Land and Environment Court of New South Wales Decisions

Gray v The Minister for Planning and Ors [2006] NSWLEC 720 (27 November 2006)

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NEW SOUTH WALES LAND AND ENVIRONMENT COURTCITATION: Gray v The Minister for Planning and Ors [2006] NSWLEC 720PARTIES: APPLICANTPeter GrayFIRST RESPONDENTThe Minister for PlanningSECOND RESPONDENTDirector-General of the Department of Planning THIRD RESPONDENTCentennial Hunter Pty LtdCASE NUMBER: 40870 of 2006CATCH WORDS: Judicial ReviewLEGISLATION CITED: Constitution Act 1902 s35CAEnvironmental Planning and Assessment Act 1979 Pt 3A, s75, s13(2)Environmental Planning and Assessment Regulation 1994 Pt 1A, cl 8A, cl 8GEnvironmental Planning and Assessment Regulation 2000 Environment Protection and Biodiversity Conservation Act 1999 (Cth) Interpretation Act 1987 s 3, s11National Parks and Wildlife Act 1974Protection of the Environment Administration Act 1991State Environmental Planning Policy (Major Projects) 2005 Threatened Species Conservation Act 1995CORAM: Pain JDATES OF HEARING: 06/11/200607/11/2006DECISION DATE: 27/11/2006LEGAL REPRESENTATIVESAPPLICANTMr N Perram SCMr M Baird Mr A Crossland SOLICITORSWoolf AssociatesFIRST RESPONDENTSubmitting AppearanceSECOND RESPONDENTMr B Walker SCMr J K KirkSOLICITORSDepartment of Planning, Legal Services BranchTHIRD RESPONDENTMr M Leeming SCSOLICITORSBlake Dawson WaldronJUDGMENT:

THE LAND AND ENVIRONMENT COURTOF NEW SOUTH WALESPain J27 November 200640870 of 2006 Peter Gray v The Minister for Planning, Director-General of the Department of Planning and Centennial Hunter Pty LtdJUDGMENT1 **Her Honour**: The Applicant is challenging decisions made under Pt 3A of the *Environmental Planning and Assessment Act* 1979 (the EP&A Act) by the Director-General of the Department of Planning in relation to the proposal to build a large coal mine known as the Anvil Hill Project by Centennial Hunter Pty Ltd (Centennial), the Third Respondent. The Minister (the First Respondent) has filed a submitting appearance. 2 The Applicant is seeking a declaration that the Director-General's view that an environmental assessment prepared by Centennial adequately addressed the Director-General's environmental assessment requirements was void and without effect. He seeks an order that the decision to place the environmental assessment on public exhibition be set aside.3 The Applicant brings this action in his own name. The Points of Claim state that he is:(i) an officer of the Hunter community Environment Centre Inc; and(ii) a member of "Rising Tide Newcastle", an unincorporated climate change action group.4 The area of land which constitutes Anvil Hill has a deposit of approximately 150 million tonnes of thermal coal. The proposed open cut mine will produce up to 10.5 million tonnes of coal per annum. The mine is intended to operate for 21 years. The intended use of this coal is for burning as fuel in power stations in New South Wales and overseas. There is an existing contract for sale of coal to Macquarie Generation, which operates the Bayswater and Liddell power stations. About half the coal is intended for export for use as fuel in power stations to produce electricity generally in Japan. There is no dispute that burning of coal will release substantial quantities of greenhouse gases into the atmosphere. 5 On 16 January 2006 Centennial applied to the Minister for major projects approval under Pt 3A of the EP&A Act in respect of the Anvil Hill Project in the Hunter Valley. Application under Pt 3A was necessary because of cl 6(1)(a) of *State Environmental Planning Policy (Major Projects)* 2005 and cl 5(1)(a) of Sch 1. The combined effect of those provisions was that development for the purpose of coal mining is declared to be development to which Pt 3A applies. On 25 November 2005 the Minister declared the Anvil Hill Project to be a project to which Pt 3A applied.*Part 3A*6 Part 3A

is headed “Major Infrastructure and Other Projects” and provides a process for the consideration and approval of projects described in s 75B(2) as major infrastructure or other development that in the opinion of the Minister is of State or regional significance. 7 Division 2 of Pt 3A deals with environmental assessment and approval of projects. 8 Section 75F is headed “Environmental assessment requirements for approval” and provides:*(1) The Minister may, after consultation with the Minister for the Environment, publish guidelines in the Gazette with respect to environmental assessment requirements for the purpose of the Minister approving projects under this Part (including levels of assessment and the public authorities and others to be consulted). (2) When an application is made for the Minister's approval for a project, the Director-General is to prepare environmental assessment requirements having regard to any such relevant guidelines in respect of the project. (3) The Director-General is to notify the proponent of the environmental assessment requirements. The Director-General may modify those requirements by further notice to the proponent.(4) In preparing the environmental assessment requirements, the Director-General is to consult relevant public authorities and have regard to the need for the requirements to assess any key issues raised by those public authorities. (5) The environmental assessment requirements may require an environmental assessment to be prepared by or on behalf of the proponent in the form approved by the Director-General. (6) The Director-General may require the proponent to include in an environmental assessment a statement of the commitments the proponent is prepared to make for environmental management and mitigation measures on the site.*

...9 Section 75H is headed “Environmental assessment and public consultation” and provides:*(1) The proponent is to submit to the Director-General the environmental assessment required under this Division for approval to carry out the project. (2) If the Director-General considers that the environmental assessment does not adequately address the environmental assessment requirements, the Director-General may require the proponent to submit a revised environmental assessment to address the matters notified to the proponent. (3) After the environmental assessment has been accepted by the Director-General, the Director-General must, in accordance with any guidelines published by the Minister in the Gazette, make the environmental assessment publicly available for*

at least 30 days. (4) During that period, any person (including a public authority) may make a written submission to the Director-General concerning the matter. (5) The Director-General is to provide copies of submissions received by the Director-General or a report of the issues raised in those submissions to: (a) the proponent, and (b) if the project will require an environment protection licence under Chapter 3 of the Protection of the Environment Operations Act 1997 —the Department of Environment and Conservation, and (c) any other public authority the Director-General considers appropriate. (6) The Director-General may require the proponent to submit to the Director-General: (a) a response to the issues raised in those submissions, and (b) a preferred project report that outlines any proposed changes to the project to minimise its environmental impact, and (c) any revised statement of commitments. ...10 Section 75I provides:*(1) The Director-General is to give a report on a project to the Minister for the purposes of the Minister's consideration of the application for approval to carry out the project. (2) The Director-General's report is to include: (a) a copy of the proponent's environmental assessment and any preferred project report, and (b) any advice provided by public authorities on the project, and (c) a copy of any report of a panel constituted under section 75G in respect of the project, and (d) a copy of or reference to the provisions of any State Environmental Planning Policy that substantially govern the carrying out of the project, and (e) except in the case of a critical infrastructure project—a copy of or reference to the provisions of any environmental planning instrument that would (but for this Part) substantially govern the carrying out of the project and that have been taken into consideration in the environmental assessment of the project under this Division, and (f) any environmental assessment undertaken by the Director-General or other matter the Director-General considers appropriate.* 11 Section 75J provides:*(1) If: (a) the proponent has duly applied to the Minister for approval under this Part to carry out a project, and (b) the environmental assessment requirements under this Division with respect to the project have been complied with, the Minister may approve or disapprove of the carrying out of the project. (2) The Minister, when deciding whether or not to approve the carrying out of a project, is to consider: (a) the Director-General's report on the project and the reports, advice and recommendations contained in the report, and (b) if the proponent is a public authority—any advice provided by the Minister having portfolio responsibility for the*

proponent, and (c) if the Minister has directed an inquiry be held in accordance with section 119 with respect to the project—any findings or recommendations of the Commission of Inquiry. ...(4) A project may be approved under this Part with such modifications of the project or on such conditions as the Minister may determine. (Note also cl 8A of the Regulation below).*Public availability of documents*12 Section 75X is headed "Miscellaneous provisions relating to approvals under this Part" and provides:*(2) The following documents under this Part in relation to a project are to be made publicly available by the Director-General: (a) applications to carry out projects, (b) environmental assessment requirements for a project determined by the Director-General or the Minister, (c) environmental assessment reports of the Director-General to the Minister, (d) approvals to carry out projects given by the Minister, (e) concept plans submitted for the Minister's approval (and approvals of concept plans), (f) requests for modifications of approvals given by the Minister and any modifications made by the Minister. ...*(Note also cl 8G of the Regulation below)*(5) The only requirement of this Part that is mandatory in connection with the validity of an approval of a project or of a concept plan for a project is a requirement that an environmental assessment with respect to the project is made publicly available under section 75H ...*13 *Environmental Planning and Assessment Regulation* 2000 ("the Regulation"): Part 1A Major Projects states:*8B Matters for environmental assessment and Ministerial considerationThe Director-General's report under section 75I of the Act in relation to a project is to include the following matters (to the extent that those matters are not otherwise included in that report in accordance with the requirements of that section): (a) an assessment of the environmental impact of the project, (b) any aspect of the public interest that the Director-General considers relevant to the project, (c) the suitability of the site for the project, (d) copies of submissions received by the Director-General in connection with public consultation under section 75H or a summary of the issues raised in those submissions. **Note:** Section 75J (2) of the Act requires the Minister to consider the Director-General's report (and the reports, advice and recommendations contained in it) when deciding whether or not to approve the carrying out of a project. 8D Rejection of applications if proponent fails to comply with requirements (1) This clause applies to the following applications: (a) an application for the Minister's approval to carry out a project, (b) an application for the Minister's approval for the*

