NEW SOUTH WALES LAND AND ENVIRONMENT COURT

CITATION:
Rivers SOS Inc v Minister for Planning [2009] NSWLEC 213

PARTIES:
APPLICANT
Rivers SOS Inc

FIRST RESPONDENT
Minister for Planning

SECOND RESPONDENT
Helensburgh Coal Pty Limited

FILE NUMBER(S):
40691 of 2009

CATCHWORDS:
JUDICIAL REVIEW :- approval of underground coal mining project - approval under Part 3A of Environmental Planning and Assessment Act 1979 - approval subject to conditions - condition requiring written approval of Director-General before undermining certain swamps - whether constructive failure to decide or invalid delegation in relation to undermining of swamps - whether required statutory notice given to Sydney Catchment Authority before approving project - whether State environmental planning policies (SEPPs) apply to the exercise of power to approve project under Part 3A - whether a provision requiring consideration of certain matters in a particular SEPP concerning mining applied to approval of project under Part 3A - whether condition requiring suitable offsets to compensate for impacts lacked finality or resulted in significantly different project - whether failure to hold public hearing in relation to a proposed revised mine plan in breach of statutory provisions or rules of natural justice.

LEGISLATION CITED:
Environmental Planning and Assessment Act 1979, Part 3, Part 3A, Part 4, s 4, s 23D, s 75A, s 75B, s 75C, s 75E, s 75F, s 75H, s 75I, s 75J, s 75R, s 77, s 80
Environmental Planning and Assessment Amendment (Infrastructure and other Planning Reform) Act 2005
Mining Act 1992, s 74
Sydney Water Catchment Management 1998, s 47

CASES CITED:
Annetts v McCann (1990) 170 CLR 596
Botany Bay City Council v Minister of State for Transport and Regional Development (1996) 66 FCR 537
Butler v Johnston (1984) 4 FCR 83

Cracknell and Lonergan Pty Ltd v Council of the City of Sydney [2007] NSWLEC 392; (2007) 155 LGERA 291
Geelong Community for Good Life Inc v Environmental Protection Agency [2008] VSC 185; (2008) 20 VR 338
GPT RE Limited v Belmorgan Property Development Pty Ltd [2008] NSWCA 256; (2008) 72 NSWLR 647
Griffith University v Tang [2005] HCA 7; (2005) 221 CLR 99
Hill Top Residents Action Group Inc v Minister for Planning [2009] NSWLEC 185
Idonz Pty Ltd v National Capital Development Commission (1986) 13 FCR 70
Kingcole Hobart Properties Pty Ltd v Planning Appeal Board (1992) 78 LGERA 289
Kioa v West (1985) 159 CLR 550
Lawyers for Forests Inc v Minister for Environment, Heritage and Arts [2009] FCAFC 114; (2009) 168 LGERA 220
Meriton Apartments Pty Ltd v Sydney Water Corporation [2004] NSWLEC 699; (2004) 138 LGERA 383
Michael Realty Pty Ltd v Carr [1975] 2 NSWLR 812
Minister for Immigration and Citizenship v SZJGV [2009] HCA 40; (2009) 238 CLR 642
Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd (1996) 91 LGERA 31
Pancho Properties Pty Ltd v Wingecarribee Shire Council [1999] NSWLEC 245; (1999) 110 LGERA 352
Re National Parks and Nature Conservation Authority; Ex parte McGregor [2001] WASCA 368
State of Western Australia v Bropho (1991) 5 WAR 75; (1991) 74 LGERA 156;
Ulan Coal Mines Ltd v Minister for Planning and Moorlarben Coal Mines Pty Ltd [2008] NSWLEC 185; (2008) 160 LGERA 20

CORAM:
Preston CJ

DATES OF HEARING:
24, 25 and 26 November 2009

JUDGMENT DATE:
16 December 2009

LEGAL REPRESENTATIVES

APPLICANT
Mr T F Robertson SC with Mr J E Lazarus
SOLICITORS
Environmental Defender's Office
FIRST RESPONDENT
Mr S J Free (barrister)
SOLICITORS
NSW Department of Planning

SECOND RESPONDENT
Dr J E Griffiths SC
SOLICITORS
Blake Dawson

JUDGMENT:

THE LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES

PRESTON CJ

16 DECEMBER 2009

40691 of 2009

RIVERS SOS INC V MINISTER FOR PLANNING AND HELENSBURGH COAL PTY LIMITED

JUDGMENT

1 HIS HONOUR:

A coal mining project is approved

Longwall mining of coal necessarily causes subsidence effects. The subsidence effects might cause subsidence impacts which, in turn, might have environmental consequences. Where longwall mining undermines surface water features, such as rivers, swamps and water reservoirs, the consequences of subsidence are heightened. Approval of a project for longwall mining of coal in such circumstances needs particular close assessment and impositions of conditions intended to prevent, minimise and/or offset environmental consequences.

2 On 22 June 2009, the Minister for Planning approved, under s 75J(1) of the *Environmental Planning and Assessment Act* 1979 ("the Act") the Metropolitan Coal Project ("the Project") on land near Helensburgh, New South Wales. The Project involved longwall mining under two rivers, the Waratah Rivulet and its eastern tributary, the Woronora Reservoir and a variety of upland swamps. The risk of subsidence, and adverse environmental consequences, were real. The approval was subject to numerous detailed conditions. The conditions were required, the approval stated, to:

"• prevent, minimise, and/or offset adverse environmental impacts;

• set standards and performance measures for acceptable environmental performance;

- require regular monitoring and reporting; and
- provide for the ongoing environmental management of the project."

The approval is challenged

3 The applicant, Rivers SOS Inc, is an incorporated association of about 40 environmental and community groups across NSW who are concerned about the impacts of mining operations on rivers and water. The applicant has brought judicial review proceedings challenging the validity of the approval. There are five grounds of challenge:

(a) *Ground 1: Condition 4 of Schedule 3 of the approval*: The Minister failed to make a decision to approve or disapprove of the Project to the extent that it related to swamps 76, 77 and 92 or, alternatively, invalidly delegated the responsibility for determining that part of the Project application to the Director-General. Condition 4 is fundamental to and cannot be severed from the approval. Its validity results in invalidity of the approval.

(b) *Ground 2: Section 47(3) of SWCM Act*: The Minister exercised the function to approve the Project without complying with the notice requirements of s 47(3) of the *Sydney Water Catchment Management* 1998 ("the SWCM Act").

(c) *Ground 3: cl 12 of the Mining SEPP*: The Minister failed to comply with the provisions of cl 12 of State Environmental Planning Policy (Mining, Petroleum Production and Extractive Industries) 2007 ("the Mining SEPP") before approving the Project, each of which was a precondition to the exercise of power of approval.

(d) *Ground 4: Condition 6 of Schedule 1 of the approval*: The Minister failed to determine the Project application, in that Condition 6 of Schedule 6 of the approval failed to deal adequately with the issue of the mitigation of impacts of the Project on the Woronora Catchment; as a result, the approval lacks finality; and the effect of the condition is to leave open the possibility that the Project as approved will be a significantly different development from that in respect of which application was made. The condition is fundamental to the approval and is not severable. Its invalidity results in the invalidity of the approval.

(e) *Ground 5: Breach of statutory requirements or principles of natural justice in not conducting a public hearing on the preferred project report*: The Minister approved the Project with the revised mine plan proposed in a preferred project report submitted to the Director-General which differed substantially from the mine plan which had been the subject of submissions by the public and public authorities and a public hearing by the Planning and Assessment Commission, in breach of the statutory requirements relating to the Planning and Assessment

Commission conducting a public hearing into the Project or, alternatively, the principles of natural justice.

4 The Minister and the proponent of the Project, Helensburgh Coal Pty Limited, contest each of the five grounds of challenge. They claim further that even if there has been any breach, that does not result in the invalidity of the approval, for various reasons, depending on the breach concerned.

Summary of decision

5 I have determined that the applicant has not made out any of the grounds of challenge to the approval and, accordingly, the proceedings should be dismissed. Costs should be reserved for later argument.

The process of approval of the Project

6 The Project involves underground longwall mining by the proponent at the Metropolitan Colliery, north of Wollongong. The Metropolitan Colliery is the subject of a mining lease which existed on 16 December 2005, being the day of commencement of the *Environmental Planning and Assessment Amendment (Infrastructure and other Planning Reform) Act* 2005. That Act repealed s 74 of the *Mining Act* 1992 ("Mining Act"). Prior to its repeal, s 74(1) of the Mining Act provided that while a mining lease has effect "nothing in, or done under, the *Environmental Planning and Assessment Act 1979* or an environmental planning instrument operates so as to prevent the holder of the mining lease from carrying on mining operations in the mining area". By virtue of cl 8K of the *Environmental Planning and Assessment Regulation* 2000 ("the Regulation"), s 74 of the Mining Act continued to have effect in relation to the Metropolitan Colliery until the end of the relevant transition period (ie until 16 December 2010) or such time until an approval was given under Part 3A of the Act to carry out mining operations in the mining area, whichever was the sooner.

7 Application for approval of the Project under Part 3A of the Act was made on behalf of the proponent on or about 25 July 2008. The Project was described in the application as involving "the continuation of underground mining operations in the Bulli Seam at Metropolitan Colliery". Further details of the Project were provided in the application and the attached documents, the Project Description and the Preliminary Assessment Report.

8 The Director-General, pursuant to s 75F(3) of the Act, subsequently notified the proponent of the environmental assessment requirements for the Project. Pursuant to s 75F(6), the Director-General required the proponent to include in its environmental assessment a statement of commitments "outlining all the proposed environmental management and monitoring measures".

9 On 5 September 2008, the proponent submitted an environmental assessment, in response to the Director-General's requirements and in satisfaction of the obligation in s 75H(1) of the Act. The

environmental assessment included a description of the proposed mining plan by reference to a number of identified longwalls ("the original mine plan"). The original mine plan involved the extraction of coal from the Bulli Seam, which is located at approximately 430m below the surface over a period of 23 years, based on a planned maximum production, the timing of which was said to be subject to a number of variables. The Project related to longwalls 20 to 44. At the time of the environmental assessment, mining of longwalls 1 to 13 had been completed and mining of longwalls 14 to 19A was underway. The environmental assessment also included a statement of commitments in which the proponent proposed, amongst other things, progressively to prepare a series of environmental management plans for the Project over the life of the Project.

10 The Director-General accepted the environmental assessment and, in accordance with s 75H(3) of the Act, notified relevant public authorities and made the environmental assessment publicly available from 22 October 2008 until 24 November 2008. During that period, any person, including a public authority, was able to make a written submission to the Director-General concerning the Project. Many persons and public authorities made submissions, including the applicant in these proceedings.

11 On 14 November 2008, the Minister, acting pursuant to s 23D(1)(b)(ii) of the Act, directed the Planning and Assessment Commission ("PAC") to review aspects of the Project. The Minister's direction to the PAC included a request to conduct public hearings in the Helensburgh area, commencing after 16 February 2009. The direction required the PAC to provide its final report by 16 March 2009. The PAC held public hearings on 11 and 12 March 2009 at the Wollongong Council Chambers and received 17 verbal submissions.

12 On 17 April 2009, the proponent wrote to the Department of Planning advising of its intention to make changes to the proposed mine plan for the Project. The proponent explained that the proposed changes arose "from discussions held with the [PAC], and have the object of reducing some of the Project's environmental impacts". The proponent asked to be advised whether the Director-General required the proponent to submit a preferred project report outlining proposed changes to the Project.

13 The Director-General, by letter from the Department dated 20 April 2009, advised the proponent, pursuant to s 75H(6)(b) of the Act, that he did require the proponent to submit a preferred project report for the Project which clearly described the proposed changes to the mine plan and adequately assessed the consequential environmental impacts of those changes.

