NEW SOUTH WALES LAND AND ENVIRONMENT COURT

Drake-Brockman v Minister for Planning and Another

[2007] NSWLEC 490

Jagot J

25-26 July, 13 August 2007

Administrative Law — Ultra vires — Major development — Approval of concept plan by Minister — Validity — Environmental assessment requirements to be prepared by Director-General — Consultation — Whether Director-General's report included statement relating to compliance with environmental assessment requirements — Whether report can constitute statement relating to compliance with environmental assessment requirements or whether separate "certification" necessary — Environmental Planning and Assessment Act 1979 (NSW), Pt 3A.

Ecologically Sustainable Development — Precautionary principle — Inter-generational equity — Greenhouse gas emissions — Requirement to take into consideration when assessment development — Mandatory assessment — Burden of proof of impact of development on climate change — Environmental Planning and Assessment Act 1979 (NSW), Pt 3A.

The Department of Planning declared the redevelopment of a former Brewery site to be a project to which Pt 3A, of the *Environmental Planning and Assessment Act 1979* (NSW) (EP&A Act) applied on the ground that it was of regional planning significance, in June 2006. In July 2006, the proponents submitted a concept plan. Later in July 2006, the June order was revoked and a new order made as issues had been raised about the legal efficacy of the original order. The July 2006 concept plan was then assessed.

The Director-General gave a report to the Minister on the concept plan for the project in February 2007 which included 45 pages by the Director-General and eight appendices being the proponent's statement of commitments, the expert advisory panel report, the preferred project report, a response to submissions by the proponent, the submissions of the public, the proponent's environmental assessment and relevant environmental planning instruments and policies.

The proponent's environmental assessment included a section on services and sustainability, environmental management and an expert report entitled "ESD Strategies and Building Services Analysis".

Section 75B in Div 1 – Preliminary of Pt 3A of the EP&A Act provided a list of the kinds of projects to which Pt 3A applied.

Section 75F(2) in Div 2 – Environmental assessment and approval of projects of Pt 3A of the EP&A Act provided that when an application was made for the Minister's approval for a project, the Director-General was to prepare

environmental assessment requirements having regard to any such relevant guidelines in respect of the project. Section 75I(2)(g) provided that the Director-General's report to the Minister was to include a statement relating to compliance with the environmental assessment requirements under Div 2 with respect to the project.

Section 75O(2)(a) of Div 3 – Concept plans for certain projects of Pt 3A of the EP&A Act required the Minister to consider that statement when granting concept approval and making related decisions.

Held: (1) All of the provisions of Pt 3A of the EP&A Act are to be construed as a unified scheme for assessing major infrastructure and significant development in which, when Divs 2 or 3 are engaged, the Minister has decided that the development is a project in accordance with Div 1.

(2) The context of Pt 3A of the EP&A Act indicates that s 75F(2) involves both an application made or an application to be made.

Currey v Sutherland Shire Council (2003) 129 LGERA 223, considered.

(3) The reference to "when" in s 75F(2) of the EP&A Act is not limited to meaning after and at no other time.

Young v Parramatta City Council (2007) 152 LGERA 221, referred to.

(4) Section 75I(2)(g) of the EP&A Act does not require the Director-General to prepare the statement relating to compliance with the environmental assessment requirements under Div 2 of Pt 3A of the EP&A Act, as the Director-General may require the proponent or an officer of a public authority to prepare the statement for it to then be included in the report to the Minister.

(5) Section 75I(2)(g) of Div 2 of Pt 3A of the EP&A Act does not impose an obligation on the Director-General to form an opinion about the matter nominated in that sub-section.

Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611, referred to.

(6)(i) Section 75I(2)(g) of Div 2 of Pt 3A of the EP&A Act does not require the report to include a certification of compliance or non-compliance. What is required is a statement "relating to" the nominated matter.

Oceanic Life Ltd v Chief Commissioner of Stamp Duties (NSW) (1999) 43 ATR 158; *Commissioners of Inland Revenue v Maple & Co (Paris) Ltd* [1908] AC 22; *Tooheys Ltd v Commissioner of Stamp Duties (NSW)* (1961) 105 CLR 602, referred to.

(6)(ii) The written communication required by s 75I(2)(g) of Div 2 of Pt 3A of the EP&A Act can be constituted by a document or series of documents provided that it is "readily discernible as a single entity" and not a mere "hodgepodge". The fact that this communication is to be included within the Director-General's report does not mean that it cannot be constituted by that report.

Chisholm v Pittwater Council [2001] NSWCA 104, referred to.

(7) There is no factual basis for suggesting that the Minister failed to give any consideration to ecologically sustainable development when approving the project. The Minister clearly did consider that matter.

Attorney-General (NSW) v Quin (1990) 170 CLR 1; *Kindimindi Investments Pty Ltd v Lane Cove Council* (2006) 143 LGERA 277; *Randall Pty Ltd v Willoughby City Council* (2005) 144 LGERA 119; *Foster v Minister for Customs and Justice* (2000) 200 CLR 442; *BGP Properties Pty Ltd v Lake Macquarie City Council* (2004) 138 LGERA 237; *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA 10, considered.

(8) None of the provisions of Pt 3A of the EP&A Act dictate that the content of any assessment under that Part must include a quantitative analysis of greenhouse gas emissions.

(9) The applicant has not established any breach of Pt 3A of the EP&A Act.

Cases Cited

Aboriginal Affairs, Minister for v Peko-Wallsend Ltd (1986) 162 CLR 24.

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223.

Attorney General (NSW) v Quin (1990) 170 CLR 1.

Attorney-General (NSW) v Lizelle Pty Ltd [1977] 2 NSWLR 955; (1977) 36 LGRA 1.

Attorney-General v JN Perry Constructions Pty Ltd [1961] NSWR 422; (1961) 6 LGRA 385.

Australian Broadcasting Corporation v Redmore Pty Ltd (1989) 166 CLR 454.

Avon Downs Pty Ltd v Federal Commissioner of Taxation (1949) 78 CLR 353.

Belmorgan Property Development Pty Ltd v GPT Re Ltd (2007) 153 LGERA 450.

Belongil Progress Association Inc v Byron Shire Council (1999) 106 LGERA 202.

Bentley v BGP Properties Pty Ltd (2006) 145 LGERA 234.

BGP Properties Pty Ltd v Lake Macquarie City Council (2004) 138 LGERA 237.

Bruce v Cole (1998) 45 NSWLR 163.

Cartier Holdings Pty Ltd v Newcastle City Council (2001) 115 LGERA 407.

Centro Properties Ltd v Hurstville City Council (2004) 135 LGERA 257.

Chisholm v Pittwater Council [2001] NSWCA 104.

CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384.

Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLR 594.

Currey v Sutherland Shire Council (2003) 129 LGERA 223.

Environment and Heritage, Minister for v Queensland Conservation Council Inc (2004) 139 FCR 24; 134 LGERA 272.

Foster v Minister for Customs and Justice (2000) 200 CLR 442.

Gray v Minister for Planning (2006) 152 LGERA 258.

Hill v Woollahra Municipal Council (2003) 127 LGERA 7.

Hunter Resources Ltd v Melville (1988) 164 CLR 234.

Immigration and Multicultural Affairs, Minister for v Eshetu (1999) 197 CLR 611.

Inland Revenue, Commissioners of v Maple & Co (Paris) Ltd [1908] AC 22.

Kindimindi Investments Pty Ltd v Lane Cove Council (2006) 143 LGERA 277.

Leichhardt Municipal Council v Minister for Planning (1992) 78 LGERA 306.

Local Government, Minister for v South Sydney City Council (2002) 55 NSWLR 381; 123 LGERA 367.

Murrumbidgee Ground-Water Preservation Association v Minister for Natural Resources [2004] NSWLEC 122.

Newcastle City Council v GIO General Ltd (1997) 191 CLR 85.

Oceanic Life Ltd v Chief Commissioner of Stamp Duties (NSW) (1999) 43 ATR 158.

Prineas v Forestry Commission (NSW) (1983) 49 LGRA 402.

Prineas v Forestry Commission (NSW) (1984) 53 LGRA 160.

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355.

R v Young (1999) 46 NSWLR 681.

Randall Pty Ltd v Willoughby City Council (2005) 144 LGERA 119.

Telstra Corporation Ltd v Hornsby Shire Council (2006) 67 NSWLR 256; 146 LGERA 10.

Terrace Tower Holdings Pty Ltd v Sutherland Shire Council (2003) 129 LGERA 195.

Tooheys Ltd v Commissioner of Stamp Duties (NSW) (1961) 105 CLR 602.

Tugun Cobaki Alliance Inc v Minister for Planning [2006] NSWLEC 396.

Weal v Bathurst City Council (2000) 111 LGERA 181.

Webster v McIntosh (1980) 3 A Crim R 455.

Wills v Bowley [1983] 1 AC 57.

Young v Parramatta City Council (2007) 152 LGERA 221.

Zhang v Canterbury City Council (2001) 51 NSWLR 589; 115 LGERA 373.

Appeal

FM Douglas QC and *J Lazarus*, for the applicant.

JE Griffiths SC and *J Kirk*, for the first respondent.

TS Hale SC and *MA Izzo*, for the third respondent.

Cur adv vult

13 August 2007

Jagot J.

A Introduction

1 On 9 February 2007 the Minister for Planning determined to approve a concept plan for a project relating to the former Carlton United Breweries site at Chippendale under s 75O of the *Environmental Planning and Assessment Act 1979* (NSW) (the EPA Act).

2 The Minister's approval described the concept plan in summary form as involving the layout of development into 11 blocks, a new park and street layout, building envelopes including maximum heights, and maximum floor space within each development block. The limited scope of this approval was specified in Sch 1 item A3 to the approval. At the same time the Minister determined that further environmental assessment would be required for the project under Pts 4 or 5 of the EPA Act for development with a capital investment value of less than $5 million (and, thus, under Pt 3A for development with a capital value in excess of $5 million).

3 Frasers Broadway Pty Ltd, the third respondent, is the owner of the site and has the benefit of the Minister's approval. The second respondent, the former owner of the site, is no longer a party to these proceedings.

4 Mr Drake-Brockman, the applicant, commenced Class 4 proceedings on 7 March 2007 challenging the validity of the approval and the Minister's related determination about further assessment under s 75P of the EPA Act. The applicant relied on three grounds to support the claim of invalidity.

5 The applicant's first ground of challenge was that at the time the Director-General's environmental assessment requirements were purportedly issued "the Concept Plan Application had not been lodged" (applicant's further amended points of claim at [18]-[21]). The applicant claimed that the Director-General had thus breached a time stipulation in s 75F(2) of the EPA Act and an obligation to consult relevant public authorities in s 75F(4) in connection with the preparation of environmental assessment requirements for the project. Accordingly, the environmental assessment requirements were invalid and so were the Minister's approval and related decisions.

6 The applicant's second ground of challenge was that the Director-General's environmental assessment report did not include a "statement relating to compliance with the environmental assessment requirements under this Division with respect to the project" as required by s 75I(2)(g) of the EPA Act, with the consequence that the Minister could not have considered that statement as required by s 75O(2)(a). When granting the approval and making the related decisions the Minister thus failed to consider a mandatory relevant matter (applicant's further amended points of claim at [49]-[54]). Accordingly, the Minister's approval and related decisions were invalid.

7 The applicant's third ground of challenge was that the Minister failed to consider ecologically sustainable development, including the precautionary principle and inter-generational equity, when granting the approval and making the related decisions (applicant's further amended points of claim at [26]-[48]). In particular, the applicant claimed that: (i) there was insufficient information about greenhouse gas emissions in connection with the redevelopment of the site to enable the Minister to carry out a careful evaluation to avoid serious or irreversible damage to the environment as a result of the redevelopment, (ii) the Minister failed to treat the proponent as bearing the onus of proving that the redevelopment of the site would have no or negligible impacts on climate change, and (iii) the Minister did not undertake a risk-weighted assessment of the various options for redevelopment of the site or consider alternatives that could reduce impacts on climate change. When granting the approval and making the related decisions the Minister thus failed to consider a mandatory relevant matter. Accordingly, the Minister's approval and related decisions were invalid.

8 One matter should be noted immediately. After the process under Div 3 of Pt 3A had commenced but before the Minister granted the approval and made the related decisions the *Environmental Planning Legislation Amendment Act 2006* (NSW) amended Pt 3A of the EPA Act. The second ground of challenge relates to one of the amendments which commenced on 12 January 2007 and extended to matters pending under Pt 3A (cl 108(3) of Sch 6 to the EPA Act). It follows that it is necessary to consider the provisions of Pt 3A as in force before 12 January 2007 when dealing with the applicant's first ground of challenge and the provisions as in force after 12 January 2007 when dealing with the applicant's second and third grounds of challenge.