concept plan for a project. (2) If: (a) any such application has not been duly made, and (b) the Director-General has notified the proponent of the action required to ensure that the application is duly made, and (c) the proponent has failed to take that action within 14 days after being so notified, the Minister may decide to reject the application without determining whether to approve or disapprove of the carrying out of the project or to give or refuse to give approval for the concept plan (as the case requires). (3) If: (a) the proponent has failed to comply with the Director-General's requirements under section 75H of the Act in connection with an application, and (b) the Director-General has notified the proponent of the requirements that have not been complied with, and (c) the proponent has failed to comply with those requirements within 21 days after being so notified, the Minister may decide to reject the application without determining whether to approve or disapprove of the carrying out of the project or to give or refuse to give approval for the concept plan (as the case requires). ...14 Certain documents are required to be made publicly available by the Director-General under cl 8G of the Regulation which provides:*(1) This clause applies to the duty of the Director-General under section 75X (2) of the Act to make specified documents relating to a project publicly available. (2) The documents are to be made available on the Department's website and in such other locations as the Director-General determines. (3) The documents are to be posted on the Department's website and in those other locations within 14 days of: (a) in the case of a document that is an application, request or submission—the date on which the application, request or submission is made, or (b) in the case of a document that is a determination of environmental assessment requirements, a report or an approval—the date on which the determination, report or approval is made or given. (4) In addition to the documents referred to in section 75X (2) of the Act, the Director-General is to include on the Department's website and in such other locations as the Director-General determines the following documents: (a) the declaration of development as a project to which Part 3A of the Act applies or its declaration as a critical infrastructure project, (b) guidelines published under section 75F or 75H of the Act, (c) any environmental assessment in relation to a project that has been placed on public exhibition under section 75H of the Act, (d) responses to submissions, preferred project reports and other material in relation to a project provided to the Director-General by the proponent after the end of*

the public consultation period (whether under section 75H (6) of the Act or otherwise), (e) reports of panels under section 75G of the Act or of inquiries under section 119 of the Act in relation to a project, (f) any reasons given to the proponent by the Minister as referred to in section 75X (3) of the Act. (5) A document may be made available on the Department's website by providing an electronic link to the document on another website. 15 While the principal issue in this case concerns the application of s 75H(3) and the circumstances under which the Director-General can accept an environmental assessment for public exhibition, it is necessary to consider the scheme provided in Pt 3A more broadly to determine the arguments raised.16 The steps taken under Pt 3A Div 2 in relation to the environmental assessment requirements ("EAR") for the Anvil Hill Project follow. No guidelines have been published by the Minister under s 75F(1). The Director-General specified the EAR for this project on 26 April 2006 as provided by s 75F(2). These required that the proponent address a number of issues in its environmental assessment including *"Air Quality-including a detailed greenhouse gas assessment"*. Under a section headed "References" the EAR stated: *The Environmental Assessment must take into account relevant State government technical and policy guidelines. While not exhaustive, guidelines which may be relevant to the project are included in the attached list. The attached list refers under Air Quality to "Approved Methods for the Modelling and Assessment of Air Pollutants in NSW (DEC)"*. 17 The parties agreed that greenhouse gases are not one of the pollutants to which this document refers. In other words no relevant State government technical or policy guidelines in relation to the assessment of greenhouse gases was referred to in the EAR. The EAR were advised to Centennial as provided by s 75F(3).18 On 26 August 2006 Centennial lodged the assessment with the Director-General as required under s 75H(1). The assessment is a very large and detailed document. It contains, at Appendix 11, a section headed "Energy and Greenhouse Assessment". Although the assessment refers to greenhouse issues in sections 5.5.8, 6.6, 6.12 and 8.0, these summarise of the contents of Appendix 11. The introduction in Appendix 11 states in part:*The Greenhouse Gas and Energy Assessment report for the project has three main sections:1. An assessment of the energy and greenhouse gas emissions from the proposed Anvil Hill Project in accordance with recognised assessment guidelines;2. Calculation of energy consumption and greenhouse gas emissions for the proposed Anvil Hill Project for*

various operational scenarios including maximum annual production, average annual production and the total project;3. Assessment and identification of where relevant management controls can be utilised to minimise energy use and greenhouse gas emissions and nomination of specific mitigation strategies to achieve this objective.The greenhouse assessment is based upon the methodologies outlined in:· NSW Energy and Greenhouse Guidelines (Guidelines) for Environmental Impact Assessment, Sustainable Energy Development Authority and Planning NSW, 2002· the World Business Council for Sustainable Development (WBCSD) and World Resources Institute (WRI) Greenhouse Gas Protocol 2004 *(GHG Protocol) and· the Australian Greenhouse Office (AGO)* Factors and Methods Workbook December 2005 *(Workbook)The Greenhouse Gas and Energy Assessment has been prepared using information provided by Umwelt regarding the estimated project annual production schedules, annual electricity consumption, annual diesel consumption, annual explosives consumption and methane gas emissions for the proposed Anvil Hill Project*.19 The assessment of greenhouse gases was conducted by the Applicant's consultants principally in accordance with the World Business Council for Sustainable Development and World Resources Institute (WRI) GHG Protocol 2004 (the WBCSP GHG Protocol) which refers to the assessment of scope 1, 2 and 3 emissions. These are defined as follows. *Scope 1: Direct GHG emissionsDirect GHG emissions occur from sources that are owned or controlled by the company, for example, emissions from combustion in owned or controlled boilers, furnaces, vehicles, etc.; emissions from chemical production in owned or controlled process equipment.Direct CO2 emissions from the combustion of biomass shall not be included in scope 1 but reported separately...GHG emissions not covered by the Kyoto Protocol, eg, CFCs, NOx etc. shall not be included in scope 1 but may be reported separately...Scope 2: Electricity indirect GHG emissionsScope 2 accounts for GHG emissions from the generation of purchased electricity consumed by the company. Purchased electricity is defined as electricity that is purchased or otherwise brought into the organizational boundary of the company. Scope 2 emissions physically occur at the facility where electricity is generated.Scope 3: Other indirect GHG emissionsScope 3 is an optional reporting category that allows for the treatment of all other indirect emissions. Scope 3 emissions are a consequence of the activities of the company, but occur from sources not owned or controlled by the*

company. Some examples of scope 3 activities are extraction and production of purchased materials; transportation of purchased fuels; and use of sold products and services.20 Scope 1 and 2 emissions were assessed and included in the environmental assessment but not scope 3 emissions which could include an analysis of the potential greenhouse gas emissions from the burning of coal by third parties outside the control of the proponent. 21 Adjustment of the assessment was required under s 75H(2) in relation to matters other than greenhouse gas assessment and the Director-General considered the assessment was adequate for public exhibition on or about 23 August 2006 pursuant to s 75H(3). This is evidenced by a letter dated 23 August 2006 from the Director-General to Centennial stating that the assessment will be made publicly available. The letter states:*I wish to advise you that the Department has determined that the environmental assessment (EA) for the Anvil Hill Project adequately addresses my requirements of 29 April 2006, and will now make the necessary arrangements to make it publicly available*.22 Also in evidence is an undated departmental Minute headed "Anvil Hill Coal Project Director-General's Requirements s 75H(2) Adequacy Assessment". This stated in relation to greenhouse gas assessment the following:*The EA includes a comprehensive air quality assessment that adequately assesses the potential air quality impacts of the project, including a detailed greenhouse gas assessment. The air quality assessment has been undertaken in accordance with DEC's* Approved Methods for the Modelling and Assessment of Air Pollutants in NSW*, and the greenhouse gas assessment has been undertaken in accordance with relevant guidelines including:·* The World Business Council for Sustainable Development and World Resources Institute Greenhouse Gas Protocol 2004; *and·* The Australian Greenhouse Office Factors and Methods Workbook December 2005.*Reference is also made to draft guidelines prepared by SEDA and PlanningNSW in 2002 titled NSW Energy and Greenhouse Guidelines for EIA. However, the Department notes that these guidelines are yet to be finalised or endorsed by the NSW Government, and are not referenced in the list of relevant guidelines attached to the Director-General's requirements. Consequently, there is no specific requirement to consider these guidelines*.23 The environmental assessment was publicly exhibited from 25 August to 6 October 2006. These proceedings were commenced on 19 September 2006.24 Another departmental Minute dated 13 September 2006 in evidence is headed

"Anvil Hill Project-Panel of Experts" and is a request to the Minister for Planning to constitute a Panel of Experts for the Anvil Hill Project. There is provision for such a panel to be appointed by the Minister under s 75G to assess any aspect of a project referred to it by the Minister. Under "Terms of Reference" the following is stated:*The Department considers that the key issues of concern to the community requiring further specialised technical assessment relate to noise, air quality, flora and fauna, and vegetation offsets. The Department has prepared terms of reference which reflect these key concerns...In regard to greenhouse emissions, the EA includes an assessment of the direct greenhouse gas emissions likely to be generated by the mine itself (e.g methane escaping from the coal seams and diesel emissions from the mining fleet), but does not include an assessment of the indirect emissions associated with the use of the resource either in Australia or overseas. This approach is based on sound greenhouse accounting procedures, and is consistent with the current guidelines for calculating greenhouse emissions from coal mines published by the Australian Greenhouse office.Consequently, while it is recognised that the burning of coal extracted from coal mines produces significant amounts of greenhouse gases, and that increasing greenhouse gas levels in the atmosphere have implications for global warming and climate change, the Department does not believe it is either necessary or appropriate for the Panel of Experts to examine the implications of the project on climate change*.25 That Minute is signed by the Director-General and the Minister, inter alia. A Panel of Experts was constituted under s 75G(1)(a) on 19 September 2006. The Panel of Experts was directed to:*1. Consider and advise on the:(a) following impacts of the project:· noise and blasting;· air quality, in particular dust impacts; and· flora and fauna, in particular vegetation offsets.(b) Relevant issues raised in submissions in regard to these impacts; and(c) Adequacy of the proponent's response to the issues raided in submissions, and2. Identify and comment or* [sic] *any other significant issues raised in submissions or during the panel hearings*.26 It appears the final Terms of Reference were amended from those attached to the Minute signed by the Minister as subsection (2) did not appear in the version attached to the Minute. Subsection (2) potentially encompasses the issue of GHG emissions from the burning of coal.27 The process of assessment under s 75H has continued since proceedings were commenced. Section 75H(6)(a) provides that the Director-General may require the proponent to submit to him a