14 On 23 April 2009, the proponent submitted to the Director-General a preferred project report for the Project ("PPR (April version)"). This report contained a description of the revised mine plan ("revised mine plan"). On 15 May 2009, the proponent submitted a revised preferred project report which was said to supersede the April version ("PPR (May version)").

15 The PAC received and reviewed the PPR (April version). The PAC was advised on 18 May 2009 that a revised version of the report was to be submitted by the proponent but decided, because of the reporting time frame required by the Minister, that "it was not possible to reconvene the Panel to give proper consideration" to the new version of the preferred project report. A copy of the PPR (April version) was Attachment 1 to the PAC Report.

16 Pursuant to s 75I of the Act, the Director-General gave to the Minister an environmental assessment report on the Project, dated 20 June 2009 ("the Director-General's report"). In relation to the two versions of the PPR, the Director-General's report stated that the PPR (May version), as compared with the PPR (April version):

> "did not change any significant mine parameter. Instead, it contained additional clarifying, explanatory and supporting material.
>
> These refinements clarified, explained and supported the existing PPR, rather than added to or changed it. Thus, the PAC's assessment of the PPR remains accurate and relevant."

17 The Director-General recommended that the Minister approve the project application subject to conditions.

18 On 22 June 2009, the Minister granted her approval for the carrying out of the Project. The approval was given subject to a series of conditions, set out in Schedules 2 to 7 of the approval.

Ground 1: Condition 4 of Schedule 3

19 The applicant claims that, having regard to Condition 4 of Schedule 3 of the approval, the Minister made no decision to approve or disapprove of the Project to the extent that it relates to the undermining of swamps 76, 77 and 92. In the alternative, the applicant claims that the Minister invalidly delegated to the Director-General the determination of that aspect of the Project.

20 Condition 4 of Schedule 3 provides:

> "4. The Proponent shall not undermine Swamps 76, 77 and 92 without the written approval of the Director-General. In seeking this approval, the Proponent shall submit the following information with the relevant Extraction Plan (see condition 6 below):
>
> (a) a comprehensive assessment of the:
>
> - potential subsidence impacts and environmental consequences of the proposed Extraction Plan;
> - potential risks of adverse environmental consequences; and
> - options for managing these risks;
>
> [
]
> (b) a description of the proposed performance measures and indicators for these swamps; and

(c) a description of the measures that would be implemented to manage the potential environmental consequences of the Extraction Plan on these swamps (to be included in the Biodiversity Management Plan – see condition 6(f) below), and comply with the proposed performance measures and indicators."

21 By Condition 6 of Schedule 3, the proponent was required to prepare and implement an Extraction Plan for all "second workings" in the "mining area" to the satisfaction of the Director-General. "Second workings" were defined in the definitions in the approval to mean "extraction of coal from longwall panels, mini-wall panels or pillar extraction". The "mining area" was defined to be "the area outlined with a solid blue line on the figure in Appendix 3". Of relevance to this ground of the applicant's challenge, swamps 76, 77 and 92 were shown to be included inside the area outlined with a solid blue line on the figure in Appendix 3. That is to say, swamps 76, 77 and 92 were located within the mining area.

22 Any Extraction Plan prepared under Condition 6 of Schedule 3 was required to include a number of management plans, one of which was a Biodiversity Management Plan. Condition 6(f) of Schedule 3 stated that the Biodiversity Management Plan was to be prepared in consultation with the Department of Environment and Climate Change and the Department of Primary Industries (Fisheries) "to manage the potential environmental consequences of the Extraction Plan on aquatic and terrestrial flora and fauna, with a specific focus on swamps".

23 The Biodiversity Management Plan, like all management plans prepared under the approval, was required to comply with requirements specified in Condition 2 of Schedule 7 and Condition 7 of Schedule 3. Condition 2 of Schedule 7 provides:

"2. The Proponent shall ensure that the management plans required under this approval are prepared in accordance with any relevant guidelines, and include:

(a) detailed baseline data;

(b) a description of:

- the relevant statutory requirements (including any relevant approval, licence or lease conditions);
- any relevant limits or performance measures/criteria;
- the specific performance indicators that are proposed to be used to judge the performance of, or guide the implementation of, the project or any management measures;

[
]

(c) a description of the measures that would be implemented to comply with the relevant statutory requirements, limits, or performance measures/criteria;

(d) a program to monitor and report on the:

- impacts and environmental performance of the project;

- effectiveness of any management measures (see (c) above);

[
]

(e) a contingency plan to manage any unpredicted impacts and their consequences;

(f) a program to investigate and implement ways to improve the environmental performance of the project over time;

(g) a protocol for managing and reporting any:

- incidents;
- complaints;
- non-compliances with statutory requirements; and
- exceedences of the impact assessment criteria and/or performance criteria; and

[
]

(h) a protocol for periodic review of the plan."

24 Condition 7 of Schedule 3 provides:

"7. In addition to the standard requirements for management plans (see condition 2 of schedule 7), the Proponent shall ensure that the management plans required under condition 6(f) above include:

(a) a program to collect sufficient baseline data for future Extraction Plans;

(b) a revised assessment of the potential environmental consequences of the Extraction Plan, incorporating any relevant information that has been obtained since this approval;

(c) a detailed description of the measures that would be implemented to remediate predicted impacts; and

(d) a contingency plan that expressly provides for adaptive management."

25 "Adaptive management" is defined in the definitions to include "monitoring subsidence impacts and subsidence effects and, based on the results, modifying the mining plan as mining proceeds to ensure that the effects, impacts and/or associated environmental consequences remain within predicted and designated ranges".

26 The terms "subsidence effects", "subsidence impacts", "environmental consequences" and "subsidence" are also defined in the definitions in the approval. "Subsidence effects" mean "deformation of the ground mass due to mining, including all mining-induced ground movements, including both vertical and horizontal displacement, tilt, strain and curvature". "Subsidence impacts" mean "physical changes to the ground and its surface caused by subsidence effects, including tensile and shear cracking of the rock mass, localised buckling of strata caused by valley closure and upsidence and surface depressions or troughs". "Environmental consequences" mean "the environmental consequences of subsidence impacts, including: damage to infrastructure, buildings and

residential dwellings; loss of surface flows to the subsurface; loss of standing pools; adverse water quality impacts; development of iron bacterial mats; cliff falls; rock falls; damage to Aboriginal heritage sites; impacts on aquatic ecology; ponding". Finally, "subsidence" means "the totality of subsidence effects, subsidence impacts and environmental consequences of subsidence impacts".

27 The applicant's first claim under this ground is that, in breach of s 75J(1) of the Act, the Minister failed to make a decision either to approve or disapprove the carrying out of the Project to the extent that it relates to the undermining of swamps 76, 77 and 92. The applicant claims "there is simply no decision about those matters. In short, there has been a constructive failure by the Minister to exercise her power of determination with respect to Condition 4 of Schedule 3, and she has thereby breached the Act. It is not a question of lack of finality or certainty but 'whether [an approval] has been given to the development which was the subject of the application': *GPT RE Limited v Belmorgan Property Development Pty Ltd* [2008] NSWCA 256 at [48]."

28 The applicant's second claim under this ground is that the Minister has, pursuant to Condition 4 of Schedule 3, purported to delegate the power to approve or disapprove the undermining of the swamps to the Director-General. The applicant submits that s 75J(1) of the Act reposes in the Minister alone the power to approve or disapprove the carrying out of the Project, as well as the power under s 75J(4) to impose conditions. The Director-General has no statutory power to approve or disapprove of the Project or impose conditions. The applicant claims that Condition 4 of Schedule 3 is beyond power as it creates a separate and unauthorised process for the Director-General to determine an aspect of the Project being the undermining of swamps 76, 77 and 92.

29 Alternatively, the applicant claims the Minister has purported to delegate to the Director-General the power to approve or disapprove the carrying out of the Project to the extent that it relates to the mining of swamps 76, 77 and 92. There is no instrument of delegation that satisfies the requirements of s 23 of the Act. Thus, the purported delegation by the Minister to the Director-General of the function of deciding whether or not to approve the Project to the extent that it relates to the undermining of swamps 76, 77 and 92 is invalid.

30 The Minister and the proponent submit that the applicant's argument "proceeds from a mischaracterisation, in legal terms, of Condition 4 of Sch 3. Contrary to the applicant's submission, the Minister has not declined to determine whether to approve or reject the application in so far as it relates to the undermining of swamps 76, 77 and 92. Nor has she delegated the determination of that approval (in a s 75J sense) to the Director-General." Rather, the Minister has given her approval to the Project including the undermining of swamps 76, 77 and 92.

31 The Minister's approval has been given subject to conditions. Those conditions require that various steps must be taken and/or criteria satisfied before particular activities can be undertaken. One condition is that before commencing second workings on any particular longwall in the mining area, the proponent must prepare and implement an Extraction Plan in respect of that mining operation, to

the satisfaction of the Director-General, according to the extensive criteria in Condition 6 of Schedule 3. The approval expressly contemplates that satisfaction of the conditions will be an iterative process involving the submission of strategies, plans and programs on a progressive basis: see Condition 12 of Schedule 2.

32 The Minister and the proponent submit that Condition 4 of Schedule 3 is a condition of the same kind. It requires that additional steps must be taken before the particular activity referred to in that condition (ie the undermining of swamps 76, 77 and 92) can be undertaken. Condition 4 operates in addition to the other conditions and performance measures prescribed in the approval.

33 I agree with the submissions of the Minister and the proponent. The Minister has approved the carrying out of the whole of the Project, including the undermining of swamps 76, 77 and 92. The Minister's approval states:

> "I approve the project application referred to in schedule 1, subject to the conditions in schedules 2 to 7".

34 Schedule 1 refers to the application number 08_0149 by the proponent for the Metropolitan Coal Project on land referred to in Appendix 1. Appendix 1 is the schedule of land. The lands described in Appendix 1 include the land on which swamps 76, 77 and 92 are located.

35 Condition 2 of Schedule 2 requires the proponent to carry out the Project generally in accordance with the environmental assessment, the preferred project report and the conditions of the approval. The Project described in the environmental assessment and the preferred project report includes the undermining of swamps 76, 77 and 92.

36 Condition 5 of Schedule 2 provides that:

> "The proponent may undertake mining operations in the mining area for up to 23 years from the date of this approval."

37 The "mining area" is defined in the definitions in the approval as "the area outlined with a solid blue line on the figure in Appendix 3". Appendix 3 is a map of the project layout. The area outlined in blue on the map includes within it the land on which swamps 76, 77 and 92 are located.

38 Accordingly, the Minister did in fact make a decision to approve the Project including that aspect relating to the undermining of swamps 76, 77 and 92.

39 The Minister did, however, impose conditions upon the approval of the Project, which regulate the carrying out of the approved project. Condition 4 of Schedule 3 is one such condition. It regulates the carrying out of that aspect of the Project which relates to the undermining of swamps 76, 77 and 92. The condition requires the proponent to do two things before carrying out that aspect of the approved project. The first is that the proponent must submit to the Director-General the information specified in

Condition 4 of Schedule 3 with "the relevant Extraction Plan". The relevant Extraction Plan would be the Extraction Plan for the second workings, being extraction of coal from the longwall panels, underneath swamps 76, 77 and 92. The proponent is required to submit that Extraction Plan to the satisfaction of the Director-General under Condition 6 of Schedule 3. The second is that the proponent must obtain the written approval of the Director-General. This approval is not whether or not the Project can include the undermining of swamps 76, 77 and 92, as that decision has already been made by the Minister in the affirmative. Rather, the approval is as to the proposed performance measures and indicators for the proposed undermining of swamps 76, 77 and 92. There are six reasons for construing the approval in this way.