9 It was common ground between the parties that the redevelopment of the Carlton United Breweries site was a project to which Pt 3A of the EPA Act applied, but was not a critical infrastructure project. The applicant's challenge thus was not affected by s 75T of the EPA Act. Nor was it affected by s 75X(4), as the proceedings were commenced within three months of the Minister's approval and related decisions being made and thus necessarily within three months of the giving of public notice of those decisions.

10 I set out the relevant statutory provisions in section B below. As the project has a lengthy history I deal with the facts only insofar as relevant to each of the three grounds of challenge in sections C, D and E below.

B Statutory provisions

11 The objects of the EPA Act are contained in s 5. They are expressed as follows:

> The objects of this Act are:
>
> (a) to encourage:
>
> (i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,
>
> (ii) the promotion and co-ordination of the orderly and economic use and development of land,
>
> (iii) the protection, provision and co-ordination of communication and utility services,
>
> (iv) the provision of land for public purposes,
>
> (v) the provision and co-ordination of community services and facilities, and
>
> (vi) the protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats, and
>
> (vii) ecologically sustainable development, and
>
> (viii) the provision and maintenance of affordable housing, and
>
> (b) to promote the sharing of the responsibility for environmental planning between the different levels of government in the State, and
>
> (c) to provide increased opportunity for public involvement and participation in environmental planning and assessment.

12 A definition of "ecologically sustainable development" was inserted into the EPA Act on 1 August 2005. Under s 4(1) this term was defined to have the same meaning as in s 6(2) of the *Protection of the Environment Administration Act 1991* (NSW). Section 6(2) provides that:

> (2) For the purposes of subsection (1) (a), ecologically sustainable development requires the effective integration of 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.

13 Part 3A of the EPA Act was inserted by the *Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Act 2005* (NSW), commencing on 1 August 2005. Pt 3A contains five Divisions.

14 Division 1 (preliminary) contains definitions (s 75A), provisions relating to the projects to which the Part applies (s 75B) and critical infrastructure projects (s 75C). A "project" means "development that is declared under section 75B to be a project to which this Part applies". An "approved project" means "a project to the extent that it is approved by the Minister under this Part, but does not include a project for which only approval for a concept plan has been given".

15 Division 2 (environmental assessment and approval of projects) contains the key obligation for persons who wish to carry out development that is a project to which Pt 3A applies. Under s 75D(1) a person may not do so "unless the Minister has approved of the carrying out of the project under this Part". Under s 75D(2) the person is to comply with any conditions to which such an approval is subject. Section 75E relates to applications for approval and provides:

(1) The proponent may apply for the approval of the Minister under this Part to carry out a project.

(2) The application is to:

(a) describe the project, and

(b) contain any other matter required by the Director-General.

(3) The application is to be lodged with the Director-General.

(4) An application may relate to part only of a project.

16 Section 75F provides that:

(1) The Minister may, after consultation with the Minister for the Environment, publish guidelines in the Gazette with respect to environmental assessment requirements for the purpose of the Minister approving projects under this Part (including levels of assessment and the public authorities and others to be consulted).

(2) When an application is made for the Minister's approval for a project, the Director-General is to prepare environmental assessment requirements having regard to any such relevant guidelines in respect of the project.

(3) The Director-General is to notify the proponent of the environmental assessment requirements. The Director-General may modify those requirements by further notice to the proponent.

(4) In preparing the environmental assessment requirements, the Director-General is to consult relevant public authorities and have regard to the need for the requirements to assess any key issues raised by those public authorities.

(5) The environmental assessment requirements may require an environmental assessment to be prepared by or on behalf of the proponent in the form approved by the Director-General.

(6) The Director-General may require the proponent to include in an environmental assessment a statement of the commitments the proponent is prepared to make for environmental management and mitigation measures on the site.

(7) This section is subject to section 75P.

17 Section 75G enables the Minister to constitute independent hearing and assessment panels, including a panel of experts, to assess any aspect of a project referred to the panel by the Minister.

18 Section 75H concerns the proponent's environmental assessment and its notification. Section 75H(1)-(3) is in the following terms:

(1) The proponent is to submit to the Director-General the environmental assessment required under this Division for approval to carry out the project.

(2) If the Director-General considers that the environmental assessment does not adequately address the environmental assessment requirements, the Director-General may require the proponent to submit a revised environmental assessment to address the matters notified to the proponent.

(3) After the environmental assessment has been accepted by the Director-General, the Director-General must, in accordance with any guidelines published by the Minister in the Gazette, make the environmental assessment publicly available for at least 30 days.

19 The balance of s 75H concerns public submissions and responses to those submissions.

20 Section 75I relates to the Director-General's report on the project to the Minister. The *Environmental Planning Legislation Amendment Act 2006* amended the section by the addition of a new subs (2)(g). Before 12 January 2007, s 75I provided:

(1) The Director-General is to give a report on a project to the Minister for the purposes of the Minister's consideration of the application for approval to carry out the project.

(2) The Director-General's report is to include:

(a) a copy of the proponent's environmental assessment and any preferred project report, and

(b) any advice provided by public authorities on the project, and

(c) a copy of any report of a panel constituted under section 75G in respect of the project, and

(d) a copy of or reference to the provisions of any State Environmental Planning Policy that substantially govern the carrying out of the project, and

(e) except in the case of a critical infrastructure project – a copy of or reference to the provisions of any environmental planning instrument that would (but for this Part) substantially govern the carrying out of the project and that have been taken into consideration in the environmental assessment of the project under this Division, and

(f) any environmental assessment undertaken by the Director-General or other matter the Director-General considers appropriate.

21 After 12 January 2007 an additional subsection, s 75I(2)(g), provides:

(g) a statement relating to compliance with the environmental assessment requirements under this Division with respect to the project.

22 Section 75J(1) provides that the Minister may approve or disapprove of the carrying out of the project. Before 12 January 2007 the Minister could do so if:

(a) the proponent has duly applied to the Minister for approval under this Part to carry out a project, and

(b) the environmental assessment requirements under this Division with respect to the project have been complied with …

In so doing s 75J(2) required the Minister to consider:

(a) the Director-General's report on the project and the reports, advice and recommendations contained in the report, and

(b) if the proponent is a public authority – any advice provided by the Minister having portfolio responsibility for the proponent, and

(c) if the Minister has directed an inquiry be held in accordance with section 119 with respect to the project – any findings or recommendations of the Commission of Inquiry.

23 After 12 January 2007 s 75J(1) provides:

(1) If:

(a) the proponent makes an application for the approval of the Minister under this Part to carry out a project, and

(b) the Director-General has given his or her report on the project to the Minister,

the Minister may approve or disapprove of the carrying out of the project.

Section 75J(2)(a) was also amended and provides that the Minister is to consider:

(a) the Director-General's report on the project and the reports, advice and recommendations (and the statement relating to compliance with environmental assessment requirements) contained in the report, and …

24 Other provisions under Div 2 relate to bio-banking and appeals.

25 Division 3 is headed "concept plans for certain projects". The *Environmental Planning Legislation Amendment Act 2006* also amended provisions within Div 3.

26 Before 12 January 2007 s 75M(1)-(3) provided:

(1) The Minister may authorise or require the proponent to submit a concept plan for a project.

(2) The concept plan is to:

(a) outline the scope of the project and any development options, and
(b) set out any proposal for the staged implementation of the project, and
(c) contain any other matter required by the Director-General.

A detailed description of the project is not required.

(3) The concept plan is to be lodged with the Director-General.

27 After 12 January 2007 s 75M(1)-(3) provides:

(1) The Minister may authorise or require the proponent to apply for approval of a concept plan for a project.
(2) The application is to:
(a) outline the scope of the project and any development options, and
(b) set out any proposal for the staged implementation of the project, and
(c) contain any other matter required by the Director-General.

A detailed description of the project is not required.

(3) The application is to be lodged with the Director-General.

28 Section 75N was not affected by the amendments and provides:

Sections 75F (Environmental assessment requirements for approval), 75G (Independent hearing and assessment panels), 75H (Environmental assessment and public consultation) and 75I (Director-General's environmental assessment report) apply, subject to the regulations, with respect to approval for the concept plan for a project in the same way as they apply with respect to approval to carry out a project.

29 Before 12 January 2007 s 75O(1)-(2) provided:

(1) If:
(a) the proponent submits a concept plan for a project, and
(b) the environmental assessment requirements under this Division with respect to giving approval for the concept plan have been complied with,

the Minister may give or refuse to give approval for the concept plan for the project.

(2) The Minister, when deciding whether or not to give approval for the concept plan, is to consider:
(a) the Director-General's report on the project and the reports and recommendations contained in the report, and
(b) if the proponent is a public authority – any advice provided by the Minister having portfolio responsibility for the proponent, and
(c) if the Minister has directed an inquiry be held in accordance with section 119 with respect to the project – any findings or recommendations of the Commission of Inquiry.

30 After 12 January 2007 s 75O provides:

(1) If:
(a) the proponent makes an application for the approval of the Minister under this Part of a concept plan for a project, and
(b) the Director-General has given his or her report on the project to the Minister,

the Minister may give or refuse to give approval for the concept plan for the project.

(2) The Minister, when deciding whether or not to give approval for the concept plan, is to consider:

> (a) the Director-General's report on the project and the reports and recommendations (and the statement relating to compliance with environmental assessment requirements) contained in the report, and
>
> (b) if the proponent is a public authority – any advice provided by the Minister having portfolio responsibility for the proponent, and
>
> (c) if the Minister has directed an inquiry be held in accordance with section 119 with respect to the project – any findings or recommendations of the Commission of Inquiry.
>
> …
>
> (4) Approval for a concept plan may be given under this Division with such modifications of the concept plan as the Minister may determine.

31 Section 75P(1) was not affected by the amendments and provides:

> (1) When giving an approval for the concept plan for a project, the Minister may make any (or any combination) of the following determinations:
>
> (a) the Minister may determine the further environmental assessment requirements for approval to carry out the project or any particular stage of the project under this Part (in which case those requirements have effect for the purposes of Division 2),
>
> (b) the Minister may determine that approval to carry out the project or any particular stage of the project is to be subject to the other provisions of this Act (in which case the project or that stage of the project ceases to be a project to which this Part applies),
>
> (c) the Minister may determine that no further environmental assessment is required for the project or any particular stage of the project (in which case the Minister may, under section 75J, approve or disapprove of the carrying out of the project or that stage of the project without further application, environmental assessment or report under Division 2).

32 The balance of s 75P contains provisions consequential on the Minister making determinations in accordance with s 75P(1).

33 Division 4 contains provisions concerning the application of other parts of the EPA Act and other Acts.

34 Division 5 contains miscellaneous provisions including s 75X(4) and (5) as follows:

> (4) The validity of an approval or other decision under this Part cannot be questioned in any legal proceedings in which the decision may be challenged except those commenced in the Court within 3 months after public notice of the decision was given.
>
> (5) The only requirement of this Part that is mandatory in connection with the validity of an approval of a project or of a concept plan for a project is a requirement that an environmental assessment with respect to the project is made publicly available under section 75H (or under that section as applied by section 75N). This subsection does not affect the operation of section 75T in relation to a critical infrastructure project.

35 As noted, s 75X(4) does not affect these proceedings given that they were commenced within three months of the Minister's approval and related decisions.

36 Section 75Z provides that "the regulations may make provision for or with

respect to the approval of projects (and concept plans for projects) under this Part and to approved projects (and concept plans)" including with respect to nominated matters.

37 Clause 8C of the *Environmental Planning and Assessment Regulation 2000* (NSW) (the EPA Regulation) provides:

> (a) The time within which the Director-General is to notify the proponent of environmental assessment requirements with respect to a project or concept plan is 28 days after the proponent requests the Director-General to prepare those requirements.

C. First ground – environmental assessment requirements

Facts relating to first ground

38 From about mid 2003 the then owners of the site proposed its redevelopment. As the redevelopment required rezoning Sydney City Council, being the relevant local government authority, liaised with the Department of Planning about the proposal. Given the size and significance of the site the Central Sydney Planning Committee was involved. The Director-General of the Department of Planning was part of this Committee. By June 2006 the redevelopment remained unresolved. The Minister expressed to the Council concerns about the matter given its significance to the City and State, noting that he would consider using Pt 3A of the EPA Act to ensure the project was dealt with efficiently.

