Land and Environment Court

New South Wales

Medium Neutral Citation:	**Haughton v Minister for Planning and Macquarie Generation; Haughton v Minister for Planning and TRUenergy Pty Ltd [2011] NSWLEC 217**
Hearing dates:	15 - 17 September 2010
Decision date:	02 December 2011
Jurisdiction:	Class 4
Before:	Craig J
Decision:	1. The applicant's summons is dismissed. 2. Costs are reserved. 3. Exhibits may be returned.
Catchwords:	JUDICIAL REVIEW: whether applicant has standing to bring proceedings - s 75T of Environmental Planning and Assessment Act 1979 - review sought for jurisdictional error - section not read down to exclude standing under s 123 of the EPA Act when review sought on that ground - ouster clause not operative JUDICIAL REVIEW: whether critical infrastructure declaration in relation to two Major Projects validly made under s 75C of the EPA Act - projects for the purpose of energy supply - statutory interpretation of relevant and interrelated sections of the legislation - category of development the subject of declaration - declaration validly made JUDICIAL REVIEW: concept plan approvals under Part 3A of the EPA Act - matters for consideration - whether Ecologically Sustainable Development is a mandatory relevant consideration - greenhouse gas emissions - climate change - whether Minister failed to consider ESD principles - extended review of materials for concept plan approval - balancing of impacts - the public interest - need to secure electricity generation - no error in weighing

competing considerations - decision was not manifestly unreasonable - summons dismissed

Legislation Cited:

Environmental Planning and Assessment Act 1979
Evidence Act 1995
Industrial Relations Act 1996
Interpretation Act 1987
Liquor Act 1982 (now repealed).
Protection of the Environment Administration Act 1991
Protection of the Environment Operations Act 1997
State Environmental Planning Policy (Major Projects) 2005
Supreme Court Act 1970
Trade Practices Act 1974 (Cth)

Cases Cited:

Aldous v Greater Taree City Council [2009] NSWLEC 17; (2009) 167 LGERA 13
Attorney-General for the Northern Territory v Minister for Aboriginal Affairs (1989) 23 FCR 536
Attorney General (NSW) v Quin [1990] HCA 21; (1990) 170 CLR 1
Attorney General v World Best Holdings Limited [2005] NSWCA 261; (2005) 63 NSWLR 557
Australian Conservation Foundation v Commonwealth [1980] HCA 53; (1980) 146 CLR 493
Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd [1998] HCA 49; (1998) 194 CLR 247
Buck v Bavone [1976] HCA 24; (1976) 135 CLR 110
Corporation of the City of Enfield v Development Assessment Commission [2000] HCA 5; (2000) 199 CLR 135
Coles Myer Limited v O'Brien (1992) 28 NSWLR 525
Corporation of the City of Enfield v Development Assessment Commission [2000] HCA 5; (2000) 199 CLR 135
Craig v State of South Australia [1995] HCA 58; (1995) 184 CLR 163
Croome v State of Tasmania [1997] HCA 5; (1997) 191 CLR 119
Drake-Brockman v Minister for Planning [2007] NSWLEC 490; (2007) 158 LGERA 349
Environment East Gippsland Inc v VicForests [2010] VSC 335
Harrison v Melhem [2008] NSWCA 67; (2008) 72 NSWLR 380
Kindimindi Investments Pty Ltd v Lane Cove Council [2006] NSWCA 23; (2006) 143 LGERA 277

Kirk v Industrial Court of New South Wales [2010] HCA 1; (2010) 239 CLR 531
Magrath v Goldsborough Mort & Co Limited [1932] HCA 10; (1932) 47 CLR 121
McCormack v Commissioner of Taxation [2001] FCA ; (2001) 114 FCR 574
Minister for Aboriginal Affairs v Peko-Wallsend Limited [1986] HCA 40; (1986) 162 CLR 24
Minister for Immigration and Citizenship v SZJSS [2010] HCA 48; (2010) 273 ALR 122
Minister for Immigration and Citizenship v SZMDS [2010] HCA 16; (2010) 84 ALJR 369
Minister for Immigration and Multicultural Affairs v Yusuf [2001] HCA 30; (2001) 206 CLR 323
Minister for Planning v Walker [2008] NSWCA 224; (2008) 161 LGERA 423
North Coast Environment Council Inc v Minister for Resources [1994] FCA 1556; (1994) 55 FCR 492
Onus v Alcoa of Australia Limited [1981] HCA 50; (1981) 149 CLR 27
Pape v Federal Commissioner of Taxation [2009] HCA 23; (2009) 238 CLR 1
Prasad v Minister for Immigration and Ethnic Affairs (1995) 6 FCR
Saeed v Minister for Immigration and Citizenship [2010] HCA 23; (2010) 87 ALJR 507
Telstra Corporation v Hornsby Shire Council [2006] NSWLEC 133; (2006) 67 NSWLR 256
Tickner v Chapman [1995] 55 FCR 316; (1995) 133 ALR 74
Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Limited [2000] HCA 11; 2000 CLR 591
Tugun Cobaki Alliance Inc v Minister for Planning and RTA [2006] NSWLEC 396
Walsh v Parramatta City Council [2007] NSWLEC 255; (2007) 161 LGERA 118

Category: Principal judgment

Parties: 40423 of 2010
Ned Richard Haughton (Applicant)
Minister for Planning (First Respondent)
Macquarie Generation (Second Respondent)

40424 of 2010
Ned Richard Haughton (Applicant)
Minister for Planning (First Respondent)
TRUenergy Pty Ltd (Second Respondent)

Representation:	Ms C Adamson SC with Ms S E Pritchard and Ms C A Burnett (Applicant) Mr J E Griffiths SC with Mr S J Free and Mr J Hutton (First Respondent) Mr J A Ayling SC with Mr A M Pickles (Second Respondents) Environmental Defender's Office (NSW) Ltd (Applicant) Department of Planning (First Respondent) Baker & McKenzie (Second Respondents)
File Number(s):	40423 of 2010 and 40424 of 2010

JUDGMENT

INTRODUCTION

1 The need for new baseload electricity generation to serve increasing energy demands within New South Wales has been recognised for several years. As the underlying purpose of this litigation demonstrates, the technology to be utilised in meeting that need is controversial.

2 In order to facilitate the development of new generating plants to address the recognised need, it was seen by the State Government as necessary to have in place special or particular development controls for such plants. To that end, on 26 February 2008 the respondent Minister (**the Minister**) declared that projects involving development of facilities for the generation of electricity that met specified minimum requirements were "critical infrastructure projects" (**the critical infrastructure declaration**). The declaration was made under s 75C of the *Environmental Planning and Assessment Act* 1979 (**the EPA Act**).

3 Section 75C is found within Pt 3A of the EPA Act which is headed "[m]ajor infrastructure and other projects". Expressed at a level of generality, the provisions of Pt 3A vested power in the Minister to approve projects engaging its provisions without the need for recourse to other consent authorities and, in many cases, without the necessity to adhere to the requirements of many statutory planning instruments that otherwise controlled development upon land.

4 On 12 January 2010, the Minister granted conditional "concept plan" approvals for two new power stations described as the Bayswater B Power Station (**Bayswater**) and the Mt Piper Power Station Extension (**Mt Piper**) (collectively the **Concept Plan Approvals**). The proponent of Bayswater was Macquarie Generation (**Macquarie**), the second respondent in proceedings 40423 of 2010, and the proponent of Mt Piper was Delta Electricity (**Delta**), the second respondent originally named in proceedings 40424 of 2010 (collectively **the proponents**). Each of the power stations proposed by the respective proponents fulfilled the requirements of the critical infrastructure declaration. The Concept Plan Approvals were given under s 75O of the EPA Act, a provision also found in Pt 3A.

5 The Minister's critical infrastructure declaration had the consequence that other provisions within Pt 3A of the EPA Act were engaged. Relevantly, s 75T proscribed the taking of any proceedings to remedy or restrain a breach of the provisions of that Part in respect of a critical infrastructure project without first applying for and obtaining the approval of the Minister so to do.

6 The applicant has commenced separate proceedings pertaining to the actions of the Minister in respect of each of Bayswater and Mt Piper. By an amended summons filed in each matter, declaratory orders are sought as to the validity of the critical infrastructure declaration and also as to the validity of each of the Concept Plan Approvals. Orders are also sought quashing the critical infrastructure declaration and also quashing each Concept Plan Approval. Consequential injunctive relief is sought against the proponents to restrain action by them in reliance upon their respective Concept Plan Approvals.

7 Prior to taking these proceedings, application was made to the Minister on behalf of the applicant seeking approval to their commencement. The Minister refused to give that approval.

8 As the issues raised in each matter are identical, the proceedings have been heard together. This judgment is therefore given in both proceedings.

9 Having regard to the manner in which the proceedings were pleaded and argued, there are seven issues that require determination. They are:

(1) whether the proceedings can be entertained, having regard to the provisions of s 75T of the EPA Act;

(2) whether the Minister complied with the requirements of s 75C of the EPA Act when making the critical infrastructure declaration;

(3) whether, when granting the Concept Plan Approvals, the Minister failed to consider a mandatory relevant consideration, namely ecologically sustainable development as an element of the public interest;

(4) whether, when granting the Concept Plan Approvals, the Minister failed to consider a mandatory relevant consideration, namely anthropogenic climate change as an element of the public interest;

(5) whether, when granting the Concept Plan Approvals, the Minister failed to enquire into the principles of ecologically sustainable development and the impact of those projects on climate change;

(6) whether the Minister misconceived the nature of his functions under s 75O by disregarding the impacts of the proposals on climate change on the understanding that such consideration fell within the responsibility of another entity of the State or an entity of the Crown in right of the Commonwealth;

and

(7) whether the determination to grant the Concept Plan Approvals was so arbitrary, illogical and unreasonable that no decision-maker in the position of the Minister would have so exercised the power.

10 Before turning to consider these issues, it is appropriate to record in more detail the factual and statutory background to the making of the decisions sought to be impugned. Of necessity, facts or statutory provisions peculiar to a particular issue will be identified when addressing that issue.

THE LEGISLATION IS AMENDED AND A PARTY IS SUBSTITUTED

11 Since the hearing of these proceedings, the provisions of Pt 3A of the EPA Act have been repealed. However, the provisions of that Part remain relevant to the validity of the actions of the Minister that are challenged in these proceedings. Thus, the provisions of the legislation as it applied at the time of the events addressed in this judgment are the provisions either recited or to which reference is made.

12 After judgment was reserved, Delta Electricity, the second respondent in proceedings 40424 of 2010, was removed as a party to those proceedings with the consent of all parties. Again by consent, TRUenergy Pty Limited was substituted as the second respondent in those proceedings. Nonetheless, it is convenient in these reasons to maintain reference to 'Delta' as the proponent of Mt Piper, as that was its role at all relevant times.

BACKGROUND

THE OWEN INQUIRY

13 In 2007, the New South Wales Government commissioned Professor Anthony Owen, Professor of Energy Economics at the Curtin University of Technology, to inquire into and report on the need and timing for new baseload electricity generation in New South Wales. A baseload plant is one that provides a "steady flow of power regardless of total power demand by the grid". Generating plants whose function is to provide baseload power are intended to run continuously throughout the year, subject to essential stoppages for repairs and maintenance, and to provide the bulk of electricity needs for the State.

14 The report of Professor Owens was publicly released on 11 September 2007. Its key findings and recommendations included the following (at [1.3]):

- "With a risk-averse approach, New South Wales needs to be in a position where new baseload generation can be operational by 2013 - 14 if necessary, in order to avoid potential energy shortfalls.
- Forecast growth in electricity use implies a need to provide around 91,000 GWh of electrical energy in New South Wales in 2013 - 14. This is around 10,500 GWh above current annual consumption - equivalent to the yearly output of the Mt Piper power station.
- Part of this gap will be filled by energy efficiency, new renewable energy generation and increased output from existing generators.
- New South Wales currently imports around ten per cent of its energy needs but growing energy consumption in other States may reduce the amount of energy available over interconnectors.
- Most of NSW extra baseload energy needs are likely to be met by coal-fired and /or gas-fired generation as other technologies can only contribute on a very small scale or will not mature until 2020.
- New renewable energy generation sources, mainly wind and biomass, are expected to supply 1,375 GWh in 2013 - 14 and about 1,600 GWh by 2016 - 17 (equivalent to replacing the current energy supplied by the Munmorah coal-fired power station).
- Technologies with minimal carbon emissions, such as Solar Thermal, and Geothermal Hot Rock could offer much as baseload generation in the future, but not for stations that are to be operational within the next ten years."

15 The Owen Report further recommended that a competitive market for electricity generation in this State should be encouraged. Electricity generation had hitherto been the province of State owned instrumentalities. His recommendation was that the Government should divest itself of electricity retail and baseload generation businesses.

16 Relevantly, the Owen Report recommended that "all baseload options remain available." The author continued (at 2 - 22):

> "In order to ensure that a coal-fired option remains open, market participants need to submit development applications before the end of 2007. It is relatively simple to curtail the progress of these projects at any time prior to entering into construction contracts should they not be required, or be required at a later date."

17 Understandably, the Owen Report was a significant resource for the formation of later decisions made in relation to new electricity generating projects.

THE CRITICAL INFRASTRUCTURE DECLARATION

18 In February 2008, a detailed briefing note was provided to the Minister by the Director-General of his Department. The expressed purpose of that briefing note was to recommend the making of a declaration of "certain power generating facilities to be critical infrastructure projects" under the provisions of Pt 3A of the EPA Act. The principal source of information contained in the briefing note for the purpose of supporting the recommendation was the Owen Report, details of which were either extracted or summarised in the document. Reference was also made to the 2007 Statement of Opportunities published by the National Electricity Market Management Company (**NEMMCO**). That company was responsible for implementation, administration and operation of the National Electricity Market, covering electricity generation and distribution across the three eastern States of Australia and also for Tasmania. The annual publication of a statement of opportunities by NEMMCO identified what was described as "the energy supply-demand balance for each region within the National Electricity Market". The 2007 Statement predicted that by 2013 - 14 "low reserve conditions" would be experienced in New South Wales unless additional generation capacity was provided. Low reserve conditions, so the briefing note indicated, increased the risk that demand may not be met.

19 The Director-General's briefing note also addressed the recommendation that the Minister's declaration be directed to a category of project rather than taking a project-by-project approach. The fact that individual projects had, to that point in time, each been the subject of separate declaration was drawn to the Minister's attention but the observation made that all of those projects had involved either an expansion or upgrade of an existing facility or involved a project "within a non-competitive market situation." The briefing note continued:

- " The current situation with additional generation capacity is fundamentally different, because projects are intended to be developed within a competitive market and there are a number of different potential solutions (based on coal, gas, wind, biomass etc fuels).
- To declare power generating proposals on a project-by-project basis would act against the competitive market (giving advantage to a particular project over another) and would 'pick a winner' (giving advantage to a particular proposal, proponent or fuel in preference to another)."

20 Ultimately, the briefing note contained a recommendation in the following terms:

> "It is recommended that the Minister:
>
> (a) **note** the information provided in this briefing note;
>
> (b) **note** the information, findings and recommendations presented in the Owen Inquiry Report (tagged 'G');
>
> (c) **note** the information provided in the 2007 Statement of Opportunities Executive Briefing (tagged 'F');
>
> (d) **form the opinion** that development for the purpose of a facility for the generation of electricity with a capacity of more than 250 megawatts, and for which a Part 3A application has been lodged prior to January 2013 is essential for the State for **economic reasons** ;
>
> (e) **form the opinion** that development for the purpose of a facility for the generation of electricity with a capacity of more than 250 megawatts, and for which a part 3A application has been lodged prior to 1 January 2013 is essential for the State for **social reasons** ;
>
> (f) **form the opinion** that development for the purpose of a facility for the generation of electricity with a capacity of more than 250 megawatts, and for which a part 3A application has been lodged prior to 1 January 2013 is essential for the State for **environmental reasons** ;
>
> (g) **declare** development for the purpose of a facility for the generation of electricity with a capacity of more than 250 megawatts, and for which a part 3A application has been lodged prior to 1 January 2013 to be critical infrastructure;
>
> (h) **note** that the declaration will only take effect once it is published in the Government Gazette."

21 As I have earlier recorded, the declaration made by the Minister was one made under s 75C of the EPA Act. That section relevantly provides as follows:

> " **75C Critical infrastructure projects**
>
> (1) Any development that is declared to be a project to which this Part applies may also be declared to be a critical infrastructure project if it is of a category that, in the opinion of the Minister, is essential for the State for economical, environmental or social reasons.
>
> (2) Section 75B applies to a declaration under this section in the same way as it applies to a declaration under that section. The declaration of a critical infrastructure project under this section may (but need not) be made at the same time or by the same method as the declaration under s 75B relating to the project."