40 First, as I have stated, the Minister's approval is stated to authorise mining operations in the mining area which includes swamps 76, 77 and 92.

41 Secondly, Condition 4 of Schedule 3 itself states that the information required to be submitted by the proponent under the condition is to be submitted with the relevant Extraction Plan. As I have noted, the relevant Extraction Plan is the Extraction Plan for the extraction of coal from longwalls underneath swamps 76, 77 and 92. If no approval had been given for mining operations in that part of the mining area in which swamps 76, 77 and 92 are located, there could be no Extraction Plan for those parts. The requirement to submit an Extraction Plan for second workings in those parts of the mining area reveals that the Minister has already given approval to undermining swamps 76, 77 and 92.

42 Thirdly, the relevant Extraction Plan with which the information specified in Condition 4 of Schedule 3 is to be submitted to the Director-General, is required to be prepared "to the satisfaction of the Director-General". This links the decision of the Director-General under Condition 6 of Schedule 3, as to whether he or she is satisfied with the relevant Extraction Plan, with the approval under Condition 4 of Schedule 3 for the undermining of swamps 76, 77 and 92 under that Extraction Plan.

43 Fourthly, Condition 1 of Schedule 3 requires the proponent to ensure that the Project does not cause any exceedences of the performance measures in Table 1. Table 1 has a specific entry for swamps 76, 77 and 92. The performance measures specified for those swamps are stated to be "set through Condition 4 below". This reveals two things. One is that the Minister approved as part of the Project the undermining of swamps 76, 77 and 92 as performance measures had been set for the carrying out of the Project underneath swamps 76, 77 and 92. The other is that the purpose of the proponent submitting the information specified in Condition 4 of Schedule 3 in seeking the approval of the Director-General under Condition 4 of Schedule 3, is to set the performance measures under Table 1 to Condition 1 of Schedule 3.

44 Fifthly, Condition 4 of Schedule 3 requires the proponent, in "seeking" the Director-General's approval under the condition, only to submit the information specified by Condition 4 of Schedule 3. The Director-General's approval is linked to the information submitted. Evidently, the approval intended is

that the Director-General is satisfied with the environmental assessment, the proposed performance measures and indicators for the swamps, and the measures to manage potential environmental consequences of the Extraction Plan on the swamps and to comply with the proposed performance measures and indicators. The Director-General's approval of these matters sets the performance measures for the purposes of Condition 1 of Schedule 3. By way of contrast, the condition does not require the proponent to submit an application for approval under s 75E of the Act to carry out the aspect of the Project relating to the undermining of swamps 76, 77 and 92 together with any environmental assessment required under s 75F of the Act.

45 Sixthly, Condition 4 of Schedule 3 must be read in context with the other conditions of the approval. This is evident from the cross reference in the condition to Condition 6 of Schedule 3 and the requirement to submit an Extraction Plan and a Biodiversity Management Plan. The preparation of those plans is also governed by other conditions, such as Condition 7 of Schedule 3 and Condition 2 of Schedule 7. There are also other conditions regulating the carrying out of the Project intended to prevent, minimise and/or offset adverse environmental impacts. Hence, even without the information required by Condition 4 of Schedule 3, the carrying out of mining operations under swamps 76, 77 and 92 would be regulated by conditions to prevent, minimise and/or offset adverse environmental impacts.

46 Accordingly, I reject the applicant's claims under ground 1 that the Minister made no decision to approve or purported to delegate the power under s 75J(1) to approve the Project to the extent it related to swamps 76, 77 and 92.

Ground 2: s 47(2) of SWCM Act

47 Section 47 of the SWCM Act provides:

> "(1) A public agency may not, in relation to land within a special area, exercise functions other than functions under this Act unless notice is first given to the SCA [Sydney Catchment Authority].
>
> (2) On receiving a notice referred to in this section, the SCA may make such representations to the public agency as the SCA thinks fit.
>
> (3) A public agency may not exercise functions contrary to any such representations unless, before the exercise of the functions, not less than 28 days' notice has been given to the SCA of the functions intended to be exercised.
>
> (4) If a public agency has functions with regard to a development application or an application for a complying development certificate relating to land within a special area to which an environmental planning instrument applies, the forwarding of the application or a copy of it to the SCA, whether by the public agency or the applicant, is taken also to be the giving of notice for the purposes of this section.
>
> (5) This section does not apply to a public agency's functions with regard to the making of an environmental planning instrument in relation to land within a special area.

(6) This section does not apply to a public agency's functions with regard to a development application, if an environmental planning instrument applying in the special area prevents the development application from being determined by the granting of consent without the concurrence of the SCA."

48 The applicant claims that sub-ss (1) and (3) provide for the giving of two, different notices. The first notice under sub-s (1) must be given in all cases whenever a public agency, in relation to land within a special area, proposes to exercise functions other than functions under the SWCM Act. In this case, the Minister proposed to exercise the function under s 75(J)(1) of the Act of approving or disapproving an application to carry out a project in a special area (the Woronora Catchment area). Hence, notice was required to be given under sub-s (1) to Sydney Catchment Authority ("SCA").

49 The applicant claims that a public agency is also required to give a second notice under sub-s (3) if, after receipt and consideration of any representations made by SCA in response to the first notice given under sub-s (1), the functions intended to be exercised by the public agency would be contrary to the representations of SCA. The second notice would be required to be given 28 days before the exercise of the functions contrary to the representations of SCA. In this case, the applicant submits, the Minister approved the Project under s 75J(1) of the Act on conditions which were contrary to the representations of SCA and hence the Minister was required to have given 28 days' notice to SCA before approving the Project, ie 28 days' notice before 22 June 2009. The applicant claims the Minister did not give any such second notice, or if notice could be said to be given, it was not given 28 days before 22 June 2009. Either way, the applicant claims, the Minister breached s 47(3) of the SWCM Act. Such a breach was intended by the legislature to have the consequence of invalidating the approval which was the result of the exercise of the function under s 75J(1) of the Act by the Minister.

50 The Minister and the proponent contest the applicant's construction of s 47 of the SWCM Act, submitting instead that only one notice is required to be given under sub-s (1). They submit that sub-s (3) fixes the time period for the notice given under sub-s (1) in the circumstance stated in sub-s (3), namely where the function intended to be exercised by the public agency will be contrary to any representations made by SCA.

51 In this case, the Minister and the proponent submit, notice was given to SCA by the Minister under sub-s (1) of the intended exercise of the function under s 75J(1) of the Act to approve or disapprove of the carrying out of the Project in a special area. SCA made representations in response to the notice given to it. A period greater than 28 days elapsed after notice was given before the Minister exercised the function under s 75J(1) of the Act to approve the Project. Hence, the Minister and the proponent claim, there was compliance with both s 47(1) and (3) of the SWCM Act.

52 As to the manner of giving notice under s 47 of the SWCM Act, the proponent relies on sub-s (4) so that the forwarding to SCA of a copy of the application for approval of the Project was taken to be the giving of notice for the purposes of s 47. The applicant contests the applicability of sub-s (4) to a Part

3A application. In terms, sub-s (4) only applies to a "development application or an application for a complying development certificate", which terms refer to applications under Part 4 of the Act not Part 3A. Alternatively, the proponent and the Minister rely upon cl 27 of the *Sydney Water Catchment Management Regulation* 2008 ("SWCM Regulation") which prescribes the manner in which notice is to be given under s 47(1) of the SWCM Act.

53 I agree with the Minister's and the proponent's construction of s 47 of the SWCM Act that the notice referred to in this section and which is required to be given is the notice under sub-s (1). No separate, second notice is required to be given under sub-s (3). The notice referred to in sub-s (3) is the notice given under sub-s (1). The purpose of sub-s (3) is to fix a minimum period of time after the giving of the notice under sub-s (1), which must have elapsed before the public agency exercises the function about which notice has been given, if the function is to be exercised contrary to the representations of SCA made in response to the notice. This construction of ss 47(1) and (3) is clear from:

(a) the natural and proper meaning of the words of sub-ss (1) and (3);

(b) the repeated use of the phrase "a notice referred to in this section" in sub-ss (2) and (4), which refers to a singular "notice" in the "section" rather than "notices in the section" or "notice in sub-s (1)";

(c) the omission of a subsection after sub-s (3) equivalent to sub-s (2) permitting SCA to make further representations to endeavour to dissuade the public agency from exercising its functions contrary to the earlier representations by SCA;

(d) the fact that, for only one type of functions, namely functions with regard to a development application or an application for a complying development certificate relating to land within a special area to which an environmental planning instrument applies, the legislature has provided that the forwarding of the application or a copy of it to SCA is "taken also to be the giving of notice for the purposes of this section", which operates logically if only one notice is required under sub-s (1), but not if a further notice were to be required, as the applicant claims, under sub-s (3) of the intended exercise of the function contrary to the earlier representation; and

(e) the fact that the SWCM Regulation prescribes the manner, content and timing of giving notice "for the purposes of s 47(1) of the Act" but makes no prescription for a notice under sub-s (3) where, if the applicant were to be correct, prescription of the content of the notice would be even more important.

54 Having concluded that only one notice was required to be given by the Minister to SCA, and that notice was under s 47(1), the next step in the analysis is to determine whether the notice was in fact given in

compliance with s 47(1) and whether the Minister's exercise of the function under s 75J(1) of the Act was after expiry of the time period of 28 days required by sub-s (3).

55 The function to be exercised in this case was to approve or disapprove of the carrying out of a project under s 75J(1) of the Act. I reject the proponent's argument that sub-s (4) applies to that function. The words used in sub-s (4) are precise and clear. The words "development application" and "application for a complying development certificate" clearly refer to those particular applications under Part 4 of the Act. They bear the meaning they have under that Act. Neither includes an application for an approval under Part 3A of the Act. Subsection (6) corroborates this conclusion. The reference in sub-s (6) to a "development application" is also a reference to a development application under Part 4 and does not include an application under Part 3A of the Act.

56 Hence, the notice the Minister was required to give was one that complied with cl 27 of the SWCM Regulation. Clause 27 provides:

> "Notice given to the SCA for the purposes of section 47(1) of the Act:
>
> (a) must be in writing, and
>
> (b) must be served on the SCA by post addressed to the SCA or by lodging it at an office of the SCA, and
>
> (c) must contain a full description of the functions proposed to be exercised and a statement of the objectives of the exercise of those functions, and
>
> (d) must give at least 28 days' notice of the commencement of the exercise of those functions."

57 The proponent relies on two letters from the Department of Planning to SCA as giving notice for the purposes of s 47(1) of the SWCM Act, the first letter dated 2 September 2008 and the second letter dated 20 October 2008. The Minister, however, relies only on the letter of 20 October 2008. Neither letter expressly states that it is a notice under s 47(1) of the SWCM Act. However, the proponent and the Minister submit that the letters nevertheless satisfy each of the requirements in cl 27 of the SWCM Act. Clause 27, or for that matter s 47(1), does not require that the notice state expressly that it is a notice under s 47(1) of the SWCM Act.

58 The first letter of 2 September 2008, so far as is relevant, is in these terms:

> "**Draft Environmental Assessment**
> **Metropolitan Coal Project**
> **Application Number: 08_0149**
>
> Helensburgh Coal Pty Ltd (Helensburgh) has lodged a project application with the Department for the proposed continuation of underground coal mining at the existing Metropolitan Coal Mine.

The project is classified as a Major Project under Part 3A of the *Environmental Planning and Assessment Act 1979* and the Minister for Planning is the approval authority for the application.

Helensburgh is in the process of submitting the Environmental Assessment (EA) for the project to the Department of Planning. Prior to the public exhibition of the EA, the Department is required to determine whether it adequately addresses the Director-General's environmental assessment requirements.