39 On 21 June 2006 the Minister approved a recommendation from the Department of Planning to declare the redevelopment of the site to be a project to which Pt 3A of the EPA Act applied on the ground that it was of regional planning significance. At the same time the Minister directed the establishment of an expert advisory panel for the project. On 23 June 2006 the declaration under s 75B(1) of the EPA Act, that the redevelopment of the site was a project to which Pt 3A of the EPA Act applied, was published in the New South Wales Government Gazette.

40 On 5 July 2006 the then site owner's consultant town planner wrote to the Minister requesting the Minister's authorisation to submit a "concept plan application" for the proposed redevelopment of the site and the Director-General's requirements for the preparation of a "single comprehensive" environmental assessment. This letter contained an outline of the project, a description of the processes relating to concept plans, a more detailed request for the Director-General's environmental assessment requirements and conclusions, and attached a "preliminary scoping paper" to assist the Director-General in determining those requirements. The attached paper was to "assist the Director-General in determining the level and scope of the environmental assessment to accompany the establishment of appropriate development controls for the site, and for the lodgement of a Concept Plan application". This paper described the project, its capital value, the site, the planning controls and the views of councils and other agencies. It also identified the key issues to be addressed in the environmental assessment, providing a brief review of each issue. Those issues were site suitability, compliance with statutory plans, built form, streetscape and public domain, transport and access, heritage and archaeology, environmental sustainability, development staging and delivery, infrastructure, geology and sub-surface conditions, contamination, water management, acoustics and miscellaneous other matters. The letter also

annexed title information, a chronology relating to the proposed redevelopment of the site commencing in 2003 and reports to Sydney City Council about the redevelopment attaching proposed redevelopment schemes and related information.

41 On 19 July 2006 the Minister approved a recommendation from the Department of Planning to revoke the order signed on 21 June 2006 and to make a new order declaring the redevelopment of the site to be a project to which Pt 3A of the EPA Act applied on the ground that it was of regional planning significance. The Department was apparently concerned that issues had been raised about the legal efficacy of the original order. On 21 July 2006 the new declaration under s 75B(1) of the EPA Act, that the redevelopment of the site was a project to which Pt 3A of the EPA Act applied, was published in the New South Wales Government Gazette.

42 On 8 August 2006 the Department facilitated a meeting of a "site stakeholder reference panel" attended by representatives of the Department, the expert advisory panel (required by the Minister's direction in June 2006) and various public and private agencies, including RailCorp, Sydney Buses, the Roads and Traffic Authority, the Heritage Office, the NSW Police, community groups, residents and others.

43 On the same day, the Heritage Office within the Department wrote to the proponent's heritage consultant about the content of the required heritage impact statement, referring to its earlier correspondence of 15 August 2005 about the redevelopment of the site.

44 The chair of the expert advisory panel arranged a public meeting about the project on 15 August 2006.

45 On or about 18 August 2006 the Minister approved a recommendation made by the Department of Planning that he agree to and endorse terms of reference for the expert advisory panel and its members. The panel's terms of reference included ensuring appropriate consultation and co-operation between all stakeholders through a stakeholder reference panel, overseeing community input and consultation, and providing independent advice to ensure that all issues of concern had been considered by the Department and proponent. The expert advisory panel was required to report to the Minister about its activities, with its report to be made available to the public. As the meetings on 8 and 15 August 2006 disclose, the panel had already commenced its activities in response to the Minister's direction in June 2006.

46 The site stakeholder reference panel met again on 21 August 2006. Many of the same agencies and people present at the meeting on 8 August 2006 also attended this meeting.

47 On 28 August 2006 the Minister approved a recommendation made by the Department of Planning that he authorise the submission of a concept plan for the project under s 75M of the EPA Act. The Department's briefing note supporting this recommendation referred to and annexed the letter from the town planning consultant dated 5 July 2006.

48 On 31 August 2006 the expert advisory panel submitted its report to the Minister. The covering letter noted that the panel had met frequently to consider options for the site including meetings with community representatives, the stakeholders reference panel and the proponent. The panel made detailed recommendations about the redevelopment of the site.

49 On 4 October 2006 the Director-General responded to the letter from the consultant town planner of 5 July 2006 by providing the Director-General's environmental assessment requirements with respect to the concept plan under s 75F(2) of the EPA Act. The Director-General's letter noted that once the environmental assessment for the concept plan had been lodged it would be subject to a test of adequacy to determine whether it satisfied the environmental assessment requirements. This is a reference to the processes contemplated by s 75H(2) and (3) of the EPA Act.

50 On 13 October 2006 the proponent's consultant town planner advised the Director-General that they had prepared a draft report and wished the Department to undertake the test of adequacy "before formal lodgement of the Study and Concept Plan Application". On 20 October 2006 the Department informed the consultant town planner that the environmental assessment generally satisfied the environmental assessment requirements (see s 75H(2) and (3) of the EPA Act).

51 The then landowner submitted a form to the Department headed "major projects application". The standard parts of the form referred to s 75E of the EPA Act and approval of the Minister to carry out a project. The form described the proposed major project as "concept plan for the redevelopment of the CUB site for mixed use, residential and commercial land uses". The respondents said this form was submitted on or about 5 October 2006 given the date of the last signature on the form. I am satisfied that this form was submitted on or about 20 October 2006 in connection with the "study in support of state significant site and concept plan environmental assessment report" lodged at about the same time. This study and related documents were the proponent's environmental assessment and were exhibited in accordance with s 75H between 26 October and 27 November 2006.

Submissions relating to first ground

52 The applicant claimed that the submission of the application for concept plan approval was a jurisdictional pre-condition to the Director-General exercising power to prepare environmental assessment requirements for a project. The Director-General may not prepare environmental assessment requirements "unless and until there is extant a valid application to the Minister for concept plan approval". In this case the application was lodged when the three page form was submitted (on or about 20 October 2006), whereas the Director-General issued the environmental assessment requirements at an earlier time on 4 October 2006. The environmental assessment requirements were thus invalid and, in consequence, so were the Minister's approval and related decisions. The applicant said there were good reasons to support this conclusion:

(1) The words "when an application is made" in s 75F(2) are clear. The Minister's approach involves reading into the section the word "being" (that is, when an application is being made) absent any justification consistent with principle (*Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 113, *R v Young* (1999) 46 NSWLR 681 at [12] and *Wills v Bowley* [1983] 1 AC 57 at 78). Further, the word "application" means a formal document and not some nebulous idea of any document commencing the process. Otherwise there would be uncertainty about when and whether the Director-General is required to prepare environmental assessment requirements.

(2) Although Div 3 of Pt 3A of the EPA Act did not refer to a concept plan application before 12 January 2007, s 75N requires s 75F(2) to be given its ordinary meaning. Hence, either the reference to the submission of a concept plan in the old s 75M is to be read as including an application for approval within the meaning of s 75F(2) or the reference to an application for approval in s 75F(2) is to be read as including the submission of a concept plan in the old s 75M.

(3) Environmental assessment requirements must be project specific so that it is essential the Director-General have sufficient information about the project to enable the Director-General to prepare the requirements. Absent a formal application, this obligation cannot be satisfied. Further, other relevant public authorities could not have appropriate input through consultation about the environmental assessment requirements as contemplated by s 75F(4) absent such sufficient information.

(4) Other approvals are either not required or cannot be refused with respect to "approved projects" as provided for in ss 75U and 75V. Hence, input of other relevant public authorities into the Director-General's environmental assessment requirements is critical. Submissions under s 75H after the requirements have been prepared cannot take the place of consultation. Absent the public authority requesting that the environmental assessment include certain issues there will be insufficient information for the authority to address those issues after the environmental assessment has been lodged and notified.

(5) Accordingly, a "concrete application" is required before the Director-General may prepare environmental assessment requirements and undertake consultation in preparing them. The document submitted on 5 July 2006 did not satisfy this requirement.

(6) Moreover, the Minister did not authorise submission of a concept plan until 28 August 2006. Absent authorisation, the proponent may not submit a concept plan. The 5 July 2006 document thus could not be the concept plan. This must be so having regard to s 75M. For example, a proponent could not otherwise comply with s 75M(2)(c) (the concept plan is to contain any other matter required by the Director-General). The proponent also clearly did not consider the document lodged on 5 July 2006 to be the concept plan application.

(7) Clause 8C of the EPA Regulation, relied on by the Minister, is irrelevant. The EPA Act cannot be construed by reference to the delegated legislation made under it (*Webster v McIntosh* (1980) 3 A Crim R 455 at 457 and *Hunter Resources Ltd v Melville* (1988) 164 CLR 234 at 244). In any event, the Director-General breached the time requirement in cl 8C.

(8) Further and alternatively, the Director-General in fact failed to consult relevant public authorities. Relevant consultation could take place only after the Minister's authorisation (28 August 2006) and before the environmental assessment requirements were issued (4 October 2006). The Director-General "did not make any systematic attempt to consult with the full range of relevant agencies as required under s 75F(4)". The documents relied upon by the respondents disclose that any consultation was not directed to the preparation of the environmental assessment requirements. Section 75F(4) required consultation "in

preparing the environmental assessment requirements". The word "in" should be given a narrow construction (*Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594).

(9) The Minister's submissions exemplify the Department's apparent approach of undertaking the "real decision-making process" before the application is lodged so that the result is a "foregone conclusion". This approach is detrimental to public participation and accountability.

(10) These breaches should lead to invalidity applying the principles discussed in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [93]. Section 75X(4) did not protect the breaches from the consequence of invalidity (*Tugun Cobaki Alliance Inc v Minister for Planning* [2006] NSWLEC 396 at [179]-[184]). The statutory scheme was not distinguishable from that considered in *Leichhardt Municipal Council v Minister for Planning* (1992) 78 LGERA 306. See also *Belongil Progress Association Inc v Byron Shire Council* (1999) 106 LGERA 202 at [36].

53 The respondents submitted the applicant's arguments on the first ground failed at every step. Nothing in the statutory scheme suggests that a request for authorisation to submit a concept plan could not itself be the concept plan. The letter of 5 July 2006 performed both functions. Div 3 of Pt 3A, as in force at the time, did not require the lodgement of an "application" for a concept plan. Hence, insofar as s 75F(2) refers to an application, it could not apply to concept plans under Div 3. The reference to "when an application is made" in s 75F(2) is best understood as identifying the circumstances when the Director-General is empowered to issue environmental assessment requirements. An "application" is not necessarily a formal document. Provided the process has been initiated and the Director-General has sufficient information to prepare the environmental assessment requirements there will be no breach, whether or not the submission on 5 July 2006 was a concept plan. No reasonable purpose is achieved by reading the provisions as manifesting some strict chronological order in which steps must be undertaken. Section 75F(2) indicates the need for some connection between the submission of the concept plan and the environmental assessment requirements. This is supported by cl 8C of the EPA Regulation, which requires the Director-General to notify the proponent of environmental assessment requirements 28 days after a request.

54 With respect to the consultation issue, the context of the submission of 5 July 2006 is relevant. It shows that the Director-General had more than sufficient information to prepare the environmental assessment requirements given the lengthy history leading up to the Minister declaring the redevelopment to be a project to which Pt 3A applied. That history included extensive consultation with a wide range of agencies. In any event, an expert advisory panel and site stakeholder reference panel had been constituted before the Director-General issued the environmental assessment requirements. The terms of reference of the expert advisory panel included consultation. The stakeholder and public meetings facilitated by the panel involved numerous public authorities and others. The expert advisory panel submitted its report before the Director-General issued environmental assessment requirements. Although the Director-General is not bound to engage in such formal processes of consultation, the statutory scheme does not exclude the formal processes that

were adopted in this case. It could not be clearer that the Director-General's environmental assessment requirements built upon the recommendations of the expert advisory panel.

55 If, contrary to these submissions, the Director-General breached any statutory obligation with respect to the environmental assessment requirements, the respondents said the result would not be invalidity. It is not clear why the Director-General is necessarily precluded from issuing environmental assessment requirements before submission or an application for approval of a concept plan. The Director-General and other authorities may have sufficient information about the project to discharge their responsibilities, as in this case. The statutory scheme speaks against a result of invalidity as claimed by the applicant. In particular: (i) the preparation of environmental assessment requirements occurs at the commencement of the process and is at the discretion of, and may be modified by, the Director-General (s 75F(3)), (ii) the Director-General may accept an environmental assessment even if it does not adequately address the environmental assessment requirements (s 75H(2) and (3)), (iii) an environmental assessment must be made publicly available and any person or authority may make submissions. The Director-General is to provide submissions or a report on the issues raised by submissions to the proponent and any other public authority considered relevant (s 75H(3)-(6)), (iv) the Director-General's report to the Minister is to include "any advice provided by public authorities on the project" (s 75I(2)(b)), and (v) for a concept plan, any approval may be subject to further determinations (s 75P and the definition of "approved project"). Within this statutory framework the environmental assessment requirements are procedural.