22 The critical infrastructure declaration made by the Minister on 26 February 2008 was in the following terms:

> "I, the Minister for Planning, having formed the opinion that the category of development referred to in the Schedule is essential for the State for economic reasons, and for social reasons, and for environmental reasons, declare projects within that category to be a critical infrastructure projects [sic] under section 75C of the *Environmental Planning and Assessment Act 1979* ."

The Schedule referred to by the Minister in his declaration was as follows:

"Development for the purpose of a facility for the generation of electricity, being development that:

(a) has a capacity to generate at least 250 megawatts, and

(b) is the subject of an application lodged pursuant to section 75E or section 75M of the *Environmental Planning and Assessment Act 1979* prior to 1 January 2013."

CONCEPT PLAN APPROVALS

23 A project to which the provisions of Pt 3A of the EPA Act applied was one that was the subject of declaration made under s 75B. Subsection (1) of that section indicated that the Part applied to the carrying out of development declared to be a project either by a State environmental planning policy or by order of the Minister published in the Gazette. The subsection further allowed for a class of development to be so declared.

24 The relevant State environmental planning policy that engaged the provisions of s 75B(1) was *State Environmental Planning Policy (Major Projects)* 2005 (**the Major Projects SEPP**). By operation of cl 6 together with cl 24 of Schedule 1 to the Major Projects SEPP, development for the purpose of a facility for the generation of electricity using a number of energy sources, including gas and coal, that had a "capital investment value of more than $30 million" was, subject to the formation of an opinion by the Minister that development fulfilled the identified criteria, declared to be a project to which Pt 3A applied.

25 On 19 June 2009, the Director-General of the Department of Planning, as delegate of the Minister, recorded the formation of the opinion that the proposals for Bayswater and Mt Piper each comprised a development of a kind falling within those provisions of the Major Projects SEPP to which I have referred. On that same day, the Director-General, once again exercising his delegated power from the Minister, authorised the submission of a concept plan for each of the two power station proposals. This authorisation was given pursuant to s 75M(1) of the EPA Act which relevantly provided as follows:

"75M Application for approval of concept plan for project

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

(2) The application is to:

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

A detailed description of the project is not required."

26 The technology intended for the provision of electricity generation was common to each of the two proposed power stations. It involved either a pulverised coal fired ultra-supercritical thermal power plant or a combined cycle gas turbine plant. Each proposed a generating plant of 2,000 megawatts capacity, using either form of technology. The authorisation given on behalf of the Minister pursuant to s 75M(1) for submission of a concept plan indicated that such a plan should address, in the alternative, each form of technology for electricity generation.

27 On 4 July 2009, the Director-General notified each of Macquarie and Delta of his requirements for environmental assessment to be undertaken for the purpose of considering their respective concept plan applications. This notification was required by s 75F(3) of the EPA Act. Among the requirements so notified as one that must be included in the environmental assessment as a "key issue" was the following:

> " **Greenhouse gases** - the Environmental Assessment must include a comprehensive Greenhouse Gas Assessment undertaken in accordance with the methodology specified in the *National Greenhouse Accounts (NGA) Factors*) (Department of Climate Change, November 2008) including:
>
> - quantification of emissions (in tonnes of carbon dioxide equivalent) in accordance with the *Greenhouse Gas Protocol: Corporate standard (World Council for Sustainable Business Development and World Resources Institute*) including: Direct emissions (Scope 1), indirect emissions from electricity (Scope 2) and any significant up or down stream emissions (Scope 3) considering all stages of the project (construction, operation and decommissioning);
>
> - comparison of predicted emissions intensity and thermal efficiency against best achievable practice and current NSW averages for the activity, and of predicted emissions against total annual national emissions (expressed as a percentage of total national greenhouse gases production per year over the life of the project);
>
> - evaluation of the availability and feasibility of measures to reduce and/or offset the greenhouse emissions of the project including the options for carbon capture and storage. Where current available technology is not technically or economically feasible, the Environmental Assessment must demonstrate that the proposal will use best available technology, including carbon capture readiness, and identify options for triggers that would require staged implementation of emerging mitigation technologies; and
>
> - evaluation of the project in light of carbon emission prices of $10, $25 and $50 per tonne under proposed Commonwealth Carbon Pollution Reduction Scheme, both with and without proposed mitigation measures."

28 Each of Macquarie and Delta prepared an environmental assessment in apparent compliance with the notification from the Director-General. Each environmental assessment was submitted, in draft, for determination that it complied with the notification. On 17 September 2009 these draft assessments were accepted by the Director-General as adequate, conformably with s 75H(2).

29 Each environmental assessment addressed the Greenhouse Gas Assessment, identified as a key issue in the Director-General's requirements. Both assessments made reference to the principles of ecologically sustainable development (**ESD**), as that expression was defined in s 6(2) of the *Protection of the Environment Administration Act* 1991.

30 The environmental assessment prepared for Macquarie addressed greenhouse gas emissions over some 21 pages of text. It did so by addressing the specific points that were raised in the Director-General's notification of requirements. That environmental assessment also referred to ESD. It addressed the principles of ESD by reference to each of its components identified in the definition in s 6(2) of the *Protection of the Environment Administration Act.* By reference to what is described as the "decision-making process" when addressing the principles of ESD, that environmental assessment states (at [27.6.5]):

> "The concept approval process ensures that decision making and monitoring of the Project would be undertaken in an integrated manner, having regard to relevant issues associated with the Project within its context. Further assessment would be undertaken and approvals sought for the Project in accordance with the requirements of the legislation and the conditions of any concept approval issued."

31 The environmental assessment prepared for Mt Piper similarly addressed the issues of greenhouse gas emissions and ESD. While a separate chapter is directed to greenhouse gas emissions, using the Director-General's requirements as the basis for the material contained in the document, the topic is also addressed under the submission-heading "Inter-generational Equity" when the principles of ESD are being discussed. In the context of the latter principle, the environmental assessment states (at [15.3.2]):

> "The maintenance of inter-generational equity is essential in the development of any infrastructure project. This was considered in the proposed extension through:
>
> - Scarce resources will not be used in the construction or operation of the development. Relative savings have been identified in reduced greenhouse gas emissions by a choice of appropriate technology; and
> - Existing impacts on the community will not be increased beyond that which would otherwise occur. The proposed development would not separately contribute to any impacts

which future generations will need to deal with. Of particular note, the greenhouse gas emission levels from carbon burning technology were identified by the community as problems that will become worse. The proposed extension would contribute to these, but levels would be minimised through the use of the latest technology for coal-fired or gas generation consistent with the economic need to provide baseload power generation capacity within the time frame required. In addition, the decision to construct and operate the plant would be undertaken within the context of the Carbon Pollution Reduction Scheme proposed to allow Australia to meet its emission targets for 2020 and beyond."

32 In summarising the consideration of ESD principles generally within the context of the Mt Piper environmental assessment, the following is stated (at [15.4]):

> "The principles of ESD will be further assessed by the proponent during the detailed design phase of the project. This design assessment would enable the identification and investigation of the feasibility of implementing additional ESD measures, including further opportunities to:
>
> - Use low impact building materials;
> - Minimise the consumption of water and energy and the generation of waste;
> - Further reduce the impact of the proposal on the biophysical environment and the community; and
> - Identify suitable site management practices.
>
> The outcomes of this further ESD assessment will be incorporated as appropriate into the final design of the site or the relevant Construction or Operational EMP."

33 The two environmental assessments were publicly exhibited between 25 September 2009 and 26 October 2009 in accordance with s 75H(3) of the EPA Act. During the exhibition period, the Department of Planning commissioned the preparation of several independent reviews of each environmental assessment, including a review of the Greenhouse Gas Assessment contained in each of them. The latter assessment was, in each case, undertaken by Arup Pty Ltd, a company of specialist consulting engineers.

34 A number of submissions were received by the Director-General during the exhibition period. As was required by s 75H(5), these submissions were provided to each of Macquarie and Delta. Each of them was required to submit a further report, known as the Submissions Report, responding to issues raised in submissions made to the Director-General; identifying any changes proposed as a consequence of those submissions and containing any revised statement of commitments: s 75H(6).

35 Each of Macquarie and Delta provided their respective Submissions Reports to the Director-General on or about 27 November 2009. Each report summarised the submissions received, including those by way of objection that addressed climate change and greenhouse gas emissions.

36 In the Submissions Report prepared for Macquarie, it is stated (at [6.3]) that a direct link between greenhouse gas emissions from Bayswater and their contribution to climate change "is difficult to determine and impossible to quantify". However, it acknowledged that the potential source of climate change, namely greenhouse gas emissions, "becomes the measurable component that can be controlled and regulated." Under the heading "Social Impacts and Climate Change", the Bayswater Submissions Report continued the discussion, acknowledging that the effects of climate change are directed to such matters as sea level rise, temperature rise, potential decrease in rainfall and exacerbated environmental conditions (at [9.4]). Again, it is stated that as there is no ability to quantify these impacts as a direct result of the project, reliance can only be placed on those aspects of the activity that can be quantified such as greenhouse gas emissions in order "to be protective of secondary effects".. In that regard it is stated:

> "DECCW already has a series of documents designed to help anticipate potential impacts and is developing the Climate Action Plan which will provide the framework for adapting policy on climate action.
>
> ...
>
> The choice of which fossil fuel will be used for the Bayswater B Project is currently undetermined and there are large differences between the GHG emissions resulting from each technology. Once the technology is chosen and the detailed design is undertaken, more studies can be undertaken into the level of GHG emissions."

37 The Submissions report prepared for Mt Piper also contains a response directed both to greenhouse gas emissions and climate change (at [3.4]) as well as the consideration of ESD (at [3.14.1]).

38 As was required by s 75I of the EPA Act, the Director-General prepared his Environmental Assessment Report for each of the two projects. These reports were completed in December 2009. Each report was provided to the Minister, together with a number of documents appended to it. They included the environmental assessment prepared by the respective consultants for each proponent, the Submission Reports prepared for each proponent together with the independent review documents commissioned by the Department. When submitted to the Minister, all of those documents were accompanied by a multi-page briefing note in respect of each application and dated 22 December 2009. The environmental assessments prepared for each project on behalf of the respective proponents were provided to the Minister in the form of a compact disk. It will be necessary to refer in more detail to the

Director-General's Environmental Assessment Reports and the Ministerial briefing notes when addressing specific grounds of challenge.

39 As I have earlier recorded, the Minister granted the Concept Plan Approvals on 12 January 2010 pursuant to s 75O of the EPA Act. The approvals were conditional approvals. The conditions imposed had the effect of modifying the applications. They are found in Schedule 2 to each Concept Approval. Relevantly, in the context of the issues raised in these proceedings, the following conditions (common to each approval) should be noticed:

> " **Limits of Approval**
>
> 1.5 This concept approval shall lapse ten years after the date of its approval by the Minister, unless works the subject of any related project approval are physically commenced on or before that date.
>
> 1.6 To avoid any doubt, this concept plan approval does not permit the construction or operation of any projects associated with the Bayswater B Power Station [the Mt Piper Power Station extension]. Construction cannot commence on any projects associated with this concept plan unless a separate project approval has been granted in relation to that Project.
>
> 2. **PROJECT APPLICATION REQUIREMENTS**
>
> 2.2 The following environmental assessment requirements apply with respect to a project application (coal or gas-fixed power station):
>
> ...
>
> 2.2(b) an updated **Greenhouse Gas Assessment** shall be undertaken in consultation with DECCW and in accordance with the methodology specified in the Australian Government's *National Greenhouse and Energy Reporting Scheme Technical Guidelines* and the NSW *National Greenhouse Accounts Factors* , or any other reference document relevant at the time of preparing the project application, and as agreed by the Director-General, including, but not limited to:
>
> i) a refinement of the greenhouse gas assessment presented in the documents referred to under condition 1.1, having regard to advancements, if any, that may occur in relation to fuel, generating technology and/or assessment methodologies;
>
> ...
>
> iii) demonstration that the plant has been designed to incorporate best commercially available technology and mitigation measures to maximise thermal efficiency within water availability constraints and minimise and/or offset greenhouse gas emissions consistent with the outcomes of the greenhouse gas minimisation strategy identified in condition 2.3; ... ".

40 Conditions 2.3 and 2.4 required the respective proponents to submit each three years, or when submitting a project application, a report directed to the availability of viable greenhouse gas reduction, mitigation and/or offset options for incorporation into the final project design "taking into consideration relevant contemporaneous economic drivers including applicable legislative framework (such as an emissions trading scheme) and

electricity demand and supply projections."

GROUND 1: COMPETENCY OF PROCEEDINGS

41 The respondents submit that these proceedings are incompetent as they have been commenced in contravention of s 75T(2) of the EPA Act. That section provides:

" **75T Third-party appeals - critical infrastructure projects**

(1) This section applies to:

(a) proceedings in the Court (and orders made by the Court) under Division 3 of Part 6, and

(b) proceedings in the Court (and orders made by the Court) under s 252 or 253 of the *Protection of the Environment Operations Act 1997,* and

(c) proceedings in the Court (and orders made by the Court) under s 20(2) of the *Land and Environment Court Act 1979.*

(2) Proceedings in the Court (and orders made by the Court) cannot be taken or made, except on application made or approved by the Minister:

(a) to remedy or restrain a breach of this Act (within the meaning of Division 3 of Part 6) arising under this Part in respect of a critical infrastructure project, including the declaration of the project as a project (and a critical infrastructure project) to which this Part applies and any approval or other requirement under this Part for the project, or

(b) to enforce any conditions of an approval under this Part for a critical infrastructure project, or

(c) to remedy or restrain a breach of this or any other Act arising in respect of the giving of an authorisation of a kind referred to in section 75V(1) for a critical infrastructure project or in respect of the conditions of such an authorisation)."

42 On 20 April 2010, Mr Haughton's present solicitor wrote on his behalf to the respondent Minister. By that letter it was indicated that Mr Haughton wished to commence proceedings in this Court challenging the critical infrastructure declarations for each project and also challenging the respective Concept Plan Approvals given by the Minister. The requirements of s 75T were acknowledged and the request made that the Minister give his approval for Mr

Haughton to commence proceedings.

43 By letter dated 16 June 2010, the Minister indicated, for reasons stated, that the application to commence proceedings was refused. In the context of s 75T, that refusal founds the submission of the respondents that the proceedings are incompetent and must be dismissed.

44 The applicant submits that the grounds upon which he challenges the decisions of the Minister, if made good, amount to jurisdictional error. As such, the provisions of s 75T cannot operate so as to deny the power of this Court to grant relief for error of that kind, having regard to the decision of the High Court in *Kirk v Industrial Court of New South Wales* [2010] HCA 1; (2010) 239 CLR 531. The applicant submits that s 75T is a privative provision which cannot operate so as to deprive this Court of its supervisory jurisdiction to restrain the exercise of executive power where that power has been exercised in breach of the jurisdictional limits imposed by statute upon the executive decision-maker. He cites the judgment of the plurality in *Kirk* where their Honours said at [100]:

> " .... the observations made about the constitutional significance of the supervisory jurisdiction of the State Supreme Courts point to the continued need for, and utility of, the distinction between jurisdictional and non-jurisdictional error in the Australian Constitutional context. The distinction marks the relevant limit on State legislative power. Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State Legislative power. Legislation which denies the availability of relief for non-jurisdictional error of law appearing on the face of the record is not beyond power."

45 The applicant accepts that s 75T has work to do in respect of non-jurisdictional error on the part of the Minister and as a consequence the section need not be read as an invalid exercise of power. Rather, he submits that the provision is to be read down so as to except from the prohibition contained in s 75T(2) those proceedings in which challenge is made to a decision of the Minister on the basis of jurisdictional error of law. The reading down of the section in that manner, so it is submitted, is consistent with the provisions of s 31 of the *Interpretation Act* 1987. By parity of reasoning, there must be excepted from the prohibition contained in s 75T(2) any orders made by the Court in proceedings to which the exception applies.

46 While the respondents deny that the Minister has erred on any of the bases pleaded by the applicant, the Minister accepts that if, contrary to his denial, those grounds were made good then each of them are errors that are jurisdictional (*Craig v State of South Australia* [1995] HCA 58; (1995) 184 CLR 163 at [194]). Accepting the authority of *Kirk* , the Minister agrees that a reading down of the prohibition contained in s 75T(2) must be undertaken but submits that the exercise in so doing is not as extensive as that contended for by the applicant, with the result that, in the circumstances of this case, the

decision in *Kirk* does not remove the prohibition found in the subsection. It is therefore necessary to consider the competing submissions in more detail.