I have asked Helensburgh to supply you with copies of the EA directly. I would appreciate it if you would review the EA and advise the Department by Monday 29 September 2008 whether you believe there are any significant issues which have not been adequately addressed by Helensburgh in its EA.

Please note that a full assessment of the EA is not required at this stage of the assessment process as there will be an opportunity to make a full submission on the project during the public exhibition of the final EA."

59 By reference to the requirements in cl 27 of the SWCM Regulation, the proponent submits that the letter:

(a) was in writing;

(b) was served on SCA by post addressed to SCA;

(c) contained a description of the function proposed to be exercised by the Minister, namely, an application under Part 3A of the Act for approval to carry out the Metropolitan Coal Project, being the proposed continuation of underground coal mining of the existing Metropolitan Coal Mine, and the Minister was to be the approval authority for the application; and

(d) was given to SCA at least 28 days before the commencement of the exercise of the function, which occurred on 22 June 2009, when the Minister approved the Project.

60 As foreshadowed in the letter, the proponent did forward the environmental assessment accompanying the application under Part 3A to SCA shortly after the letter was sent. SCA replied to the Department of Planning's letter of 2 September 2008 on 29 September 2008. SCA stated it had completed its review of the environmental assessment to determine its adequateness. SCA summarised its significant issues of concern and commented on the adequacy of the environmental assessment. SCA noted that it would have an opportunity to make a full submission on the Project during the final exhibition of the environmental assessment.

61 The second letter to SCA of 20 October 2008, so far is relevant, is in these terms:

"**Metropolitan Coal Project**
Application Number: 08_0149

Helensburgh Coal Pty Ltd (Helensburgh) proposes to continue underground coal mining at the existing Metropolitan Coal Mine extracting up to 3.2 million tonnes of run-of-mine coal a year from the Bulli coal seam for a period of 23 years.

The project is classified as a "Major Project" under *State Environmental Planning Policy (Major Projects)* 2005 and will therefore be assessed and determined by the Minister for Planning under Part 3A of the *Environmental Planning and Assessment Act 1979* (EP&A Act).

The Department will be publicly exhibiting the environmental assessment for the project until Monday 24 November 2008. I have asked Helensburgh to supply you with 4 hard copies and 5 CD-ROM copies of the EA directly.

You are invited to make a written submission on the proposal, including any recommended conditions of approval by Monday 24 November 2008. A copy of the notice appearing in the Sydney Morning Herald and Illawarra Mercury (Wednesday 22 October 2008) advising of the exhibition and how you can make a submission is also attached for your information."

62 Attached to the letter was a notice, so far as is relevant, in these terms:

"MAJOR PROJECT APPLICATION
Metropolitan Coal Project
Application number 08_0149
Location Helensburgh, approximately 30 kms north of Wollongong
Proponent Helensburgh Coal Pty Ltd
Council area Wollongong

Description of the Project
The Metropolitan Coal Project, which includes:
- augmenting, upgrading and using the existing infrastructure at the mine;
- extracting up to 3.2 million tonnes of run-of-mine coal a year from the Bulli coal seam for a period of 23 years using longwall mining methods;
- processing run-of-mine coal at the mine;
- transporting product coal and coal reject from the mine by road and/or rail;
- disposing of coal rejects at the mine; and
- rehabilitating the site.

Approval Authority
Minister for Planning under Part 3A of the *Environmental Planning and Assessment Act 1979* (EP&A Act)

Exhibition
The Environmental Assessment (EA) for the project will be made publicly available until **Monday 24 November 2008**. During this period you may:
- view a copy of the EA at:
  - **Department of Planning**, Information Centre, 23-33 Bridge Street, Sydney;
  - **Wollongong City Council**, 41 Burelli Street, Wollongong;
  - **Nature Conservation Council**, Level 2, 301 Kent Street, Sydney;
  - **Helensburgh Pty Ltd**, Metropolitan Colliery, off Parkes Street, Helensburgh.
- download a copy of the EA from www.peabodyenergy.com.au/nsw/metropolitan-mine.html; or
- ask the Department of Planning (1300 305 695) to send you a CD-ROM copy.

Submissions
You are invited to make a written submission on the project. Your submission should include:
- your name and address;
- the project application number (08_0149);
- a statement on whether you support or object to the project; and
- the reasons why you support or object to the project.

Your submission must reach the Department by **Monday 24 November 2008**, and should be:

- posted to: Major Development Assessment, Department of Planning, GPO Box 39, SYDNEY NSW 2001;
- faxed to: (02) 9228 6466; or
- emailed to: plan_comment@planning.nsw.gov.au".

63 The Minister and the proponent submit, by reference to the requirements in cl 27 of the SWCM Regulation, that this letter and the attached notice:

(a) were in writing;

(b) were served on SCA by post addressed to SCA;

(c) contained a description of the functions proposed to be exercised, namely, an application under Part 3A of the Act to carry out the Metropolitan Coal Project, which was described in the letter and in more detail in the attached notice, and which would be assessed and determined by the Minister as the approval authority under Part 3A; and

(d) was given to SCA at least 28 days before the commencement of the exercise of the function, namely 22 June 2009 when the Minister approved the Project.

64 SCA responded to the Department of Planning's letter of 20 October 2008 by letter dated 24 December 2008 attaching a detailed written submission on the Project and reviewing the environmental assessment. SCA requested the project approval include a range of conditions to prevent or minimise impacts upon Woronora Dam, Woronora Storage, and other SCA infrastructure in the catchments, including Waratah Rivulet.

65 The applicant submits that these letters from the Department of Planning to SCA do not comply with the requirements in paragraphs (c) and (d) of cl 27 of the SWCM Regulation.

66 As to paragraph (c) of cl 27 of the SWCM Regulation, the applicant submits the letters did not contain a "full" description, did not state how the function was intended to be exercised (such as that approval was intended to be granted and the terms of the approval) and did not contain a statement of the objectives of the exercise of the function. As to paragraph (d) of cl 27 of the SWCM Regulation, the applicant submits that the letters did not contain a statement giving notice of the date of commencement of the exercise of the function, which date would need to be at least 28 days after the date of the letter.

67 Dealing first with the applicant's submission as to paragraph (d) of cl 27 of the SWCM Regulation, on a proper construction of cl 27, the notice is not required to contain a statement specifying the date of commencement of the exercise of the function about which notice is being given. The only matters which the notice is "required to contain" are prescribed in paragraph (c) of cl 27. Paragraph (d) supports the time requirement in s 47(3) of the SWCM Act. Paragraph (d) of cl 27 and sub-s (3) of s 47

require the public agency that proposes to exercise the function about which notice is required to be given under s 47(1), to give the notice to SCA at least 28 days before the commencement of the exercise of the function. Paragraph (d) does not require the notice itself to specify the date upon which the public authority will commence to exercise the function.

68 Turning now to the applicant's submission as to paragraph (c) of cl 27 of the SWCM Regulation, the first point to be made is that the content requirements stated in paragraph (c) are drawn in general terms because they apply to a vast range of functions that may be exercised by public agencies. What will be required to satisfy the content requirements in paragraph (c) will depend upon the particular function in question. Where, as here, the function is to determine an application for approval of a project, a description will be "full" in the sense that it is complete as is necessary to describe the function proposed to be exercised if it identifies the statutory function by which approval can be granted, the public agency with power to exercise the function, the particular application seeking approval and the particular project for which approval is sought. Such a description will also be a sufficient statement of the objectives of the function. The objectives of the function of determining an application for approval of a project are implicit: they are to permit the project to be carried out.

69 In this case, the Department of Planning's letter of 20 October 2008 contained a description of the function proposed to be exercised which properly can be characterised as "full" having regard to the function in question. The function is the determination under Part 3A of the Act by the Minister for Planning as the relevant approval authority of a specified application (Application No. 08_0149) to carry out a specified project (the Metropolitan Coal Project) described in the first paragraph of the letter and in the "Description of the Project" in the attached notice, and the environmental assessment which the Department of Planning had arranged to be forwarded to SCA by the applicant. Having regard to this function, no further description of the function was required.

70 Such a description is also a statement of the objectives of the exercise of the function. The objective of the function under Part 3A to determine an application to carry out a project is to determine whether the project should be approved to be carried out. The objective is implicit in the description of the function.

71 It was not necessary, contrary to the applicant's submissions, to state how the function was intended to be exercised. The language of a "description of the functions proposed to be exercised" or a "statement of the objectives of the exercise of those functions" does not encompass or require a description or statement of how the function is intended to be exercised.

72 Furthermore, the purpose of giving notice under s 47(1) of the SWCM Act is to give SCA an opportunity to make representations to influence the public agency as to how it ought, in SCA's opinion, exercise the functions in relation to land within a special area for which SCA has responsibility. To require the public agency to give notice stating how it intends to exercise the power

will result in the notice being given only after the public agency has determined how it intends to exercise the power. This would deny SCA the opportunity to make representations to the public agency at a time prior to, and when there is the best chance to influence, the forming of the intention.

73 For these reasons, the Department of Planning's letter of 20 October 2008 sufficed to give notice to SCA for the purposes of s 47(1) of the SWCM Act.

74 As the Minister did not exercise the function under s 75J(1) of the Act about which notice had been given, until 22 June 2009, far in excess of 28 days after notice was given to SCA on 20 October 2008, s 47(3) of the SWCM Act was also complied with. Hence, it is not necessary to determine whether the Minister's exercise of the function was contrary to the representations of SCA. The undertaking of that task is only necessary if less than 28 days' notice had been given before the Minister exercised the function under s 75J(1) of the Act.

75 The applicant's challenge to the approval on ground 2 is, therefore, rejected.

Ground 3: Clause 12 of Mining SEPP

76 The applicant submits that the Minister failed to comply with cl 12 of the Mining SEPP in determining the application for approval to carry out the Project. Clause 12 provides:

> "Before determining an application for consent for development for the purposes of mining, petroleum production or extractive industry, the consent authority must:
>
> (a) consider:
>
> (i) the existing uses and approved uses of land in the vicinity of the development, and
>
> (ii) whether or not the development is likely to have a significant impact on the uses that, in the opinion of the consent authority having regard to land use trends, are likely to be the preferred uses of land in the vicinity of the development, and
>
> (iii) any ways in which the development may be incompatible with any of those existing, approved or likely preferred uses, and
>
> (b) evaluate and compare the respective public benefits of the development and the land uses referred to in paragraph (a) (i) and (ii), and
>
> (c) evaluate any measures proposed by the applicant to avoid or minimise any incompatibility, as referred to in paragraph (a) (iii)."

77 The determination of this ground of challenge requires three questions to be answered. The first question is whether SEPPs, including the Mining SEPP, apply at the time of the Minister exercising the power under s 75J(1) to approve the project. If not, the ground fails. If so, the second question is whether cl 12 of the Mining SEPP applies to the Minister determining an application for approval of a

project under Part 3A of the Act. If not, the ground fails. If so, the third question is whether the applicant has proven that the Minister failed to comply with each of the requirements in cl 12. If not, the ground fails. If so, however, the ground would be established.

78 To answer the first question it is necessary to turn to s 75R of the Act which specifies which environmental planning instruments apply and, if they apply, when they apply. Section 75R(2) and (3) provides:

> "(2) Part 3 and State environmental planning policies apply to:
>
> (a) the declaration of a project as a project to which this Part applies or as a critical infrastructure project, and
>
> (b) the carrying out of a project, but (in the case of a critical infrastructure project) only to the extent that the provisions of such a policy expressly provide that they apply to and in respect of the particular project.
>
> (3) Environmental planning instruments (other than State environmental planning policies) do not apply to or in respect of an approved project."