56 Consultation under s 75F(4) is comparable to the types of consultation obligations considered in *Attorney-General (NSW) (Ex rel Franklins Stores Pty Ltd) v Lizelle Pty Ltd* [1977] 2 NSWLR 955 at 965; (1977) 36 LGRA 1 at 9-10 and *Attorney-General v JN Perry Constructions Pty Ltd* [1961] NSWR 422; (1961) 6 LGRA 385 in which breach did not lead to invalidity. See also *Australian Broadcasting Corporation v Redmore Pty Ltd* (1989) 166 CLR 454 at 457-459. The statutory scheme relating to the making of regional environmental plans considered in *Leichhardt Municipal Council v Minister for Planning*, where breach of a consultation provision led to invalidity, was significantly different.

57 Finally, the respondents relied on s 75X(4). Properly construed, the section gave a "particularly strong indication of legislative intent" that any breach of s 75F(4) would not lead to invalidity. The provision is an important part of the statutory scheme. Construed in light of the principles in *Project Blue Sky*, it disclosed the legislative intent that decisions under Pt 3A would not be invalid by reason of breach other than a failure to make an environmental assessment publicly available. The contrary obiter dicta in *Tugun Cobaki* at [179]-[184] should not be followed.

Decision relating to first ground

An introductory observation

58 There are two elements to this ground of challenge. The first is that the Director-General prepared the environmental assessment requirements before he had power to do so, the power being conditioned on the lodgement of an application. By reason of this temporal problem, the applicant said the

Director-General could not discharge the consultation obligations under s 75F(4). The second is that the Director-General in fact did not consult as required under s 75F(4). I will deal with these elements separately, but wish to say something immediately about the first of them.

59 The first element depends on the "application" being lodged after the Director-General issued the environmental assessment requirements. The further amended points of claim identified the form (which I have found was submitted on or about 20 October 2006) as the "application" and thus the jurisdictional pre-condition enabling the Director-General to prepare the environmental assessment requirements. The applicant was logically confined to identifying this form as the jurisdictional pre-condition because the only other documents of potential relevance were the letter of 5 July 2006 (lodged before the Director-General issued the requirements and the relevance of which the applicant rejected) and the proponent's environmental assessment. The proponent's environmental assessment could not be the required application, as it had to be lodged after the Director-General issued the requirements. Hence, the form is central to the applicant's first argument.

60 On its face this form related to an application under s 75E for approval to carry out a project. The proponent did not seek such approval at any time. Moreover, there is no reference to an approved form in any provision of Pt 3A. The provisions of the EPA Regulation with respect to Pt 3A (see s 75Z of the EPA Act and Pt 1A of the EPA Regulation) do not specify an approved form for applications, concept plans or environmental assessments under Pt 3A. Contrast the provisions for development applications and environmental impact statements (Div 1 and 4 of Pt 6, Div 2 of Pt 14 and Sch 1 and 2 of the EPA Regulation). In short, the form is foreign to the statutory scheme of Pt 3A.

61 The applicant's submissions characterised the form as a jurisdictional pre-condition by emphasising the importance of having a "concrete application" to enable the Director-General to prepare and consult with other public authorities about project specific environmental assessment requirements. Yet the form contains a bare reference to the project and not much more. It contains a box of no more than three lines to describe the project and contemplates that a "preliminary assessment" will be attached to provide information about the project. Pt 3A does not refer to or require a preliminary assessment. The assessment that in fact was lodged in connection with this form was the proponent's environmental assessment required under s 75H.

62 The detail and complexity of the parties' submissions might obscure a fundamental difficulty about this part of the applicant's first argument; namely, it depends on accepting that the existence of a document not required by any provision of Pt 3A somehow conditions the exercise of functions under that Part. If that is not a sufficient basis to reject this argument a lengthier explanation is provided below.

Section 75F(2) and the temporal issue

63 Part 3A of the EPA Act is to be construed consistent with principle. The statutory scheme must be considered in context. The context includes all of the provisions of the EPA Act, "the existing state of the law and the mischief…one may discern the statute was intended to remedy" (*CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408). The primary object is to construe relevant provisions so that they are "consistent with the language and purpose of all the provisions of the statute" (*Project Blue Sky* at [69]).

Statutory provisions are to be approached on the basis that they are "intended to give effect to harmonious goals" (*Project Blue Sky* at [70]). Where conflict appears, it is to be alleviated by "adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions" (*Project Blue Sky* at [70]). In so doing, meaning must be given to every word of the relevant provisions (*Project Blue Sky* at [71]).

64 Part 3A may apply to kinds of projects warranting the description of major infrastructure or other development of significance (s 75B(2)). The Part applies only where the Minister has made decisions about a kind of development or a particular development (s 75B). Consistent with this scheme, a "proponent" is not a person who has made an application but a person proposing to carry out development comprising all or any part of the project (s 75A). A "project" is not a thing described in an application but any development declared under s 75B to be a project to which Pt 3A applies. In other words, the legislation provides that development is not a "project" unless the Minister so declares either through recommending a State environmental planning policy (made by the Governor) or by order in the gazette. The Minister thus controls access to Pt 3A. Once that fact is recognised, many of the apparent problems with the provisions of Pt 3A fall away.

65 Provisions that seem to create a "chicken and egg" problem do not do so once it is recognised that the provisions of Div 2 and 3 of Pt 3A can only be engaged with respect to "projects", being development declared to be subject to Pt 3A. For example, both an application and concept plan are to contain matters required by the Director-General (s 75E(2)(b) and s 75M(2)(c)). The obvious vehicle for the Director-General to identify any such required matter is the environmental assessment requirements. Yet if the provisions operate as the applicant submitted a proponent cannot obtain the Director-General's environmental assessment requirements until after the application or concept plan has been lodged or submitted. To take another example, a proponent wishes to submit a concept plan for a project. The obvious vehicle for obtaining the Minister's authorisation is the concept plan. Yet if the provisions operate as the applicant submitted a proponent cannot submit a concept plan absent the Minister's authorisation and a concept plan submitted in advance is a nullity.

66 The resolution to these apparent problems is to construe all of the provisions of Pt 3A as a unified scheme for assessing major infrastructure and significant development in which, when Divs 2 or 3 are engaged, the Minister has decided that the particular development or kind of development is a project in accordance with Div 1.

67 The provisions of Pt 3A are capable of sensible operation once it is recognised that the Part vests in the Minister an explicit "gatekeeper" role. Pt 3A contemplates and assumes that proponents, being people "proposing to" carry out development that is a project, will or may engage with regulatory authorities about the anticipated project or project before Divs 1, 2 or 3 are invoked. Section 75B could not sensibly operate, at least insofar as it deals with particular development, absent such engagement. Nor could s 75M with respect to concept plans. The applicant's submission that Pt 3A should not operate in this way as it undermines public participation and accountability concerns the policy underlying the Part, which is a matter for the legislature alone. It is also apparent that the statutory scheme contains public consultation provisions after

an environmental assessment for a project or concept plan has been lodged, compliance with which is mandatory (s 75H(3) and s 75X(5)). These obligations are inconsistent with the applicant's unfounded criticism that the result is thereby a "foregone conclusion". The applicant has made no complaint about any alleged breach of these public consultation obligations.

68 The provisions of Divs 2 and 3 interact with each other and cannot logically follow the applicant's temporal lockstep approach. Section 75H(1) contemplates that a proponent's environmental assessment is "required under this Division". The requirement, however, is found in the combined effect of s 75D, s 75E and s 75F. Section 75G comes after ss 75E and 75F, yet the Minister may wish to convene a panel before an application is lodged or the Director-General prepares environmental assessment requirements (as occurred here). The references to matters required by the Director-General to be contained in the application (s 75E(2)(b)) and concept plan (s 75M(2)(c)) are too close to the subject matter of the Director-General's environmental assessment requirements to indicate some wholly separate function. This indicates that an "application" may be sufficient for one purpose (preparing environmental assessment requirements) yet later be supplemented for other purposes (lodging a proponent's environmental assessment for notification to the public). The words "when an application is made" in s 75F(2) must be construed in this broader context.

69 These considerations point to three answers to the applicant's temporal submission. The first two answers arise from the construction of Pt 3A. The third from the facts of this case.

70 First, there is no reason to read the opening part of s 75F(2) as excluding an application to be made. This does not involve reading words into s 75F(2). It involves construing the provision in context. The context identified above indicates that s 75F(2) involves an application made or to be made. The reasoning of the Court of Appeal in *Currey v Sutherland Shire Council* (2003) 129 LGERA 223 (at [23]-[29]) provides support for this conclusion. *Currey* involved a provision in an environmental planning instrument. The Court of Appeal construed the words "created" and "granted" in the environmental planning instrument as encompassing the meaning "to be created" and "to be granted" because the context required that conclusion.

71 Secondly, the meaning of "when" is not necessarily limited to "after", still less to the meaning which the applicant's submissions involved of "only after and at no other time". "When" introduces a contingency, but this contingency operates by reference to a condition expressed in the present tense (when an application "is" made). Nothing in the provision or context suggests that the Director-General has no capacity to prepare requirements unless and until the contingency "has been" satisfied (contrast the expression construed in *Young v Parramatta City Council* (2007) 152 LGERA 221). The fact that the task entrusted to the Director-General is to "prepare" requirements also indicates to the contrary. To "prepare" ordinarily means to make or get ready for something. There is no reason, textual or logical, to conclude that the Director-General may only commence the process of preparing requirements for a project after the application for approval or concept plan has been lodged (particularly remembering how "project" and "proponent" are defined). Accepting the applicant's submissions would mean that, despite knowing a development has been declared to be a project and an application or concept plan foreshadowed,

the Director-General may do nothing until a form comes across the counter. This argument finds no support in and serves no purpose or object apparent from the legislation.

72 Section 75F(2) identifies the need for a connection between the environmental assessment requirements and the project. The extent of connection required cannot be defined in isolation from the facts of any particular case. What is clear is that the lodgement of a three page form not required by any provision of Pt 3A is immaterial to any question of validity arising under the Part.

73 Thirdly, and in any event, the proponent lodged a document sufficient to enable the Director-General to prepare the requirements before they were issued, whether that document is called an "application" or a "concept plan". The document the proponent submitted on 5 July 2006 objectively satisfied all of the requirements of s 75M(2) for a concept plan, despite the fact that its author thought the foreshadowed environmental assessment proper would constitute the concept plan and "concept plan application". Consistent with s 75M(2), the 5 July 2006 document and its attachments outlined the scope of the project and development options. They set out a proposal for staged implementation of the project. There is no suggestion that the document did not contain any other matter required by the Director-General or that it was not "lodged with the Director-General" even though it was addressed to the Minister. That the author of the document contemplated the foreshadowed environmental assessment under s 75H would in fact constitute the concept plan or "concept plan application" does not deprive the document of its true character. In any event, applications may be supplemented over time, so the author's belief was correct. Even if the letter of 5 July 2006 could not be characterised as a concept plan proper, it was sufficient to satisfy the required connection between the anticipated concept plan for the project and the Director-General's environmental assessment requirements.

74 Section 75M(1) (the Minister may authorise or require the proponent to submit a concept plan) does not assist the applicant's argument. It is one thing to accept that the Director-General must have sufficient information to discharge the functions under s 75F(2). It is another to characterise the information in fact available to the Director-General as a nullity or legally irrelevant because of the date on which it was lodged. For example, if a concept plan is submitted before any such requirement or authorisation there is no reason to treat it as invalid for all time and all purposes. Once the Minister authorises or requires its submission the same concept plan may be treated as having been made nunc pro tunc. This is consistent with the approach adopted in *Currey* at [33]-[35]. Although the Court of Appeal was dealing with development applications under Pt 4, no different approach under Div 3 of Pt 3A is warranted. If anything, the context of Div 3 of Pt 3A is more suited to this approach than Pt 4. In particular, the person to be authorised or required under s 75M(1) is "the proponent". The provisions assume that the Minister knows about the project before the power in s 75M(1) is exercised. No purpose consistent with the legislative scheme is achieved by treating steps taken before the Minister's exercise of power as a nullity (particularly as they are likely to be the same steps that informed the Minister sufficient to enable the power to be exercised).