THE IMPACT OF KIRK V INDUSTRIAL COURT OF NSW

47 Notwithstanding the privative provision contained in s 75T(2) of the EPA Act, all parties acknowledge that this Court has and may exercise judicial review functions in respect of the Minister's exercise of power relating to a critical infrastructure project under Pt 3A, if the errors alleged are jurisdictional. This acknowledgment is appropriate having regard to the holding of the High Court in *Kirk.* The basis upon which this position is accepted differs as between the applicant and the respondents.

48 In the context of *Kirk* , the applicants submit that this Court has been vested with the supervisory jurisdiction of the Supreme Court by way of judicial review. Reference is made to s 20(2) of the *Land and Environment Court Act* 1979 (**the Court Act**), whereby this Court is invested with "the same civil jurisdiction as the Supreme Court would, but for section 71, have to hear and dispose of proceedings" including proceedings to "review, or command, the exercise of a function conferred or imposed by a planning or environmental law" (s 20(2)(b)). The EPA Act is a "planning or environmental law" (s 20(3)(a)). Section 71 of the Court Act relevantly proscribes the commencement or hearing of proceedings in the Supreme Court where such proceedings are of a kind identified in s 20(2).

49 In substance, the submission is that by reason of those provisions, the constitutionally entrenched or protected supervisory jurisdiction of review for jurisdictional error is shared between the Supreme Court and the Land and Environment Court. Thereby, this Court's power to exercise that supervisory function satisfies the holding in *Kirk* .

50 For his part, the Minister acknowledges the importance of the provisions of the Court Act to which reference has been made. However, he places emphasis upon s 58 of the Court Act whereby decisions made by this Court when exercising jurisdiction under s 20(2) are subject to a full right of appeal to the Supreme Court. Thus, the Supreme Court retains the ultimate supervisory power to review executive decisions for jurisdictional error. The creation of "islands of power immune from supervision and restraint" (*Kirk* at [99]) is thereby avoided.

51 As all parties have accepted the jurisdiction of the Court to engage in the present controversy, at least to resolve the jurisdictional issue, it is unnecessary to determine which of the alternate bases for exercise of

jurisdiction is correct. Having regard to the provisions of ss 20(2), 58 and 71 of the Court Act, coupled with the fact that this Court was created as a superior court of record (s 5(1)), whose judges are afforded "the same rank, title, status and precedence" as a judge of the Supreme Court (s 9(2)), I prefer the approach of the Minister but nothing presently turns upon that expressed preference. The presence of s 58 distinguishes the position of this Court from that which pertained under s 179 of the *Industrial Relations Act* 1996 considered in *Kirk* .

52 The substantive debate between the applicant and the respondents in this context is the extent to which the holding in *Kirk* requires s 75T to be read down, so as to engage the Court's jurisdiction in a manner that would enable the present applicant to obtain the orders that he seeks. As I have already recorded, the applicant contends that his proceedings properly engage the jurisdiction of the Court because the impugned decisions of the Minister involve errors that are claimed to be jurisdictional.

53 The Minister accepts that s 75T does purport to make the exercise of the constitutionally protected jurisdiction conditional upon the approval of the Minister. To that extent he accepts that the section must be read down so as to preclude its application to proceedings in which an applicant seeks relief on the basis of jurisdictional error. According to the submission, this involves reading down the provisions of s 75T(1)(c) which, it will be recalled, relates to proceedings brought under s 20(2) of the Court Act.

54 However, the Minister contends that the constitutionally imposed limitation upon the operation of para (c) of s 75T(1) does not apply to paragraphs (a) and (b) of the subsection. It will be remembered that paragraph (a) identifies the provisions of Div 3 of Pt 6 of the EPA Act. The only provisions of that Division of present relevance are ss 122 and 123. The latter section affords standing to "any person" to bring proceedings in this Court "to remedy or restrain a breach of this Act". Section 122 defines a breach of the EPA Act as "a contravention of or failure to comply with" the Act. Jurisdictional error in the exercise of an administrative discretion provided by the EPA Act necessarily involved a failure to comply with that Act.

55 Paragraph (b) of s 75T(1) refers to proceedings brought pursuant to ss 252 or 253 of the *Protection of the Environment Operations Act* 1997. Those provisions also afford standing to "any person" to bring proceedings in this Court either to restrain a breach of that Act in the case of s 252, or to restrain a breach of any other Act, where that breach is causing or likely to cause environmental harm.

56 By his further amended points of claim, the applicant pleads his entitlement to bring these proceedings as founded in s 123(1) of the EPA Act. No doubt the pleading was so framed in order to make clear that the open standing entitlement afforded by the subsection was invoked. In the alternative, it was pleaded that the applicant had standing at common law to bring proceedings by reason of s 20(2) of the Court Act. The alternative basis upon which an entitlement to claim is pleaded will be addressed in due course.

57 As I have indicated, in essence, the Minister submits that the jurisdiction of the Court invoked pursuant to the open standing provisions identified in paragraphs (a) and (b) of s 75T(1) are not the subject of the constitutional protection articulated in *Kirk* . As the present applicant relies upon s 123 for his standing to bring and maintain the present proceedings, the refusal of the Minister to approve their commencement is fatal, with the result that they must be dismissed. The holding in *Kirk* , so it is submitted, does not invalidate State legislation that restricts the commencement of proceedings by persons who do not satisfy the common law tests of standing applicable to applications for prerogative relief in the Supreme Court. It is the availability of that relief in the Supreme Court that is a "defining characteristic" of that Court.

58 The Minister's submission that the constitutional protection articulated by the High Court in *Kirk* does not extend to proceedings instituted by an applicant exercising an open standing right conferred by statute is not the subject of express observation either in the judgment of the plurality in *Kirk* nor in that of Heydon J *.* The effect of the Minister's submission seems to be that such limitation is implicit. This is said to arise from the analysis in the judgment of the plurality in which the power of the State Supreme Courts to grant prerogative relief for jurisdictional error was identified as a power exercised by those courts at the time of Federation. Thus, the reliance placed by the Minister that it was a "defining characteristic" of such a court (*Kirk* at [97] - [98]). The submission continues that standing at common law was necessary to found commencement of proceedings for prerogative relief at the time of Federation and nothing contained in the judgments of the High Court has changed that position.

59 The submission on behalf of the Minister needs to be placed in context. In *Kirk* there was no occasion for the High Court to consider the standing of the appellants before it for the prerogative relief that they sought. That relief had first been sought pursuant to s 69 of the *Supreme Court Act* 1970. As they were the only parties directly affected by the decision sought to be impugned, no question of their standing to seek relief arose.

60 It seems to me that there are a number of matters that speak against the restricted position for which the Minister contends. At a level of generality, it must be observed that the focus of the judgments in *Kirk* was upon the

validity of a privative provision in State legislation that sought to limit the power of the Supreme Court to review the determination of a State court or tribunal for jurisdictional error. That focus extended to the constitutionally protected supervisory role retained by a State Supreme Court to review the actions of the executive for jurisdictional error (at [98] - [99]). The identity of the party invoking the exercise of that supervisory role did not call for consideration by the High Court. That being so, it is not immediately apparent why the High Court's expressed rejection of the power of the State legislature to restrict judicial review by the Supreme Court of a decision of the executive for jurisdictional error, is (questions of discretion aside) a restriction that only applies when the applicant or claimant seeking review has common law standing so to do.

61 The observations of the High Court in *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49; (1998) 194 CLR 247 (*Bateman's Bay*) should be noticed in this regard. There, the High Court not only reflected upon principles of extended standing to bring proceedings in respect of the actions of public officials but also reflected upon the utility of equitable remedies in addressing administrative error. In the joint judgment of Gaudron, Gummow and Kirby JJ, their Honours said (at [24]):

> "Writing extrajudicially, Sir Anthony Mason has said that:
>
> > '[E]quitable relief in the form of the declaration and the injunction have played a critical part in shaping modern administrative law which, from its earliest days, has mirrored the way in which equity has regulated the exercise of fiduciary powers.' ".

62 At [25] the plurality in *Bateman's Bay* continued:

> "In this field, equity has proceeded on the footing of the inadequacy (in particular the technicalities hedging the prerogative remedies [citation omitted]) of the legal remedies otherwise available to vindicate the public interest in the maintenance of due administration."

63 In my opinion there is substance in the submission advanced on behalf of the applicant that the manner in which the Minister concedes that s 75T should be read down to accommodate the finding in *Kirk* is too limited. There are four interrelated matters that support the applicant's submission. They are -

(i) the necessity to distinguish between standing and jurisdiction;

(ii) there is sufficient right or interest in the applicant to support a justiciable controversy in order to maintain the proceedings;

(iii) his position in maintaining the proceedings is supported by s 31(2) of the *Interpretation Act* ; and

(iv) well-accepted principles as to the manner in which privative or ouster provisions in legislation are to be interpreted also support his position.

Each of these matters require some elaboration.

THE STANDING/JURISDICTION DICHOTOMY

64 Standing and jurisdiction are distinct concepts. In essence, standing involves the identification of a legal entity entitled to invoke the jurisdiction of a court. Jurisdiction involves a determination as to whether a court is invested with power to determine proceedings instituted in it and, having made a determination, what, if any, orders that court is empowered to make. The submission made on behalf of the Minister would appear to elide the distinction between these two concepts.

65 Subject to constitutional limitations, Parliament can confer and remove either or both standing and jurisdiction in respect of a given controversy or species of controversy. The constitutional limitation upon removal of jurisdiction is exemplified in the decision in *Kirk.* In the context of Commonwealth legislation, the power of the Commonwealth Parliament to confer standing to bring proceedings has been acknowledged by the High Court in *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Limited* [2000] HCA 11; 200 CLR 591 (*Truth About Motorways*). There, the High Court was concerned with the open standing provisions of ss 80 and 163A of the *Trade Practices Act* 1974 (Cth). The validity of those provisions to permit any person to bring pleadings with respect to a public wrong was sustained (see particularly Gummow J at [121] - [122]). Although the Court was there concerned with the open standing provision as it related to the concept of "matter", within the meaning of Chapter III of the Constitution, there is no logical reason to think that the statutory provisions for open standing sustained in that case would not apply to the statutory imposition of open standing in State legislation.

66 The open standing provision contained in s 123 of the EPA Act does not affect the jurisdiction of this Court to determine the validity of the critical infrastructure declaration or Concept Plan Approvals on the ground of jurisdictional error, they being the Ministerial acts that are the subject of the present proceedings. The operation of that section only has affect upon the standing of the legal entity entitled to seek relief for the breach or breaches alleged on the part of the Minister.

67 The distinction between standing and jurisdiction is illustrated by the decision of the High Court in *Australian Conservation Foundation v Commonwealth* [1980] HCA 53; (1980) 146 CLR 493 (*ACF*). The jurisdiction of the High Court in that

case was properly invoked by reason of s 75(iii) of the Constitution by as the Commonwealth was a party. However, in *ACF* the High Court held that the plaintiff lacked standing to challenge the validity of decisions made under Commonwealth legislation because it lacked standing at common law. It was observed that although general law principles of standing were necessary to be invoked in that case, standing could have been conferred by statute although none was applicable to that particular case (Stephen J at 537 and 541). Mason J (as his Honour then was) adverted to the provisions of s 80(1)(c) of the *Trade Practices Act* (at 551) as an example of a provision potentially expanding the standing of an applicant to seek relief although he reserved the constitutional aspects of such a provision. That question has since been resolved in *Truth About Motorways* .

68 The open standing provisions found in s123 of the EPA Act or in s 80(1)(c) of the *Trade Practices Act (Cth)* have, in common, an expressed stipulation that the right of any person to bring proceedings arises whether or not any right of that person has been or may have been infringed. The affect of such provision is, with respect, identified by Gummow J in *Truth About Motorways* where his Honour said (at [125]):

> " ... the moving party is a person who comes to the court not with the fiat of the Attorney-General under traditional procedures, but by statutory entitlement."

The existence of that statutory entitlement ought not logically impinge upon the jurisdiction of the Court to determine whether administrative error has been committed by a member of the executive.

A JUSTICIABLE CONTROVERSY

69 One aspect of the controversy between the applicant and the respondents is the extent to which s 75T is required to be read down so as to allow, if at all, the applicant to challenge breaches of Pt 3A of the EPA Act involving jurisdictional error of law. Given the provisions of s 123 of the EPA Act, the present applicant must surely have a sufficient interest in the determination of that controversy, such that the resolution of it will determine whether he is entitled to invoke the constitutionally protected jurisdiction of the Court to review the decisions of the Minister for such error.

70 Moreover, observations of the High Court (albeit obiter) in *Batemans Bay* indicate that it is appropriate to dispose of proceedings such as the present by asking whether the applicant's interest is sufficient to support a justiciable controversy. The plurality observed (at [39]):

> "In a case where the plaintiff has not sought or has been refused the Attorney-General's fiat, it may well be appropriate to dispose of any question of standing to seeking injunctive or other equitable relief by asking whether the proceedings should be dismissed because the right or interest of the plaintiff was insufficient to support a justiciable controversy, or should be stayed as otherwise oppressive, vexatious or an abuse of process. The plaintiff would be at peril of an adverse costs order if the action failed. A suit might properly be mounted in this way, but equitable relief denied on discretionary grounds. Further, declaratory rather than injunctive relief may be sufficient."

71 The discussion of principle in that case at [38] - [51] also suggests a judicial disinclination to refrain from determining disputes in the circumstance that the interest sought to be protected is, in substance, the public interest in the observance of the limitation of statutory power imposed by Parliament upon a public authority or official.

72 The plurality in *Bateman's Bay* also compared the traditional role of the Attorney-General in England with the role of the holder of that same office under current parliamentary arrangements in both this State and in the Commonwealth. Under those arrangements, the Attorney is almost always a member of Cabinet. Their Honours observed (at [38])::

> "At the present day, it may be 'somewhat visionary' for citizens in this country to suppose that they may rely upon the grant of the Attorney-General's fiat for protection against ultra vires action of statutory bodies for the administration of which a ministerial colleague is responsible."

73 This observation is apt in the present circumstances. Under s 75T of the EPA Act, the "gatekeeper" for the taking of any proceedings is the very Minister whose actions are sought to be impugned as being beyond power. In *Bateman's Bay* the plurality posed the question as to whether the opportunity for vindication of the public interest in equity is to be denied "for want of a competent plaintiff." They continued (at [50]):

> "The answer, required by the persistence in modified form of the *Boyce* principle, is that the public interest may be vindicated at the suit of a party with a sufficient material interest in the subject matter. Reasons of history and the exigencies of present times indicate that this criterion is to be construed as an enabling, not a restrictive, procedural stipulation".

That procedural stipulation may be identified for present purposes in the form of s 123 of the EPA Act, insofar as it would permit the prosecution of a claim within the constitutionally protected jurisdiction of review of executive action for jurisdictional error.

74 Further examples of the relaxation of standing provisions for vindication of rights extending beyond an individual can be found in other judgments of the High Court. In *Croome v State of Tasmania* [1997] HCA 5; (1997) 191 CLR 119 the plaintiffs were held to have sufficient standing to challenge the validity of Tasmanian legislation rendering consensual sexual relations between males to

be criminal because the plaintiffs acknowledged that they had in the past breached conduct to which the legislation attached criminal liability. In *Pape v Federal Commissioner of Taxation* [2009] HCA 23; (2009) 238 CLR 1 the plaintiff was afforded standing to challenge the validity of Commonwealth legislation notwithstanding that there was no fact or circumstance unique to him " ... (apart, that is, from him being the only person willing to take a proceeding in this Court, the outcome of which, if successful, would deny him entitlement to $250)" (per Heydon and Kiefel JJ at [274]).

75 All of these matters support the existence of a justiciable controversy between the applicant and the Minister as being one that affords standing to the applicant to engage the jurisdiction of the Court in order to determine whether the actions of the Minister sought to be impugned by the applicant involved jurisdictional error.

INTERPRETATION ACT 1987

76 The provisions of s 31 of the *Interpretation Act* lend support to the applicant's submission as to the manner in which s 75T of the EPA Act should be read down to accommodate the holding in *Kirk.* Section 31 relevantly provides as follows:

> " **31 Acts and instruments to be construed so as not to exceed the legislative power of Parliament**
>
> (1) An Act or instrument shall be construed as operating to the full extent of, but so as not to exceed, the legislative power of Parliament.
>
> (2) If any provision of an Act or instrument, or the application of any such provision to any person, subject-matter or circumstance, would, but for this section, be construed as being in excess of the legislative power of Parliament:
>
> (a) It shall be a valid provision to the extent to which it is not in excess of that power, and
>
> (b) the remainder of the Act or instrument, and the application of the provision to other persons, subject-matters or circumstances, shall not be affected.
>
> (3) ... ".