79 An "approved project" is a defined term. Section 75A states that, in Part 3A, "'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."

80 From these provisions it can be seen that State Environmental Planning Policies ("SEPPs") apply only in the circumstances specified under Part 3A of the Act. First, SEPPs apply to the declaration of a project as a project to which Part 3A applies or as a critical infrastructure project: see s 75R(2)(a) and also ss 75B and 75C of the Act.

81 Secondly, SEPPs apply to the approved project itself, that is the project to the extent that it is approved by the Minister: see s 75R(3) and definition of "approved project" in s 75A. The concept of an approved project necessarily has a temporal component, by reference to the date on which the project is approved. SEPPs only apply to the project on and from the date of approval when the project acquires the status of being an approved project.

82 Thirdly, SEPPs apply to the carrying out of a project (s 75R(2)). It is to be noted that the word "project" is used and not "approved project". This means that SEPPs apply to the carrying out of a project, not only after it is approved, but also before it is approved (at which time the carrying out of the project may be in breach of the Act). But the important point for present purposes is that SEPPs apply to the conduct of "carrying out" the project.

83 There are a number of steps or stages of the processes relating to the approval of a project under Part 3A of the Act that are not specified in s 75R. Of relevance to this case, the omissions include: the application for approval of a project (under s 75E); the process for specifying environmental

assessment requirements for a project (under s 75F); the process for environmental assessment and public consultation about the project (under s 75H); the Director-General's environmental assessment report on the project to the Minister (under s 75I); and the process of the Minister deciding whether or not to approve the project (under s 75J).

84 The last mentioned omission is critical in this case. On their terms, s 75R(2) and (3) do not make SEPPs apply at the stage of the Minister deciding whether or not to approve a project under s 75J(1). Hence, any prohibition on the carrying out of a project or any procedural requirement contained in a SEPP that matters be considered in deciding whether or not to approve a project, would not apply to the Minister's exercise of power in s 75J(1) because the SEPP does not apply at that stage. Only after the Minister approves a project, would the SEPP apply, first, to the approved project and, secondly, to the carrying out of the project.

85 Thus, if a SEPP prohibited the carrying out of a project and if the Minister approved the carrying out of the project, thereupon the SEPP would apply to the approved project and prohibit the carrying out of the project. However, the SEPP would not apply to the Minister's earlier exercise of the power to approve the project.

86 Such a prohibition in a SEPP on the carrying out of a project could be overcome by at least two means. First, the Minister may exercise the special power in s 75R(3A) of the Act to amend the SEPP to authorise the carrying out of the approved project notwithstanding the prohibition in the SEPP. Section 75R(3A) provides:

> "(3A) The Minister may, by order published on the NSW legislation website, amend an environmental planning instrument to authorise the carrying out of any of the following development (or to remove or modify any provisions of the instrument that purport to prohibit or restrict the carrying out of any of the following development):
>
> (a) development that is an approved project,
>
> (b) development that is a project for which a concept plan has been approved (whether or not approval for carrying out the project or any part of the project is subject to this Part)."

87 Secondly, using the general plan-making power under Part 3 of the Act, the Minister could request the Governor to make an environmental planning instrument, such as another SEPP, amending the SEPP to remove the prohibition or otherwise to authorise the carrying out of the approved project.

88 This construction of s 75R of the Act differs from that held by Biscoe J in *Hill Top Residents Action Group Inc v Minister for Planning* [2009] NSWLEC 185, a decision only delivered at the end of the first day of hearing in the present case. Biscoe J held "[t]he preferable construction of s 75R … is that it does provide that State environmental planning policies apply to a Ministerial approval". Three reasons were given, one in each of paragraphs 65, 66 and 67 of the judgment:

> "65 In my opinion, the legislature did not intend to empower the Minister to "approve" unlawful conduct. That is, to approve the "carrying out" of a project that cannot lawfully be carried out because it is prohibited by a State environmental planning policy. In the context of Part 4, a consent authority has no power to grant development consent to development that is prohibited and any such consent is invalid: *Chambers v Maclean Shire Council* [2003] NSWCA 100, 57 NSWLR 152 at [117] per Ipp JA (Sheller and Giles JJA agreeing); *Conservation of North Ocean Shores Inc v Byron Shire Council* [2009] NSWLEC 69, 167 LGERA 52 at [14] per Preston CJ. The same principle applies, in my view, in Part 3A. There is nothing in Part 4 or in Part 3A that expressly says this. In my view, it is implicit in the scheme of the *EPA Act* itself, under which s 31 authorises environmental planning instruments to provide that development specified therein is prohibited. The power of the Minister to approve a project under s 75J(1) should be construed as impliedly subject to that limitation. It is unnecessary for s 75R or any other provision of Part 3A to spell it out expressly.
>
> 66 The preferable construction of s 75R, in my view, is that it does provide that State environmental planning policies apply to a Ministerial approval. Section 75R(3) provides in effect that State environmental planning polices (but not other environmental planning instruments) apply "to or in respect of an approved Project". The words "in respect of" are of wide import. The composite phrase "to or in respect of an approved project" in s 75R(3) takes its meaning, I think, from the meaning attributed to the same phrase in s 75R(1), where it includes "any approval" under Part 3A for the project (a meaning which should prevail over the definition of the shorter phrase "approved project" in s 75A).
>
> 67 The second respondent's construction leads to the position that the carrying out of the Project would be prohibited under s 75R(2)(b) but the Minister would be authorised to grant approval unconstrained by the prohibition. All that would mean is that the Court could grant injunctive relief against the second respondent carrying out the Project but could not declare the approval void. The notion of a valid but inoperative approval is absurd, to my mind, suggesting that it is unlikely to have been what the legislature intended. Indeed, the whole statutory approval process in such a situation seems absurd on the second respondent's construction. Surely the legislature did not intend a process whereby a proponent applies for the Minister's approval and submits an environmental assessment "to carry out" a project (ss 75E, 75H), the Director-General gives 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), and the Minister approves the "carrying out" of the Project (s 75J) when, at every step of the process, the Project cannot lawfully be carried out because it is prohibited. Where the language of a statute, in its ordinary and grammatical construction, leads to absurdity that can hardly have been intended, a construction may be put upon it which modifies the meaning of the words or even the structure of a sentence: *Minister for Immigration and Citizenship v SZJGV* [2009] HCA 40 at [9]."

89 The applicant submitted that I should follow this decision, not only because it was correct but in any event for reasons of judicial comity. The Minister and the proponent submit to the contrary, saying I should not follow the decision as it is wrong.

90 Judicial comity usually dictates that a judge of first instance should follow the decision of another judge of first instance unless convinced that it is wrong: see, for example, *Michael Realty Pty Ltd v Carr* [1975] 2 NSWLR 812 at 820; *Pancho Properties Pty Ltd v Wingecarribee Shire Council* [1999] NSWLEC 245; (1999) 110 LGERA 352 at [128]-[129]; *Meriton Apartments Pty Ltd v Sydney Water Corporation* [2004] NSWLEC 699; (2004) 138 LGERA 383 at [29]; and *Cracknell and Lonergan Pty Ltd v Council of the City of Sydney* [2007] NSWLEC 392; (2007) 155 LGERA 291 at [57]. However,

this does not apply where the decision is obiter dictum. Obiter dictum need not be followed by another judge at first instance even for reasons of judicial comity.

91 The decision in *Hill Top* that the SEPP in that case applied to, but precluded, the exercise of the power under s 75J(1) to approve the project in question cannot be characterised as obiter dictum. The applicant in that case contended that the approval granted by the Minister was void because the Minister had no power to approve the project that was prohibited by the SEPP, as well as that the carrying out of the approved project was prohibited. The second respondent (the proponent of the project) joined issue with the applicant's contention that the approval was void by reason of the SEPP precluding the exercise of the power to approve the project. The second respondent contended that the SEPP did not apply to the approval of a project but rather only applied to the stages of declaration of a project as a project to which Part 3A applies and, later, the carrying out of the project. Accordingly, the decision in *Hill Top* resolving this contested issue, of the applicability of the SEPP to the exercise of the Minister's power to approve the carrying out of the project in question that was prohibited by the SEPP, was part of the ratio decidendi.

92 I, therefore, need to consider whether judicial comity requires me to follow the decision. With regret, I am convinced that the decision on this point is wrong and that I should depart from it. My reasons are as follows.

93 First, as I have explained above, the text of s 75R is clear in expressly and exhaustively specifying the circumstances in which, and the times at which, SEPPs will apply. SEPPs do not apply to any circumstance or at any time not expressly specified in s 75R of the Act. Hence, SEPPs do not apply to the exercise of the power under s 75J to approve or disapprove a project.

94 Secondly, with respect to the reason given in paragraph 65 of the *Hill Top* decision, I do not consider that there is implicit in the scheme of the Act a limitation on any person with power under the Act to approve a development, project or activity not to exercise that power to approve a development, project or activity that is prohibited. If any such limitation on the exercise of such a power exists, it derives from the statutory provisions governing the exercise of the power and is not implicit in the statutory scheme.

95 Under Part 4 of the Act, a consent authority is precluded from granting development consent to development that is prohibited. That preclusion is because the statute expressly provides that a development application seeking development consent to carry out development may only be made for development that an environmental planning instrument provides may not be carried out except with development consent. The provisions regulating the making, assessing and determining of a development application are contained in Division 2 of Part 4 of the Act. Section 77, in Division 2, pronounces that this Division "applies to development that may not be carried out except with development consent". Hence, if an environmental planning instrument provides that specified

development is prohibited on land to which the provision applies or development cannot be carried out on land with or without development consent, Division 2 has no application to such development. Hence, a person cannot apply under Division 2, by means of making a development application, to a consent authority for consent to carry out such development. A public authority can only be a "consent authority" as defined in s 4(1) of the Act in relation to a development application (or application for a complying development certificate) that is made under Division 2. The power of a consent authority under s 80(1) of the Act is to determine a development application made under Division 2.

96 Hence, the lack of power to grant development consent to development that is prohibited is a result of the express statutory provisions in Division 2 of Part 4 of the Act, not by implication from the statutory scheme.

97 Under Part 3A of the Act, the express provisions of the Part regulate the making, assessing and determining of applications for approval of a project under Part 3A. None of these provisions expressly refer to or operate on the basis of a threefold classification of projects as not needing approval, needing approval or being prohibited, in contrast to the provisions of Part 4 which do refer to and operate on the basis of such a threefold classification of development. Indeed, the provisions of s 75R(1), (2) and (3) operate to exclude other provisions of the Act in Parts 3, 4 and 5 and environmental planning instruments under Part 3, except to the extent that s 75R specifies that they are to apply.

98 Hence, any prohibition in an environmental planning instrument will only apply for the purposes of Part 3A if, and to the extent that, s 75R specifies that the environmental planning instrument is to apply. If the environmental planning instrument does not apply to the power under s 75J(1) to approve or disapprove a project, the Minister may still take the provisions of the environmental planning instrument into account under s 75J(3) of the Act, but would not be required to do so.

99 In the face of the express provisions of Part 3A, there is no room for implication of a limitation on the exercise of the Minister's power under s 75J(1) to approve or disapprove the carrying out of a project under Part 3A.

100 Thirdly, in relation to the reason given in paragraph 66 of the *Hill Top* decision, I do not agree that s 75R(3) has the effect of making SEPPs apply to the exercise of power under s 75J(1) to approve or disapprove the carrying out of a project. In terms, s 75R(3) states that it is the "approved project" to which environmental planning instruments (other than State environmental planning policies) do not apply. The inverse is that SEPPs do apply to an "approved project". "Approved project" is a defined term in Part 3A and means the project to the extent that it is approved by the Minister: see s 75A. In terms, therefore, s 75R(3) does not make SEPPs apply to a project before it is approved by the Minister, only afterwards.

