with listed threated species and communities**.

Otherwise that Report is silent upon the matter of intergenerational factors, their measurement and the probable outcomes of the life of the project.

It would be reasonable to conclude that if intergenerational factors had been recognised, measured and probable outcomes identified in relation to the affected communities, that report would have said so?

It would also be reasonable to assume that the Department was well aware of exhaustive findings of Preston CJ in the **Gloucester Resources** case (2019 NSW LEC 7 8 February 2019) and how to go about an assessment on that issue.

In that case **distributive inequity** was analysed and part of that analysis was guided at the outset by

Distributive inequity of the Project

> 398 A further social impact, revealed in the other types of social impact discussed earlier, is the distributive injustice or inequity that would result from approval of the Rocky Hill Coal Project. Distributive justice concerns the just distribution of environmental benefits and environmental burdens of economic activity. Distributive justice is promoted by giving substantive rights to members of the community of justice to share in environmental benefits (such as clean air, water and land, a quiet acoustic environment, scenic landscapes and a healthy ecology) and to prevent, mitigate, remediate or be compensated for environmental burdens (such as air, water, land and noise pollution and loss of amenity, scenic landscapes, biological diversity or ecological integrity). Issues of distributive justice not only apply within generations (intra-generational equity) but also extend across generations (inter-generational equity).
>
> 399. The principle of intra-generational equity provides that people within the present generation have equal rights to benefit from the exploitation of natural resources as well as from the enjoyment of a clean and healthy environment: *Telstra v Hornsby Shire Council* at [117]. The principle of inter-generational equity provides that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for future generations (see s 6(2)(b) of the *Protection of the Environment*

Administration Act 1991): *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* (2013) 194 LGERA 347; [2013] NSWLEC 48 at [486], [492].

A mandatory consideration of 'intergenerational factors' arises out of state legislation by dint of

A. The EP&A Act

1.3 Objects of Act

The objects of this Act are as follows—

(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment**,**

1.4 Definitions

ecologically sustainable development has the same meaning it has in section 6(2) of the *Protection of the Environment Administration Act 1991***.**

B. The POEA Act

Objectives of the Authority

(1) The objectives of the Authority are—

(a) to protect, restore and enhance the quality of the environment in New South Wales, having regard to the need to maintain ecologically sustainable development, and

(b) to reduce the risks to human health and prevent the degradation of the environment, by means such as the following—

- promoting pollution prevention,
- adopting the principle of reducing to harmless levels the discharge into the air, water or land of substances likely to cause harm to the environment,
- minimising the creation of waste by the use of appropriate technology,
- regulating the transportation, collection, treatment, storage and disposal of waste,
- encouraging the reduction of the use of materials, encouraging the re-use and recycling of materials and encouraging material recovery,
- adopting minimum environmental standards prescribed by complementary Commonwealth and State legislation and advising the Government to prescribe more stringent standards where appropriate,
- setting mandatory targets for environmental improvement,
- promoting community involvement in decisions about environmental matters,
- ensuring the community has access to relevant information about hazardous substances arising from, or stored, used or sold by, any industry or public authority,
- conducting public education and awareness programs about environmental matters.

(2) For the purposes of subsection (1) (a), **ecologically sustainable development** requires the effective integration of social, economic and environmental considerations in decision-making processes. Ecologically sustainable development can be achieved through the implementation of the following principles and programs—

(a) the precautionary principle—namely, that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.
In the application of the precautionary principle, public and private decisions should be guided by—
(i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and

(ii) an assessment of the risk-weighted consequences of various options,

(b) **inter-generational equity**—namely, that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations,

(c) conservation of biological diversity and ecological integrity—namely, that conservation of biological diversity and ecological integrity should be a fundamental consideration,

(d) improved valuation, pricing and incentive mechanisms—namely, that environmental factors should be included in the valuation of assets and services, such as—
(i) polluter pays—that is, those who generate pollution and waste should bear the cost of containment, avoidance or abatement,

(ii) the users of goods and services should pay prices based on the full life cycle of costs of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any waste,

(iii) environmental goals, having been established, should be pursued in the most cost effective way, by establishing incentive structures, including market mechanisms, that enable those best placed to maximise benefits or minimise costs to develop their own solutions and responses to environmental problems.