77 As I have earlier sought to demonstrate, *Kirk* is directed to the operation of s 75T of the EPA Act to the extent to which the section seeks to limit or restrict review by the Supreme Court (or presently, this Court) of the exercise of ministerial power for jurisdictional error. It is to accommodate such limitation that the section must be read down. Section 31(2) of the *Interpretation Act* does not require s 123 of the EPA Act or reference to it in s 75T also to be read down.

OUSTER OR PRIVATIVE CLAUSES

78 There is one final matter to which it is necessary to advert briefly in considering the way in which s 75T should be construed. This pertains to the manner in which the Courts have generally approached the interpretation of ouster or privative clauses.

79 The general rule was succinctly summarised by Dixon J in *Magrath v Goldsborough Mort & Co Limited* [1932] HCA 10; (1932) 47 CLR 121 where his Honour said (at 134):

> "The general rule is that statutes are not to be interpreted as depriving superior courts of power to prevent an unauthorised assumption of jurisdiction unless an intention to do so appears clearly and unmistakably".

That statement of principle has since been adopted on many occasions. A recent example is the decision of the Court of Appeal in *Attorney General v World Best Holdings Limited* [2005] NSWCA 261; (2005) 63 NSWLR 557 per Spigelman CJ, Mason P and Tobias JA agreeing on this point at [98] - [100].

80 Applying this principle, the Court would not read down s 75T so as to deprive a person upon whom standing had been conferred by statute to challenge a ministerial decision on the basis of jurisdictional error.

THE APPLICANT'S STANDING AT GENERAL LAW

81 As earlier recorded, the Minister accepts that if a challenge is made to a decision by him, involving jurisdictional error, and is maintained pursuant to s 20(2) of the Court Act by an applicant having standing at general law, s 75T of the EPA Act must be read down so as to allow such a claim to be determined in this Court. The alternate submission by the present applicant is that, if contrary to his submission, he is not entitled to bring proceedings in reliance upon s 123 of the EPA Act, he nonetheless has standing at general law so to do.

82 In an affidavit read in the proceedings without objection from the respondents, the applicant's evidence was to the effect of that recorded in the following paragraphs.

(i) He is a committed "environmental activist", having been engaged in environmental campaigns since 2005 with focus in those campaigns upon climate change and renewable energy issues.

(ii) At Newcastle University he was active in that University's Environmental Collective whose endeavours contributed to the ultimate decision of the University to reduce its greenhouse gas emissions by purchasing ten per cent

of its electricity consumption from GreenPower accredited renewable energy sources.

(iii) He is the technical administrator of six nominated internet websites disseminating information or raising issues in relation to climate change, including the website for an organisation known as Rising Tide.

(iv) Since 2005 he has been a member of Rising Tide Australia, an organisation centred in Newcastle and which seeks to take action against the causes of anthropogenic climate change as well as agitating action for "equitable, just, effective and sustainable solutions to the climate change crisis." Rising Tide is a member of the global Rising Tide movement and locally focussed its campaign activities upon coal mining and coal combustion for electricity generation in the Hunter region of New South Wales. It is funded by public donations and has twelve active members. The applicant's participation in Rising Tide led to that organisation contributing agenda items for local contribution to the Australian Government National 2020 Summit conducted in Canberra on 19 - 20 April 2008. Its contribution included material directed to "population, sustainability, climate change and water".

(v) In response to the public exhibition of the environmental assessments for each of Bayswater and Mount Piper in October 2009, submissions were made to the Minister by Rising Tide expressing opposition to new fossil fuel fired power stations. The basis of the objection was the impact that the combustion of such fuels would have by increasing greenhouse gas emissions with a consequential impact upon climate change. I infer that the applicant was active in the preparation of these submissions.

(vi) As a member of Rising Tide, the applicant has also been active in other projects associated with the mining and transport of coal as well as those involved in raising community awareness of climate change said to be brought about by the combustion of fossil fuels. He participated in the organisation of what is said to be the first Australian Climate Summit held in Canberra in 2009 as well as a climate camp involving approximately 1,000 participants. Another part of his activities have involved "peaceful protests" in and around Newcastle harbour in relation to the Newcastle Coal Export Terminal.

(vii) Finally, the applicant identifies his address in a suburb of Newcastle which is located on a natural flood plain. Based on severe storm events that have already occurred in the area, he opines that with the predicted "deleterious effects" of climate change, he is likely to be subjected to severe weather events including the intensity and frequency of flood events and storm surges.

83 Both parties accept that the principles articulated by the High Court in *ACF* and *Onus v Alcoa of Australia Limited* [1981] HCA 50; (1981) 149 CLR 27 are relevant to the determination to be made as to the applicant's standing at

common law. They also accept that these decisions are usefully analysed in a manner relevant to the present circumstances by Sackville J in *North Coast Environment Council Inc v Minister for Resources* [1994] FCA 1556; (1994) 55 FCR 492. Relevantly, the principles there summarised by his Honour were to the following effect (at 512):

(i) a "special interest" in the subject matter of the action must be demonstrated; a "mere intellectual or emotional concern" for preservation of the environment was insufficient to constitute such an interest; any asserted interest must extend beyond that of members of the public in upholding the law and involve more than genuinely held convictions;

(ii) a "special interest" in the preservation of a particular environment may be demonstrated and in that respect an intellectual or emotional concern is not a disqualification from standing to bring proceedings;

(iii) non-compliance with procedures ordained by statute are not themselves sufficient to confer standing on an applicant;

(iv) the fact that a submission was made in response to notification of an environmental impact statement or, in this case, an environmental assessment to aid the Minister's consideration of the application did not, of itself, confer standing to challenge the decision or decisions made by the Minister; and

(v) special interest of an organisation is not demonstrated simply by adopting objects demonstrating an interest in and commitment to the preservation of the physical environment.

84 Notwithstanding these statements of principle derived from the cases to which his Honour referred, the applicant in that case was afforded standing in the particular circumstances of the case. His Honour was satisfied that, in the context of observations made by Stephen J in *Onus* , the importance of the organisation's concern with the subject matter of the decision and closeness of its relationship to that subject matter enabled it to satisfy the requirements for standing. Matters to which his Honour referred in upholding that standing included the fact that the Environment Council was a peak environmental organisation with a large number of groups as members, its recognition by the Commonwealth for a number of years resulting in receipt by it of financial grants, recognition by the State Government, including in an advisory role, the conduct and coordination of projects and conferences on matters of environmental concern and its involvement in submissions and preparation of a study directed to the management of State forests.

85 As will be apparent from my earlier recitation of those facts upon which the applicant relies, to sustain standing at common law, there are a number of

differences that pertain to his position compared to those that sustained standing in *North Coast Environment Council* . Not the least of these is the fact that he brings the proceedings in his own name rather than in the name of Rising Tide, being the organisation with which he appears to be principally concerned and through which many of the activities that he has described have been carried out. The membership of that organisation is also significantly less than that represented by the "peak environmental organisation" identified by Sackville J. These are differences to which I will shortly turn.

86 In support of its standing at general law, the applicant also relies upon observations made by Osborn J in *Environment East Gippsland Inc v Vicforests* [2010] VSC 335. His Honour was there concerned with proceedings in which an incorporated environmental association sought to restrain logging of old growth forest within a State forest area. The standing of the incorporated association to bring the proceedings was challenged. After giving consideration to the principles derived from the cases to which I have already made reference, Osborn J determined that the applicant had established standing on the basis that it held the requisite special interest. Those factors considered relevant by his Honour to sustain that conclusion were identified (at [80]) as being:

(i) the involvement of the unincorporated predecessor to the applicant in the consultative process in formulating the forest management plan for the area as well as its continuing involvement in the implementation of that plan, particularly as it pertained to the conservation of endangered species;

(ii) the involvement of the applicant in that case in using the area in question for education in ecological values, including the conduct of camps and walks in and through the area by means of which it raises funds in order to carry on its activities;

(iii) having made submissions to the relevant statutory instrumentality, it had been instrumental in securing a moratorium on logging in the area, the lifting of that moratorium being very much at the heart of the case that it sought to sustain; and

(iv) by reason of its representing a particular sector of the public interest, that representation had been recognised by government, resulting in some very modest government grants, possibly from the Commonwealth Government, and the grant of an award in recognition of its community contribution.

87 Having addressed the evidence in support of each of these findings, Osborn J expressed his conclusion thus (at [88]):

> "It follows that EEG's interest in the enforcement of the law with respect to proposed logging at Brown Mountain does not simply derive from intellectual or emotional concern, nor from its ostensible objects. Although it is not a peak environmental association of the type with which Sackville J was concerned in the two cases I have referred to above, it does have a special interest in the implementation of the [forest management plan] and the enforcement of the statutory framework governing logging at Brown Mountain Creek."

Prior to expressing this conclusion his Honour had made reference to observations of members of the High Court in both *Truth About Motorways* and *Batemans Bay* in which there appeared to be broader scope for standing to invoke equitable remedies to secure compliance with obligations imposed upon public officials. Passages from those judgments to which I have earlier referred were cited in support of his Honour's observations.

88 The applicant also seeks to place some store upon observations of members of the Court of Appeal in *Coles Myer Limited v O'Brien* (1992) 28 NSWLR 525. That case concerned the determination as to whether the appellant fell within the statutory description of "persons aggrieved" as that phrase was used in the *Liquor Act* 1982 (now repealed). In my respectful opinion the case is of little assistance in addressing the present question. One must treat with caution the observations there made as to manner in which the statutory phrase should be interpreted. It is of relevance only to note in a very general way the observations of members of the court as to the trend of modern authority to approach standing provisions in a way which was generous to those who seek to approach the Court for statutory remedies.

89 In light of the approach reflected in the cases to which I have referred, it is then necessary to consider the standing of Mr Haughton at common law to maintain the present proceedings, in light of the evidence that he has adduced in support of a claim of "special interest" in the subject matter of the proceedings. That subject matter is, by dint of his points of claim, the critical infrastructure declaration and the Concept Plan Approvals.

90 Although the determination of standing at common law is, in the present matter, attended with considerable difficulty, I have concluded that the applicant does enjoy such standing. In reaching that conclusion I am influenced by three statements from the authorities to which I have referred. In *Onus v Alcoa* , Stephen J observed that the possession of an intellectual or emotional concern was not a disqualification from standing to sue. His Honour then continued (at 42):

> "As the law now stands it seems rather to involve in each case a curial assessment of the importance of the concern which a plaintiff has with particular subject matter and of the closeness of that plaintiff's relationship to that subject matter."

91 In the same case, Brennan J (as his Honour then was) elaborated upon the concept of "special interest" as that concept had been articulated by Gibbs J in *Australian Conservation Foundation v Commonwealth.* Brennan J did so in the following terms (at 73):

> "A special interest in the subject matter of an action being neither a legal nor equitable right, nor a proprietary or pecuniary interest, will ordinarily be found to arise from modern legislation enacted to protect or enhance non-material interests - interests in the environment, in historical heritage, in culture. Where such statute imposes a public duty to protect or enhance a non-material interest a breach of the duty is apt to affect a non-material interest, and it would be vain to search for proprietary or pecuniary damage suffered by a plaintiff. A plaintiff in such a case, though he may be able to show a special interest in what the statute seeks to protect or enhance, would be unable to show a private right or to prove that he has suffered proprietary or pecuniary damage. To deny standing would deny to an important category of modern public statutory duties and effective procedure for curial enforcement".

92 In *North Coast Environment Council,* Sackville J drew together these observations when his Honour said (at 506):

> "While *Onus v Alcoa* involved a very different factual situation from that in *ACF v Commonwealth* , the observations of Stephen J emphasise the need to assess the nature of the applicant's concern with and relationship to the subject matter. The observations of Brennan J accept that modern legislation often protects non-material interests, and that an applicant will have standing to complain of an alleged breach if there is an 'affection or threatened affection' of the applicant's interest by the apprehended breach of duty ... . These formulations require a close examination of the circumstances of an individual case and are inconsistent, in my opinion, with any rigid or easily identifiable dividing line."

93 From my earlier recitation of fact pertaining to the interests and activities of the applicant, there can be no doubt as to the significant interest and concern held by him in the anthropogenic effects of climate change brought about by the combustion of fossil fuels, particularly in the use of coal as the source of energy for the production of electricity. That interest and concern extends beyond that which may be held by many members of the public as is made manifest by his activities while at the University of Newcastle and more recently in his activities as a member of Rising Tide, focussed upon coal mining and coal combustion for electricity generation, particularly in the Hunter Region. Relevant also to be noticed in this regard is his contribution, again as a member of Rising Tide, to the agenda items for the Newcastle Delegates to the National 2020 Summit convened by the Commonwealth Government. Also relevant, although not determinative, is the fact that Rising Tide made a submission in response to the public notification of the environmental assessments for each of Bayswater and Mt Piper.

94 These matters suggest to me that there is an affectation or threatened affectation of the applicant's strongly held and demonstrated beliefs if, as is claimed, the Minister has exceeded his jurisdiction in making the

determinations that are the subject of these proceedings.

95 Clearly enough, the concerns expressed and views held by the applicant are not unique. That is not disentitling in the present context. It can also be said that Rising Tide is anything but a "peak organisation", a factor that found favour in *North Coast Environment Council* . However, the fact that Rising Tide has a small membership detracts, so it seems to me, from the argument advanced on behalf of the Minister, that the actions of the applicant should not be equated to those of the organisation. With a membership of only 12, I can more readily infer that the decisions made and actions taken by that unincorporated association closely reflect the views and motives of the applicant.

THE SECOND RESPONDENT'S CHALLENGE TO STANDING

96 I do not overlook the challenge by the second respondent in each matter to the standing of the applicant to bring these proceedings. Each of Macquarie and Delta submit that the proceedings fail " *in limine* " by reason of the Minister's refusal to approve the taking of these proceedings.

97 The submission suggests that the provisions of s 75T are procedural only in nature. It is argued that the section does not deny the capacity of the Court to review relevant decisions of the Minister; it only imposes a procedural precondition to the commencement of such proceedings. As that procedural precondition has not been met, namely the grant of ministerial approval, the proceedings are barred and must be dismissed. The submission also draws attention to the fact that there is no challenge to the decision of the Minister, communicated on 16 June 2010, refusing to approve the commencement of proceedings.

98 Although the seeking of the Minister's approval is itself a procedural requirement, s 75T is in substance a privative or ouster provision. It seeks to oust the jurisdiction of the Court to consider invalidity of action of the kind identified in paragraph (a) of subsection (2) except with the approval of the Minister. If the submission made on behalf of the second respondent in each matter is correct, it would have the consequence that by exercising the discretion available to him under the section to refuse the taking of proceedings, the Minister could deny to this Court (or the Supreme Court) the power to review for jurisdictional error a substantive decision or decisions pertaining to critical infrastructure development.

99 The determination to refuse an application to take proceedings may, in itself, be unimpeachable by application of any recognised principle of administrative

law. However, the Minister's discretion to deny jurisdiction to review his substantive decision or decisions for jurisdictional error, even at the suit of an applicant having standing at general law, would require a reading of the section that contravened the holding of the High Court in *Kirk* (particularly at [55(h)] and [99] - [100]). For that reason I do not accept the submissions of the second respondent in each matter.

100 In oral submissions, Macquarie and Delta otherwise adopted the submission advanced on behalf of the Minister. Those submissions have already been addressed.

CONCLUSIONS ON STANDING

101 The applicant is afforded standing to bring these proceedings by operation of s 123 of the EPA Act. In as much as that provision affords standing to the applicant to seek to have the decisions of the Minister impugned for want of jurisdiction, s 75T of the EPA Act does not oust the jurisdiction of this Court to have those issues determined at the instance of the applicant. That is a consequence of the holding of the High Court in *Kirk.*

102 Even if I be wrong in determining that the applicant's standing is sustained by s 123 of the EPA Act, he nonetheless has standing at common law. His interest is sufficiently "special" by reason of the importance of his concern with, and the closeness of relationship, to the subject matter of the proceedings.

GROUND 2: THE CRITICAL INFRASTRUCTURE DECLARATION

103 The applicant contends that the critical infrastructure declaration made on 23 February 2008 was invalid. He so submits for two reasons:

(i) no opinion was formed by the Minister conformably with s 75C(1) of the EPA Act in relation to either the Bayswater or Mt Piper project; and

(ii) no declaration was made in relation to either project that conformed with the requirements of s 75C(1).