101 Furthermore, s 75R(3) applies SEPPs to the project that is approved, not to the process of approving the project, including the exercise of power of s 75J(1) to approve the carrying out of the project.

102 I do not agree that the term "approved project" in s 75R(3) bears the extended meaning it is given in s 75R(1). Subsection 75R(1) provides:

> "(1) Part 4 and Part 5 do not, except as provided by this Part, apply to or in respect of an approved project (including the declaration of the project as a project to which this Part applies and any approval or other requirement under this Part for the project)."

103 The legislative draftsperson did not include in sub-s (3) the words in brackets inserted after "approved project" in sub-s (1). The words in brackets cause the term "approved project" to include not only the project as approved, but also things that are not the project itself but relate to the process of approval of the project, such as the declaration that the project is a project to which Part 3A applies and the approval of the project by the Minister. The extension of the meaning of "approved project" in sub-s (1) beyond the definition of "approved project" in s 75A must be taken to be deliberate and intended to extend the exclusory operation of sub-s (1) in respect of Part 4 and Part 5 of the Act. Similarly, the non-inclusion of the words in brackets found in sub-s (1) in sub-s (3) should also be seen to be deliberate and intended to allow the term "approved project" to operate only as defined in s 75A and not have the extended meaning found in sub-s (1). Accordingly, on this construction, s 75R(3) does not cause SEPPs to apply to any of the things referred to in the words in brackets in sub-s (1), including to the approval of the project by the Minister.

104 I also do not agree that the presence of the words "in respect of" in sub-s (3) alters this conclusion. True it is that the words "in respect of" are of wide import but, as noted by a Full Court of the Federal Court of Australia in *Butler v Johnston* (1984) 4 FCR 83 at 87, "their exact width will depend upon the context in which they appear". Furthermore, whatever be the width conveyed by the words "in respect of" in their context, the two subject matters the subject of the relationship established by the words must remain. In this case, the relationship established by the words "in respect of" is between two specified subject matters: "environmental planning instruments (other than State environmental planning policies)" on the one hand and "approved project" on the other hand. It is not permissible in interpreting the words "in respect of" to change one of the subject matters of the relationship established by the words. Hence, it is not permissible to substitute for the "approved project", being one of the subject matters of the relationship, "the exercise of the power to approve a project" under s 75J(1). To say that a SEPP applies to or in respect of the exercise of power to approve a project under s 75J(1) is quite different to saying, as s 75R(3) does say, that SEPPs apply to or in respect of an approved project, that is a project that is approved by the Minister under s 75J(1).

105 Fourthly, with respect to the reason in paragraph 67 of the *Hill Top* decision, having regard to the provisions of Part 3A of the Act and their purpose, I do not agree that the notion of a valid but inoperative approval under Part 3A is absurd. If the provisions of Part 3A, and in particular s 75R, have

the operation and effect I have said, there is no limitation on the Minister exercising the power under s 75J(1) to approve a project, regardless of whether the carrying out of the approved project would be prohibited by a SEPP which applies to the approved project and the carrying out of the project. It cannot be absurd to do that which the statute allows. As Cole JA observed in *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* (1996) 91 LGERA 31 at 75-76:

> "It is not unreasonable to do that which the statute permits in performance of a statutory power or obligation and for purposes contemplated or permitted by the statute."

106 Furthermore, any prohibition in a SEPP on the carrying out of the approved project is capable of being overcome. The Minister can exercise the special power under s 75R(3A) of the Act to amend the SEPP containing the prohibition to remove the prohibition or otherwise authorise the carrying out of the approved project. Exercise of this special power overcomes the problem (or the putative absurdity) of a valid but inoperative approval; upon exercise of the power the approval becomes operative in the sense that the approved project may be carried out lawfully under the approval. The Minister could also recommend to the Governor the making of another environmental planning instrument under Part 3 of the Act, such as a new SEPP, removing the prohibition in the existing SEPP or authorising the carrying out of the approved project regardless of the prohibition. This too would enable the approval to become operative.

107 These steps to overcome the prohibition in a SEPP need not take a long time. If the proponent, the Director-General and the Minister are aware that there is a prohibition in the SEPP which would apply to the approved project, steps could be taken to overcome the prohibition simultaneously with, or shortly after, the exercise of the power under s 75J(1) to approve the carrying out of the project. Such steps were not taken in the *Hill Top* case, no doubt because the project was not considered to be prohibited before the Court determined that it was. However, if they had known, such steps could have been taken.

108 For these reasons, I am not convinced that I should follow the decision in *Hill Top*. Instead, I am of the view that SEPPs did not apply to or in respect of the exercise of power under s 75J(1) to approve or disapprove the carrying out of the Project. On this basis, the Mining SEPP, and hence cl 12 of the Mining SEPP, did not apply to the Minister's exercise of power under s 75J(1) to approve the carrying out of the Project.

109 If I am wrong in this conclusion, I consider that in any event cl 12 of the Mining SEPP did not apply to the Minister's determination of the application for approval of the Project under Part 3A of the Act. Clause 12 uses the language found in Part 4 of the Act of "an application for consent for development", "consent authority" and "development". None of these words, phrases or terms are used in Part 3A where, instead, application is made for "approval" (not "consent") to carry out a "project" (not "development") and there is no "consent authority" but simply "the Minister" who may "approve" or "disapprove" of carrying out of the Project. It is to be noted that cl 12, containing this language of Part

4 of the Act, is contained within Part 3 of the Mining SEPP which is entitled "Development application – matters for consideration".

110 The use of the language and concepts of Part 4 of the Act in cl 12 of the Mining SEPP, but not the language and concepts of Part 3A of the Act, would appear deliberate and intended. The Mining SEPP was made after the insertion into the Act of Part 3A. The Mining SEPP does expressly refer to Part 3A in certain provisions. In the interpretation provision of cl 3(2) of the Mining SEPP, the word "approved" is defined to include any development or any use of land, not only for which any required development consent under Part 4 of the Act has been granted but also for which approval under Part 3A of the Act has been granted. Clause 19 of the Mining SEPP, containing savings and transitional provisions, again expressly distinguishes between an application for approval under Part 3A of the Act and an application for development consent under Part 4 of the Act.

111 In circumstances where the legislative draftsperson of the Mining SEPP has expressly referred in some of the provisions of Mining SEPP to the language and concepts of Part 3A of the Act, but not in cl 12 of the Mining SEPP, and has expressly referred in cl 12 to "determining an application for consent for development" by "a consent authority" but not "approving an application for approval of a project", cl 12 should be interpreted as referring only to determining an application for consent for development under Part 4 of the Act and not approving an application for approval under Part 3A of the Act.

112 Accordingly, cl 12 of the Mining SEPP did not apply to the Minister's exercise of power under s 75J(1) to approve the carrying out of the Project.

113 For these two sets of reasons, the applicant's challenge on ground 3 should be rejected. It is not necessary to determine the third question of whether cl 12 was breached if it applied.

Ground 4: Condition 6 of Schedule 6

114 Condition 6 of Schedule 6 of the approval provides:

> "If the Proponent exceeds the performance measures in Table 1 of this approval, and either
>
> (a) the contingency measures implemented by the Proponent have failed to remediate the impact; or
>
> (b) the Director-General determines that it is not reasonable or feasible to remediate the impact,
>
> then the Proponent shall provide a suitable offset to compensate for the impact to the satisfaction of the Director-General.
>
> *Note: Any offsets required under this condition must be proportionate with the significance of the impact.*"

115 The applicant submits that by reason of the Minister not specifying in Condition 6 of Schedule 6, or elsewhere in the approval, what are suitable offsets, or the range of possible offsets, the Minister failed to determine the application for approval in relation to the issue of mitigation of impacts of the proposed project on the Woronora Catchment; as a result, the approval lacked finality; and the condition left open the possibility that the Project as approved would be a significantly different project from that in respect of which application was made.

116 It is true that Condition 6 of Schedule 6 does not specify the offsets or the range of offsets which the Director-General could require the proponent to provide. However, this does not mean that the condition has the consequences that the applicant submits.

117 First, the condition must be read in the context of the other conditions of approval and the limited circumstances in which it is likely to operate. The approval was granted on numerous conditions. The Minister stated in the approval that the conditions were imposed, to:

> "• prevent, minimise, and/or offset adverse environmental impacts;
> set standards and performance measures for acceptable environmental performance;
> require regular monitoring and reporting; and
> provide for ongoing environmental management of the project."

118 Up front in the conditions of approval is Condition 1 of Schedule 2 which provides:

> "The Proponent shall implement all reasonable and feasible measures to prevent and/or minimise any harm to the environment that may result from the construction, operation, or rehabilitation of the project."

119 Secondly, Condition 2 of Schedule 3 requires the proponent to carry out the Project generally in accordance with the environmental assessment, the preferred project report and the conditions of the approval.

120 Thirdly, Condition 1 of Schedule 3 requires the proponent to "ensure that the project does not cause any exceedences of the performance measures in Table 1". Table 1 sets out the subsidence impact performance measures. The Table provides:

Table 1: Subsidence Impact Performance Measures

Water Resources	
Catchment yield to the Woronora Reservoir	Negligible reduction to the quality or quantity of water resources Woronora Reservoir No connective cracking between the surface and the mine
Woronora Reservoir	Negligible leakage from the Woronora Reservoir Negligible reduction in the water quality of Woronora Reservoir
Watercourses	
Waratah Rivulet between the full supply level of the Woronora Reservoir and the	Negligible environmental consequences (that is, no diversion of flo in the natural drainage behaviour of pools, minimal iron staining, an

maingate of Longwall 23 (upstream of Pool P)	releases)
Eastern Tributary between the full supply level of the Woronora Reservoir and the maingate of Longwall 26	Negligible environmental consequences over at least 70% of the (that is no diversion of flows, no change in the natural drainage beha minimal iron staining and minimal gas releases)
Biodiversity	
Threatened species, populations, or ecological communities	Negligible impact
Swamps 76, 77 and 92	Set through condition 4 below
Land	
Cliffs	Less than 3% of the total length of cliffs (and associated overhan mining area experience mining-induced rock fall
Heritage	
Aboriginal heritage sites	Less than 10% of Aboriginal heritage sites within the mining area a subsidence impacts
Items of historical or heritage significance at the Garrawarra Centre	Negligible damage (that is fine or hairline cracks that do not require the owner of the item and the appropriate heritage authority agre writing
Built features	
Built features	Safe, serviceable and repairable, unless the owner and the MSB agre writing

Note: The Proponent will be required to define more detailed performance indicators for each of these performance measures in the various management plans that are required under this approval (see condition 6 below)."

121 "Negligible" is defined in the definitions in the approval as "[s]mall and unimportant, such as to be not worth considering".

122 Fourthly, the proponent is required by many conditions of the approval to prepare and implement strategies, plans and programs. These include an Environmental Management Strategy (Condition 1 of Schedule 7), a Catchment Monitoring Program (Condition 2 of Schedule 3), a Research Program (Condition 9 of Schedule 3) and an Extraction Plan for all second workings, being the extraction of coal in the mining area (Condition 6 of Schedule 3). Each Extraction Plan, in turn, is required to include, amongst other things, a:

> "• Water Management Plan, which has been prepared in consultation with DECC, SCA and DWE to manage the environmental consequences of the Extraction Plan on watercourses (including the Woronora Reservoir), aquifers and catchment yield;
>
> • Biodiversity Management Plan, which has been prepared in consultation with DECC and DPI (Fisheries), to manage the potential environmental consequences of the Extraction Plan on aquatic and terrestrial flora and fauna, with specific focus on swamps;
>
> • Land Management Plan, which has been prepared in consultation with SCA, to manage the potential environmental consequences of the Extraction Plan on cliffs, overhangs, steep slopes and land in general;
>
> • Heritage Management Plan, which has been prepared in consultation with DECC and the relevant Aboriginal groups, to manage the potential environmental consequences of the Extraction Plan on heritage sites or values;

- Built Features Management Plan, which has been prepared in consultation with the owner of the relevant feature, to manage the potential environmental consequences of the Extraction Plan on any built features".