response to the issues raised in submissions, and this was done by letter to Centennial dated 16 October 2006. A partial response to submissions received during the public exhibition of the assessment dated 30 October 2006 was provided by Centennial to the Director-General. That response included an assessment of greenhouse gas emissions resulting from the burning of the coal intended to be recovered from the Anvil Hill mine (scope 3 emissions). This is available on the Department of Planning website as required by cl 8G(4)(d) of the Regulation. 28 The Applicant conceded that if this material had been part of the assessment and placed on public exhibition pursuant to s 75H(3) he would not be before the Court. He argued his case still has utility because the failure to publicly exhibit the environmental assessment with this information is a failure to comply with an important part of the Pt 3A process so that members of the public can be properly informed in order to determine if they wish to make submissions.29 It is also clear from documents tendered that a large number of submissions raising concerns about the greenhouse implications of burning coal from the Anvil Hill project were received before and during the exhibition period for the environmental assessment.*Scope 3 emissions*30 The WBCSD GHG protocol relied on by Centennial's consultants is directed to identifying GHG in the context of businesses wishing to develop a GHG inventory to serve goals such as managing GHG risks and identifying reduction opportunities, public reporting and participation in voluntary GHG programs, participating in mandatory reporting programs, participating in GHG markets and recognition for early voluntary action. As the Applicant submitted the protocol is not directed at the assessment of GHG emissions in a development assessment process but rather at the calculation of GHG in the context of carbon trading schemes where a carbon "inventory" is required.31 Chapter 4 of WBCSD GHG Protocol states in relation to scope 3 emissions that:*While data availability and reliability may influence which scope 3 activities are included in the inventory, it is accepted that data accuracy may be lower. It may be more important to understand the relative magnitude of and possible changes to scope 3 activities. Emission estimates are acceptable as long as there is transparency with regard to the estimation approach, and the data used for the analysis are adequate to support the objectives of the inventory. Verification of scope 3 emissions will often be difficult and may only be considered if data is of reliable quality*.32 The Australian Greenhouse Office Factors and Methods Workbook December 2005 states

that:*Members of the Greenhouse Challenge Plus programme are required to separately report scope 1 and 2 emissions and the scope 3 emissions they currently report (i.e. emissions from off-site waste disposal, emissions associated with the production of fuels, and emissions from the generation of purchased electricity – see below). Members are also encouraged (but not required) to report other scope 3 emissions*.33 The Department of Planning's Draft Guidelines Energy and Greenhouse in EIA May 2006 which are relevantly the same as the 2002 Guidelines referred to in the s 75H(2) adequacy assessment report at par 22 state that:*With "upstream" issues (inputs to the project such as materials, plant and equipment), a case by case approach needs to be taken. The energy and greenhouse implications associated with the "processing or handling" of the important material inputs to the project immediately prior to the project may need to be considered. However at this stage it is not considered appropriate or feasible to consider all embedded energy or greenhouse emissions in materials or other inputs to projects.With "downstream" issues (outputs from the project in terms of products and waste, or implications in terms of induced use of products, infrastructure or services), a case by case approach needs to be taken. Generally emissions and waste products should be considered (unless being recycled or reused) including any "decomposition" methane sources. In cases where the product is likely to be considered as an "upstream" input for another project, then to it [sic] may not be necessary to be considered in the assessment of the project. This would avoid double counting*.34 The provision of scope 3 emission calculations in the above documents demonstrates that such an assessment can be done methodologically, albeit with limitations on how these should be applied. The Department of Planning's Draft Guidelines are directed to environmental impact assessment processes unlike the other documents.*Applicant's caseIssue 1: Assessment did not comply with EAR*35 Section 75F(1) empowers the Minister to issue guidelines for the purpose of approving projects under Pt 3A including guidelines as to "levels of assessment". No such guidelines have been issued.36 The EAR issued by the Director-General included a requirement that Centennial's environmental assessment include an assessment of as a "key" issue "Air quality – including a detailed greenhouse gas assessment".37 The EAR necessitated "a detailed greenhouse gas assessment" as an aspect of Centennial's environmental assessment. It follows that whatever else the "detailed greenhouse gas

assessment" was to be, it was to be an "environmental assessment". This follows from s 75H(1) which required Centennial to submit an "environmental assessment" and the EAR themselves which dictated what was to be in that environmental assessment.38 The expression "environmental assessment" in the EAR should be given the same meaning it bears in s 75F and s 75H. This is because the requirements are an "instrument" within the meaning of s 3(1) of the *Interpretation Act* 1987 and because such instruments, absent intention to the contrary, are to be construed as having the same meaning as the Act authorising them: s 11 Interpretation Act.39 The expression "environmental assessment" means *"an assessment of the impact on the environment of the proposal"*. Other words synonymous with, or similar to, "impact" might be used. However, the word "environment" is essential to the notion as is the idea that the impacts are those causally connected to the proposal. "Environment" is defined in s 4 of the EP&A Act to include *"all aspects of the surroundings of humans, whether affecting any human as an individual or in his or her social groupings"*.40 It follows that an environmental assessment is an assessment of the impacts of a proposal on all aspects of the surroundings of humans, whether affecting any human as an individual or in his or her social groupings. In the absence of guidelines limiting the level of assessment required under s 75F(1) the environmental assessment must be broad, as a matter of law.*Issue 2: Failure to take into account ESD principles*41 The EP&A Act includes in its objects at s 5(a)(vii) the encouragement of ecologically sustainable development ("ESD"). Under s 4 of the EP&A Act, ESD has the same meaning as in s 6(2) of the *Protection of the Environment Administration Act* 1991. The principles are applicable to decisions made under the EP&A Act and the Director-General should have had regard to these when he decided that the environmental assessment did adequately address the EAR. Further the Director-General must act in the public interest. Following the decision of *Telstra v Hornsby Shire Council [2006] NSWLEC 133;* (2006) 146 LGERA 10, consideration of the public interest means that the principles of ESD must be considered by a decision-maker. 42 There are three reasons why the Minister and the Director-General who is subject to his direction must take into account the public interest when operating under Pt 3A. Firstly, in the second reading speech, the *Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Bill* (the Reform Bill) Pt 3A was introduced to the NSW Parliament: *New*

Part 3A of the Environmental Planning and Assessment Act will strengthen environmental outcomes and provide for earlier consideration of environmental constraints. These changes will provide a more systematic approach to resolving environmental issues, replacing the current single issue considerations. Earlier consideration of environmental constraints will allow earlier and more effective influence over project design and location decisions. ***This provides better outcomes for the community and the environment without unreasonable cost to the proponent.*** (emphasis added). (Hansard, 9 June 2005, p 16767)43 Secondly, Pt 3A applies to projects the Minister determines are major infrastructure or projects of State or regional planning significance.44 Thirdly, the Minister is required to act *"for the good management of the public affairs of NSW"*, s 35CA *Constitution Act* 1902, meaning in the public interest. The Director-General must act as directed by the Minister, s 13(2) EP&A Act, meaning he must also act in the public interest. By virtue of *Telstra v Hornsby* that means that ESD principles must be taken into account. 45 The two ESD principles most relevant are the precautionary principle and intergenerational equity. There is no reference to either of these in the Director-General's documents at all, including at the stage of deciding whether the assessment "adequately addressed" EAR. *Director-General's submissions*46 A preliminary issue raised in submissions was that the assessment of the adequacy of the environmental assessment by the Director-General was not a decision liable to be quashed on judicial review. It did not determine legal rights and was not a report or recommendation in the sense considered in *Ainsworth v Criminal Justice Commission [1992] HCA 10;* (1992) 175 CLR 564.*Issue 1: Assessment did not comply with EAR*47 In s 75F(5) "may" means that EAR need not require an environmental assessment by the proponent. Rather the preparation of an environmental assessment by the proponent is at the discretion of the Director-General. There are no specified requirements or minimum standards for the environmental assessment in Pt 3A or elsewhere in the EP&A Act. 48 Part 3A may be contrasted with the Pt 5 requirements for an environmental impact statement which requirements are more detailed. Section 111 of the EP&A Act places a duty on the determining authority to consider to the fullest extent all matters likely to affect the environment by the proposed activity. Section 112 of the EP&A Act states that in relation to certain prescribed activities and an activity that is likely to significantly affect the environment, consent shall not be