104 The applicant further submits that the formation of the opinion required by s 75C(1) is a jurisdictional fact upon which the Minister's power to make a declaration under the subsection is conditioned. The Minister accepts the validity of this last submission as a statement of principle (*Corporation of the City of Enfield v Development Assessment Commission* [2000] HCA 5; (2000) 199 CLR 135) but denies that he has erred in addressing the provisions of the

section in the manner alleged by the applicant.

FORMATION OF OPINION WITHIN THE MEANING OF S 75C(1)

105 In essence, it is the applicant's case that the necessity to form an opinion in accordance with s 75C(1) requires that the Minister do so in relation to a particular project "or a closed, known group of projects." This is said to be the consequence of the requirement of the subsection that the opinion be formed as to the essentiality of the development "for the State for economic, environmental or social reasons". It is argued that the Minister's opinion was formed in respect of an unconfined category "of existing and potential projects" with the result that the quality of essentiality required for the formation of the opinion was not possible.

106 I have earlier set out the terms in which the opinion of the Minister was expressed. He did so by reference to a "category of development referred to in the Schedule" to his declaration in respect of which he formed the opinion of essentiality for economic, social and environmental reasons. The Schedule identified two characteristics for development of a facility for the generation of electricity, being development that:

> "(a) has a capacity to generate 250 megawatts; and
>
> (b) is the subject of an application lodged pursuant to section 75E or section 75M of the *Environmental Planning and Assessment Act 1979* prior to 1 January 2013."

107 I have earlier set out the provisions of the section. The section is closely related in its expression and operation to s 75B and it therefore becomes instructive to consider the relevant provisions of those sections juxtaposed to each other. Section 75B relevantly provides as follows:

> " **75B Projects to which Part applies**
>
> (1) **General**
>
> This part applies to the carrying out of development that is declared under this section to be a project to which this Part applies;
>
> (a) by a State environmental planning policy, or
>
> (b) by order of the Minister published in the Gazette (including by an order that amends such a policy).
>
> The carrying out of particular or a class of development or development for a programme or plan of works or activities, may be so declared.
>
> ...
>
> (5) **Amendment or revocation of declaration**

> The declaration of a project may be amended or revoked at any time (including before or after an approval for the project is given under this Part)."

108 Section 75C is in the following terms:

> " **75C Critical infrastructure projects**
>
> (1) Any development that is declared to be a project to which this Part applies may also be declared to be a critical infrastructure project if it is of a category that, in the opinion of the Minister, is essential for the State for economic, environmental or social reasons.
>
> (2) Section 75B applies to a declaration under this section in the same way as it applies to a declaration under that section. The declaration of a critical infrastructure project under this section may (but need not) be made at the same time or by the same method as the declaration under s 75B relating to the project."

109 It seems to me that the language of the Minister's critical infrastructure declaration closely reflects the language of subsection (1) of s 75C. It is tolerably clear from the terms of the subsection that it is a category of project which, in the opinion of the Minister, possesses the requisite qualities of essentiality. Once that opinion is formed in respect of a category then any project that falls within the category may be the subject of the declaration.

110 I do not accept the submission of the applicant that the declaration involved an unconfined category of existing or potential projects. First, there is nothing in the language of the declaration to suggest that its provisions related to an existing project. There was no necessity for it so to do. Importantly, the Schedule to the declaration did confine the category. It was both necessary for it to have the specified minimum generating capacity and it was also required to be one in respect of which an application for approval under Pt 3A was to be lodged prior to 1 January 2013.

111 As I understood the applicant's submission, it is the capacity for such an application to be lodged within 5 years from the making of the declaration that caused the category to be ascribed the description "unconfined". It was submitted that an opinion of essentiality could not be formed in 2008 in respect of any application fulfilling the description and lodged at any time almost 5 years hence.

112 In my opinion, there are two answers to the latter submission. First, the material before the Minister early summarised in [18] - [20] enabled the formation of the opinion as to the essentiality of the category of project at that time. If, by reason of the number of applications received and being implemented pursuant to the declaration the qualities of essentiality cease to exist, then the combined operation of s 75C(2) and 75B(5) would have authorised the amendment or revocation of the declaration.

113 Further, I see no reason to confine the word "category" as used in s 75C(1) in a

manner that does not accord with its ordinary meaning. Relevantly, its meaning according to the Macquarie Dictionary is "any general or comprehensive division; a class". That definition would, in the present context, allow for a description of a class of project having identified characteristics. That is what the declaration did. As the Minister submits, the requirement that the opinion be formed in relation to a category of project, rather than a particular project, indicates an intention to consider the question of essentiality at a higher level of generality when making a declaration than is necessary for a particular project. The qualities of that project are called up for consideration at a later stage in the process of determining any approval that might be given.

114 In support of the submission that a restrictive interpretation should be given to s 75C(1), the applicant made extensive reference to secondary materials, particularly the second reading speeches in both the Legislative Assembly and Legislative Council at the time at which the Bill introducing Pt 3A to the Parliament was read. As a consequence of consideration of this material, it was submitted that the power to make a declaration under the section was to be exercised "only in extraordinary and clearly specified circumstances".

115 I am of the opinion that reference to the secondary materials is unnecessary for the purpose of interpreting s 75C. In essaying the task of interpretation, focus must first be had upon the legislative text, a principle of interpretation recently confirmed by the High Court in *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23; (2010) 87 ALJR 507. As Heydon J observed in that case at [74], it is not a question of determining what the Parliament intended to do, as expressed in speeches in the House, but rather what it did in the form of the words used in the legislation. To similar effect was the statement of the plurality in that case when they said at [33] " … it is erroneous to look at extrinsic materials before exhausting the application of the ordinary rules of statutory construction." Observations to similar effect as to the utility of resorting to second reading speeches is found in the judgment of the Court of Appeal in *Harrison v Melhem* [2008] NSWCA 67; (2008) 72 NSWLR 380 at [12].

116 As I have endeavoured to indicate, the language of s 75C is tolerably clear in its requirement as to the subject matter in respect of which the Minister is to form the requisite opinion if a declaration is to be made. It is the language of the subsection that circumscribes the exercise of power. I do not find the meaning of the provision to be ambiguous or obscure nor does the manner in which I have interpreted the provision lead to an unreasonable or "manifestly absurd" result (cf s 34(1)(b) of the *Interpretation Act*).

DECLARATION WITHIN THE MEANING OF S

117 The submission of the applicant in this regard is very much related to the submission related to that which is to be the object of the Minister's opinion. In short, the applicant contends that the declaration must itself be directed to a project as distinct from a category or class of development.

118 In support of his submission, the applicant draws a distinction between the language of s 75C and that of s 75B. Attention is directed to provisions of subsection (2) of s 75B referring to the "kind of development" that may be declared to be a project whereas subsection (1) of s 75C permits a critical infrastructure declaration to be made in respect of "a project". This contrast in language, so it is submitted, indicates that the narrower concept of a particular project was intended by the legislature when a critical infrastructure declaration was in contemplation by contrast with the power to declare a particular form or kind of development as a project to which the general provisions of Pt 3A applied.

119 In my opinion, the interpretation for which the applicant contends involves too narrow a construction of the statutory provisions and fails fully to appreciate the relevant relationship that is manifest in the language used between the two sections. That interrelationship is made manifest by both subsections of s 75C. Subsection (1) of the latter section is only given work to do in respect of development "declared to be a project to which this Part applies". The provision pursuant to which development is declared to be a project for the purpose of Pt 3A is s 75B.

120 Perhaps of greater significance in the present context are the provisions of subsection (2) of s 75C. That subsection requires that s 75B applies to a declaration "under this section in the same way as it applies to a declaration under that section." It will be remembered that by subsection (1) of s 75B, Pt 3A applies to the carrying out of development "declared under this section to be a project". That notion of "project" is then qualified, or perhaps more precisely expanded, by the last sentence of the subsection providing that "[t]he carrying out of particular or a class of development, or development for a program or plan of works or activities, may be so declared." Thus, for the purpose of the subsection the notion of "a project" is extended to "a class of development". It seems to me to follow that as a "class of development" as well as "particular" development may be the subject of a declaration under s 75B(1), the effect of subsection (2) of s 75C empowers the making of a critical infrastructure declaration in the same manner, subject, of course, to the formation of the requisite opinion identified in subsection (1) of s 75C.

121 I accept the Minister's submission on this point that the use of the word "category" in subsection (1) of s 75C supports a construction of the provision militating against the requirement that a declaration can only be made in respect of a specific project or projects. It would lead to a surprising result if the Minister was required to form the opinion as to essentiality in respect of a category of project but constrained to making a declaration only in respect of a particular project. As I have indicated, the notion of "project" identified in s 75B(1) is extended to a "class" which is a word in ordinary usage, that is synonymous with the word "category". While I accept that "class" has not been used in s 75C(1), that circumstance does not in my view detract from the interpretation of the section that I believe to be correct, given the express application of the provisions of s 75B pertaining to a declaration by operation of subsection (2) of s 75C.

122 For these reasons, I conclude that the critical infrastructure declaration was validly made.

DISCRETION

123 The Minister submitted that if the critical infrastructure declaration was determined to be invalid, any relief on that account should be refused in the exercise of discretion. There were two factors identified by the Minister in support of that submission:

(i) the declaration was made on 26 February 2008 and the present proceedings were not commenced until June 2010;

(ii) evidence was given of a number of projects that had been dealt with between February 2008 and June 2010 on the basis that the critical infrastructure declaration was valid and in respect of a number of those projects either Concept Plan Approvals or Project Approvals had been granted.

By reason of the delay in commencing the proceedings a declaration that the critical infrastructure declaration was invalid would cast doubt upon the validity of the actions and determinations of the Minister in respect of those other projects. Thus there was delay coupled with prejudice that would weigh against the making of any order.

124 The applicant's response is to indicate that as the decision of the High Court in *Kirk* was not delivered until February 2010, it was only then that the potential for claim arose. Thereafter the Minister's approval to commence the proceedings was brought, that application having been made in April 2010 and it was not until June that the Minister refused to give his approval.

125 As I have determined that the critical infrastructure declaration was validly

made, it is unnecessary and possibly inappropriate that I determine this issue.

GROUND 3: CONSIDERATION OF THE PUBLIC INTEREST: ECOLOGICALLY SUSTAINABLE DEVELOPMENT

126 The applicant submits that in determining to grant the Concept Plan Approvals on 12 January 2010, the Minister was bound, but failed, to consider the principles of ESD. It is said that this obligation arose as an element of 'the public interest', the consideration of which was mandated by the Minister in making a decision under Pt 3A of the EPA Act. In particular, it is claimed by the applicant that those elements of ESD comprising the precautionary principle and inter-generational equity were not considered by the Minister.

127 Alternatively, it is claimed that when purporting to grant the Concept Plan Approvals, there was no evaluation by the Minister "sufficient to demonstrate an understanding of the principles of ESD" (Further Amended Points of Claim at [46]). In the context of the claim reference is again made to both the precautionary principle and the consideration of intergenerational equity.

128 In order to consider these claims, it is first necessary to notice the relevant statutory provisions. As I have earlier recorded, the applications for Concept Plan Approvals were authorised by s 75M of the EPA Act. It is appropriate to recite again the provisions of subsection (2) of that section which are as follows:

> "(2) The application is to:
>
> (a) outline the scope of the project and any development options, and
>
> (b) set out any proposal for the staged implementation of the project, and
>
> (c) contain any other matter required by the Director-General.
>
> A detailed description of the project is not required."

129 The power of the Minister to determine an application made for Concept Plan Approval is found in s 75O. It relevantly provides:

> " **75O Giving of approval for concept plan**
>
> (1) If:
>
> (a) the proponent makes an application for the approval of the Minister under this Part of a concept plan for a project, and

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

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

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

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

...

(3) In deciding whether or not to give approval for the concept plan for a project, the Minister may (but is not required to) take into account the provisions of any environmental planning instrument that would not (because of section 75R) apply to the project if approved. However, the regulations may preclude approval for a concept plan for the carrying out of a class of project (other than a critical infrastructure project) that such an instrument would otherwise prohibit.

(4) Approval for a concept plan may be given under this Division with such modifications of the concept plan as the Minister may determine.

(5) Approval for the concept plan may be given under this Division subject to satisfactory arrangements being made, before final approval is given for the project or any stage of the project under this Part or under the other provisions of this Act, for the purpose of fulfilling the obligations in a statement of commitments made by the proponent ... ."

130 The nature of determination that may be made by the Minister when granting an approval is the subject of s 75P. It is unnecessary to recite all the provisions of that section but those of present relevance provide as follows:

" **75P Determinations with respect to project for which concept plan approved**

(1) When giving an approval for the concept plan for a project, the Minister may make any (or any combination) of the following determinations:

(a) the Minister may determine the further environmental assessment requirements for approval to carry out the project or any particular stage of the project under this Part (in which case those requirements have effect for the purposes of Division 2),

(b) the Minister may determine that approval to carry out the project or any particular stage of the project is to be subject to the other provisions of this Act (in which case the project or that stage of the project ceases to be a project to which this Part applies),

(c) the Minister may determine that no further environmental assessment is required for the project or any particular stage to the project (in which case the Minister may, under section 75J, approve or disapprove of the carrying out of the project or that stage of the project without further application, environmental assessment or report under Division 2).

(1A) The further requirements for approval to carry out the project or any part of the project that the Minister may determine under subsection (1)(a) are not limited to matters that the Director-General may require under Division 2."

Those provisions to which I have referred that deal with applications for and approval of Concept Plans are contained in Div 3 of Pt 3A. The provisions of Div 2 address applications to carry out a project and the determination of such an application.

131 In the case of each project application, the Minister's approval was expressed in the following terms:

"I, the Minister for Planning, under the *Environmental Planning and Assessment Act 1979* determine:

(a) to approve the concept plan referred to in Schedule 1, subject to the modifications in Schedule 2; and

(b) pursuant to section 75P(1)(a) of the *Environmental Planning and Assessment Act 1979* , the further environmental assessment requirements for approval to carry out the preferred option (either coal or gas-fired power station), as detailed in Schedule 2."

132 In each approval, Schedule 1 described the proposal as being either Bayswater or Mt Piper comprising a pulverised coal-fired ultra super critical thermal plant and associated infrastructure or a gas-fired combined cycle gas turbine plant and associated infrastructure. The Schedule to each approval also recited that each was declared a major project under s 75B(1)(a) by reason of its inclusion in the Schedule to the Major Projects SEPP and also recited the classification of the proposal as critical infrastructure by reference to the critical infrastructure declaration.

133 I have earlier referred to the "modifications" to which the Minister referred in his determination, circumscribing the operation of the approval. In addition to Condition 1.6, providing that the Concept Plan Approval in each case did not permit the construction or operation of any project associated with either power station and indicating that construction could not commence on any project associated with the concept plan unless a separate approval had been granted, there are other conditions that need to be noticed given the competing submissions raised by the parties.

134 Condition 1.3 provided that if there was any inconsistency between the concept approval and a project approval granted for the project, the concept approval prevailed to the extent of inconsistency. Condition 1.4 then provided as follows:

"1.4 The proponent shall comply with any reasonable requirement(s) of the Director-General arising from the Department of Planning's assessment of:

(a) any reports, plans or correspondence that are submitted in accordance with this Concept Plan Approval or any related project approvals; and

(b) the implementation of any actions or measures contained in these reports, plans or correspondence."

135 Condition 2.1 provided:

> 2.1 The Proponent's preferred option (coal or gas-fired power station) requires further environmental assessment and the submission of a separate project application in accordance with Condition 2.2. The requirements outlined in Condition 2.2 include the development of any ancillary infrastructure off-site not otherwise covered by a separate approval, as applicable to the preferred option."

In the case of Bayswater, the condition continued by referring to additional infrastructure to be provided as part of the project.

136 I have earlier referred to the requirements of Condition 2.2 as they related to the detailed requirements for "an updated Greenhouse Gas Assessment". The condition further required updated assessments directed to air quality, including technology for the minimisation of air emissions and the mitigation and management measures to reduce the emission of air pollutants. Other assessments that were required related to noise and vibration, water use, an ash management strategy if coal was selected as the preferred fuel, further ecological assessment, heritage impact, particularly directed to aboriginal cultural heritage, traffic and transport and hazard analysis. Condition 2.3 was the condition requiring reports either on a triennial basis or with any project application directed to "viable greenhouse gas reduction, mitigation and/offset options for incorporation into the final project design taking into consideration relevant contemporaneous economic drivers including applicable legislative framework (such as an emissions trading scheme) and electricity demand and supply projections."

137 It is against this background, together with the materials provided to the Minister at the time of determining the Concept Plan Approvals, that the present issue is to be determined.