123 All management plans required by the approval are to comply with the requirements in Condition 2 of Schedule 7 and Condition 7 of Schedule 3. These conditions have been quoted earlier in this judgment.

124 The strategies, plans and programs required by the approval may be submitted on a progressive basis. Condition 12 of Schedule 2 provides:

> "With the approval of the Director-General, the Proponent may submit any strategies, plans or programs required by this approval on a progressive basis.
>
> *Note: The conditions of this approval require certain strategies, plans, and programs to be prepared for the project. They also require these documents to be reviewed and audited on a regular basis to ensure they remain effective. However, in some instances, it will not be necessary or practicable to prepare these documents for the whole project at any one time; particularly as these documents are intended to be dynamic and improved over time. Consequently, the documents may be prepared and implemented on a progressive basis. In doing this however, the Proponent will need to demonstrate that it has suitable documents in place to manage the existing operations of the project."*

125 Fifthly, the proponent is required to prepare and implement a Rehabilitation Management Plan (Condition 4 of Schedule 6) and a Rehabilitation Strategy (Condition 2 of Schedule 6). Condition 1 of Schedule 6 specifies the rehabilitation objectives:

> "1. The Proponent shall achieve the rehabilitation objectives in Table 11 to the satisfaction of the Director-General of DPI.

Table 11: Rehabilitation Objectives

Domain	*Rehabilitation objective*
Surface Facilities Area	Set through condition 2 below
Waratah Rivulet, between the downstream edge of Flat Rock Swamp and the full supply level of the Woronora Reservoir Eastern Tributary, between the maingate of Longwall 26 and the full supply level of the Woronora Reservoir	Restore surface flow and pool holding capacity as soon as reasonably practicable
Cliffs	Ensure that there is no safety hazard beyond that existing prior to mining
Other land affected by the project	Restore ecosystem function, including maintaining or establishing self-sustaining native ecosystems: comprised of local native plant species; with a landform consistent with the surrounding environment
Built features	Repair/restore to pre-mining condition or equivalent
Community	Minimise the adverse socio-economic

	effects associated with mine closure including the reduction in local and regional employment Ensure public safety"

126 It is within this framework of conditions that Condition 6 of Schedule 6 requiring offsets operates.

127 In the terms of Condition 6 of Schedule 6, before any offset can be required, the proponent, first, must have exceeded the performance measures in Table 1 to Condition 1 of Schedule 3 of the approval, notwithstanding the requirement of Condition 1 that the proponent shall ensure that the Project does not cause any exceedences of the performance measures, and the requirements of the various conditions requiring the preparation and implementation of strategies, programs and plans which would define more detailed performance indicators and measures to prevent exceedence of the performance measures. These conditions, and the measures required by the conditions, are intended to prevent exceedence in the first place. Condition 6 of Schedule 6 is intended to address the contingency that these measures have been unsuccessful.

128 Next, Condition 6 requires either of two situations to occur: first, that the contingency measures which the proponent would have included in each type of management plan to manage unpredicted impacts and their consequences (see Condition 7(d) of Schedule 3 and Condition 2(e) of Schedule 7) have failed to remediate the impact or, second, the Director-General determines that it is not reasonable or feasible to remediate the impact (the words "reasonable" and "feasible" are defined in the definitions in the approval). Only if either of these two situations occurs, is the requirement to provide suitable offsets triggered.

129 The condition, therefore, operates in a cascading manner: first, prevent any impact, but if that fails, remediate the impact, but if it is not reasonable or feasible to remediate the impact, provide a suitable offset to compensate for the impact. Because the operation of the condition is cascading, it is narrowing: the number of impacts the subject of prevention will exceed the number of impacts the subject of remediation which, in turn, will exceed the number of impacts the subject of compensatory offset. This is relevant in understanding the extent to which there might be provision of offsets for impacts not prevented or remediated.

130 It is also to be noted that the offsets that can be required by the condition are not at large, but are constrained by the terms of the section. First, the concept of "offset" itself, when used in relation to impact, establishes equivalence between the impact and the offset. Secondly, the offset is required to "compensate" for the impact. This too reinforces the requirements for equivalence between the impact and the offset. Thirdly, the offset must be "suitable". Suitability includes equivalence between offset and impact but also appropriateness of the offset to the nature of the impact (such as on water resources, watercourses, biodiversity, land, heritage or built features) and proportionality between the offset and the significance of the impact.

131 Condition 6 of Schedule 6, in conjunction with other conditions of the approval, can be seen to be intended to "deal with a residual risk from unexpected trends or events, and [was] imposed in accordance with the precautionary principle for the purpose of guarding against them": *Lawyers for Forests Inc v Minister for Environment, Heritage and Arts* [2009] FCAFC 114; (2009) 168 LGERA 220 at [47]. Such a precautionary approach is a proper response to deal with uncertainty as to potential impacts: see *Ulan Coal Mines Ltd v Minister for Planning and Moorlarben Coal Mines Pty Ltd* [2008] NSWLEC 185; (2008) 160 LGERA 20 at [99] and cases therein cited.

132 In these circumstances, it cannot be said that the Minister, in approving the Project subject to Condition 6 of Schedule 6, has failed to determine the application for approval of the Project. The Minister has not left undetermined the issue of the mitigation of impacts of the Project on the Woronora Catchment. To the contrary, the Minister has determined to deal with the impacts of the Project on the Woronora Catchment in the way I have summarised, by preventing, mitigating, remediating and, only as a last resort, providing suitable offsets to compensate for any residual impacts not dealt with by the other mechanisms.

133 Condition 6 of Schedule 6 does not cause the approval to lack finality. The fact that the proponent may need, if the circumstances in Condition 6 of Schedule 6 are satisfied, to provide a suitable offset to compensate for the impact to the satisfaction of the Director-General, does not cause the approval to lack finality. Even if there could be said to be some lack of finality that does not necessarily cause the condition to be invalid. As I said in *Ulan Coal Mines* at [49]-[51]:

> "49 At the outset, it should be noted that there is no common law principle that an exercise of statutory power must be certain or final in order to be valid: see *King Gee Clothing Co Pty Ltd v Commonwealth* (1945) 71 CLR 184 at 194-195; *Cann's Pty Ltd v Commonwealth* (1946) 71 CLR 210 at 227-228; *Qiu v Minister for Immigration and Ethnic Affairs* (1994) 55 FCR 439 at 447; *Genkem Pty Ltd v Environment Protection Authority* (1994) 35 NSWLR 33 at 42; 85 LGERA 197 at 205 and *Winn v Director-General of National Parks and Wildlife* (2001) 130 LGERA 508 at 514 [12].
>
> 50 Rather, a condition will only be invalid, by lacking certainty or finality, if it falls outside the class of conditions which the statute expressly or impliedly permits: *Winn v Director-General of National Parks and Wildlife* (2001) 130 LGERA 508 at 514 [12]-[15], 519 [34]-[36]; *Warehouse Group (Australia) Pty Ltd v Woolworths Ltd* (2005) 141 LGERA 376 at 412 [89]; *Kindimindi Investments Pty Ltd v Lane Cove Council* (2006) 143 LGERA 277 at 292 [55], [57]; *GPT Re Limited v Wollongong City Council* (2006) 151 LGERA 116 at 146 [90] (appeal dismissed sub nom *Belmorgan Property Development Pty Ltd v GPT Re Ltd & Anor* (2007) 153 LGERA 450) and *Hurstville City Council v Renaldo Plus 3 Pty Ltd* [2006] NSWCA 248 (8 September 2006) at [89]-[90]. Where a condition does fall outside what the statute permits, the purported approval is not an approval under the statute at all (assuming the condition is not severable).
>
> 51 The relevant question in this case, therefore, is whether Condition 29 falls outside the power to impose conditions that s 75J of the Act expressly or impliedly permits. This involves construction of the section and its application to the circumstances of this particular Project: see *Winn v*

Director-General of National Parks and Wildlife (2001) 130 LGERA 508 at 514 [12], 519 [34]-[36]."

134 The relevant question, therefore, is whether Condition 6 of Schedule 6 falls outside the power to impose conditions that s 75J of the Act expressly or impliedly permits. I do not consider that it does. Having regard to the condition, its relationship to other conditions of the approval and its likely operation, as well as to the nature and extent of the Project, Condition 6 of Schedule 6 cannot be said to be outside the power under s 75J(4) of the Act to impose conditions.

135 Finally, Condition 6 of Schedule 6 cannot be said to leave open the possibility that the Project as approved will be a significantly different project from that in respect of which application was made. The provision of suitable offsets to compensate for an impact of the Project that the proponent has not been able to prevent or remediate does not cause any change to the Project itself. For example, the provision of a monetary amount or an equivalent habitat, good or service elsewhere, to compensate for an impact that was not able to be prevented or remediated, does not alter the Project in any way. Rather, it implements the polluter pays principle which states that those who cause environmental impacts should bear the costs of prevention, remediation or reparation.

136 For these reasons, the applicant has not established that Condition 6 of Schedule 6 is outside power, and hence invalid, on the grounds that it lacks finality or results in a significantly different project to that for which approval was sought. The applicant's challenge on ground 4 should be rejected.

Ground 5: PAC's public hearing in breach of statutory requirements or rules of natural justice

137 The fifth ground of challenge seizes on the fact that the Minister approved the Project with the revised mine plan proposed in the PPR (May version) rather than the original mine plan. The applicant claims that this results in two breaches, one of the statutory provisions for public hearing and reporting by the PAC and the other of the rules of natural justice.

138 The statutory breach is that the report prepared by the PAC under cl 268V of the Regulation, included with the Director-General's report to the Minister under s 75I(2)(c) and considered by the Minister when deciding whether or not to approve the carrying out of the Project under s 75J(2)(a) and (c), was not a valid report in respect of the Project with the revised mine plan because the PAC failed to hold a public hearing in relation to the revised mine plan at which members of the public and public authorities could make submissions or appear. Because there was no such public hearing, the PAC could not provide a summary of submissions received in relation to the revised mine plan. As a consequence, the applicant claims, the Minister's approval is invalid.

139 I reject the applicant's argument. There was no statutory obligation on the PAC to hold a public hearing in relation to the revised mine plan. The PAC was requested by the Minister to review specified aspects of the Project only and to hold a public hearing as part of that review. The PAC did

both. The report the PAC provided to the Minister was responsive to the Minister's request and direction.

140 The Minister's request to the PAC, pursuant to s 23D(1)(b)(ii) of the Act, made on 14 November 2008, was as follows:

> "I, the Minister for Planning:
>
> 1. Request the Planning Assessment Commission (the Commission) to:
>
> (a) carry out a review of the potential subsidence related impacts of the Metropolitan Coal Project on the values of Sydney's drinking water catchment, and in particular its potential impact on the Waratah Rivulet and Woronora Reservoir, taking into consideration the recommendations of the Southern Coalfield Inquiry;
>
> (b) advise on the significance and acceptability of these potential impacts, and to recommend appropriate measures to avoid, minimise, or offset these impacts; and
>
> (c) identify and comment on any other significant issues raised in submissions regarding the Metropolitan Coal Project or during the public hearings;
>
> 2. Direct that for the purposes of carrying out the review, the Commission is to be constituted of 5 members, being those members being specified in Schedule 1; and
>
> 3. Direct the Commission to conduct public hearings as part of the review, in the Helensburgh area, commencing after 16 February 2009, and to provide its final report (under cl 268V of the *Environmental Planning and Assessment Regulation 2000*) by 16 March 2009."