given before the determining authority has been furnished with, and has examined and considered, an environmental impact statement (EIS) in relation to the activity. 49 *Prineas v Forestry Commission of NSW* (1983) 49 LGRA 402 concerned the decision making process relating to an EIS under Pt 5 of the EP&A Act. In that case the applicants sought declarations that the EIS relating to logging in a forest was inadequate and not an EIS within the meaning of s 112 of the Act. It was held by Cripps J that an EIS does not have to cover every topic and explore every avenue advocated by experts, and that the EIS in this case substantially complied with the Act, even though it may have been better if certain omitted matters were considered. Cripps J stated at 417 that:*...the environmental impact statement must be sufficiently specific to direct a reasonably intelligent and informed mind to the possible or potential environmental consequences of the carrying out or not carrying out of that activity. It should be written in understandable language and should contain material which would alert lay persons and specialists to problems inherent in the carrying out of the activity. I do not think the obligation in s 111, that is to take into account "to the fullest extent possible all matters affecting or likely to affect the environment" imposes on a determining authority when preparing an environmental impact statement a standard of absolute perfection or a standard of compliance measured by no consideration other than whether it is possible in fact to carry out the investigation...In my opinion there must be imported into the statutory obligation a concept of reasonableness...in my opinion, provided an environmental impact statement is comprehensive in its treatment of the subject matter, objective in its approach and meets the requirement that it alerts the decision-maker and members of the public and the Department of Environment and Planning to the effect of the activity on the environment and the consequences to the community inherent in the carrying out or not carrying out of the activity, it meets the standards imposed by the regulations. The fact that the environmental impact statement does not cover every topic and explore every avenue advocated by experts does not necessarily invalidate it or require a finding that it does not substantially comply with the statute and the regulations*. 50 The Court of Appeal upheld the findings of Cripps J; see *Prineas v Forestry Commission of NSW* (1984) 53 LGRA 160.51 *Bell v Minister for Urban Affairs and Planning and Port Waratah Coal Service Ltd* (1997) 95 LGERA 86 also concerned non-compliance with a requirement imposed by the now

repealed *Environmental Planning and Assessment Regulation* 1994 (NSW). In that case, development consent was granted by the Minister, as consent authority, for coal facilities, a designated development under the EP&A Act. An objector to the development complained that the EIS prepared in support of the application contained deficiencies, as it did not comply with certain requirements of the Director-General of the Department of Urban Affairs and Planning given pursuant to cl 51 and 52 of the 1994 Regulation, relating to what the contents of an EIS must include and stating that in preparing an EIS the applicant must consult with the Director and have regard to the Director's requirements. Applying the decision of Cripps J in *Prineas*, Bignold J held at 109-110 that although the EIS wrongly omitted material that cl 51 required be included, the omission, though significant, was not so significant that it invalidated the whole of the EIS. He stated at 109 that undue influence should not be placed on what is omitted from an EIS to the extent that it outweighs a consideration of the legal adequacy of what is included in the EIS. It follows from these cases that the environmental assessment in this case is adequate given the more stringent requirements for an EIS in Pt 5.52 The second reading speech of the Reform Bill emphasises that the aim of Pt 3A is to cut red tape (Hansard, 9 June 2005, p 16764).53 The EP&A Act is concerned with controlling development of land to prevent inappropriate environmental effects. Implicit in the assessment is that it is the project itself which causes effects on the environment in a proximate way. In *Minister for Environment and Heritage v Queensland Conservation Council Inc and Anor [2004] FCAFC 190;* (2004) 139 FCR 24 the full bench of the Federal Court held that effects which are sufficiently close to the action to allow it to be said, without straining the language, that they would be the consequences of the action on the protected matter at [53] are relevant. That case was considering the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) (EPBC Act) which requires that likely effects be considered (s 75(2)(a)) and has no application to Pt 3A.54 The issue of causation does not arise because the Applicant must fail for the above reasons. If it is necessary to consider causation the following arguments were put forward. Even if causation as considered by the High Court in *Marche v E and MH Stramere Pty Ltd [1991] HCA 12;* (1991) 171 CLR 506 is applicable, there are cautionary statements about its application by the High Court in *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd [2005] HCA 26;* (2005) 221 CLR 568 and *Travel*

Compensation Fund v Tambree (trading as Tambree & Associates) [2005] HCA 69; 80 ALJR 183. Further a subsequent event can break the chain of causation, for example *Medlin v State Government Insurance Commission [1995] HCA 5;* (1995) 182 CLR 1. Any later use of coal mined over time from the Project can only occur as a result of independent and voluntary human action. It will be subject to actual and potential regulation in that context. The GHG emissions from burning the coal will be released as a product of other activities, undertakings and development in Australia and overseas. These impacts are completely separate from the Anvil Hill Project.55 Burning coal to produce GHG emissions in NSW will be conducted in activities subject to regulation under the EP&A Act. Overseas burning of the coal is also likely to be subject to overseas regulation. The release of GHG from power plants is likely to be subject to increasing regulation nationally and internationally. Technologies relating to GHG are developing and may change over the next two decades.56 None of the relevant instruments require the impacts of the combustion of coal mined from the Anvil Hill Project to be assessed, those instruments being:(a) the WBCSD GHG Protocol(b) the Australian Greenhouse Office (AGO) factors and Methods Workbook December 2005(c) the NSW Greenhouse Plan, and(d) the Draft Energy and Greenhouse Guidelines for Environmental Impact Assessment, Sustainable Energy Development Authority and Planning NSW.*Issue 2: Failure to take into account ESD principles*57 The Director-General did have regard to ESD principles. The fact that an assessment of GHG emissions alone was required demonstrates that regard was intended to be had to the future impacts of GHG. The problem of climate change/global warming is an increasing problem which is recognised by the Director-General in taking into account the environmental concern about GHG emissions by requiring an analysis of these and that must include the effect on future generations. 58 ESD requires that there be integration of environmental and economic considerations in decision making about projects. The Director-General required GHG to be assessed in the environmental assessment and therefore clearly intended that it be taken into account. Further there are minutes and notes on the departmental files to the Director-General which show that the Director-General was made aware directly of concerns raised about the impact of GHG from the project on climate change/global warming.59 There is no requirement that the Director-General give reasons as to why he considered the environmental assessment was

adequate. The document prepared in the department for the Director-General on the adequacy of the environmental assessment can be assumed to have informed his decision to accept the environmental assessment. As this is part of an ongoing process to consider the project under Pt 3A for approval it should not be expected that reasons are given at every step of that process. *Centennial's submissionsIssue 1: Assessment did not comply with EAR* 60 The submissions of the Director-General were adopted. There are factual matters relevant to the issues. There has now been a further assessment of GHG by Centennial in the responses required under s 75H(6)(a) which includes consideration of scope 3 emissions. The provision of that response satisfies any complaint that such information will not be part of the assessment process. Further there are references to ESD in the environmental assessment. 61 There was no authority put forward by the Applicant to support his argument that environmental assessment is required for activities of third parties, which requirement is foreign to planning law. Reliance on cases considering the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) (EPBC Act) are of little assistance as it specifically requires that adverse impacts on a protected matter must be considered unlike any provisions in Pt 3A.62 The Applicant is arguing that the Director-General failed to correctly construe his own EAR. That is inherently unlikely and in any event the EAR were satisfied because the environmental assessment included scope 1 and 2 emissions being assessed and on any view that constituted a detailed GHG assessment. 63 The consideration of whether there has been a breach of Pt 3A must be undertaken in light of *Project Blue Sky v Australian Broadcasting Authority [1998] HCA 28;* (1998) 194 CLR 355 at [93].64 Section 75X is a complete answer to the Applicant's case. *Tugun Cobaki Alliance v Minister for Planning and RTA* [2006] NSWLEC 396 considered this section and the findings of Jagot J at [179]-[184] are embraced.*Issue 2: Failure to take into account ESD principles*65 ESD principles are not mandatory relevant considerations as determined in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40;* (1986) 162 CLR 24 for any decision under Pt 3A and certainly not the intermediate decision under review. 66 ESD principles are not mandatory relevant considerations by virtue of the second reading speech relied on by the Applicant. Section 75B(2) which specifies the projects to which the part may apply does not import an obligation to have regard to ESD. The oath under the new s 35CA of the *Constitution Act* 1902 does not mean

that ESD is a mandatory relevant consideration. 67 The Applicant has not established that they were not taken into account.68 Further the evidence suggests the Director-General did take ESD considerations into account (the effective integration of economic and environmental considerations in decision making processes) given the large number of matters in the "adequacy checklist" and the environmental assessment. Requiring a detailed GHG assessment also reflects an awareness of ESD principles.**Finding***Issue 1: Assessment did not comply with EAR*69 The Director-General's submissions raised five matters concerning the interpretation of Pt 3A which he said confirmed his arguments. I will consider each of these matters first as these relate to how Pt 3A operates in relation to s 75F and 75H.70 Firstly, the Director-General argued that Pt 3A does not have the effect of requiring that an environmental assessment be produced by a proponent for development under that part. Environmental assessment by the proponent is required under Pt 3A, contrary to the arguments of the Director-General. That is clear from the nature of the projects which are likely to come under Pt 3A as described by s 75B(2), the wording of s 75H(1) and s 75I(2)(a) which requires a proponent's environmental assessment be sent to the Minister. Section 75J(1)(b) refers to the Minister giving approval for a particular project if the EAR have been complied with. Further cl 8D of the Regulation refers to the failure to comply with the EAR by a proponent as a basis for the Minister rejecting the application without determining it. The only way the proponent is required to apply the EAR in Pt 3A is through the provision of an environmental assessment under s 75H(1) suggesting the provision of an environmental assessment by the proponent is an essential part of the process under Pt 3A. The inclusion of "may" in s 75F(5) enables the Director-General to specify a form for the environmental assessment if he so chooses, it does not mean that an environmental assessment by the proponent is optional under Pt 3A.71 Secondly, the Director-General submitted the content of an environmental assessment is subject to the discretion of the Director-General in establishing the EAR. That submission appears to be correct. The EAR are determined by the Director-General as provided by s 75F(2) and notification of the EAR to the proponent occurs under s 75F(3). Section 75F(5) provides that the EAR can require an environmental assessment by a proponent in a form approved by the Director-General. 72 Thirdly, according to the Director-General's submissions, an environmental assessment may be accepted for