MANDATORY RELEVANT CONSIDERATION: THE PRINCIPLE

138 The parties accept that the decision of the Minister can only be impugned on this ground if the consideration upon which the applicant relies is a consideration that the Minister is bound to consider. A matter is not a mandatory relevant consideration unless it is expressed to be so in the statute conferring power or unless an implication to that effect is found by reference

to the subject-matter, scope and purpose of that statute (*Minister for Aboriginal Affairs v Peko-Wallsend Limited* [1986] HCA 40; (1986) 162 CLR 24 per Mason J at 40). As Brennan J observed in that case (at 55):

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

139 Section 75O identifies three matters that are mandatory considerations for the Minister when determining a concept plan application. Only one of those is presently relevant to the applications made by the proponents, namely the Director-General's report together with those reports and recommendations that are incorporated by reference in the Director-General's report. Clearly enough the principles of ESD are not the subject of reference in the section. It follows that consideration of them will only be mandatory on the part of the Minister if, by necessary implication, the EPA Act binds him so to do when making a decision under s 75O (*Drake-Brockman v Minister for Planning* [2007] NSWLEC 490; (2007) 158 LGERA 349 at [126]).

140 It is accepted by the respondents that when determining an application under s 75O of the EPA Act, the 'public interest' is a mandatory relevant consideration. Acceptance of that position is founded in the judgment of Hodgson JA (Campbell and Bell JJA agreeing) in *Minister for Planning v Walker* [2008] NSWCA 224; (2008) 161 LGERA 423 where his Honour said (at [39]):

> "In my opinion, it is a condition of validity that the Minister consider the public interest. Although that requirement is not explicitly stated in the EPA Act, it is so central to the task of a Minister fulfilling functions under a statute like the EPA Act that, in my opinion, it goes without saying. Any attempt to exercise powers in which a Minister did not have regard to the public interest could not, in my opinion, be a *bona fide* attempt to exercise his or her powers, and so would not even pass the *Hickman* test."

141 It is the content of the 'public interest' that is in issue in the present case. In *Walker* it was a unanimous decision of the Court of Appeal that ESD was not a mandatory relevant consideration for the Minister when determining an application under s 75O of the EPA Act.

THE PUBLIC INTEREST: PRINCIPLES OF ESD

142 The foundation of the applicant's argument that the principles of ESD are a mandatory relevant consideration for a determination under s 75O lies in s 5 of the EPA Act. That section identifies the objects of the Act, paragraph (a) of which identifies the encouragement of eight different and to some extent disparate subjects. One of those is the encouragement of ecologically sustainable development. By s 4 of the EPA Act, the expression "ecologically

sustainable development" has the same meaning as it has in s 6(2) of the *Protection of the Environment Administration Act.*

143 It is not in contest that principles of ESD would be a relevant consideration on the part of the Minister. The applicant seeks to support the submission that the principles of ESD have become a relevant mandatory consideration by reference to an obiter observation of Hodgson JA in *Walker.* His Honour said (at [56]):

> "However, I do suggest that the principles of ESD are likely to come to be seen as so plainly an element in the public interest, in relation to most if not all decisions, that failure to consider them will become strong evidence of failure to consider the public interest and/or to act *bona fide* in the exercise of powers granted to the Minister, and thus become capable of avoiding decisions."

Those observations were agreed in by Campbell JA but not by Bell JA.

144 As the Minister submits, those observations by Hodgson JA need to be read in the context of the process of reasoning otherwise disclosed in the judgment leading to the conclusion that the principles of ESD were not then a mandatory relevant consideration for a decision under s 75O. After making the statement at [39] of his judgment that the public interest was a mandatory relevant consideration in making a determination under the EPA Act, his Honour said (at [41]):

> "However, this requirement, so stated, operates at a very high level of generality, and does not of itself require that regard be had to any particular aspect of the public interest: cf *Walsh v Parramatta City Council* [2007] NSWLEC 255 at [60] ... . One would generally presume that a Minister making a decision does have regard to the public interest, and one would look for substantial evidence to make out a case that the Minister had not had regard to the public interest."

145 His Honour then referred, with approval, to the statement by Preston CJ in *Telstra Corporation v Hornsby Shire Council*[2006] NSWLEC 133; (2006) 67 NSWLR 256 at [121] - [124] that the obligation to consider the public interest when determining a development application under s 79C(1)(e) of the EPA Act could embrace the principles of ESD where they were relevant to the decision under review. Hodgson JA then added an important qualification at [44]:

> "However, that does not of itself mean that a 'mandatory' requirement that the Minister have regard to the public interest is necessarily breached in all cases where the Minister does not have regard to the principles of ESD. The 'mandatory' requirement that the Minister have regard to the public interest does not of itself make it mandatory (that is, a condition of validity) that the Minister have regard to any particular aspect of the public interest, such as one or more of the principles of ESD. Whether or not it is mandatory to have regard to one or more of the principles of ESD must depend on statutory construction."

146 A consideration of these passages from the judgment of Hodgson JA indicates that while identification of a particular matter as an aspect of the public interest was not a mandatory consideration, a failure to consider ESD might, in some circumstances, give rise to an inference that the Minister had failed to have regard to the public interest and not acted in good faith. The drawing of such an inference would depend upon the proven circumstances but consideration of those circumstances would, according to the observation of Hodgson JA, involve "substantial evidence" to make good a proposition that there had been such a failure.

147 Relevant in this context is the level of particularity at which the subject matter, said to be relevant and mandatory, must be considered. As Preston CJ observed in *Walsh v Parramatta City Council* [2007] NSWLEC 255; (2007) 161 LGERA 118 at [60], "the statute must expressly or impliedly oblige the decision-maker to enquire and consider the subject matter at the level of particularity involved in the applicant's submission."

148 The requirement to consider the statutory provision in the context of the particularity required has resonance in the present matter. The application is both by statutory description and substance a plan in concept only. As the provisions of s 75M(2) make clear, it is an application required only to "outline the scope of the project and any development options" with no "detailed description of the project" required. The nature of the application and the level of detail required by that section must, in turn, inform the level of particularity to which a mandatory relevant consideration in the form of the public interest is subject. It is not readily apparent to me that those provisions to which I have referred would have the consequence of mandating consideration of the principles of ESD in the manner alleged by the applicant.

149 It is also to be noticed that the particular facts attending the exercise of a statutory power will only be relevant to the question of whether a particular matter is a mandatory consideration where the terms of the statute providing the power so requires (*Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323 at [73]). In this context the appellant's contention that the importance attached by the public to ESD principles is now more acute than what it was in previous years is, in itself, irrelevant to the determination of whether those principles are themselves a mandatory relevant consideration. I accept that the attachment of such importance to those principles may have some relevance to the question as to whether the Minister had regard to the public interest. Such acknowledgement is consistent with the observations of Hodgson JA in *Walker* to which I have earlier referred. In that regard, reference is made by the applicant to the following event:

(a) the release in 2007 of the Fourth Assessment Report of the

Intergovernmental Panel on Climate Change containing warnings about the likely impacts of climate change and its effect in Australia;

(b) the release in 2007 of reports on climate change by the Commonwealth Scientific and Industrial Research Organisation and the Bureau of Meteorology;

(c) the ratification by the Australian Government of the *Kyoto Protocol* obliging Australia to limit its greenhouse gas emissions;

(d) the *Copenhagen Accord* issued in December 2009;

(e) commitments by the Federal and State Government to target reduction of greenhouse gas emissions and the increase of targets relating to renewable energy consumption; and

(f) a number of statutory regimes, programs and policies that followed ratification of the *Kyoto Protocol* .

150 Undoubtedly these matters were relevant for consideration. However, the fact of greater awareness of ESD by reason of these events does not, so it seems to me, provide the "substantial evidence" that the Minister did not have regard to the public interest (*Walker* at [41]). This is a matter to which I will shortly turn.

THE PUBLIC INTEREST: A BALANCE IS REQUIRED

151 The applicant does not submit that in making the decision to approve the Concept Plans, the Minister failed to take into account the public interest. It is only the identified aspect of that public interest, namely the principles of ESD, that are claimed not to have been addressed. As I have already indicated, the statutory foundation upon which consideration of the principles of ESD are said to be mandatory is s 5 of the EPA Act.

152 However, as was identified in *Walker* , the 'public interest', if reflected in the objectives of the EPA Act, is multifaceted ([52] - [55]). While not all the objects of the EPA Act expressed in s 5 would be relevant to the determination of the concept plan applications, there is at least one other, beside the object of "encouraging" ecologically sustainable development that would be relevant. The object of encouraging "the protection, provision and coordination of communication and utility services" (s 5(a)(iii)) would be apposite in this context.

153 The Minister has accepted that the respective briefing notes dated 22 December 2009 submitted to him for determination of each application reflected his reasons for granting the Concept Plan Approvals on 12 January 2010. Those briefing notes reflect the multifaceted consideration given by the Minister to each application for approval. Clearly, matters to which his consideration was directed in determining those applications is also reflected in the conditions imposed at the time and contained in Schedule 2 of his determination in each case.

154 In all relevant respects, the two briefing notes to the Minister are in almost identical terms. After identifying the respective sites and description of the concept proposal in each case, including the alternate sources of power for electricity generation intended by each, the need and justification for each proposal is addressed in some detail. Reference is made to the Owen Inquiry Report as well as the NEMMCO Statement of Opportunities, both for 2007 and for 2009. The briefing note acknowledges that the timing at which low reserve conditions (seen to be critical) would arise has been put back in time from that predicted in 2007 for reasons that are explained but the occurrence of low reserve conditions, necessitating new baseload generation, is still predicted. Deleterious economic and social risks are said to arise once low reserve conditions occur with the observation made that renewable energy projects are not currently being implemented at a sufficient rate to address the generation shortfall. Demand management and energy efficiency measures are also said to be insufficient to address a generation shortfall.

155 In the context of these considerations, reference is also made in the briefing note to the submissions received by the Director-General during the exhibition period of the environmental assessment prepared for each proponent, including those submissions opposing the coal-fired option as well as those voicing concerns about greenhouse gas emissions and climate change. This led to inclusion in the briefing note of a section headed "Greenhouse Gas Impacts".

156 In the section of the briefing note under this latter head, the total greenhouse gas emissions from each of the plants, measured in total carbon dioxide equivalents, is stated as a calculation of the percentage increase which those emissions represent above the known or estimated emissions both from this State and from Australia in 2007. Those percentage increases have been calculated on the assumption that there is no mitigation of or offsets from those emissions. In regard to such measures, the briefing note continues:

> "The Environmental Assessment identified a number of options for the management of greenhouse gas emissions through reductions or offsets including sequestration through carbon sinks, carbon credit trading, geo-sequestration and renewable energy production.

> The proponent noted, however, that at this point in time, none of the options listed above are technically or commercially feasible. The proponent has instead proposed to prepare the power station to be capable of accepting carbon capture and storage technology when it is commercially feasible.
>
> Regardless of the selected fuel option, the proponent has committed that the power station would be built as carbon capture and storage ready to facilitate a future retrofit.
>
> The Department has recommended a specific condition of approval which requires that the Proponent clearly demonstrate that best practice technology is to be implemented to minimise greenhouse gas emissions and to demonstrate that it is investigating carbon reduction technologies that could be feasibly retrofitted to the plant as well as other emission reduction or offset measures that would be incorporated as part of the project to reduce or offset greenhouse gas emissions."

157 It will be remembered from my earlier reference to the Minister's approval of each application that no work could be undertaken in reliance upon the concept plan unless and until a project approval had been granted and a condition or conditions imposed implementing those matters that are the subject of observation in the briefing note to which I have made reference.

158 Albeit in summary form, I have endeavoured to identify a number of the elements of the briefing note, the totality of which the Minister accepts as reflecting his reasons for the decision to grant approval. Those reasons reflect the multifaceted consideration required to be undertaken by the Minister when making a decision that calls up considerations of opinion and policy consistent with the exercise of power being invoked (cf *Buck v Bavone* [1976] HCA 24; (1976) 135 CLR 110 at 118 - 119). In short, the multifaceted consideration coupled with the express limitation upon the matters for consideration identified in s 75O(2) support the "high level of generality" at which the public interest is required to be considered in order for the Minister to address the mandatory relevant consideration of the public interest. To the extent to which consideration of the principles of ESD are "encouraged" by the objects in s 5 of the EPA Act, they are potentially encompassed with that part of the consideration reflected in the imposition of conditions applicable to the preparation, and ultimate assessment, of the required Project Approvals that are the precondition for undertaking any development as a consequence of the concept approvals.

ESD PRINCIPLES NOT IGNORED

159 In the previous section of this judgment I have referred to the briefing notes prepared for the Minister prior to his determination of the Concept Plan Approvals. In order to understand the material that was before the Minister at the time of making its decision on 12 January 2010, it is necessary to note the recommendation contained in that briefing note. It was as follows:

"It is recommended that the Minister:

- **note** the information provided in this briefing note;
- **consider** the Director-General's assessment report (tagged "B");
- determine that further environmental assessment is required for the project which is to be addressed under Part 3A of the *Enviromental Planning and Assessment Act 1979* ; and
- **grant consent approval** to the concept plan by signing the recommended instrument of approval (tagged "C")."

The recommendation was in identical terms for each concept plan application.

160 The only mandatory relevant consideration imposed upon the Minister by s 75O(2), at least of present relevance, is the consideration of the Director-General's report. In each case that report contained about 52 pages of text signed by three officers of the Department of Planning, including the Director-General. According to the text, apart from recommended conditions, there were appended to each report the Submission Report, the Statement of Commitments, and Environmental Assessment as well as the expert independent review reports commissioned by the Department of Planning, including that prepared by Arup in respect of greenhouse gas emissions. Notwithstanding the text reference to the respective environmental assessment reports prepared on behalf of each proponent being appended to the Director-General's report, it is accepted that those reports were provided to the Minister in electronic form as a compact disc. There is no evidence before me to suggest that the Minister did not read the briefing notes in each case as well as the report of the Director-General provided to him in respect of each application.

161 The plaintiff contends that the environmental assessment reports provided to the Minister in electronic form were not read by the Minister, or at least an inference should be drawn to that effect. As I understand the submission, it is founded upon both the fact that these documents were in electronic form and also upon the length of each document. In hard copy, the Bayswater Assessment was some 1365 pages in length while the Mt Piper Assessment in hard form was about 778 pages.

162 It is accepted by the applicant that all this material was provided to the Minister. In the absence of evidence to the contrary, it is properly to be inferred that the material made available was considered. There is no legal impediment under Pt 3A to some or all of that material being provided in electronic form (*Tugun Cobaki Alliance Inc v Minister for Planning and RTA* [2006] NSWLEC 396 at [111]).

163 Reliance by the applicant upon the decision of the Federal Court in *Tickner v Chapman* [1995] 55 FCR 316; (1995) 133 ALR 74 for the inference that electronic material was not considered would appear to be misplaced. Evidence was adduced in that case that only one day was available between the time when the Minister received representations required by him to be considered and the making of the declaration that the relevant statutory provision called upon him to make, having considered those representations. The evidence disclosed not only that the Minister was not at the office at which the documentary material was located but also that his schedule in the 24 hour period would not have afforded an opportunity to consider the submissions required to be considered except upon the "vague and nebulous" description of them given to him by a member of staff (at 370). It was a case in which the usual inference was properly displaced. There is no evidence before me in the present case indicating that, with or without the assistance of staff, the Minister would not have had an opportunity between 21 December and 12 January to consider the content of the respective environmental assessments prepared by each proponent.

164 Although he was required to consider and make the determination on the materials provided to him, he was not disentitled from utilising staff assistance in that process (*Tugun Cobaki* at [169] - [170]). The context in which the applicant submits that the principles of ESD were not considered is in their application to anthropogenic climate change. That limited address to the claimed failure on the part of the Minister requires, as the Minister submits, recognition of three important principles. First, the weight to be given to relevant considerations is a matter for the decision-maker alone. While epithets such as 'proper, genuine and realistic consideration' have been applied to this requirement, that epithet needs to be applied with caution lest it involve "a slide into impermissible merit review" (*Kindimindi Investments Pty Ltd v Lane Cove Council* [2006] NSWCA 23; (2006) 143 LGERA 277 at [79]). With due respect to those who may have a different view, I do not understand the decision of the High Court in *Minister for Immigration and Citizenship v SZJSS* [2010] HCA 48; (2010) 273 ALR 122 to have imposed any important qualification to that expressed by the Court of Appeal in *Kindimindi.*

165 Second, the concept of ESD, with its four principles stated in the *Protection of the Environment Administration Act* operates, at least in the present context, at a high level of generality. The principles are not confined to any specific subject matter such as greenhouse gas emissions or anthropogenic climate change. Moreover, they neither mandate any particular method of analysis of a potentially relevant subject matter nor the outcome that should follow from any consideration (*Drake-Brockman v Minister for Planning* at [132(2)]. As Jagot J also observed in that case, there is a unifying theme of ecologically sustainable development, being the effective integration of economic and

environmental considerations with the breadth of that unifying theme explaining "the ubiquity of the concept in development decisions" and disclosing "the level of generality at which it is capable of operating" (132(1)]).