75 The applicant's arguments to the contrary are not persuasive. Section 75F(2) entrusts the task of determining whether there is sufficient information to

prepare the environmental assessment requirements for a project to the Director-General. As noted, a "project" is not any development a proponent wishes it to be but development declared to be a project to which Pt 3A applies. In any case involving a declaration under s 75B(1)(a) (such as here), the Director-General could be expected to have substantial information about the project at that time, well before any application or concept plan is lodged or submitted. If there is not sufficient information, Pt 3A does not prevent the Director-General from obtaining more. Similarly, s 75F(4) entrusts the task of consultation to the Director-General. The Director-General determines if there is sufficient information to consult. The Director-General determines the identity of "relevant" public authorities. Contrary to the applicant's submissions, this does not introduce any unworkable uncertainty absent the applicant's assumptions about the way in which Pt 3A should work in contrast to the actual scheme enacted by Parliament. In any event, on the facts of this case, where is the uncertainty in the proponent expressly requesting the Director-General's environmental assessment requirements and the Director-General in fact providing them?

76 The applicant's submissions about the need for the Director-General to have sufficient information about a project to prepare environmental assessment requirements and consult and ss 75U and 75V operating to remove or confine requirements for other approvals may have force in circumstances other than those present in this case. Significantly, the applicant did not claim that the Director-General had insufficient information to prepare the requirements or to undertake consultation. Presumably this is because the document submitted on 5 July 2006 not only expressly requested the environmental assessment requirements, but also provided ample information for the Director-General to prepare the requirements and consult relevant public authorities. The Director-General also had the benefit of the report of the expert advisory panel before preparing the environmental assessment requirements. In fact, the only things the Director-General did not have before preparing the requirements were the three page form and the proponent's environmental assessment itself. Yet nothing in Pt 3A required the form. And a proponent's environmental assessment cannot be completed before the Director-General has prepared the environmental assessment requirements.

77 The applicant's reference to cl 8C of the EPA Regulation was merely responsive to the Minister's submission. The applicant did not claim that failure to satisfy the time stipulation in cl 8C had any consequence for the validity of the Director-General's requirements (and nor, in my view, could it have done so on the facts of this case).

78 For these reasons the applicant has not established that the Director-General's environmental assessment requirements were invalid by reason of any breach of s 75F(2) of the EPA Act.

Section 75F(2) and the consultation issue

79 The applicant's submission that the Director-General could consult for the purposes of s 75F(4) only after the Minister had authorised the submission of a concept plan is not persuasive. Consistent with the conclusions above, consultation in anticipation of such authorisation is not necessarily excluded from the process of "preparing" the requirements referred to in s 75F(4). Nothing in the text of Pt 3A requires this result. Nor would any relevant purpose be achieved by it. The incongruity that this approach would create is

disclosed by the facts of this case. The Minister required constitution of an expert advisory panel at the same time as making the declaration under s 75B on 21 June 2006. The formal constitution of and approved terms of reference for the panel settled on 18 August 2006 included deliberations and options for the concept plan. Yet the Minister did not formally authorise submission of the concept plan until 28 August 2006. The inescapable inference is that the Minister and Department knew at all times that a concept plan was to be lodged after the declaration on 21 June 2006. They had access to a wealth of information about the site redevelopment because of the earlier dealings with the Council. By 5 July 2006 they also had available a document that satisfied all the objective requirements of a concept plan.

80 Again, the opening words of s 75F(4) ("in preparing the environmental assessment requirements…") require a connection between consultation and the project. The extent of connection required cannot be defined in isolation from the facts of any particular case. I do not accept that the relevant period in this case is limited to 28 August until 4 October 2006 (being the dates of the Minister's authorisation and the Director-General issuing the environmental assessment requirements). I do accept (as the respondents acknowledged) that consultation after 4 October 2006 is not consultation for the purposes of s 75F(4).

81 Section 75F(4) implicitly requires the Director-General to consider the potentially relevant public authorities. According to s 75F(4), potentially relevant public authorities are those the Director-General thinks could raise key issues that should be part of the environmental assessment requirements. If the Director-General identifies such authorities, s 75F(4) requires that they be consulted in preparing the environmental assessment requirements. It follows that to establish a breach of s 75F(4), the applicant would have to prove facts such as the following (recognising that the consequences of any such breach are a separate matter):

- the Director-General identified a relevant authority but did not consult that authority;
- the Director-General identified a relevant authority and consulted that authority but did not consider any key issue the authority raised in preparing the requirements; or
- (perhaps) the Director-General's consideration of the relevant authorities or their key issues was so unreasonable no reasonable person in the Director-General's position could have reached the same view.

82 The applicant's claims about consultation under s 75F(4) did not involve proving any such facts. Instead, the applicant's challenge with respect to s 75F(4) either depended on the temporal argument rejected above or involved complaints that the Director-General was not "systematic" about or misdirected the consultation (by focusing the consultation on the purposes of the expert panel rather than the environmental assessment requirements proper).

83 These complaints are not sustained by the facts. Representatives of the Department were involved in the site stakeholder reference panel. That panel included many public authorities, being authorities I infer were identified as relevant public authorities by or on behalf of the Director-General. The site stakeholder reference panel raised many issues about the redevelopment. The expert advisory panel dealt with these and other issues in its report. The Director-General prepared the environmental assessment requirements with the

benefit of this report. The requirements expressly incorporate as a key issue consistency with the panel's recommendations. Many of the other matters in the key issues section of the requirements also relate to issues raised at the site stakeholder reference panel meetings. The applicant's distinction between issues relevant to the project proper and issues relevant to the Director-General's requirements is artificial and unsustainable. The environmental assessment requirements identify the matters the environmental assessment of the project is to address. Consultation relating to issues that actually concern public authorities about the project is necessarily also consultation about the environmental assessment requirements because the issues of concern will inevitably inform the content of the requirements. Giving the word "in" a narrow construction, as the applicant submitted, is beside the point.

84 For these reasons, the applicant has not established any breach of s 75F(4) of the EPA Act.

D Second ground – statement relating to compliance

Facts relating to second ground

85 The Director-General gave a report to the Minister on the concept plan for the project in February 2007. The report included 45 pages by the Director-General and eight appendices. The appendices included the recommended conditions of approval, the proponent's statement of commitments (s 75F(6)), the expert advisory panel report (s 75G and s 75I(2)(c)), the preferred project report (s 75H(6)(b) and s 75I(2)(a)), a response to submissions by the proponent (s 75H(6)(a)), the submissions of the public (s 75H(4)), the proponent's environmental assessment (s 75H(1) and s 75I(2)(a)) and relevant environmental planning instruments and policies (s 75I(2)(d) and (e)).

86 The report proper of 45 pages contained eight sections. Section 1 contained the executive summary. In section 2, the Director-General described the site, locality and project including its history and the various studies leading up to the declaration of the project under s 75B. Section 3 contained details of the processes engaged under Pt 3A including the expert panel, the study, the concept plan and related documents. Section 4 dealt with the statutory context. It outlined other steps taken under and requirements of Pt 3A. Section 5 addressed consultation and other issues from 13 October 2006 when the proponent lodged the draft environmental assessment, including exhibition and notification, submissions, the response to submissions and amendments to the proposal.

87 Section 6 of the report was headed assessment. It commenced with a table repeating the provisions of s 75I(2) as they applied before 12 January 2007 (that is, absent any reference to s 75I(2)(g) "a statement relating to compliance with the environmental assessment requirements under this Division with respect to the project"). Against the text of s 75I(2)(f) ("any environmental assessment undertaken by the Director-General or other matter the Director-General considers appropriate") the report stated in response "the environmental assessment of this application is this report in its entirety". Section 6.1 explained that the assessment had been prepared after reviewing many documents including the proponent's environmental assessment. Section 6.2 identified each relevant issue and who had raised it. The report then considered how the proponent sought to address the issue. The section concluded:

> Each subsection concludes with a statement on whether the issue is resolved or whether amendments are necessary by either modifying the Concept Plan or introducing new provisions in an environmental planning instrument.
>
> Unless noted to the contrary, the Department is satisfied the responses provided by the Proponent in their EA and the additional response to issues raised in submissions are reasonable.

88 Section 6.2 then dealt with issues under headings following the format identified in section 6.1 – namely, the issue, who raised it, a consideration of the issue and the Director-General's resolution of the issue. The resolutions varied depending on the issue. For example, the density and height issue ended with a resolution that they were "appropriate to the site". The urban design – building envelopes issue ended with a resolution that the concept plan be modified. The report dealt with each issue in this manner before the conclusion in section 7.

89 The report's conclusion contained the following observations:

> The Department has reviewed the environmental assessment and the preferred project report. It has duly considered advice from public authorities as well as issues raised in general submissions in accordance with Section 75l(2) of the Act. All the relevant environmental issues associated with the proposal have been assessed …
>
> In assessing the development of CUB Site, the Department has considered and identified solutions to resolve outstanding environmental issues with the Concept Plan raised by the Department, community and government agencies. The Department recommends modifications to the Concept Plan or will recommended changes to the planning provisions in the proposed SEPP amendment or both.
>
> Some environmental issues remain outstanding with the development of CUB Site and relate to detailed matters concerning the future projects or stages of the project. The Department considers that these outstanding issues are not impediments to a determination of the Concept Plan and can be addressed in detail as part of the further development approvals.

Submissions relating to second ground

90 The applicant submitted that the Director-General's report under s 75I(2) did not include a statement relating to compliance with the environmental assessment requirements with respect to the project as required by s 75I(2)(g) and, hence, the Minister did not consider that statement in breach of s 75O(2)(a) of the EPA Act. Consequently, the Minister's approval and related decisions were invalid. The applicant developed these submissions as follows:

(1) Section 75O(2)(a), as amended from 12 January 2007, requires the Minister to consider "the Director-General's report on the project and the reports and recommendations (and the statement relating to compliance with environmental assessment requirements) contained in the report". Before 12 January 2007, the Minister's power to give or refuse approval to a concept plan was dependent on compliance with "the environmental assessment requirements under this Division with respect to giving approval for the concept plan". This demonstrates the critical nature of the statement within the statutory scheme.

(2) Whether the "assessment requirements under this Division with respect to the project" is construed to mean the Director-General's environmental assessment requirements or the process of environmental

assessment under Div 2 (see the observations in *Tugun Cobaki* at [178]), there is no statement relating to compliance with those requirements in the Director-General's report.

(3) Although the report recorded that the Director-General accepted the proponent's environmental assessment as adequately addressing the environmental assessment requirements under s 75H(2) and (3), this was immaterial. The question whether an assessment adequately addresses the requirements under s 75H(2) and (3) is different from the question whether the project complies with those requirements, being a matter "to which the Director-General is expressly required to turn his or her mind" by s 75I(2)(g). Unless the report contains this statement of opinion by the Director-General, the Minister cannot give approval to a concept plan.

(4) The Director-General clearly did not form the required opinion. The table in section 6 of the report conspicuously omitted any reference to s 75I(2)(g), probably because the new subsection only came into force on 12 January 2007 and the report was completed in February 2007. The complete absence of the statement necessarily renders the Minister's approval and related decisions invalid. To allow these decisions to stand where neither the Minister nor the Director-General formed the required opinions about whether the project complied with the environmental assessment requirements would subvert the whole purpose of having such requirements. By s 75I(2)(g), Parliament required a "clear and express statement of opinion" about compliance with the environmental assessment requirements. However, in the Director-General's report it "is as if those requirements do not exist".

(5) Contrary to the respondents' submissions, the entirety of the report cannot be the required statement because the report must "include" the statement. Section 75I(2)(g) serves no purpose if the entire report may be the statement. The meaning of "statement" is clear. From 12 January 2007 the Minister no longer has to consider whether there has been compliance with the environmental assessment requirements but has to consider the Director-General's opinion about such compliance. To do so, the statement of opinion must be clear on the face of the report in one location. Otherwise the Minister would have to read the report with a "fine tooth comb" to ascertain the Director-General's opinion. This is inconsistent with a statutory scheme intended to "cut red tape" (a reference to the second reading speech, Hansard, 27 May 2005, p 16322). The obligation in s 75I(2)(g) is substantive not formal, as the Director-General must first form the required opinion before the statement may be included.

(6) If, contrary to these submissions, the entirety of the report can be the statement required by s 75I(2)(g) then the report did not deal with the vast majority of the environmental assessment requirements. A reference table the applicant prepared was said to demonstrate this fact.

(7) The third respondent's submission that the Minister was bound to consider whether or not the proponent's environmental assessment complied with the environmental assessment requirements should be rejected. The Minister's obligation is to consider the statement.

(8) There is no room for substantial compliance, as there was either compliance or not (*Hunter Resources Ltd v Melville* at 239.