public exhibition by the Director-General even if it does not adequately address the EAR. The provisions of Pt 3A do not bear out this interpretation. Section 75H(3) does not specify in its terms that the Director-General form a view whether the environmental assessment submitted is adequate in terms of the EAR before accepting the environmental assessment for public exhibition. As the Applicant argued, that requirement is implied by the language of s 75H(3), which refers to acceptance of the environmental assessment by the Director-General. Given that s 75H(2) enables the Director-General to require an amended environmental assessment if he considers it does not adequately address the EAR, the use of "accept" in s 75H(3) suggests that he has to undertake that analysis of whether the environmental assessment is adequate in order to accept it and place it on public exhibition. This is confirmed by the Director-General's actions in considering a Minute on the adequacy of the environmental assessment before deciding whether it was ready for public exhibition. Further, the letter sent by the Director-General to Centennial dated 23 August 2006 states that the Director-General considers the environmental assessment satisfies the EAR and that the environmental assessment can be placed on public exhibition. This is further confirmed by the second reading speech for the Reform Bill which states:*Prior to exhibiting the environmental assessment the director-general must be satisfied that the assessment meets the specified requirements*. (Hansard, 9 June 2005, p 16765)73 Fourthly, the Director-General may, pursuant to s 75F(3), modify the EAR subsequently by further notice to the proponent. Part of the argument in support of this submission was that the decision to allow an environmental assessment to be exhibited which did not comply with the EAR was an implied modification of the EAR. Given that I have already decided that the environmental assessment must be held to have complied with the EAR before it can be publicly exhibited it is difficult to accept that submission. Further, the decision to allow the environmental assessment to be publicly exhibited cannot act as an implied modification of the EAR because that is not a process contemplated in the division. There is no suggestion that any action under s 75F(3) has taken place in this case. Reliance on Hutley JA in *Prineas* at 167 that the EIS in that case was ultimately exhibited with approval of the Director-General of Planning suggesting an implied modification of his requirements, does not assist the Director-General's argument, as Hutley JA had concluded that there was no requirement, only a recommendation, from the Director-

General. In Pt 3A the EAR identified by the Director-General are clearly significant as they alone determine what level of assessment must be undertaken in the environmental assessment, particularly in the absence of any guidelines issued by the Minister under s 75F(1). This is emphasised by the second reading speech stating that environmental outcomes will be strengthened as a result of Pt 3A being introduced (see par 42 above).74 Having decided in relation to the third issue above that the Director-General must decide if an environmental assessment does adequately address the EAR before being placed on public exhibition, the fifth argument raised by the Director-General is at the centre of the issues in this part of the case. The issue is whether the adequacy of compliance with the EAR in an environmental assessment is a discretionary decision of the Director-General and not therefore one the Court can consider. It is the Applicant's primary argument that the decision whether the EAR have been complied with in the environmental assessment (he argued they have not) is a legal issue and therefore one the Court can consider in its own right in judicial review proceedings. 75 A threshold issue raised by the Director-General was that his forming the view that the environmental assessment adequately addresses the EAR was not a decision which could be subject to judicial review. This was partly because the Director-General argued there was no requirement in the Act for him to form such a view, which argument I have rejected. The Director-General argued that this was certiorari in disguise as it was seeking to quash a decision which had no legal effect or did not alter rights, interests or liabilities as identified in *Ainsworth v Criminal Justice Commission* *[1992] HCA 10;* (1992) 175 CLR 564 at 580. I have held that there is a decision required by the Director-General that before an environmental assessment is publicly exhibited under s 75H(3) it must be found to have adequately addressed the EAR. It is clear that a declaration can be sought in relation to that decision, see *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125 and also the majority of the High Court in *Ainsworth* at 581-582. I consider that the decision can be the subject of an application for declaratory relief in judicial review proceedings.76 The Applicant argued that while the decision is a subjective one reached by the Director-General it nevertheless raises a legal question. The Applicant's counsel argued that the Director-General had to ask himself two questions in relation to the environmental assessment, (i) did the environmental assessment comply with the EAR and (ii) if not, can it be said that it

generally complies with those requirements. As the environmental assessment provided did not contain a detailed analysis of GHG in conformity with the EAR it was clear that the Director-General did not ask himself the first question and he therefore fell into legal error. This submission was made on the basis that a detailed GHG assessment could only comply with the EAR if the conduct of the mine did not have the effect of causing carbon dioxide emissions when the coal is burnt because that caused an environmental impact, meaning an impact on all aspects of the surrounding of humans *"whether affecting any human as an individual or in his or her social groupings"* (definition of "environment" in s 4(1) of the EP&A Act). Accordingly the Director-General misconstrued the EAR according to the Applicant. Because he applied a wrong principle the opinion he formed is able to be set aside because this was an error of law, in conformity with dicta in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259. 77 Because Pt 3A provides no guidance on the exercise of the Director-General's discretionary decision in determining the scope and application of the EAR the passage in *Buck v Bavone [1976] HCA 24;* (1976) 135 CLR 110, referred to in *Wu Shan Liang* (at 275-276) would appear to favour the Respondent's arguments. In the passage from *Buck v Bavone* quoted in *Wu Shan Liang*, Gibbs J stated at 118-119: *It is not uncommon for statutes to provide that a board or other authority shall or may take certain action if it is satisfied of the existence of certain matters specified in the statute. Whether the decision of the authority under such a statute can be effectively reviewed by the courts will often largely depend on the nature of the matters of which the authority is required to be satisfied. In all such cases the authority must act in good faith; it cannot act merely arbitrarily or capriciously. Moreover, a person affected will obtain relief from the courts if he can show that the authority has misdirected itself in law or that it has failed to consider matters that it was required to consider or has taken irrelevant matters into account. Even if none of these things can be established, the courts will interfere if the decision reached by the authority appears so unreasonable that no reasonable authority could properly have arrived at it. However, where the matter of which the authority is required to be satisfied is a matter of opinion or policy or taste it may be very difficult to show that it has erred in one of these ways, or that its decision could not reasonably have been reached. In such cases the authority will be left with a very wide discretion which cannot be effectively reviewed by the courts.*

78 I agree with the Director-General's submission that the factual record shows that the Director-General did consider whether the environmental assessment complied with the EAR and concluded that it adequately addressed these. That is confirmed by the letter to Centennial dated 23 August 2006. 79 There are no specific requirements identified for the contents of an environmental assessment and no trigger specified for when it is required in terms of the level of impact on the environment. Part 3A is unlike Pt 5 of the EP&A Act in this regard. Apart from the EAR specified by the Director-General there are no other provisions concerning the contents of the environmental assessment. Nor are there any requirements for the content of the EAR to be specified by the Director-General, these are wholly within the discretion of the Director-General. Further s 75H(2) states that the Director-General may consider if the environmental assessment adequately addresses the EAR. 80 The Applicant argued that the broad definition of "environment" in the EP&A Act combined with a broad application of causation based on common sense, relying on *Marche*, provides a legal principle which binds the Director-General so that he had to require scope 3 emissions be provided in the environmental assessment by Centennial because that is what the EAR required by "detailed GHG assessment". There is no definition of environmental assessment in the EP&A Act so that the meaning of the expression in Pt 3A is undefined. The words should be given their ordinary meaning. In one sense that is what the Applicant's argument seeks to do, however, to argue that "environment", because so broadly defined in s 4, must be so interpreted in every section in which it appears elevates the definition of "environment" to an objective legal test without any other provision of Pt 3A providing any support for that view. As stated by McColl JA in *Cranbrook School v Woollahra Council* (2006) 146 LGERA 313 at [39] "*...the meaning of a definition turns on the context in which it appears, considered as a whole...*" See also, generally, [38] - [40] of that decision.81 Regardless of the conclusion I come to on whether the causation of environmental impact in this case is relevant to the environmental assessment my view is that there is no legal "test" imposed on the Director-General in forming his view on the adequacy of the Applicant's environmental assessment as the Applicant's arguments proposed.82 Part 3A lacks objective criteria within it by which to assess the EAR prepared by the Director-General and the proponent's environmental assessment, and the Applicant's specific arguments fail on

this ground given there is no statutory indication within Pt 3A that the Director-General's subjective judgment is intended to be subject to any legal test such as that proposed by the Applicant. I agree with the Director-General that the legal "tests" as contended by the Applicant have no statutory basis and the second test of determining adequacy of compliance would appear to undermine the first test which the Applicant contends has been breached. The Applicant is unsuccessful on this ground.*Causation of environmental impact*83 The issue of causation did not need to be determined in order to answer the first issue raised although it was raised in that context, but does arise in answering the second issue. The Applicant proposed, relying on *Marche* that a common sense test applies to causation of environmental impact. That meant that it was common sense to determine that there would be greenhouse impacts resulting from the burning of the coal from the Anvil Hill Project which would contribute to global warming/climate change and that therefore this impact should be considered in the environmental assessment for the project. *Marche* concerned the test for determining causation under the law of negligence. It is problematic to apply a rule of causation relying on commonsense, developed to enable legal liability to be determined in private law matters, where whether actual injury or loss sustained by a plaintiff is sufficiently connected with the breach of a duty of care of the defendant is in issue, to judicial review proceedings concerning the meaning of "environmental assessment" under the EP&A Act. As the Respondents argued, environmental assessment is designed to assess the magnitude of possible future adverse consequences of a particular activity to the environment. The Applicant has not referred me to any case where such reasoning has been applied in a judicial review context, let alone one similar to this case. The Director-General's arguments identified, as summarised at par 54, the limitations in relation to the application of the principle in *Marche*. As I discuss below the issue of causation does require some judgment to be applied, as the Director-General's submissions recognised, but there are cases which have considered the issue in the context of environmental assessment that are more applicable than *Marche*.84 The issue of potential causation of impact justifying environmental assessment has arisen in several cases in NSW and under the EPBC Act. These have considered what impacts are sufficiently related to the proposed activity and therefore necessary to be considered in environmental assessments under other parts of the EP&A Act and other legislation requiring environmental impact