166 The third matter to be noticed is that consideration of ESD does not require specific reference to the specific principles of ESD in the material presented to the Minister (*Drake-Brockman v Minister for Planning* at [132(7)]). It is sufficient that the Minister engage with the substance of those principles (*Walker* at [59]).

167 It should also be observed that if the precautionary principle as an element of ESD was required to be considered, then any complaint about the failure so to do is, in reality, premature. This observation necessarily follows from the fact that a concept plan only was approved; that conditions earlier identified proscribed the carrying out of any development or even associated development until a project approval had been granted and the condition of granting any project approval required further investigation and updated reports upon the impact of use of either technology on greenhouse gas emissions which, in turn, were and are the identified source of climate change.

168 In the context of these observations of principle, it is appropriate to have regard to what it was that the Minister considered. Taking account of the reasons for his decision, as expressed in the endorsement by him of the briefing note in respect of each application and also having regard to those materials that were identified to him and, it must be assumed, informed the giving of those reasons, it seems to me that the extent to which they are applicable, the principles of ESD were considered. That material was voluminous, as was the material before me. It is unnecessary to recite it in detail and sufficient to provide references to that material where appropriate.

169 There was considerable material before the Minister identifying the predicted level of greenhouse gas emissions from the projects, if constructed and operated in the manner and at the level identified at the concept stage. As I have earlier recorded, the Director-General required, and each environmental assessment contained, comprehensive greenhouse gas assessments for the projects. These respective assessments were summarised in the Director-General's report submitted to the Minister conformably with s 75O and also further summarised in the briefing notes to which I have referred. The greenhouse gas assessment is contained in Chapter 10 of each environmental assessment and all the materials directed to that topic are drawn together and discussed at length in the Director General's report. That report in each case addresses the topic under the head "Greenhouse Gas Emissions/Climate Change Issues". The correlation between greenhouse gas emissions and climate change and the impacts from climate change are acknowledged in the

Director-General's report (see, for example the report in respect of Bayswater at p 35).

170 It will also be remembered that during the exhibition of the environmental assessments for each project, the Department commissioned independent reviews of the greenhouse gas assessments. They were provided to the Minister in hard copy, were referred to and commented upon in the Director-General's reports and referred to in each briefing note to the Minister accompanying the respective reports and their attached documents.

171 The material provided to the Minister reflected that consideration of the effect which implementation of each project, assuming its implementation in the form then contemplated, was able to meet both State and Australian greenhouse gas and renewable energy targets. So much is reflected in the Director-General's reports for each project.

172 The relationship between greenhouse gas emissions and their contribution to climate change was acknowledged in all of the documents. Some of the references in that regard, particularly those from the respective environmental assessments, have been referred to earlier in these reasons. The balancing of considerations and effect flowing from the interaction between greenhouse gas emissions and climate change against the risks of an electricity generation shortfall, with the inability of that shortfall being made good from renewable energy resources or measures presently open, have also earlier been identified. They were the subject of consideration in the briefing note.

173 The Minister clearly had brought to his attention the numerous submissions that had been received during the exhibition period of the environmental assessments opposing a gas-fired option in particular and drawing attention to the projected greenhouse gas emissions and the impact they will have upon climate change. These submissions were the subject of specific consideration in the respective Submissions Reports prepared by each proponent, as they were required to do by the Director-General. Those reports were made available to the Minister as appendices to the Director-General's report. Both in the reports and in the Minister's briefing notes, the submissions received by the Director-General, including those directed to climate change were addressed.

174 Both as formulated as a concept and to ensure that any project propounded to give effect to that concept was appropriate, the Minister considered that best practice had been demonstrated in respect of the concept and would be required in respect of any project in the context of greenhouse gas emissions. That consideration included the necessity for greenhouse gas emission mitigation or offset measures required to be further addressed at project

stage. So much is reflected in all of the material before the Minister, including the Director-General's reports and briefing notes and is further reflected in the conditions imposed to which I have earlier referred.

175 It is apparent from the consideration of the Director-General's reports in each matter that the Minister considered whether increased greenhouse gas emissions would be included in the valuation, pricing and incentive mechanisms associated with the projects. This consideration took the form of references to the then anticipated Commonwealth Carbon Pollution Reduction Scheme, it being acknowledged that the scheme may not be implemented, at least as presently then understood, or that its implementation would be delayed.

176 In giving this summary, it is relevant to repeat that express reference to the stated principles of ESD need not be made to reflect consideration in substance of those principles. The material to which I have referred, so it seems to me, does reflect the substance of those principles, at least at a level relevant to the concept approval then in contemplation and bearing in mind the conditions upon which it was contemplated such an approval would be given. However, sight ought not be lost of those references that I have earlier given within the reports prepared on behalf of the respective proponents and provided to the Minister in which express reference was made to the principles of ESD both in general and in respect of some of its elements.

177 In summary of those matters to which I have referred it is apparent that the Minister:

(i) considered the need for each project and assessed consequences of the project not being undertaken;

(ii) quantified the greenhouse gas emissions as a means of assessing the relative contribution each project would make to climate change;

(iii) considered whether the need would be satisfied by other means predicted to produce lower greenhouse gas emissions;

(iv) considered whether further design development or efficiency would produce lower greenhouse gas emissions in the event that the project proceeded; and

(v) considered whether greenhouse gas emissions would be factored into valuation, pricing and incentives associated with the project.

Having regard to those matters, formulaic recitation of the principles of ESD would have served no relevant purpose.

178 There were further claims made by the applicant as to a lack of specific consideration. In the context of the issues raised in this case, these further specific claims are very much related to the fourth ground of challenge, directed to anthropogenic climate change as an element of the public interest. The applicant submits that the Minister was required explicitly to consider the effect of the projects on climate change and not confined to total greenhouse gas emissions.

179 There was no evidence adduced before me identifying a means by which the impact on climate change from a specific project could be quantified. At best, it can be acknowledged that a project of the kind contemplated by the approvals will contribute to the overall impacts of climate change. As already recorded, the quantification of emissions from each proposed plant, depending upon the technology used, was quantified without addressing mitigatory measures. The unqualified calculation of emissions were directed to the Minister's attention, including in the Director-General's report, in order to compare those predicted impacts against other coal and gas power stations and the utilisation of other fuel options.

180 A submission requiring even greater specificity of consideration was made by the applicant, namely a requirement to consider the effect of climate change on this State. For reasons already stated, there was no evidence to suggest that any available material, to the Minister or otherwise, would have enabled this assessment to be made. Nonetheless, the acknowledgement of impact from the emission of greenhouse gas and its impact on climate change was included in the "need and justification" sections of both the Director-General's report and the briefing note submitted to the Minister.

181 In addition to the two projects that are the subject of challenge in these proceedings, there was a further project under consideration by the Minister, namely a proposal for refurbishment of the existing Munmorah Power Station. The applicant submits that the cumulative effect of all three proposals, assuming their implementation, was required to be considered by the Minister.

182 An examination of the material before the Minister indicates that this, in fact, occurred. The fact that the predicted capacity of all three projects, if implemented, exceeded the predicted generation shortfall which was being addressed was the subject of reference in the Director-General's report. Without doing disservice to the detail contained in this report, it was the advice given in that report that while all three projects, if implemented, could exceed the predicted generation shortfall, that was not a reason for declining the grant of concept approval for any one project. It identified the possibility that one or more would not be viable for implementation at the time at which it was required because of the likelihood that the market or demand for

electrical power would prevent supply outstripping demand to any significant extent. Again, it is to be repeated that by reason of the conditions imposed at the time of concept approval, refinement of proposals and the requirement to include a capacity to add carbon capture facilities as technology was no doubt at least one of the factors reflecting economic and market considerations in the discussion on this topic. These matters do not bespeak a failure to consider the issue of cumulative impact.

183 A further matter identified by the applicant that was said to be mandated for consideration by the Minister was the differential effects on climate change as between the gas-fired option and the coal-fired option, and also between the burning of fossil fuel and use of renewable fuels. As would be apparent from my earlier reference to the materials before the Minister, the differential effects of the various fuel options were addressed. Quantified predicted greenhouse gas emissions for each option was provided, including in the briefing note provided to the Minister. The Director-General's report certainly indicated that, all other things being equal, the order of preference for the operation of generating plants were renewable fuels, followed by gas-fired plants, with the least preferred being that of a coal-fired plant. However, for reasons explained, including the inability of renewal fuels alone to meet the predicted energy generation shortfall, the policy of encouraging a competitive electricity generation industry and, significantly, the need to have approvals in place so as to assure energy security, should the predicted demand exceed the available supply, the difference in greenhouse gas emissions among the various fuels considered were not regarded as determinative. Again, the fact that this level of consideration was given to the alternatives does not, to my mind, reflect a failure to consider the differential effects on climate change of the various fuel options.

184 This ground of challenge is not sustained.

GROUND 4: CONSIDERATION OF THE PUBLIC INTEREST: ANTHROPOGENIC CLIMATE CHANGE

185 The principles advanced by the applicant in support of this ground are essentially the same as those propounded in support of the previous ground. Much of the material both in principle and factually relevant to this ground has already been discussed. In similar vein, and for reasons expressed, I have concluded in respect of this ground that, in the context of consideration of the concept plan application under s 75O, anthropogenic climate change was not a mandatory relevant consideration. In any event it was a topic addressed in the material provided to the Minister to the extent required. Consistent with

the principles earlier stated, it is necessary to record that the climate change ground is advanced as an element of the public interest and failure to consider it can only go to validity if it gives rise to an inference that the Minister failed to consider the public interest or did not make the decision in good faith (*Walker*).

186 I have already provided a number of references in the evidence demonstrating that the topic of climate change was addressed in the various documents placed before the Minister. One of the complaints that the applicant makes, as I understand his submissions, is that while the topic was addressed in the context of greenhouse gas emissions, no reference was made as to the nature of the effects from climate change and the impact upon them from the operation, if it occurred, of the power station proposals. However, the evidence reveals that material identifying the consequence of climate change was addressed and was before the Minister. This material is exemplified in the Submissions Report prepared for Bayswater. In that report the following is written in response to an objection directed to the lack of consideration of the "economic and social costs of increased greenhouse gas emissions leading to climate change" (at [13.10]):

> "The submission refers to the economic and social costs of increased severe weather events such as more severe droughts, bushfires and storms resulting in increased insurance premiums and property loss. It also states that a clear analysis of these costs should be undertaken at the local, regional and State level when considering proposed GHG increases.
>
> It is widely understood that climate change is having an effect on our weather patterns and that GHG are a contributing factor in climate change. However the magnitude to which increased GHG emissions as a result of either option proposed contributes to overall climate change is outside the scope of this EA. Rather the EA addressed the options to offset GHG emissions either by investing in carbon offset projects or by directly augmenting with renewable energy. As stated in section 10.4.2 of the EA review of these options would need to be undertaken by the proponent for the Project Application who would be the responsible party for the detailed design, construction and operation of the facility. This would be undertaken subsequent to the concept approval process.
>
> ...
>
> The proponent will also ensure that Bayswater B would be capable of implementing [carbon capture and storage] when this technology becomes feasible. An ongoing review process proposed would keep abreast of [carbon capture and storage] technologies."

These matters coupled with those to which I have already referred when addressing Ground 3 reflect the basis upon which I do not uphold this ground of the applicant's challenge.

187 Before leaving these grounds there are two matters that need to be addressed. These relate first to evidence sought to be adduced by the applicant in support of its grounds and second, the implications of the decision

of Biscoe J in *Aldous v Greater Taree City Council* [2009] NSWLEC 17; (2009) 167 LGERA 13.

188 In support of his case, the applicant sought to read an affidavit sworn by Professor Ian Lowe, Emeritus Professor of Science, Technology and Society at Griffith University. Without doing disservice to an impressive curriculum vitae, Professor Lowe may appropriately be described as an environmental scientist. Regrettably, his affidavit, or rather his reort annexed to it was not prepared with a keen eye to the rules of evidence as to its form but it is its substance that principally attracted the objection of all respondents. I provisionally allowed the affidavit to be read but indicated that I would reserve my ultimate decision upon its admissibility until judgment was delivered. This course was agreed in by the respondents, the hearing of the matter being facilitated by that concession, given that Professor Lowe was not required for cross-examination upon his evidence.

189 The affidavit sworn by Professor Lowe is, itself, formal in form as it attaches a detailed report that he had prepared. It was really by reference to that report to which my remarks about its form were made and it is certainly the substance of the report to which objection is taken. It is therefore convenient to refer to it as the Lowe Report. The Lowe Report is substantially comprised of statements of fact and expressions of opinion that were not before the Minister when approvals were granted for the Concept Plans on 12 January 2010. In that report reference is made to a number of documents not identified in terms in the documents before the Minister, some of which I have referred to in [149].

190 Ordinarily, in proceedings of this kind, evidence of material that was not before the decision-maker at the time of making the decision will be irrelevant and on that account inadmissible (*McCormack v Commissioner of Taxation* [2001] FCA 1700; (2001) 114 FCR 574 at [35] - [40]. This limitation is equally applicable where the ground of review is failure to have regard to a mandatory relevant consideration (*Attorney-General for the Northern Territory v Minister for Aboriginal Affairs* (1989) 23 FCR 536 at 540).

191 At paragraphs 34 - 50 of the Lowe Report, Professor Lowe seeks to opine that ESD was a mandatory relevant consideration or a "centrally relevant" consideration when determining the concept plan applications. The effect of his evidence at paragraphs 51 - 80 is that ESD was not considered, or adequately considered, either in the Director General's report or by the Minister in respect of each proposal. Professor Lowe's opinion as to ESD being a mandatory relevant consideration or a "centrally relevant" consideration for the Minister making a determination under s 75O of the EPA Act is irrelevant and therefore inadmissible.

192 While it may be accepted that where there was "centrally relevant" information that was "readily available" to a statutory decision-maker, evidence of the existence and nature of that information is, it may be accepted, admissible in judicial review proceedings as an exception to the general rule (*Prasad v Minister for Immigration and Ethnic Affairs* (1995) 6 FCR 155 at 170). There is no basis either in principle or under the *Evidence Act* 1995 enabling the admissibility of expert evidence as to whether particular information is centrally relevant or the manner in which that information is to be provided to the decision-maker in order to render the decision lawful. Moreover, as is made clear in *Minister for Aboriginal Affairs v Peko-Wallsend Limited* , the identification of what constitutes a mandatory relevant consideration involves a process of statutory interpretation.

193 In so far as Professor Lowe's evidence seeks to opine upon the process of decision making in this area under s 75O, his evidence, if otherwise relevant, does not identify his specialised knowledge for the purpose of ss 76 and 79 of the *Evidence Act* . No expertise in planning law or public administration or familiarity with the statutory process culminating in a decision under s 75O is made manifest in his evidence. Thus, his opinion as to what is a mandatory consideration when making a determination under s 75O is not probative of any fact in issue.

194 Paragraphs 39 - 42 of the Lowe Report seem to involve an exercise in establishing that the "appreciation of the significance" of ESD as it relates to climate change "has increased significantly since 2006". The opinion relied upon seems to be an endeavour to establish that since the observation of Hodgson JA in *Walker* at [56], the principles of ESD have now become an element of the public interest with the consequence that failure to consider them will be evidence of a failure to consider the public interest itself. That aspect of the applicant's case has earlier been addressed.

195 Of present relevance is the fact that the increased significance of ESD since 2006 is not relevant to the determination as to whether ESD is a mandatory consideration under s 75O. It will be recalled that such a proposition was unanimously rejected by the Court of Appeal in *Walker.* The obiter observations of Hodgson JA in that regard do not change that determination. Further, the notion that increased public perception of the importance of a matter would convert that very topic into a mandatory relevant consideration when exercising the statutory power under s 75O would be contrary to principles expressed in the High Court. As the Minister submitted, the task of identifying whether a consideration is a mandatory relevant consideration essentially involves a backwards looking exercise, requiring an hypothesis about the purpose of the legislation being considered and is not dependant upon the particular facts of the matter before the decision-maker (*Minister for*

Immigration and Multicultural Affairs v Yusuf at [73]).