91 The respondents submitted that the Director-General's report contained the relevant statement and, to the extent that it did not, the consequence would not be invalidity of the Minister's approval and related decisions. The applicant's argument was formalistic and without merit, namely, the report had to include a sentence to the effect "the proponent has/has not complied with the environmental assessment requirements under this Division". The report did not contain a sentence in those terms but the whole report addressed the substance of the requirements. As part of this analysis, the report confirmed that the proponent's environmental assessment was adequate in accordance with s 75H(2) and (3). Moreover, a proponent's environmental assessment, like an environmental impact statement, is a means to a decision-making end. The Courts do not impose a standard of perfection (*Prineas v Forestry Commission (NSW)* (1983) 49 LGRA 402 at 417 and *Prineas v Forestry Commission (NSW)* (1984) 53 LGRA 160 at 163). If the applicant's approach to the required statement were correct, then it involved a mere formality. A strict failure to comply with such a requirement would not lead to invalidity having regard to the nature of the obligation in the overall statutory context and s 75X(5).

92 The third respondent also submitted that the Minister was bound to consider whether or not the proponent's environmental assessment complied with the environmental assessment requirements. In this case, there was no suggestion that the proponent's environmental assessment did not satisfy those requirements and it was clear that the Minister considered this matter. It followed that the applicant's second ground elevated form over substance.

Decision relating to second ground

93 The statute controls the content of the Director-General's report. Close attention to its provisions is essential. The Director-General is to give a report to the Minister for the purposes of the Minister's consideration of the application for approval to carry out the project (s 75I(1)). In the context of concept plans under Div 3 this must be read as for the purposes of the Minister's consideration of the application for approval of a concept plan for the project (after 12 January 2007) or for the purposes of the Minister's consideration of the concept plan for the project (before 12 January 2007). The report is to include certain matters. Not all of those matters are to be prepared by the Director-General. Hence:

(1) the proponent's environmental assessment and preferred project report referred to in s 75I(2)(a) are prepared by or on behalf of the proponent;

(2) any advice provided by public authorities referred to in s 75I(2)(b) is prepared by those authorities;

(3) any panel's report under s 75G referred to in s 75I(2)(c) is prepared by the panel;

(4) the provisions of any relevant State environmental planning policy or environmental planning instrument referred to in s 75I(2)(d) and (e) are made by the Governor on recommendation of the Minister; and

(5) any environmental assessment undertaken by the Director-General or other matter the Director-General considers appropriate referred to in s 75I(2)(f) is prepared by the Director-General.

94 Section 75I(2)(g) requires the report to include a statement relating to

compliance with the environmental assessment requirements under this Division with respect to the project. There is no justification for reading into this provision a requirement that the Director-General prepare this statement. For example, the Minister may authorise the panel to do so under s 75G. A panel is able to "assess any aspect of a project referred to the panel by the Minister". The Director-General may also request a proponent to prepare this statement. The Director-General may request an officer of another public authority to do so (s 17 of the EPA Act). Where the Director-General is required to perform the task, Pt 3A makes it clear. Section 75I(2)(g) places no obligation on the Director-General other than to include the statement in the report.

95 Pt 3A also identifies powers dependent on opinions being formed or states of mind held (see, for example, s 75B(2)(a) and (b), s 75H(2), s 75H(7) and s 75I(2)(f)). Section 75I(2)(g) does not include any reference to an opinion, state of mind or consideration. While the whole of s 75I(2) is dependent on human action and thought, there is a well-established and important difference in judicial review of administrative action between provisions involving states of mind and other provisions (see the summary in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [130]-[139] per Gummow J). Contrary to the applicant's submissions, s 75I(2)(g) does not impose any obligation on the Director-General to form an opinion about the matter nominated in that subsection. The section cannot do so because it does not oblige the Director-General to prepare the statement. Moreover, it appears in a list where the Director-General could not prepare five of the seven documents nominated.

96 It follows that the applicant's submissions about the Director-General having to form a certain opinion under s 75I(2)(g) and the Minister having to consider the Director-General's opinion, absent which the intent of the whole of Pt 3A would be subverted, do not relate to the statutory scheme Parliament enacted. It also follows that any subjective error the Director-General may have made about the form of the legislation as in force in February 2007 is immaterial unless the error led to breach of any relevant statutory requirement.

97 The apparent problem of an entire report both addressing a nominated matter and including that matter is a diversion. It is true that s 75I(1) identifies a report for the purposes of the Minister's consideration and s 75I(2) identifies the matters to be included in the report. Nevertheless, the provisions indicate that they are not all mutually exclusive. For example, a report for the purposes of the Minister's consideration under s 75I(1), in many cases, will be constituted by the Director-General's environmental assessment under s 75I(2)(f). Section 75I(2)(f) does not require the Director-General to prepare such an assessment but if the Director-General does so it is difficult to see why that assessment would not be capable of satisfying both ss 75I(1) and 75I(2)(f). Similarly, insofar as an assessment amounts to a statement within the meaning of s 75I(2)(g) or the converse there is no reason to assume that the statutory provisions prevent the same document from satisfying both subsections.

98 The effect of the applicant's approach would be to require the Director-General to prepare a report proclaiming itself to be the report under s 75I(1) and to include in the report separate sections proclaiming themselves to be, respectively, the Director-General's environmental assessment, any other matters the Director-General considers appropriate and the statement relating to compliance with the environmental assessment requirements with respect to the

project. The report in this case discloses the impracticality of this approach. The response to s 75I(2)(f) (any environmental assessment undertaken by the Director-General or other matter the Director-General considers appropriate) in section 6 of the report is "the environmental assessment of the project application is this report in its entirety". Nothing in the legislation precluded this approach.

99 The applicant's concern that there must be a statement in one location to the effect that "there has/has not been compliance with the environmental assessment requirements under this Division" or the Minister will not readily be able to discharge his obligations of consideration under s 75O(2)(a) is also not sustainable.

100 First, s 75I(2)(g) does not require the report to include a certification of compliance or non-compliance. What is required is a statement "relating to" the nominated matter. The words "relating to" have been described as vague, indeterminate, with "no expression more general or far-reaching", so that they must take meaning from their context (*Oceanic Life Ltd v Chief Commissioner of Stamp Duties (NSW)* (1999) 43 ATR 158 at [56] per Fitzgerald JA citing *Commissioners of Inland Revenue v Maple & Co (Paris) Ltd* [1908] AC 22 at 26, *Tooheys Ltd v Commissioner of Stamp Duties (NSW)* (1961) 105 CLR 602 at 620 and various other decisions). The reference to a statement "relating to" the nominated matter speaks against the applicant's inflexible approach to the provision.

101 Secondly, the substance of the statement is important. If, as the applicant's submissions assumed, the "environmental assessment requirements under this Division" were the Director-General's requirements under s 75F(2) then they would consist of issues the Director-General required the proponent's environmental assessment to address. Given the nature of development capable of being declared to be a project under s 75B the question whether the assessment complied with those requirements would ordinarily involve a complex evaluative exercise. For example, the Director-General's requirements in this case included demonstrating that the proposal was consistent with the report of the expert advisory panel or, in the event of inconsistency, that a similar or better outcome would be achieved. A certification as the applicant submitted was necessary would be ill adapted to constitute a statement relating to compliance about that requirement. The broader context supports this conclusion. The report and the other documents to be included in it are all directed to the environmental assessment of major infrastructure or other significant development. These documents (apart from the environmental planning instruments) would be expected to contain evaluative material in which issues of compliance interact with and inform the overall assessment.

102 Thirdly, the idea of a "statement" relating to environmental and planning issues is not unique within the EPA Act and Regulation. A development application for designated development is to be accompanied by an "environmental impact statement" (s 78A(8)(a) of the EPA Act). A development application likely to significantly affect threatened species is to be accompanied by a "species impact statement" (s 78A(8)(b) of the EPA Act). Development applications are to be accompanied by a "statement of environmental effects" (s 78A(9) of the EPA Act and cll 50(1)(a) and Sch 1 to the EPA Regulation). In all cases the required statement is an evaluative and analytical document (or documents) rather than a single certification. While these references are not

determinative they indicate that the meaning of "statement" is not necessarily as confined in the context of the same legislation as the applicant submitted.

103 Fourthly, the Court of Appeal considered and rejected a submission that a requirement for a "conservation plan" in an environmental planning instrument referred to a single document on the grounds that the singular includes the plural (s 8(b) of the *Interpretation Act 1987* (NSW)) and the result would be absurd and contrary to the ordinary meaning of "plan". The Court held that a plan "must be readily discernible as a single entity even though it may be made up of one or more documents or parts of documents" (*Chisholm v Pittwater Council* [2001] NSWCA 104 at [39]-[42]). Although the context is different in this case, the ordinary meaning of "statement" (1. something stated. 2. a communication or declaration in speech or writing setting forth facts, particulars etc – *Macquarie Dictionary* (3rd ed)) extends beyond the form of certification proposed by the applicant.

104 Fifthly, the fact that the Minister's task of consideration under s 75O(2)(a) could be more onerous if an evaluative and lengthy document such as the Director-General's report is capable of satisfying s 75I(2)(g) is immaterial. The applicant relied on the reference in the second reading speech to Pt 3A "cutting red tape" to support this submission. However, there is also a reference in the same speech to strengthening the rigour of the assessment process (Hansard, 27 May 2005, p 16322). In any event, the relevant task is to construe the statutory provisions not the second reading speech.

105 Finally, the applicant's submissions, if accepted, lead to a highly artificial result. The Director-General prepared a report containing a substantive analysis of the concept plan for the project. It annexed all of the documents identified above. The applicant conceded that the Director-General's report would have complied with s 75I(2)(g) if it had included a single additional sentence to the effect that the concept plan did or did not comply with the environmental assessment requirements. The absence of such a sentence was said to be a critical omission depriving the Minister of the capacity to consider the statement as required by s 75O(2)(a). The Minister, however, was obliged to consider the Director-General's report proper under s 75I(1) and certain of the nominated items in s 75I(2) (see the observations in *Tugun Cobaki* at [117]-[134] about the infelicitous drafting of s 75J(2)(a)). This obligation extended to the reports contained in the report (to use the peculiar language of s 75O(2)(a)) including the report of the expert advisory panel and the preferred project report. The applicant did not suggest any failure on the Minister's part to consider all of that material. In this context, it is difficult to discern any possible purpose that the additional single sentence might serve.

106 I am satisfied that s 75I(2)(g) required the Director-General's report to include a written communication relating to compliance with the nominated matter. The written communication could be constituted by a document or series of documents provided that it was "readily discernible as a single entity" and not a mere "hodgepodge" (*Chisholm* at [41]). The fact that this communication was to be included within the Director-General's report did not mean that it could not be constituted by that report.

107 If s 75I(2)(g) is concerned solely with the Director-General's environmental assessment requirements then the Director-General's report satisfied s 75I(2)(g). Section 4.4 of the report provided a short summary of the key issues in those requirements. Section 6.1 of the report stated that it had been prepared after

reviewing various documents including the proponent's environmental assessment. The proponent's environmental assessment was itself included in the Director-General's report as an appendix (in disc form). The primary purpose of the proponent's environmental assessment was to address the Director-General's environmental assessment requirements. The proponent's environmental assessment did so at length. To assist the reader it also identified the Director-General's environmental assessment requirements and provided, in tabular form, either a cross-reference to another part of the assessment addressing the requirement or a summary explanation of the manner in which the requirement had been addressed (see section 16 and tables 12 and 13). Section 6.1 of the Director-General's report concluded with the statement "Unless noted to the contrary, the Department is satisfied the responses provided by the Proponent in their EA and the additional response to issues raised in submissions are reasonable". The notations to the contrary are contained in section 6.2, following the format referred to above (issue, raised by, consideration and resolution). The issues addressed in section 6.2 of the Director-General's report clearly "relate to" the Director-General's environmental assessment requirements. The applicant's table identifying requirements allegedly omitted from the report failed to recognise that the report's substantive provisions operated by exception, with all other responses by the proponent being considered "reasonable". I do not accept the applicant's submissions to the contrary.

108 Accordingly, the statement in the last paragraph of section 6.1 of the report, read in context and with the subsequent section 6.2, constitutes a readily discernible written communication or statement relating to compliance with the Director-Generals' environmental assessment requirements for the project. The statement that the proponent's responses were reasonable was a statement relating to compliance with those requirements because such compliance was the very purpose of the proponent's environmental assessment. The fact that some of the proponent's responses were unsatisfactory, thus requiring modifications to the project, was also a statement relating to compliance. Given the nature of the projects to which Pt 3A applies and the requirements likely to be imposed by the Director-General it would be rare to be able to reduce the statement to a single sentence making a simple assertion to the effect that the proponent has complied or not. It would also be unhelpful for the Minister to be denied the opportunity to obtain a reasoned analysis of the proponent's response to the requirements because of an artificially restrictive reading of s 75I(2)(g). In any event, for the reasons given above, such a statement would be a statement or certificate of compliance rather than a statement "relating to" compliance.