assessment such as the EPBC Act. Broadly, cases have held that environmental assessment requires the consideration of impacts which are sufficiently connected to a particular project, and can include off site impacts resulting from third parties not under the control of the proponent. In *Bell,* Bignold J accepted that an EIS could be required to consider off site effects. That case considered whether the impact of increased numbers of coal trains on the Northern Rail Line should be included in the EIS prepared in relation to the expansion of Stage 3 of the Koorangang Island Coal Terminal which provided for stockpiling and ship loading of coal. Bignold J concluded at 101 that external environmental impacts of some development are relevant in assessing the likely impact on the environment where a "real and sufficient link" is demonstrated. 85 The Director-General argued that if causation became relevant (he argued it was not) there must be some likelihood of the particular effects occurring and proposed that an appropriate test beyond that identified by Bignold J is that the environmental effects of a proposed project are significant, proximate, and not unlikely to occur.86 The Applicant relied on decisions in the Federal Court in relation to the EPBC Act. That Act specifically requires the Minister in deciding if a particular proposal is a controlled action to which that Act applies to consider "all adverse impacts" of a proposal. At first instance Keifel J in *Queensland Conservation Council Inc v Minister for the Environment and Heritage* [2003] FCA 1463 considered the objects of the EPBC Act and its particular provisions. Section 75(2) requires the Minister to consider all adverse impacts the action has or will have, or is likely to have, on the protected matter, in that case the world heritage values of the Great Barrier Reef. Her Honour rejected the Minister's argument that "all adverse impacts the action is likely to have" did not include the action of third parties which would result from the action taking place. She referred to a decision of the New Zealand Court of Appeal, *Environmental Defence Society Inc v South Pacific Aluminium Ltd* (no 4) (1981) 1 NZLR 530, where Woodhouse P (Cooke, Richardson and McMullin JJ concurring) held that impacts which required assessment were broader than site-specific impacts. In particular, in that case, Woodhouse P stated at 534 that:*...it could not be Parliament's intention that in every context a discussion limited to site-specific environmental impacts will satisfy an applicant's responsibility to provide a realistic impact report. If that were the case the "green light" could well be given to some major industrial project which involved insignificant*

environmental implications considered by reference only to the site itself, but manifold and adverse effects when assessed against the further construction of another undertaking which alone could give it industrial meaning and with which it clearly would be inextricably involved.87 Further cases referred to by Kiefel J were *Kivi v Forestry Commission of NSW* (1982) 47 LGRA 38, where Cripps J referred to the need for assessment to extend to the *"whole, cumulated and continuing effect"* of an activity, findings also adopted by Sackville J in *Tasmanian Conservation Trust Inc v Minister for Resources [1995] FCA 1035;* (1995) 55 FCR 516 at 541. Kiefel J concluded at [31] that:*These cases strongly suggest that the question whether there is likely to be significant effects upon the environment requires a wide consideration of the consequences which will follow if a proposed activity proceeds*.88 In relation to s 75 of the EPBC Act she held that a wider inquiry was required *"limited only by considerations of the likelihood of it happening"* (at [39]).89 At issue was whether the use of water by cotton farmers downstream of the proposed dam the subject of Ministerial consideration and the likely environmental impacts this would have was relevant to the Minister's consideration and her Honour held that it was.90 This decision was upheld on appeal. In *Minister for Environment and Heritage v Queensland Conservation Council Inc [2004] FCAFC 190;* (2004) 139 FCR 24 the full Federal Court held at [53] that "impact" in its ordinary meaning can readily include the "indirect" consequences of an action and may include the results of acts by people other than the principal actor. The Court also held that the EPBC Act required consideration of:...*effects which are sufficiently close to the action to allow it be said, without straining the language, that they are, or would be, the consequences of the action on the protected matter*.91 While that finding on "effects" is focussed on the relevant protected matter as referred to in the EPBC Act, it is equally applicable to consider effects which may harm the environment in NSW, whether these be direct or indirect.92 That decision may be contrasted with the decision of Dowsett J in *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage* [2006] FCA 736. That decision concerned a challenge to the Minister's decision that a referred proposal for a new coal mine was not a controlled action. The Respondents relied on his finding at [72] to suggest that a finding of causation in relation to the impacts of climate change/global warming could not be made:*I have proceeded upon*

the basis that greenhouse gas emissions consequent upon the burning of coal mined in one of these projects might arguably cause an impact upon a protected matter, which impact could be said to be an impact of the proposed action...However I am far from satisfied that the burning of coal at some unidentified place in the world, the production of greenhouse gases from such combustion, its contribution towards global warming and the impact of global warming upon a protected matter, can be so described. The applicant's concern is the possibility that at some unspecified future time, protected matters in Australia will be adversely and significantly affected by climate change of an unidentified magnitude, such climate change having been caused by levels of greenhouse gases (derived from all sources) in the atmosphere. There has been no suggestion that the mining, transportation or burning of coal from either proposed mine would directly affect any such protected matter, nor was there any attempt to identify the extent (if any) to which emissions from such mining, transportation and burning might aggravate the greenhouse gas problem. ... This case is far removed from the factual situation in Minister for Environment and Heritage v Queensland Conservation Council Inc *[2004] FCAFC 190; (2004) 139 FCR 24.*93 That case was reviewing a decision of the relevant Commonwealth Minister of the Environment not to declare a particular action to be a controlled action. I do not find it persuasive if it is relied on by the Respondents as suggesting that the impacts of GHG emissions produced from coal mined in NSW are beyond the scope of environmental impact assessment procedures in NSW. I do not know what evidence was before Dowsett J as to what measurement of GHG emissions is feasible, for example. This case concerns different circumstances, namely what is required by a detailed GHG assessment in the context of an environmental assessment of a large coal mine under the EP&A Act. 94 It is clear from the evidence that the extent of potential GHG emissions from mining and transportation, and operation of the mine, have been calculated in the scope 1 and 2 emissions contained in the environmental assessment. Scope 2 emissions are indirect GHG emissions being the emissions resulting from the electricity to be consumed by the proponent. As outlined above at par 30-34 and in argument, no international or national instrument referred to in these proceedings requires that scope 3 emissions be calculated because of methodological issues related to, inter alia, double counting. Apart from the draft Department of Planning Guideline the protocols referred to are

not directed to environmental impact assessment particularly but rather the calculation of GHG gases in relation to inventory calculations, as identified in par 30 above. The issue of double counting may well be relevant in that context. 95 The draft Department of Planning Guidelines 2006 are directed to environmental impact assessment and refer to scope 3 emissions being prepared on a case by case basis (see par 33). They also refer to the issue of double counting. The Guidelines have apparently been in draft form since at least 2002 as that is the date of a previous similar version in the evidence. It was emphasised by the Director-General that this was still a draft guideline and therefore had no formal legal standing. In relation to the definition of scope 3 emissions this document appears very similar to the other protocols referred to. Those protocols were also not identified by the Director-General as being formally adopted as government policy. Nevertheless the Director-General did accept as adequate the reliance of Centennial on the WBCSD Protocol and the Australian Greenhouse Office Factors and Methods Workbook in the environmental assessment. 96 The Applicant argued that GHG emissions from the burning of the coal should be considered in the environmental assessment because of the contribution to global warming/climate change. Scope 3 emissions are intended to measure that impact. It is clear that scope 3 emission calculations can be undertaken, as they have been in the response document prepared by Centennial. 97 Given the quite appropriate recognition by the Director-General that burning the thermal coal from the Anvil Hill Project will cause the release of substantial GHG in the environment which will contribute to climate change/global warming which, I surmise, is having and/or will have impacts on the Australian and consequently NSW environment it would appear that Bignold J's test of causation based on a real and sufficient link is met. While the Director-General argued that the use of the coal as fuel occurred only through voluntary, independent human action, that alone does not break the necessary link to impacts arising from this activity given that the impact is climate change/global warming to which this contributes. In submissions the parties provided various scenarios where this approach would lead to unsatisfactory outcomes such as, in the Director-General's submissions, the need to assess the GHG emissions from the use of ships built in a shipyard which use fossil fuels. Ultimately, it is an issue of fact and degree to be considered in each case, which has been recognised in cases such as *Minister for Environment and Heritage v Queensland Conservation*

Council Inc and Another [2004] FCAFC 190; (2004) 139 FCR 24, by the Full Court at [53]. 98 The Director-General's test that the effect is significant, is not unlikely to occur and is proximate also raises issues of judgment. Climate change/global warming is widely recognised as a significant environmental impact to which there are many contributors worldwide but the extent of the change is not yet certain and is a matter of dispute. The fact there are many contributors globally does not mean the contribution from a single large source such as the Anvil Hill Project in the context of NSW should be ignored in the environmental assessment process. The coal intended to be mined is clearly a potential major single contributor to GHG emissions deriving from NSW given the large size of the proposed mine. That the impact from burning the coal will be experienced globally as well as in NSW, but in a way that is currently not able to be accurately measured, does not suggest that the link to causation of an environmental impact is insufficient. The "not likely to occur" test is clearly met as is the proximate test for the reasons already stated.99 While cases concerning the issue of causation in different statutory contexts have to be applied with care, they are nevertheless instructive, particularly where it is the ordinary meaning of words such as "impact" and "effect" on the "environment" which are being considered. While the EPBC Act has different provisions, as the Respondents emphasised, the cases under that Act referred to above recognise that the meaning of "impact" and "effects" clearly has broad application. These meanings inform the consideration of what environmental impacts are to be assessed under the EP&A Act and Pt 3A in particular given the broad definition of "environment" is s 4 and the broad objects set out in s 5 of the EP&A Act.100 I consider there is a sufficiently proximate link between the mining of a very substantial reserve of thermal coal in NSW, the only purpose of which is for use as fuel in power stations, and the emission of GHG which contribute to climate change/global warming, which is impacting now and likely to continue to do so on the Australian and consequently NSW environment, to require assessment of that GHG contribution of the coal when burnt in an environmental assessment under Pt 3A.*Issue 2: Did the Director-General fail to take ESD principles into account?* 101 The Applicant's Points of Claim challenge the Director-General's opinion that the environmental assessment prepared by Centennial was adequate because he failed to take into account ESD principles, particularly the precautionary principle and the principle of

intergenerational equity. These principles are referred to in the objects in s 5(a)(vii) of the EP&A Act and are defined in s 6(2) of the *Protection of the Environment Administration Act* 1991 (PEA Act) as follows:*(2) For the purposes of subsection (1) (a), ecologically sustainable development requires the effective integration of economic and environmental considerations in decision-making processes. Ecologically sustainable development can be achieved through the implementation of the following principles and programs: (a) the precautionary principle—namely, that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. In the application of the precautionary principle, public and private decisions should be guided by:*