196 One of the exceptions to the general proposition that in proceedings for judicial review, evidence is confined to that before the decision-maker, is where evidence is required or at least relevant to understanding the meaning of technical terms used in material before the decision-maker. At paragraphs 34 - 37 of his report, Professor Lowe addressed the meaning of ESD. However, his exploration of that principle is no more specific than is the definition found in s 6(2) of the *Protection of the Environment Administration Act* and there is no suggestion that the statutory definition contains terms having a specialised usage that Professor Lowe is qualified to elucidate. The statutory expression requires no expertise in order to understand its meaning. The evidence in this regard is irrelevant.

197 Much of the remainder of the evidence contained in the Lowe Report is, in effect, a commentary upon the Minister's consideration of ESD as reflected in the materials before him. He concludes (at paragraph 53) that the ESD principles were not considered and were deliberately excluded (at paragraph 64).

198 In similar fashion, Professor Lowe seeks to review and interpret the documents that were before the Director-General when the environmental assessment report and briefing notes were prepared by him. On the reading of those materials by Professor Lowe, he opines that there was "no attempt" to assess "the consequences of the potential emissions from the the projects against the principles of ESD as set out in section 6(2) of the [*Protection of the Environment Operations Act*]" (at paragraphs 74, 78).

199 The evidence described in the preceding two paragraphs is clearly inadmissible by reference to ss 56 and 76 of the *Evidence Act.* It is evidence that does not call for expertise but simply involves material which the Court, on judicial review, is required to assess in light of the challenge made to the Minister's decision. It is material to which I have identified and from which I have concluded that relevant consideration was given by the Minister. For all these reasons, the evidence of Professor Lowe is rejected.

200 This also has the consequence that the series of documents contained in Exhibit B, being documents numbered 22 - 38 in that Exhibit and appearing under the heading "Climate Change Documents" are rejected. These are documents which, at least in part, were the subject of reference by Professor Lowe. As was observed by counsel for the second respondents, a selection of documents that were in the public domain touching upon climate change and no matter how notorious (for example, the report prepared by Sir Nicholas Stern in the UK or the Climate Change Review prepared by Professor Garnaut) cannot and does not purport to be the full suite of documents directed to the

impact of climate change by the emission of greenhouse gases which, in principle, might have been relevant to be considered by the Minister.

201 Although the applicant placed reliance upon observations by Biscoe J in *Aldous v Greater Taree City Council* , the respondents submitted that his Honour's determination in that case was not relevant to the issue raised in the present case. In *Aldous* his Honour traced the course of State, National and International recognition in recent years to the impacts of climate change, particularly change that was said to be of anthropogenic origin and which necessitated actions by all to mitigate the effects of that phenomenon. His Honour determined that since the decision in *Walker* the time had come to consider climate change as a mandatory relevant obligation extending to a requirement to take into account the principles of ESD and, in that case, climate change induced coastal erosion (at [40]).

202 Dr Griffiths SC, who appeared for the Minister, challenged the basis upon which his Honour reached the conclusion that he did, apparently founded upon the observations of Hodgson JA in *Walker* at [56]. I have earlier made observations as to the manner in which that paragraph of the judgment needs to be considered in the context of earlier paragraphs of the judgment by Hodgson JA, particularly what was said by his Honour and agreed with by other members of the court at [43], [44] and [55].

203 However, it is unnecessary to explore this matter further in light of the fact that Biscoe J was addressing an application made under Pt 4 of the EPA Act, particularly by reference to s 79C. The regime for assessment under Pt 4 differs markedly from that which pertains under Pt 3A. In particular Pt 4 contains no provisions differentiating between a concept plan approval and a project approval, a differentiation that is the subject of specific consideration in the present case.

GROUND 5: FAILURE TO MAKE ENQUIRIES INTO THE PRINCIPLES OF ESD AND IMPACTS ON CLIMATE CHANGE

204 This ground of challenge is expressed in the alternative to the previous two grounds. In short, the applicant submits that the Minister failed in his duty to make inquiries into those principles of ESD that he has identified and the impacts which the projects under consideration would have upon climate change.

205 The relevant principle in this regard is summarised by Preston CJ in *Walsh v Parramatta City Council* at [60], a passage to which earlier reference has been made. In short, there must be an obligation expressly or impliedly imposed by statute upon the decision-maker to make the enquiry at the level of particularity involved in the submission. The Minister submits that this requirement is not satisfied because the matters identified by the applicant were not "centrally relevant" to the decision made by him under s 75O.

206 Apart from identifying principles of ESD and their relevance to the projects, the matters relied upon by the applicant are those that, in substance, are matters also relied upon in support of the previous two grounds. They include material in relation to climate change and the contribution that fossil fuel fired power stations make to climate change by reason of their greenhouse gas emissions. They are the matters that are the substance of the submission supported by references to a number of the documents, including documents, the tender of which I have rejected.

207 As I have endeavoured to demonstrate, these topics have, in substance, and at the level of generality required for the purpose of the subject determination, been addressed in the documents before the Minister. No further or additional case is made under this claim demonstrating a duty to enquire into the particular aspects of ESD. Moreover, for reasons earlier addressed the incremental impact of the projects on climate change could not be predicted but the relevant contributor to that impact, namely the emission of greenhouse gases was sought to be quantified and measures directed to mitigation and control in the implementation of the concept approvals, should that occur, were addressed.

208 This ground does not succeed.

GROUND 6: THE MINISTER MISCONCEIVED THE NATURE OF THE FUNCTION BEING EXERCISED

209 The essence of the submission directed to this ground is that the Minister misconceived the nature of his function under s 75O as he was erroneously led to believe that he was "permitted to disregard the climate change impacts of the projects for the NSW environment" because it was the responsibility of another entity so to do, whether that other entity be another agency of this State or an agency of the Commonwealth. This submission arises from statements extracted from both the briefing note to the Minister and the Director-General's reports in respect of each concept plan application. A number of selected and selective extracts from these documents are provided which are best summarised in the applicant's outline of submissions where it

is said at [166]:

> "The Minister was effectively advised that policies of the State and Federal Governments present and future, may apply the GHG emissions, and that the free market may also determine the optimum level of GHG emissions. It followed that it was not for the Minister in exercising the power in s 75O to consider the link between increased GHG emissions leading to increased climate change impacts, on the basis that there might be other opportunities to offset the GHG emissions generated by the projects."

210 I do not find an examination of the material, as a whole, supports the applicant's submission. It is clear from the evidence that I have earlier identified that the Minister did not disregard the climate change impacts of the concept proposals that he was considering. So much is apparent not only from the assessments contained in the proponents' environmental assessments, but also in the Director-General's report and the Ministerial briefing note. Consideration of climate change impacts is also made manifest by the conditions that were imposed, including the requirement in Condition 2.2(b) for an updated greenhouse gas assessment, the requirement imposed by Condition 2.3 for triennial reports on viable greenhouse gas reduction together with the requirement that a further report addressing that topic be lodged with any project approval application. The documents before the Minister clearly demonstrated, if demonstration was necessary, the interrelation between greenhouse gas emissions and climate change.

211 While the concept approvals addressed the coal-fired or gas-fired options for any project proposal, it is not correct to indicate that in arriving at the decision he did the Minister should be indifferent to the various fuel types or other forms of renewable energy. The advice given was that less greenhouse gas intensive fuel types were, all other things being equal, to be preferred as they were likely to have a lesser impact upon climate change. Indeed, the Director-General's report in respect of each proposal stated:

> "If demand management, energy efficiency and renewable energy projects by themselves negate the need for significant additional non-renewable power generation capacity in future, it will be a positive outcome for the State."

This statement is made in the context of the recognised need for new generating facilities with the present understanding that technologies involving renewable energy sources had not yet been developed sufficiently to ensure or at least give comfort that the predicted shortfall could be met by these means.

212 The material presented to the Minister also involves scrutiny of those alternate greenhouse gas intensive fuels to ensure that if, in order to meet predicted demand, those fuels were utilised then the least greenhouse gas intensive configuration for the selected fuel type should be preferred. The scrutiny recognised on the part of the Department of Planning in this regard led to the

preparation of the Arup reviews which, in turn, appear to have informed the imposition of the greenhouse gas review required by Condition 2.2 of the Concept Plan Approvals.

213 The Minister was advised that application for the Concept Plan Approvals should not be refused solely on the basis of the particular fuel type proposed but the primary reason given was unrelated to a perceived limitation in the planning system. The principal reasons given in that regard appeared in the briefing note for each matter the effect of which was -

(i) fossil fuels rather than renewable fuels were recommended because the renewables were unlikely to provide sufficient energy to meet the predicted generation shortfall with the consequences earlier referred to in this judgment; and

(ii) in recommending the option of coal-fired or gas-fired facilities, the Minister was informed that he could not be assured that gas would be technologically or economically viable in the future and so the prudent course was to have options available.

214 The documents do not demonstrate to me the existence of material before the Minister indicating that the planning system was in some way impotent or to be ignored in addressing the impacts of fuel types. Indeed, the documents, particularly the Director-General's report, suggested that fuel types might be regulated by other policy and legislative regimes but that the planning regime had a role to play. In the context of the argument that important decisions were left to others, with the consequence that there was some form of abrogation or misunderstanding of the role imposed upon the Minister when exercising the discretion to give an approval under s 75O, the limited way in which reference to other responsibilities were the subject of observation can be demonstrated with the following three examples.

1. The Director-General's report stated that "the Department considers that there are likely to be other opportunities to offset the greenhouse gas emissions generated by the proposal".

2. The briefing note to the Minister stated that it was not "appropriate" for the planning system to regulate entrants to the electricity generation and supply market.

3. The briefing note also stated that it was for government more broadly to "regulate or influence the entry of new generators (including distinctions based on fuel types) through regulation, policy and/market based instruments". It was not suggested that the Minister was unable to take this course, only that there were other or additional methods of regulation.

215 In summary, neither the documents before the Minister nor the actions of the

Minister in granting the concept approvals that he did reflect some perceived inhibition in regulating the climate change impacts of the two proposals. While it was accepted that it was not relevant to use the two concept approvals being considered by him as a vehicle for setting broad government policy in relation to greenhouse emissions and climate change, the evidence amply reveals that all relevant aspects of the public interest were considered. These included the public interest in maintaining a reliable supply of electricity in the face of plausible evidence that a generation shortfall could occur at a time before which renewable energy sources and other measures could meet that shortfall, thus necessitating an option for coal or gas-fired stations, using the best available technology.

216 I find no basis upon which to sustain this ground of challenge.

GROUND 7: THE DETERMINATION: AN ARBITRARY, ILLOGICAL AND UNREASONABLE DECISION

217 This ground of challenge appears to be founded upon the well known principle articulated in *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223 (*Wednesbury*). It is submitted that the decisions to grant the Concept Plan Approvals were "arbitrary, illogical and so unreasonable that no reasonable decision-maker would have made them on the material that was put before the Minister".

218 It is trite, but necessary, to observe the stringency with which the test is to be applied. The question is not one as to whether the decision-maker could reasonably have made the same decision had there been different or additional material before that decision-maker. Rather, the question is whether, on the material that was before the decision-maker, the decision was so unreasonable that no reasonable decision-maker could have come to it (*Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; (2010) 84 ALJR 369 at [135]).

219 In support of its submission, the applicant identifies matters to which reference has already been made in relation to greenhouse gas emissions, and the consequence of anthropogenic climate change. Errors are also claimed to be contained within the material provided to the Minister and as well reference is made to documents or opinion not provided to the Minister including opinions contained within the evidence of Professor Lowe that I have rejected or in documents to which he referred. Those latter matters can very obviously not avail the applicant.

220 It is appropriate to make observation about some of the errors alleged by the applicant in the documents that were before the Minister. First, it is contended that the Director-General's reports and briefing notes misconstrued the Owen Report by failing to distinguish between current energy consumption and current energy generating capacity in this State. Any error in that regard would, so it seems to me, be immaterial for two reasons:

(i) while the briefing notes and Director-General's reports referred to the Owen Report of 2007, the conclusions expressed under the head of need and justification were based on the projected generation shortfall identified in the NEMCO Statement of Opportunities of 2009 (referred to in that context as the AEMO Statement of Opportunities), it being recognised that by reason of events that had since occurred, the figures contained in the Owen Report had been superseded;

(ii) the conclusions expressed on need and justification did not depend on a precise calculation of the projected shortfall at any particular time. Both the briefing notes and Director-General's reports acknowledged that projected figures were inherently uncertain and dependent on assumptions (see, for example, the Director General's report in respect of Bayswater at pp 10 - 12). What the documents demonstrate is a policy to grant Concept Plan Approvals for several potential power plants whose generating capacity, if implemented, would exceed the projected generation shortfall in order to provide security of supply against the possibility that one or more of the concepts approved would not proceed. It also seemed to be recognised that the market would ensure that supply did not significantly outstrip demand.

221 A further matter raised by the applicant is that the combined greenhouse gas emissions from the projects will increase the greenhouse gas emissions of this State by somewhere between 8 percent and 15 percent per annum for about 30 years. This estimate involves no more than an addition of figures provided in the briefing note and in the Director-General's report to the Minister. As a bald statement the arithmetic is correct. However, as my earlier observation of the totality of the materials indicates, it was a factor weighed in the documents before the Minister and, one must assume, by the Minister himself with other considerations that led to the decision that he made. As was observed by Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (at 42), particular caution is required to be exercised "when the ground of asserted unreasonableness is giving too much or too little weight to one consideration or another". Both the documents before the Minister and the conditions imposed upon the concept approvals demonstrated that the greenhouse gas emissions from the projects, in isolation and in combination, required consideration but that those considerations weighed against other considerations, in particular the need to secure the supply of electricity. These

were equally matters of public interest that required consideration.

222 It must also be remembered that in the documents directing attention to the increased greenhouse gas emissions, those percentage increases to which the applicant draws attention were "raw" figures in the sense that they were expressed to be "without any mitigation or offsets". As I have earlier recorded, the Director-General's reports contemplate that greenhouse gas emission would be lower than the "raw" percentages if, by way of example, a carbon pollution reduction scheme was enacted or carbon sequestration and storage technology was developed and applied. That qualification appears in the Director-General's reports for both projects. The need for consideration and implementation of any developed technology in that regard was the subject of requirement in the event that project approval was sought.

223 Beyond those matters, reliance is placed by the applicant in support of this ground upon those matters that have been addressed in the previous five grounds. As I have found none of those grounds to have been sustained, these further matters add nothing to demonstrate, to the requisite level of proof, that the decisions by the Minister to grant project approval to each project application was so arbitrary, illogical and unreasonable such that the exercise of the power under s 75O miscarried.

CONCLUSION

224 I have earlier stated my reasons for upholding Ground 1, namely the standing of the applicant to bring these proceedings and for dismissing Ground 2 pertaining to the challenge to the declaration made by the Minister as to critical infrastructure development. When addressing the remaining grounds of challenge it has been necessary to keep firmly in mind the constraints that apply to review of an administrative decision for illegality. The role of the Court in that regard is to declare and enforce the law (*Attorney General (NSW) v Quin* [1990] HCA 21; (1990) 170 CLR 1 at 35). Merits review is not permitted.

225 The position is, with respect, well summarised by Jagot J in *Drake-Brockman v Minister for Planning* , where her Honour said (at [124]):

> "The Land and Environment court has separate merits and judicial review functions ... . In its merits review function the court makes the decision it finds correct or preferable on the evidence, weighing up for itself the competing considerations. In its judicial review function, the Court may not trespass on the merits or impugn a decision made within the necessary legal boundaries. This distinction and consequential limitation in judicial review proceedings is to be 'constantly borne in mind' ".

It is the judicial review function that I have been required to undertake in these proceedings.

226 In respect of those grounds to which the observations just made are relevant, I have determined that the decisions of the Minister to grant Concept Plan Approvals were made within the legal boundaries set by those provisions of Pt 3A of the EPA Act which I have identified. Application of those provisions did not compel a particular result. Material was provided to the Minister upon which he could consider competing elements of the public interest to secure the supply of electricity in this State.

227 There was plausible evidence before him of the need for additional electricity generation plants that, absent their provision, could have threatened the security of supply. Equally, he was provided with material sufficient for the purpose of approving Concept Plans for each of two power stations to permit an understanding of the possible adverse environmental consequences that implementation of those concepts might have. The weighing of those potentially competing considerations was a function that the statute called upon him to exercise. I have determined that in performing that function he did not exceed the power that he was given in that regard. As I have earlier said, whether a contrary decision was available on the materials before the Minister is not a matter that identifies legal error.

ORDERS

228 For these reasons the orders that I make are as follows:

1. The applicant's summons is dismissed.

2. Costs are reserved.

3. Exhibits may be returned.

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Decision last updated: 05 December 2011