141 The PAC fulfilled each of the requests of the Minister. The PAC conducted public hearings on 11 and 12 March 2009 at Wollongong Council Chambers, in accordance with the Ministerial direction and cl 268R of the Regulation which governs public hearings of the Commission. The PAC provided a copy of its findings and recommendations on the review conducted by it at the request of the Minister, in May 2009. In its report, the PAC considered the PPR (April version) which had been submitted by the proponent to the Director-General on 23 April 2009 and was forwarded to the PAC. The PAC was advised on 18 May 2009 that a revised version of the preferred project report was to be submitted (the PPR (May version)) but decided that because of the Minister's reporting time frames, "it was not possible to reconvene the Panel to give proper consideration" to the revised version. The PAC therefore only commented on the PPR (April version). The PAC did not hold further public hearings in relation to the PPR (April version) or the PPR (May version).

142 There was no statutory obligation on the PAC to hold public hearings in relation to the PPR (April version) or the PPR (May version). The PAC has no independent power to hold public hearings. The PAC only has the functions specified in s 23D of the Act and the exercise of those functions depend on

delegation or request from the Minister. The duty to hold a public hearing is invoked only in the circumstances prescribed in cl 268R(1)(a) or (b) of the Regulation. In this case, only paragraph (a) was relevant, that is to say, the PAC was under a duty to conduct a public hearing "if requested to do so by the Minister". Apart from these circumstances, the PAC had no power to conduct a public hearing. Hence, the PAC could not of its own motion decide to hold a public hearing in relation to the PPR (April version), or for that matter, if time had allowed, the PPR (May version). The PAC could only do so if the Minister requested the PAC to hold a public hearing in relation to either the PPR (April version) or PPR (May version) or both.

143 The Minister did not make, pursuant to s 23D(1)(b)(ii), a further request to the PAC to carry out a review, or to conduct a public hearing as part of the review, of the PPR (April version) or the PPR (May version). The only request made by the Minister was that on 14 November 2008. The terms of that Ministerial request did not impose an obligation to conduct further public hearings on the PPR (April version) or PPR (May version).

144 Certainly, the express terms of the Ministerial request of 14 November 2008 did not provide for the PAC to conduct further public hearings on any preferred project report that might be submitted after the public hearings have been held by the PAC.

145 It is also not necessary to imply any such duty. The submission of a preferred project report by a proponent is a separate statutory step and does not, by itself, change a project. The Director-General may, pursuant to s 75H(6) require a proponent to submit to the Director-General a preferred project report. That is what occurred in this case. The Director-General, by letter dated 20 April 2009, requested the proponent pursuant to s 75H(6)(b), "to submit a preferred project report for the Metropolitan Coal Project. This report must clearly describe the proposed changes to the mine plan for the project, and adequately assess the consequential environmental impacts of these changes." That request was in response to notice by the proponent on 17 April 2009 that it wished to make some changes to the proposed mine plan, such changes arising from discussion with the PAC, and having the object of reducing some of the Project's environmental impact. Hence, the proponent's notice and the Director-General's request under s 75H(6)(b) occurred after the public hearings held by PAC on 11 and 12 March 2009.

146 A preferred project report, required under s 75H(6)(b), by its nature can only outline proposed changes to a project; it cannot effect a modification of a project. The power to modify a project resides in the Minister under s 75J(4); the Minister may approve a project with such modifications or on such conditions as the Minister may determine. In determining whether to modify a project or impose conditions, the Minister must consider the Director-General's report (see ss 75J(1)(b) and 75J(2)(a)), which report must include a copy of any preferred project report (see s 75I(2)(a)). Through this mechanism, the Minister may determine whether to accept any, some or all of the proponent's proposed changes outlined in the preferred project report.

147 Once it is appreciated that submission by a proponent of a preferred project report, in response to a request by the Director-General for one, does not effect any modification to a project, then there is no basis for the applicant's claim that the PAC failed to conduct a public hearing, as part of a review requested by the Minister, on the Project as modified by the PPR (April version) or PPR (May version). The Project remained unaffected by the PPR (April version) or PPR (May version).

148 Hence, the PAC complied with the Minister's request and the statutory requirements under s 23D of the Act, and cll 268R and 268V of the Regulation, to review, and conduct a public hearing as part of the review, the aspects of the Project requested by the Minister and to provide a copy of its findings and recommendations on the review conducted by it.

149 It is also to be noted that the request for the PAC to carry out a review of certain aspects of the Project, and the direction to conduct a public hearing as part of the review, are not co-extensive. The public hearing is but one part of the review, and it is not the only means of carrying out the review. Hence, there is no requirement flowing from the Minister's request and direction to conduct a public hearing, to provide an opportunity for persons or public authorities to make submissions on any material received or considered by the PAC in carrying out the review.

150 Alternatively, the applicant claims, the PAC was obliged under the rules of natural justice to hold a public hearing so as to provide an opportunity for members of the public and public authorities to make submissions to, and appear at, a public hearing on the PPR (April version) or PPR (May version). I reject this argument as well.

151 First, the duty which the applicant contends the PAC owed to the applicant, namely to hold a public hearing in relation to the PPR (April version) or PPR (May version), is not consistent with the statutory powers and duties of the PAC. I have explained above that the PAC has no power to decide for itself to conduct a public hearing in relation to the PPR (April version) or PPR (May version). It could only do so if requested by the Minister under s 23D(1)(b)(ii) of the Act. The Minister did not do so, either by way of a new request, or, on a proper construction, by the request of 14 November 2008.

152 Hence, the duty for which the applicant contends goes beyond the power of the PAC; it is not a duty that attaches to (whether by reason of the common law or implied legislative intent) a power that is able to be exercised by the PAC.

153 Secondly, if I be wrong in this conclusion and the PAC were to have power under cl 268R to conduct a public hearing in relation to the PPR (April version) or PPR (May version), the PAC did not owe a duty of procedural fairness to the applicant in these proceedings to conduct such a public hearing.

154 As was held in *Annetts v McCann* (1990) 170 CLR 596 at 598:

> "It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment …": see also *Kioa v West* (1985) 159 CLR 550 at 584.

155 In this case, although the Act does make provision under s 23D(1)(a) for the PAC to determine applications for the approval of projects and concept plans under Part 3A, if those matters are delegated to it by the Minister, the Minister did not delegate this function in relation to the Project. Rather, the Minister merely requested a review of certain aspects of the Project under s 23D(1)(b)(ii), directed the PAC to conduct a public hearing as part of the review and requested a report on the review by a certain date. The PAC had no power to make any decision as a result of these requests and directions. Instead, the Minister retained the power to decide to approve or disapprove the Project, after considering, amongst other things, the findings and recommendations of the PAC following the review in respect of the Project requested by the Minister. Hence, it is the decision of the Minister, not the review and report of the PAC, that has the capacity to affect rights, interests and legitimate expectations. However, the applicant does not claim that the Minister denied the applicant procedural fairness, but rather the PAC.

156 Thirdly, no right, interest or legitimate expectation of the applicant in these proceedings was affected by the PAC not conducting a public hearing in relation to the PPR (April version) or PPR (May version).

157 The only rights which the applicant had were statutory rights to make submissions; these were limited by the Act and the Regulation. There was the right to make a submission to the Director-General under s 75H(4) of the Act during the period that the environmental assessment for the Project was publicly available. The applicant availed itself of this right. There was also the right to make submissions to the PAC in response to a notice of a public hearing to be conducted by the PAC under cl 268R(4)(c), in relation to the subject matter of the public hearing. The applicant also availed itself of this right.

158 But there were no other statutory rights. Of relevance to the applicant's claim, there was no statutory right to make any submission in relation to any preferred project report submitted to the Director-General in response to a request by the Director-General under s 75H(6). It is to be noted that the sequence of provisions in s 75H of the Act involves the Director-General's request for a preferred project report coming after the environmental assessment is made publicly available, the public and public authorities make submissions on the environmental assessment and the Director-General provides copies of the submissions received to the proponent. The preferred project report is one of the means of responding to the issues raised in the submissions.

159 The Director-General is under no obligation to make any preferred project report submitted by the proponent publicly available, although the Director-General does have discretion to do so if the Director-General considers that significant changes are proposed to the nature of the project: see s 75H(7). However, even if the Director-General does exercise the discretion to make the preferred

project report available to the public, there is no statutory provision equivalent to s 75H(4) enabling any person to make a submission to the Director-General concerning the preferred project report that has been made publicly available. Hence, there is no statutory right to make a submission on the preferred project report.

160 There was also no statutory right to be heard at any public hearing held by the PAC in relation to a preferred project report, unless the Minister requests the PAC to conduct a review, and to hold a public hearing as part of the review, in relation to a preferred project report. More generally, there was no right of a person who has made a submission not later than the date specified in the notice of the public hearing under cl 268R(4)(c) of the Regulation to make a further submission responding to any submission made by any other person or public authority in response to a notice of the public hearing. No procedure is established for persons to comment upon other persons' submissions or to ask questions of other persons who have made submissions, whether at the public hearing or otherwise.

161 Accordingly, no right of the applicant was affected by the PAC not holding a public hearing in relation to the preferred project report, either the April version or the May version.

162 Similarly, no interest of the applicant was affected. The applicant is an incorporated association of about 40 environmental and community groups across NSW who are concerned about the impacts of mining on rivers and waters. However, such interest was not relevantly affected "in a direct and immediate way": *Kioa v West* (1985) 159 CLR 550 at 584. An interest giving rise to a duty to be heard is not necessarily to be equated with an interest sufficient to found standing to bring proceedings: see *Idonz Pty Ltd v National Capital Development Commission* (1986) 13 FCR 70 at 73, 82, 84; *Kingcole Hobart Properties Pty Ltd v Planning Appeal Board* (1992) 78 LGERA 289 at 295 (affirmed (1993) 2 Tas R 328); *State of Western Australia v Bropho* (1991) 5 WAR 75 at 79, 91-93; (1991) 74 LGERA 156 at 159, 170-172; *Botany Bay City Council v Minister of State for Transport and Regional Development* (1996) 66 FCR 537 at 568 (appeal dismissed (1996) 45 ALD 125); *Re National Parks and Nature Conservation Authority*; *Ex parte McGregor* [2001] WASCA 368 at [113]-[128]; and *Griffith University v Tang* [2005] HCA 7; (2005) 221 CLR 99 at [45].

163 If legitimate expectations can extend beyond rights and interests, in this case there is no source giving rise to a legitimate expectation in the applicant that the PAC would conduct a public hearing so as to provide the applicant an opportunity to make submissions on the PPR (April version) or PPR (May version). There was no undertaking or representation by the PAC (or the Director-General or the Minister), policy statement or rule, or regular practice which could give rise to such an expectation: see generally *Geelong Community for Good Life Inc v Environmental Protection Agency* [2008] VSC 185; (2008) 20 VR 338 at [12]-[29]. It was not necessary to satisfy any statutory preconditions to the exercise by the Minister of the power to approve the Project.

164 For these reasons, I reject the applicant's challenge on ground 5, based on the principles of natural justice, that the PAC was obliged to hold a public hearing in relation to the PPR (April version) or PPR (May version).

Conclusion and orders

165 The applicant has not established any of its grounds of challenge. The proceedings should therefore be dismissed. I will reserve the question of costs to provide the parties with an opportunity to make submissions.

166 The Court orders:

1. The proceedings are dismissed.

2. Costs of the proceedings are reserved.