(i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and

(ii) an assessment of the risk-weighted consequences of various options, (b) inter-generational equity—namely, that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations, (c) conservation of biological diversity and ecological integrity—namely, that conservation of biological diversity and ecological integrity should be a fundamental consideration, (d) improved valuation, pricing and incentive mechanisms—namely, that environmental factors should be included in the valuation of assets and services, such as:

(i) polluter pays—that is, those who generate pollution and waste should bear the cost of containment, avoidance or abatement,

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

(iii) environmental goals, having been established, should be pursued in the most cost effective way, by establishing incentive structures, including market mechanisms, that enable those best placed to maximise benefits or minimise costs to develop their own solutions and responses to environmental problems. 102 The role of the Court in judicial review proceedings has been considered on numerous occasions. An oft-quoted

passage is that of Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40;* (1986) 162 CLR 24, where he states at 41 that: *in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision-maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power*. 103 Factors which a decision-maker is bound to consider in making the decision are determined by construction of the statute conferring the discretion: *Peko-Wallsend* at 39. In this Court reliance is also placed on, inter alia, Mofitt P in *Parramatta City Council v Hale and Ors* (1982) 47 LGRA 319 at 345 where he states that the applicant bears an onus of establishing a breach which onus must be discharged in accordance with proper legal requirements and by inference, not suspicion. Such an inference should be drawn only *after anxious consideration, but when the inference is available and ought to be drawn, the court...should not hesitate to give effect to the inference it has drawn*. (at 345). 104 Recently Jagot J in *Tugun* at [143] applied these statements in relation to a challenge to the Minister's decision under Pt 3A in a different context to that in this case. 105 The Applicant is challenging a decision made during a statutory environmental impact assessment process about a project in relation to which the final decision whether to approve it is yet to be made. I am not therefore considering if the final decision maker in approving a project, the Minister in this case, took into account ESD principles in reaching his final decision but whether these principles were taken into account by the Director-General when he accepted Centennial's environmental assessment as adequately complying with the EAR. As the Respondents argued there is no obligation on the Director-General to provide written reasons for his decisions and it cannot be assumed that in the absence of any reference to these principles he did not have regard to them. The Applicant bears the onus of proof in his case.106 The primary evidence of the Director-General's reasoning is that contained in the departmental Minute dated 13 September 2006. This recommended the establishment of a panel of experts to consider several issues related to the environmental impact of the project. It states that it was not necessary or appropriate that the panel consider the implications of the project on climate change/global warming whilst recognising that such change was occurring globally (see par 24 above). It is also clear that the Director-General did not require scope 3 emissions to be in the environmental assessment exhibited to the

public.107 The three arguments made by the Applicant, set out at par 42 – 44 in addition to one set out in the Amended Points of Claim, relies on the contents of the second reading speech when Pt 3A was introduced, the nature of the projects to which Pt 3A applies and the requirement that the Minister, and therefore the Director-General, must act in the public interest because of the Constitution Act. Because of the decision in *Telstra v Hornsby Shire Council* the public interest includes the application of ESD principles. Additionally, the objects of the EP&A Act s 5(a)(vii) include the encouragement of ESD principles. Clause 56 of the Amended Points of Claim states that the Director-General is required, when performing functions under the EP&A Act, to act in accordance with the principles of ESD.108 Centennial argued none of these factors render ESD principles a mandatory relevant consideration for the Director-General within the meaning of *Avon Downs Pty Ltd v Federal Commissioner of Taxation [1949] HCA 26;* (1949) 78 CLR 353 in this case. The Director-General argued that ESD principles were taken into account.109 Numerous decisions of this Court have confirmed the importance of ESD principles for decision makers making decisions under legislation which adopts ESD principles, see for example *Murrumbidgee Ground-Water Preservation Association v Minister for National Resources* [2004] NSWLEC 122 at [128], *BGP Properties v Lake Macquarie Council* (2004) 138 LGERA 237, *Bentley v BGP Properties Pty Ltd* (2006) 145 LGERA 243, *BT Goldsmith Planning Services Pty Ltd v Blacktown City Council* [2005] NSWLEC 210, *Telstra v Hornsby [2006] NSWLEC 133;* (2006) 146 LGERA 10.110 *Murrumbidgee* was a judicial review proceeding concerning the lawfulness of a water-sharing plan under the *Water Management Act* 2000. At [174] and [178] respectively, McClellan J states:*... the Minister is required to act in a manner consistent with and so as to further the objects of the Act. ... by providing that one of the objects of the Act is the application of the principles of ecologically sustainable development, the Water Management Act takes an approach which is now common in environmental legislation....As I have indicated the precautionary principle is now given statutory recognition not only in the* Water Management Act *but in numerous NSW Statutes...it is a central element in the decision making process and cannot be confined. It is not merely a political aspiration but must be applied when decisions are being made under the* Water Management Act *and any other Act which adopts the principles*.111 *Bentley* concerned a prosecution under the *National*

Parks and Wildlife Act 1974 (the NPW Act) for illegal clearing of threatened species. *BT Goldsmith* was a Class 1 proceeding, concerning whether or not a species impact statement should be prepared under the *Threatened Species Conservation Act* 1995. *BGP Properties v Lake Macquarie Council* was a Class 1 appeal under s 97 of the EP&A Act which held that a decision maker must have regard to ESD principles under s79C. *Telstra v Hornsby* was also a merit review in Class 1 proceedings before this Court. In the latter cases Preston J held at [124] that the s 79C(1)(e) of the EP&A Act obliges a consent authority to have regard to the principles of ESD.112 *Telstra v Hornsby* is not a challenge in judicial review proceedings such as this case. What the decision does serve to clarify and elucidate is the obligation on a decision maker granting development consent under the EP&A Act in applying the public interest in the context of ESD principles. While it was considering these issues in the context of Class 1 proceedings under s 79C of the EPA Act it has potentially broader application.113 The Respondents emphasised that Pt 3A was unlike Pt 4 and Pt 5, and did not contain any provision such as s 79C which contains a list of matters including the public interest which must be taken into account in granting development consent. The decision was therefore said to have no application to decisions made under Part 3A. A number of the observations made in the judgment are directed to decision making under the EPA Act more generally. While not binding as they are obiter statements they have persuasive weight in my view. The Respondents' submissions by implication resisted the Applicant's argument that it was necessary for the Director-General to act in the public interest under Pt 3A when exercising his functions in accordance with the Minister's directions under s 13(2) of the EP&A Act. Reliance was placed by the Respondents on s 75R which states that Pt 4 and Pt 5 do not apply to an approved project, defined as a project approved by the Minister under Pt 3A. The precise application of this section is unclear to me given that the Anvil Hill Project is yet to be approved and is therefore not presently an approved project. 114 There is substantial case law apart from *Telstra v Hornsby* suggesting that all decisions under the EP&A Act require that ESD principles be considered in any event. *Telstra v Hornsby* is a substantial judicial pronouncement on precisely what that obligation on decision makers under the EP&A Act entails. I consider that must include decisions made under Pt 3A. It is not required that the ESD principles be referred to explicitly by a decision maker. In this case the

decision under challenge is that of the Director-General in relation to an environmental impact assessment process under that Part.115 While Pt 3A does not specify any limits on the discretion exercised by the Director-General in relation to the scope of the EAR and how these are applied in an environmental assessment I consider that he must exercise that broad discretion in accordance with the objects of the Act which includes the encouragement of ESD principles including those referred to by the Applicant. Essentially I agree with the arguments of the Applicant. The additional issue to consider however is whether that means scope 3 emissions should have been included in the environmental assessment because ESD principles do not refer to a particular environmental issue, as they are broad principles, in circumstances where there is recognition by the Director-General as seen in the departmental Minute dated 13 September 2006 that climate change/global warming is a global environmental issue to which the coal won from the project will contribute.116 It is first necessary to consider the role of environmental impact assessment in relation to the implementation of ESD principles under the EP&A Act, including Pt 3A. There is extensive literature and case law on the general topic of environmental impact assessment and ESD principles, both national and international, which I would have explored had there not been time constraints in delivering this judgment. More assistance from the Applicant in his case would have been desirable as I consider the case was very “bare bones” as presented. In *Bentley v BGP Properties* Preston J refers to the important role environmental impact assessment and approval has as a key means of achieving environmentally sustainable development. His Honour stated at [67] – [70]:*Requiring prior environmental impact assessment and approval is a key means of achieving ecologically sustainable development. It facilitates achievement of the principle of integration ("ecologically sustainable development requires the effective integration of economic and environmental considerations in decision-making processes": s 6(2) of Protection of the Environment Administration Act adopted by s 5(1) of NPW Act. See also Principle 4 of Rio Declaration on Environment and Development 1992 Int). If environmental considerations are to be an integral part of decision-making processes, it is necessary to assess the environmental impacts and risks associated with proposed activities. Environmental impact assessment is widely applied to predict the impacts of proposed activities on the environment. Prior environmental impact*