(*bold emphases added*)

With respect, having regard to the five paragraphs in the Department's December 2022 response and its earlier Report in October 2022, when compared Preston CJ's extensive analysis in the **Gloucester** case, the question asked of the Department by the Commission remains unanswered: there does not seem to be details of measurement or probable outcomes shown.

Similarly, Umwelt's Additional Information (December 2022) does not respond with an analysis in the manner of the **Gloucester** decision, relying in part on historical road transportation volumes being acceptable to some of the community in the past (p21) and that as less are now proposed it should be acceptable. However, as discussed in my response in Question 6, reliance is made on the totality of road operations both legal (railway ballast) and otherwise in arriving at that proposition, and in the writer's view, that is unacceptable.

Umwelt describes some efforts to minimise impacts by a range of environmental and social management and control measures (p24); and considers that Daracon has made significant efforts to minimise impacts associated with the Project: "It is considered that the social impacts of the Project have been minimised where possible through project design and the proposed management and enhancement approaches." There is strong emphasis on the economic benefits to the state and local region (p24) cf. the **Gloucester** analysis.

On p23 Umwelt lists the objectives in terms of its view of intergenerational equity, and mostly relies upon the certainty of a consent with "a range of environmental and social management and control measures" as outlined in Section 8 of the ADA. It predicts that the "Project is projected to generate significant economic benefits for both State and local region which is expected to contribute to the wealth of both current and future generations"(p24).The Departmental answer is wanting,

espousing that in terms of policies standards and guidelines plus mitigation measures and the recommended consent conditions the impacts of the Project would be acceptable. A reading of paragraphs 398 –et seq. in the **Gloucester** judgment may be beneficial.

Conclusion:

The answers by both entities concerning the required measurement of intergenerational factors and identification of the probable outcomes of the impacts of predicted truck movements and the characteristics of towns and residential development along the haul route over the Project's life are, not as satisfactory as I would have hoped.

Question 6:

"Submissions to the Commission identified a risk that the ongoing haulage of quarry products by road could affect the commercial viability of businesses along the primary haulage route including in and around Paterson. What evidence is there that this will not occur?"

The Department's response includes an approach reiterative in substance of similar assertions elsewhere:

"The proposed maximum annual road haulage rate of 450,000 tpa is less than the historical average rate of annual road haulage period of approximately 18 years, dating back to 2002-03."

It is plainly unjust for the Department and the Applicant to justify the Proposal's product truck haulage by reliance on historical truck traffic numbers which, the NSW Court of Appeal **Hunter Industrial Rental Equipment Pty Ltd v Dungog Shire Council** [2019] CA 147 relevantly found

"A. With respect to lots 5 and 6, DP 242210 ("the land"):

(1) Set aside declarations (1) and (2) made in the Land and Environment Court and in place thereof:

Declare that the consent to development application 171/90/79 granted by Dungog Shire Council ("the consent") permitted use of the land only as a quarry primarily for the purpose of winning material for railway ballast, in breach of which the appellants have since 2012 used the land otherwise than primarily for winning railway ballast, in breach of the Environmental Planning and Assessment Act 1979 (NSW) ("the Planning Act"), s 4.2(1)(a)."

Simply put: if there has been a breach of the law in relation to historical quarry truck product haulage, it is in the public interest that no reliance on that illegality ought be made to justify truck product haulage equivalent to or in greater number for the Project. There may be many reasons that complaints were not made about the intensity of quarry traffic in those years, and they cannot be now explored. Reliance on a breach deserves to be given no weight in this matter.

Is it proper for the Department, with full knowledge of the multiplicity of the Court proceedings including the judgment of the Court of Appeal, to assert that because there was quarry product road haulage in the past that was unlawful and no one complained about impacts 'beyond those predicted to be experienced under the Project'; to implicitly justify in terms, that it will be alright to cause the predicted impacts under a lawful development consent so long as they don't exceed the historical volumes? And if there are complaints then then the outcomes of the imposition of conditions in that consent about mitigation and community consultation etc. will satisfy the complainants?