109 Alternatively, and in accordance with the respondents' submissions, the statement in section 5.2 of the report confirming that the Director-General considered the proponent's environmental assessment adequate for the purposes of exhibition under s 75H(2) and (3) is also a statement within the meaning of s 75I(2)(g). Contrary to the applicant's submissions, a statement that the Director-General accepted the environmental assessment as adequately addressing the requirements is clearly a statement of the kind contemplated by s 75I(2)(g) because it is a statement "relating to" compliance. The applicant's submissions appeared to assume that merely because an administrative action has efficacy for the purpose of one statutory provision it necessarily could not

have efficacy for any other. The distinction drawn by the applicant between whether the environmental assessment adequately addresses the requirements and "whether the project complies with the requirements" is not supported by the terms of s 75I(2)(g). Section 75I(2)(g) does not require a statement as to whether or not the project complies with the requirements.

110 Finally, it is also apparent that the proponent's environmental assessment (included in the Director-General's report) itself contained a statement relating to compliance with the Director-General's requirements (section 16 and tables 12 and 13). As noted, nothing in s 75I(2)(g) required the statement to be prepared by the Director-General.

111 If the environmental assessment requirements under Div 2 with respect to the project extended to the processes under that Division and not merely the Director-General's requirements under s 75F(2), then the report also satisfied s 75I(2)(g). The report addressed those processes in sections 1 to 5.

112 The omission of s 75I(2)(g) from the table at the beginning of section 6 of the Director-General's report is immaterial if the report in fact included the statement required by s 75I(2)(g). For the reasons set out above, I am satisfied that the report did include the required statement in accordance with s 75I(2)(g). The applicant's claim that the Minister failed to consider the statement under s 75O(2)(a) thus cannot be sustained, as it was consequential on the alleged breach of s 75I(2)(g). The applicant did not seek to establish any failure of consideration by the Minister with respect to this ground independent from the statement said to be missing from the Director-General's report.

E Third ground – failure to consider ESD

Facts relating to third ground

113 The Director-General's environmental assessment requirements under s 75F(2) contained a requirement in the "key issues" section as follows:

> Ecological sustainable development
>
> Demonstrate that commercial buildings proposed for the site will provide future leasable office space that is capable of achieving the relevant commitments of the Department of Energy, Utilities and Sustainability's *3 CBDs Greenhouse Initiative* and 5 star greenhouse level.

114 The proponent's environmental assessment addressed this requirement in Pt D section 14 (services and sustainability), Pt E section 22 (environmental management) and Appendix U, being a report prepared by Ove Arup "ESD Strategies and Building Services Analysis". This report identified its purpose as:

> … developing an appropriate ESD strategy that is flexible enough to meet future requirements for the site.

115 The Ove Arup report dealt with minimum energy, water and health targets for the project. It dealt with the residential component by reference to the parameters in "BASIX" and "NatHERS". BASIX is the NSW government's building sustainability index concerning the reduction of energy and water consumption and consequential impacts, such as greenhouse gas emissions. Under the EPA Regulation a BASIX certificate is required for all development including a dwelling. NatHERS is the nationwide house energy rating scheme. The Ove Arup report dealt with the commercial component by reference to various industry benchmarks. The "3 CBDs Greenhouse Initiative" is a policy adopted by the councils of the Cities of Sydney, North Sydney and Parramatta.

The "5 star greenhouse level" also deals with greenhouse gas emissions from commercial development. Part of Ove Arup's assessment included greenhouse gases and the need for flexible and adaptable commercial building forms.

116 The Director-General's report included the following information in section 6.2.18 about ecologically sustainable development:

> 6.2.18 Ecologically Sustainable Development
>
> Raised By
>
> The Department
>
> Consideration
>
> While this report generally represents an assessment of ecologically sustainable development, it is considered appropriate to consider the Concept Plan in light of the DGRs requirements that the EA should demonstrate that the Concept Plan for the CUB Site address issues of sustainable development, drainage and stormwater issues (inclusive of SWUDs).
>
> The Proponent in the EA proposes that the Concept Plan will achieve the following sustainable development principles and has made commitments to this effect in the Statement of Commitments.
>
> (1) *For residential development:*
>
> § Meeting the 40% reduction on the BASIX energy consumption benchmark.
>
> § A 4.5 average star comfort rating using NatHERS or equivalent as well as each apartment being required to achieve specified load maximums and whole building average maximum heating and cooling loads.
>
> (2) *For commercial development:*
>
> § A minimum 4.5 starts ABGR energy performance (in line with PCA 2006 Grade A building guidelines and Sydney City Council requirements for any commercial building design)
>
> § Buildings should achieve 4 star Green Star Rating.
>
> § Buildings should achieve a 4 start NatHERS rating.
>
> (3) *For retail development,*
>
> § Compliance with any future compulsory rating tool provided by the Australian Building Greenhouse Rating Scheme.
>
> (4) *All development:*
>
> § All refrigerants and insulation should be specified to have an Ozone Depletion Potential (ODP) of zero.
>
> § Any external lighting should not be directed beyond the site boundary upwards.
>
> The Proponent includes a WSUD for the CUB Site that seeks to integrate the management of the three urban water streams of potable water, wastewater and stormwater. It is based on the following principles as outlines in the EA:
>
> …
>
> The Department has considered these points and notes that the Proponent has made commitments to ensuring that these targets and measures are implemented on the CUB Site. The Department also notes that the high modal split away from private vehicles will mean that the CUB Site will help assist in reducing greenhouse gas emissions and is a positive contribution.
>
> Consequently, the Department is satisfied that the proposal is consistent with ESD principles and WSUD objectives.

Resolution

The Department considers the concept plan has adequately addressed ecologically sustainable development principles.

117 The Minister's approval under s 75O(1) was limited to the matters specified in Sch 1 item A3 (in effect, layout, land uses, building envelopes, maximum floor space and related matters). Sch 1 item A4(2)(c) requires compliance with the revised statement of commitments (see s 75F(6) of the EPA Act). The revised statement of commitments included commitments relating to such matters as "environmentally sustainable development" (item 1) and "water sensitive urban design" (item 13). Schedule 2 item A18 requires all future applications for development on the site to be in accordance with State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004. The aims of that policy are to encourage sustainable residential development on a consistent basis throughout NSW. The Minister also decided that further environmental assessment was required for the project, under Pts 4 or 5 of the EPA Act (as applicable) or Pt 3A depending on the capital value of the part of the project involved.

Submissions relating to third ground

118 The applicant submitted that, in granting the approval, the Minister failed to consider the principles of ecologically sustainable development, with the consequence that the approval and related decisions were invalid. These submissions were developed as follows:

(1) In *Gray v Minister for Planning* (2006) 152 LGERA 258 Pain J held that the principles of ecologically sustainable development were a mandatory relevant consideration for decisions under Pt 3A of the EPA Act (at [114]).

(2) This was consistent with the approach to ecologically sustainable development in *Bentley v BGP Properties Pty Ltd* (2006) 145 LGERA 234 at [57], *Murrumbidgee Ground-Water Preservation Association v Minister for Natural Resources* [2004] NSWLEC 122 at [178] and *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA 10 at [121]-[122]. It was also consistent with the principles established in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40 that mandatory relevant considerations are to be drawn from the subject-matter, scope and purpose of the legislation if not expressly stated. Pt 3A did not identify such matters as s 75J(2) and s 75O(2) required the Minister to consider documents not substantive matters.

(3) The respondents conceded in their points of defence that climate change induced by greenhouse gas emissions poses a risk of serious and irreversible harm to the environment, but did not concede any net increase of greenhouse gas emissions by reason of this project. To consider this issue all direct and indirect impacts of the project must be assessed (*Minister for Environment and Heritage v Queensland Conservation Council Inc* (2004) 139 FCR 24; 134 LGERA 272 at [53] and *Gray* at [98]).

(4) The expert report of Mr Lee, environmental consultant, prepared for the purpose of these proceedings disclosed that the greenhouse gas emissions from the project would be substantial and equivalent

to 0.45% of the total emissions from the City of Sydney local government area. This incremental change had to be considered consistent with the precautionary principle and inter-generational equity.

(5) The Minister's obligation was to give "proper, genuine and realistic consideration" to each relevant matter (*Weal v Bathurst City Council* (2000) 111 LGERA 181 at [9], [80], *Centro Properties Ltd v Hurstville City Council* (2004) 135 LGERA 257 at [37], noting the qualification to use of this expression in *Kindimindi Investments Pty Ltd v Lane Cove Council* (2006) 143 LGERA 277 at [79]). Relevant matters are to be the "fundamental element in" or "focal point" of consideration (*Zhang v Canterbury City Council* (2001) 51 NSWLR 589; 115 LGERA 373 at [69]-[85] and cases cited therein).

(6) Contrary to these principles the Minister: (i) did not have sufficient information to discharge his obligations, (ii) did not apply the precautionary principle by failing to treat the proponent as having the onus of proving that the project would have no or negligible impacts on climate change, (iii) failed to consider alternatives to achieve no or negligible impacts on climate change, (iv) failed to undertake a risk weighted assessment of options, (v) paid mere lip service to ecologically sustainable development and (vi) did not consider inter-generational equity. In particular, the Minister had no quantitative information of the kind contained in Mr Lee's report about emissions from the embodied energy in connection with the construction of the development, total annual emissions from the operation of the development, the relative significance of these emissions or options to ameliorate them. The lack of information of this nature was fatal to the Director-General's decision in *Gray* (at [126], [133]-[134]). *Gray* could not be distinguished. In this case there was no attempt at all to quantify emissions. The fact that it may be difficult to do so is insufficient to avoid the obligation (*Gray* at [138]). The Director-General did not mention in his report the need for the proponent to satisfy the onus imposed by the precautionary principle or the role of inter-generational equity. Nor were ameliorating alternatives such as those identified by Mr Lee mentioned. The Director-General's report dealt with ecologically sustainable development in a manner "remarkable for its brevity and lack of attention to detail", the assessment being "cursory", "derisory" and "cosmetic".

(7) The respondents' argument that the claim was premature because the Minister approved a concept plan only was misconceived. Concept plans are important steps under Pt 3A, as s 75P(1)(c) (enabling the Minister to determine that no further environmental assessment is required) discloses.

119 The respondents submitted that this third ground of challenge failed on the facts and the law. The object of the EPA Act is to encourage ecologically sustainable development. That object was one among many, potentially competing, objects. Decision-making under the EPA Act is thus "polycentric, value laden and subjective". No absolute standard or outcome is involved. This is apparent from the definition of "ecologically sustainable development" adopted. The definition operates at a high level of generality. It involves

significant scope for judgment and evaluation. Greenhouse gas emissions are but one potential component of ecologically sustainable development. Nothing in the EPA Act requires that issue to be given primacy over all others, when taking into account the object of encouraging ecologically sustainable development.

120 Further, on the facts, the precautionary principle did not apply, as no aspect of the Minister's decision involved postponing measures dealing with greenhouse gases by reason of scientific uncertainty (see *Telstra v Hornsby* at [139]). The complaint was also premature, as the Minister approved nothing more than a broad outline of the project not the actual carrying out of the development.

121 In any event, the Minister considered ecologically sustainable development as the documents demonstrated. The applicant had not discharged the onus to establish the contrary. The applicant's submissions, and reliance on Mr Lee's evidence, invited the Court to engage in an impermissible review of the merits of the Minister's decision.

122 The third respondent adopted these submissions, but also submitted as a threshold issue that the Minister was not subject to any obligation to consider ecologically sustainable development when making decisions under Pt 3A. *Gray* was thus incorrect and should not be followed.

Decision relating to third ground

123 The restrictions that apply to a court reviewing an administrative decision for alleged illegality are well known, but bear repetition. The court's role is to declare and enforce the law (*Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36). Merits review is not permitted. When alleging a failure to consider, an applicant must identify some matter expressly required to be considered or "otherwise necessarily implied from the scheme of the legislation" and demonstrate that this matter has not been taken into account (*Kindimindi* at [79]-[80]. See also *Minister for Local Government v South Sydney City Council* (2002) 55 NSWLR 381; 123 LGERA 367 at [211]). The weight to be given to relevant considerations is generally a matter for the decision maker alone (*Peko-Wallsend* at 41). For this reason, "epithets such as 'proper, genuine and realistic' consideration … risk an assessment of the nature of the consideration which will encourage a slide into impermissible merit review" (*Kindimindi* at [79] referring to *Bruce v Cole* (1998) 45 NSWLR 163 at 186E. See also *Belmorgan Property Development Pty Ltd v GPT Re Ltd* (2007) 153 LGERA 450 at [76]).