Indeed the Department's claim that past truck numbers produced impacts that were 'beyond those predicted to be experienced under the Project' fails at the outset because there is no evidence to show what number of truck loads after 2002 were for railway ballast.

The Department's recommendation for an SIMP goes only to the management of impacts, not identification of what they will be.

Umwelt (Additional Information p31), relies on the Department's "recommended condition for a SIMP" to manage and mitigate negative social impacts." One of these measures includes a Local Services Provision Framework informed by a business survey setting a baseline. The Framework would require "the inclusion of mechanisms to mitigate impacts on local service providers and businesses". The Framework, it is asserted, would assist to suggest proposed refinements such as reduced truck movements and identification of impacts and changing nature of these and allow for adaptive management should unexpected impacts arise. The implication that there would be no harm done to businesses on Saturdays when no haulage is contemplated is not to the point. There are other days in the week. The reduction in truck numbers does not assist the applicant either.

Conclusion:

There would seem to be no acceptable satisfactory evidence showing that there will be no harm to the commercial viability of businesses along the primary haulage route in and around Paterson.

Many would be unconvinced that the affected businesses' and others' concerns (even given the proposed mitigation measures and the Department's recommended conditions with their evaluation and adaptive management of the causes of road product haulage impacts) can be removed or reduced by mitigation and community consultation, when the primary cause would be permitted by a lawful consent with a guaranteed output and product delivery upon which the grantee of that consent can always rely without demur as authorising the impacts and consequential concerns.

Question 7

In reference to paragraph 94 of the Department's Assessment Report, how was the conclusion reached that the impacts of the increased road haulage associated with the Application on road users, including cyclists, school bus passengers, and pedestrians, present an acceptable level of risk?

The Department's Response

The Department cites the review in the Traffic Impact Assessment submitted by the Applicant and again relies on the history of road usage by the applicant and road upgrades.

"The Department considers that, with the implementation of Daracon proposed road upgrades and other reasonable and feasible mitigation measures, and the Department's recommended conditions of consent, risks to road safety from the Project can be appropriately managed to road safety can be appropriately managed." (last unnumbered page).

The "risks to road safety" ought not be "managed." They should be eliminated, or at best, minimised.

The writer is concerned about pedestrian safety.

The Department on pedestrian safety:

"With regard to pedestrian safety, the rural nature of the locality (*what locality*?) means that the vast majority of pedestrian movements occur within urban locations. The Department considers that the existing footpaths and pedestrian crossings or those proposed by local councils in future works programs within Paterson, Bolwarra Heights, and East Maitland would allow for the safe movement of pedestrians in these urban centres."

What are the existing footpaths and pedestrian crossings "proposed by local councils in future works programs within Paterson, Bolwarra Heights, and East Maitland" that the Department relies upon?

Should the SSD receive consent and proposed condition A13 be imposed, the quarry truck movements through the now "urban centre" of Paterson and towns beyond will directly reflect the average frequency of truck movements at the site:

40 truck movements every 90 seconds in any hour between 7am -3pm

30 truck movements every two minutes 3pm – 6pm in any hour.

How can pedestrians feel safe and retain what would be left of their sense of place with that overbearing constant volume of passing quarry traffic? The fact, so often repeated, that there have been road haulage rates much higher in the past than those proposed is not a justification for the imposition of the proposed frequency of truck movements.

Umwelt's Response

Reliance is upon road improvements, driver conduct and other traffic controls including a traffic management plan; investigation of a Camera Monitoring Station at the King and Duke Street

Intersection in Paterson; and investigation of the relocation of the existing Paterson bus stop near the CBC Bed and Breakfast business; a possible pedestrian crossing at Paterson, coupled with the lack of historical reported accidents, the Revised Project presents an acceptable risk on road users, including cyclists, school bus passengers, and pedestrians.

Conclusion

The frequency of quarry truck traffic through Paterson is incompatible with pedestrian safety. The changes proposed to the town to accommodate the truck traffic are inimical to the public's use and enjoyment of the town's facilities and attractions.