124 The Land and Environment Court has separate merits and judicial review functions (Pt 3 of the *Land and Environment Court Act 1979* (NSW)). In its merits review function the Court makes the decision it finds correct or preferable on the evidence, weighing up for itself the competing considerations. In its judicial review function, the Court may not trespass on the merits or impugn a decision made within the necessary legal boundaries. This distinction and consequential limitation in judicial review proceedings is to be "constantly borne in mind" (*Peko-Wallsend* at 40-41). It follows that care must be taken in applying observations about the level or extent of assessment of issues found to be appropriate in merits appeals to other contexts. Specifically, observations made by the Court in it merits jurisdiction cannot be understood as mandating a particular outcome in judicial review proceedings. This is evident from the emphasis on the particular factual context in the outcomes apparent from those decisions.

125 For example, in *BGP Properties Pty Ltd v Lake Macquarie City Council* (2004) 138 LGERA 237 (an appeal in the Court's merits review jurisdiction), the Court emphasised that consent authorities under Pt 4 of the EPA Act are to consider the principles of ecologically sustainable development "in cases where issues relevant to those principles arise" (at [113]). See also *Telstra v Hornsby* at [124]). *Telstra v Hornsby* (another appeal in the Court's merits review jurisdiction) was an example of development where the Court found on the facts that the precautionary principle had no role to play (at [184]).

126 For the applicant's argument to succeed, it is insufficient to accept that the Minister was bound to consider ecologically sustainable development in approving the concept plan for the project. To succeed, the applicant must establish that the EPA Act, by necessary implication, bound the Minister to consider one aspect of the complex of matters that might inform the concept of ecologically sustainable development (greenhouse gas emissions) in a particular manner and to a particular extent. Specifically, the applicant claimed that such consideration demanded a quantitative analysis of greenhouse gas emissions generally of the kind carried out by Mr Lee. The question is do the provisions of the EPA Act support this necessary implication?

127 In *Randall Pty Ltd v Willoughby City Council* (2005) 144 LGERA 119 at [34], Basten JA adopted the observation of Pearlman J that the objects of the EPA Act are "very wide in their ambit" (citing *Cartier Holdings Pty Ltd v Newcastle City Council* (2001) 115 LGERA 407 at [34]). Those objects do not "stipulate or imply a hierarchy" (see, by analogy, *Terrace Tower Holdings Pty Ltd v Sutherland Shire Council* (2003) 129 LGERA 195 at [56]).

128 In *Foster v Minister for Customs & Justice* (2000) 200 CLR 442 at [23] Gleeson CJ and McHugh J referred to Brennan J's statement of principle in *Peko-Wallsend* at 55:

> The Court has no jurisdiction to visit the exercise of a statutory power with invalidity for failure to have regard to a particular matter unless some statute expressly or by implication requires the repository of the power to have regard to that matter or to matters of that kind as a condition of exercising the power,

Gleeson CJ and McHugh J then observed that:

> The level of particularity with which a matter is identified for the purpose of applying this principle may be significant. A related question arises where the failure complained of is not a complete failure to address a certain subject, but a failure to make some inquiry about facts said to be relevant to that subject.

Gaudron and Hayne JJ agreed with this observation and also noted in *Foster* at [34]:

> The relevant state of satisfaction is of matters described in qualitative terms which call for the making of value judgments about which reasonable minds may differ.

129 Those observations are apt in the present context. There is no factual basis for suggesting that the Minister failed to give any consideration to ecologically sustainable development when approving the project. The Minister clearly did consider that matter. Nor can it be suggested that the Minister failed to give any consideration to greenhouse gas emissions. The references in the Director-General's report, the proponent's statement of commitments and items set out in the Schedules to the approval to BASIX, NatHERS, ABGR energy performance, Green Star Rating, the Australian Building Greenhouse Rating Scheme and the high modal split away from private vehicles acting to assist in

reducing greenhouse gas emissions, belie any such suggestion. It is true that the Minister did not have before him information as contained in Mr Lee's report specifying the total embodied energy involved in the production and construction of the development, the total annual operational emissions or the relative significance of those emissions in the context of the City of Sydney local government area or more generally. As noted, the relevant question for the Court is not whether it would have been desirable for the Minister to have this information but whether the EPA Act, by necessary implication, required the Minister to have information to this effect, failing which the Minister could not consider ecologically sustainable development? The applicant submitted it did, relying on the decision in *Gray* at [126] and [133]-[135].

130 In *Gray* the Director-General had required as part of the proponent's environmental assessment under s 75F(2) a "detailed greenhouse gas assessment" (at [16]). The proponent had included in its environmental assessment a study of greenhouse gases including "scope 1" (direct) and "scope 2" (electricity indirect) greenhouse gas emissions, but not "scope 3" (other indirect) emissions. As the Director-General had required the proponent's environmental assessment to include a "detailed greenhouse gas assessment", the Court held that the Director-General's decision under s 75H(3) to accept the assessment as adequately addressing the environmental assessment requirements (despite the absence of any information about "scope 3" emissions) involved a failure to consider the precautionary principle and inter-generational equity components of ecologically sustainable development. *Gray* thus turned on the terms of the Director-General's requirements under s 75F(2) in the particular case. In so observing I should not be understood as accepting that the Director-General's requirements are irrevocable (see, by analogy, *Prineas v Forestry Commission (NSW)* (1984) 53 LGRA 160 at 167) or that the Director-General's view that the requirements have been adequately addressed is liable to be declared invalid absent some material legal error of the kind identified by Dixon J in *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360 (and putting to one side, for this purpose, the effect of the privative provisions in ss 75T, 75X(4) and 75X(5) of the EPA Act).

131 It follows that the decision in *Gray* is distinguishable from the present case. The applicant's grounds of challenge in this matter do not include any complaint about the Director-General's acceptance of the proponent's environmental assessment under s 75H(3). They do not include, as appeared to have been critical in *Gray*, any alleged disjunction between what the Director-General required under s 75F(2) and what the Director-General accepted as adequate under s 75H(3). *Gray* does not stand for a general proposition that Pt 3A of the EPA Act requires any particular form of assessment of greenhouse gas emissions for each and every project to which that Part applies. Any such understanding would be inconsistent with the statutory provisions and established principles of judicial review to which I have referred above. The decision in *Gray*, therefore, does not assist the applicant. The applicant must establish its propositions other than by reference to *Gray*.

132 Assume that Pt 3A obliged the Minister to consider the principles of ecologically sustainable development where relevant to the particular project (contrary to the Minister's submission that the relevant object of the EPA Act is

merely to encourage ecologically sustainable development and the third respondent's submission that the Minister has no such obligation). Nevertheless:

(1) In enacting the EPA Act Parliament did not subordinate all other considerations to ecologically sustainable development. The terms of the EPA Act make clear that ecologically sustainable development is one of its objects. The unifying theme of ecologically sustainable development as defined in s 4(1) (the effective integration of economic and environmental considerations) is sufficiently broad to apply generally to development decisions, in common with two of the other objects of the Act ((a)(i) concerning the proper management, development and conservation of natural and artificial resources and (a)(ii) concerning the orderly and economic use and development of land). The breadth of the unifying theme of ecologically sustainable development explains the ubiquity of the concept in development decisions and discloses the level of generality at which it is capable of operating.

(2) The definition of "ecologically sustainable development" inserted into the EPA Act from 1 August 2005 nominates the precautionary principle, inter-generational equity, conservation of biological diversity and ecological integrity, and improved valuation, pricing and incentive mechanisms (each as explained in the statutory definition) as "principles and programs" through which the effective integration of economic and environmental considerations can be achieved. These "principles and programs" nominated by Parliament are not confined to any specific subject matter such as greenhouse gases or climate change. They also do not mandate any particular method of analysis of a potentially relevant subject matter or outcome in any case.

(3) None of the provisions of Pt 3A of the EPA Act dictate that the content of any assessment under that Part must include a quantitative analysis of greenhouse gas emissions. The scheme of Pt 3A is inconsistent with the applicant's submissions. Pt 3A requires the Director-General to determine the necessary content of any environmental assessment (s 75F generally) and allows the Minister input into that process both generally (s 75F(1)) and specifically (s 75G(1)). Within the "very wide … ambit" of the objects of the EPA Act (*Cartier Holdings* at [34]) issues other than greenhouse gas emissions, such as water consumption, water quality, public infrastructure, public transport, and affordable housing to name but a few, may be important to the principles of ecologically sustainable development as they apply to any particular project. The weight to be given to each relevant issue is a matter for the decision-maker, absent a claim of *Wednesbury* unreasonableness (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223). The stringent standard relevant to such a claim is well known. *Wednesbury* unreasonableness did not form any part of the applicant's case in this matter.

(4) In this context, the idea that the Minister can only consider ecologically sustainable development by considering a quantitative analysis of greenhouse gas emissions finds no support in the statutory scheme

enacted by Parliament. The Minister or Director-General may choose to require such an assessment for a particular project but Parliament has not dictated that outcome.

(5) The fact that the respondents admitted that climate change generally induced by greenhouse gas emissions poses a risk of serious and irreversible harm to the environment and the development would involve the production of greenhouse gases is not (as the applicant appeared to assume) decisive. The respondents did not concede any net increase in greenhouse gases and Mr Lee's evidence does not establish this. Mr Lee's evidence is a calculation of absolute emissions disregarding the fact that the project involved redevelopment of a former industrial site and the people who will live and work in the development must already live and work somewhere else. But these observations themselves involve an impermissible trespass on the merits of the decision. The relevant point is that Mr Lee's report was not before the Minister. I infer that the Minister adopted the Director-General's conclusion that the project, including its greenhouse gas emissions, would be consistent with the principles of ecologically sustainable development. Nothing in the legislation required the Minister to reach this conclusion of consistency only after considering information about greenhouse gas emissions of the character and extent proposed by the applicant. Mr Lee's evidence invited a review of the merits of the Minister's decision and was thus immaterial to these proceedings.

(6) I do not accept the applicant's descriptions of the Director-General's (and thus the Minister's) consideration of ecologically sustainable development as mere "lip service", "cursory", "derisory" and "cosmetic" and thus no consideration at all. The project involved a very large residential and commercial development on a former industrial site near the southern fringe of the Sydney CBD fronting an existing major bus route. The Director-General recommended (and the Minister adopted) deletion of the public car park to increase public transport use, modifications to accommodate cycle ways, and requirements for all future development to meet nominated standards for water use, wastewater reuse and energy consumption. Specific greenhouse gas emissions ratings were also required for the commercial component (described by Mr Lee as an "exemplary" target), and all future development was required to comply with BASIX, the provisions of which are directed to implementing consistent standards across NSW reducing water use and greenhouse gas emissions.

(7) In this context it was open to the Director-General to observe that his entire report generally represented an assessment of ecologically sustainable development. It was open to the Director-General to conclude that the project was consistent with the principles of ecologically sustainable development. It was open to the Minister to accept those conclusions. In so doing, the Minister considered ecologically sustainable development and its principles and programs as relevant to the project. The Director-General did not need to specifically mention the two principles and programs relied on by the applicant (the precautionary principle and inter-generational equity) to

enable the Minister to consider those principles and programs and ecologically sustainable development generally (see, by analogy, *Hill v Woollahra Municipal Council* (2003) 127 LGERA 7 at [53]).

(8) The applicant bore the onus and thus had to establish the legal and factual foundation of its case (*Minister for Local Government v South Sydney City Council* at [192]). The applicant has not established either that the Minister could only consider ecologically sustainable development by considering a quantitative assessment of greenhouse gas emissions or that the Minister in fact failed to consider ecologically sustainable development, apply the precautionary principle or consider inter-generational equity as relevant to the project.

133 For these reasons I do not accept that the Minister, in granting the approval and making the related decisions, failed to consider ecologically sustainable development, including the precautionary principle and inter-generational equity. Accordingly, I do not need to consider the third respondent's argument that the Minister had no obligation to do so or the Minister's arguments about the precise nature of the obligation (to consider "encouraging" ecologically sustainable development) or to the effect that, as the Minister approved a concept plan only, the applicant's arguments were premature.

F Conclusions

134 The applicant has not established any breach of Pt 3A of the EPA Act. It follows that this matter is not an appropriate vehicle to address the respondents' careful and considered submissions about the operation of s 75X(5) of the EPA Act. I also do not need to consider the Minister's arguments on discretion. The Class 4 application is dismissed. Costs may be argued.

So ordered

Solicitor for the applicant: *Environmental Defenders' Office Ltd*.

Solicitor for the first respondent: Department of Planning.

Solicitors for the third respondent: *Holding Redlich*.

NICK EASTMAN