assessment and approval are important components in a precautionary approach. The precautionary principle is intended to promote actions that avoid serious or irreversible damage in advance of scientific certainty of such damage. Environmental impact assessment can help implement the precautionary principle in a number of ways including:(a) enabling an assessment of whether there are threats of damage to threatened species, populations or ecological communities;(b) enabling an evaluation of the conclusiveness or certainty of the scientific evidence in relation to the threatened species, populations or ecological communities or the effect of proposed development on them;(c) enabling informed decisions to be made to avoid or mitigate, wherever practicable, serious or irreversible damage to the threatened species, populations or ecological communities and their habitats; and(d) shifting the burden of proof (evidentiary presumption) to persons responsible for potentially harmful activity to demonstrate that their actions will not cause environmental harm: Conservation Council of SA Inc v Development Assessment Commission [1999] SAERDC 86 at [24] and [25] upheld in Tuna Boat Owners Assn of SA Inc v Development Assessment Commission [2000] SASC 238; (2000) 77 SASR 369, 110 LGERA 1 at [27]- [30]. See generally on the issue of the precautionary principle in environmental impact assessment, G Tucker and J Treweek, "The Precautionary Principle in Impact Assessment: An International Review" in R Cooney and B Dickson (eds) Biodiversity and the Precautionary Principle, Risk and Uncertainty in Conservation and Sustainable Use (Earthscan, 2005) pp 73-93.The requirement for prior environmental impact assessment and approval enables the present generation to meet its obligation of intergenerational equity by ensuring the health, diversity and productivity of the environment is maintained and enhanced for the benefit of future generations.Finally, prior environmental impact and assessment and approval can facilitate the internalisation of external environmental costs by including environmental factors in the valuation and costs of assets and services (such as in the price of allotments created by subdivision and development), by implementing the user pays or polluter pays principle (those who cause harm to the environment should bear the cost of containment, avoidance or abatement) and by ensuring that users of goods and services should pay prices used on the full life cycle costs of providing goods and services including the use of natural resources and assets (such as the full life cycle costs of maintaining reserved, existing habitat and of establishing and maintaining

compensatory habitat of threatened species, populations and ecological communities).117 *Bentley* concerned a criminal prosecution for the clearing of threatened species. One of the statutory defences was that a development consent has been issued under the EP&A Act which requires environmental assessment, hence Preston J's obiter remarks on the importance of environmental assessment processes, particularly as they relate to ESD. While they are broad statements of principle concerning environmental impact assessment in relation to ESD, and are not directed to any particular part of the EP&A Act, they serve to underscore the significance of environmental assessment under all the relevant parts of the EP&A Act, including Pt 3A. That significance is confirmed by the second reading speech in Parliament when Pt 3A was being introduced, as referred to elsewhere in the judgment. *Intergenerational equity*118 The key purpose of environmental assessment is to provide information about the impact of a particular activity on the environment to a decision maker to enable him or her to make an informed decision based on adequate information about the environmental consequences of a particular development. This is important in the context of enabling decisions about environmental impact to take into account the various principles of ESD including the principle of intergenerational equity. Intergenerational equity has received relatively little judicial consideration in this Court in the context of the requirements for environmental assessment under the EP&A Act. 119 In a recent article by Preston J "*The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific"* (Asia Pacific Journal of Environmental Law, Vol 9, Issues 2 & 3, p 109) three fundamental principles underpinning the principle of intergenerational equity are identified:(i) the conservation of options principle which requires each generation to conserve the natural and cultural diversity in order to ensure that development options are available to future generations;(ii) the conservation of quality principle that each generation must maintain the quality of the earth so that it is passed on in no worse condition than it was received;(iii) the conservation of access principle which is that each generation should have a reasonable and equitable right of access to the natural and cultural resources of the earth.120 The principles above are mirrored in the definition of intergenerational equity in the PEA Act at par 102.121 Preston J refers in his article to several decisions in other national courts which have taken intergenerational equity into account, including the landmark decision of

the Supreme Court of the Philippines in *Minors Oposa v Secretary of the Department of Environment and Natural Resources* 33 ILM 174 (1994). This and other cases referred to at pp 180 - 182 clearly occur in a different legal context to that before me but do underscore the importance of this principle.122 In terms of environmental impact assessment which takes into account the principle of intergenerational equity, as set out above, one important consideration must be the assessment of cumulative impacts of proposed activities on the environment. As I stated in *BT Goldsmith* (at [90]) failure to consider cumulative impact will not adequately address the environmental impact of a particular development where often no single event can be said to have such a significant impact that it will irretrievably harm a particular environment but cumulatively activities will harm the environment. In *BT Goldsmith* I was considering a different provision of the EP&A Act concerning the requirement to undertake a species impact statement under s 78A. While the provisions were different and my conclusions were based in part on the objects of the EP&A Act and the *Threatened Species Conservation Act* 1995 these findings also apply here.123 In *Anderson and Anor v Director- General of the Department of Environment and Conservation and Ors* (2006) 144 LGERA 43 I considered the principle of intergenerational equity as it applied to the granting of s 90 permits enabling destruction of aboriginal objects under the NPW Act. That Act also includes the attainment of ESD principles in its objects. At [199] I found that this principle required that there be an assessment of the cultural significance of a particular area in the context of whether its destruction would mean there was less opportunity for future generations of Aboriginal people to enjoy the cultural benefit of the site. Part of my reasoning concerned the need to assess the cumulative impact of allowing the destruction of aboriginal objects in a particular area.124 The Respondents argued that ESD principles were taken into account given that a detailed analysis of GHG was included in the EAR and was considered in the assessment of the adequacy of the environmental assessment. The extent to which the Director-General gives weight to the principles is a matter for him. Further, ESD requires the integration of economic and environmental considerations in decision-making processes, as has occurred in relation to the EAR. There is no failure to consider the issue of GHG. It is clear from the documents that downstream emissions were not included in the inventory calculations of the Anvil Hill Project in the environmental assessment. Those submissions overlook the role the

environmental impact assessment process plays in Pt 3A in relation to the implementation of intergenerational equity, particularly the need to assess cumulative impacts. If an important downstream impact is omitted from that assessment it is more difficult for the final decision maker, the Minister, to be informed about all relevant matters.125 The Director-General argued that ESD principles do not require that downstream GHG emissions be taken into account in relation to the Anvil Hill Project in any event. Given my findings on causation I do not agree with that submission.126 While the Court has a limited role in judicial review proceedings in that it is not to intrude on the merits of the administrative decision under challenge (see par 102-104) it is apparent that there is a failure to take the principle of intergenerational equity into account by a requirement for a detailed GHG assessment in the EAR if the major component of GHG which results from the use of the coal, namely scope 3 emissions, is not required to be assessed. That is a failure of a legal requirement to take into account the principle of intergenerational equity. It is clear from the evidence that this failure occurred on the Director-General's part and that the Applicant is able to discharge its onus in that regard. While that conclusion is shortly stated I will return to the scope of environmental impact assessment as it relates to intergenerational equity again later in the judgment. *Precautionary principle*127 The Applicant also raised the precautionary principle as one of the ESD principles not taken into account by the Director-General. As stated in *Telstra v Hornsby* at [150], the function of the precautionary principle is to require the decision-maker to assume that there is, or will be, a serious or irreversible threat of environmental damage and to take this into account, notwithstanding that there is a degree of scientific uncertainty about whether the threat really exists or its extent. As identified in *Telstra v Hornsby* at [150], if the two conditions precedent or thresholds are satisfied so that there is a threat of serious or irreversible environmental damage and there is the requisite degree of scientific uncertainty the principle will apply so that the shift in an evidentiary burden will occur meaning that the proponent for the development has to demonstrate that the threat does not exist or is negligible. 128 The Director-General's counsel argued in his written submissions that the precautionary principle was inapposite as follows: *That principle requires that if there are "threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing*

measures to prevent environmental degradation". No aspect of the acceptance by the DG of the EA involved any element of refusing to take into account the GHG issue by reference to a "lack of full scientific certainty". As Preston CJ [sic] *stated in Telstra Corporation at [149]:"If there is no, or not considerable, scientific uncertainty (the second condition precedent is not satisfied) but there is a threat of serious or irreversible environmental damage (the first condition precedent is satisfied), the precautionary principle will not apply."If the DG had adopted a sceptical approach to the climate change issue, and had declined to require the EA to address this (or to address downstream GHG emissions) because of this scepticism, and if in so doing he had failed to consider the precautionary principle, then there may be basis for legal complaint. That is not this case*.129 The precise implication of this submission is unclear in that it does not explicitly state that the Director-General accepted that there are threats of serious or irreversible environmental damage for NSW and/or Australia as a result of GHG emissions about which there is not scientific uncertainty although that appears to be implied by the submission. The passage in *Telstra v Hornsby* quoted in the submission set out above continues as follows: *The threat of serious irreversible environmental damage can be classified as relatively certain because it is possible to establish a causal link between an action or event and environmental damage, to calculate the probability of their occurrence, and to insure against them. Measures will still need to be taken but these will be* preventative *measures to control or regulate the relatively certain threat of serious or irreversible environmental damage, rather than precautionary measures which are appropriate in relation to uncertain threats: A Deville and R Harding,* Applying the Precautionary Principle *(Federation Press, 1997) pp 31 and 34; J Cameron, "The precautionary principle: Core meaning, constitutional framework and procedures for implementation" in R Harding and E Fisher (eds),* Perspectives on the Precautionary Principle *(Federation Press, 1999, 29)*[sic]*, p 37; and N de Sadeleer,* Environmental Principles: From Political Slogans to Legal Rules *(Oxford University Press, 2995), pp 74-75 and 158*.130 In terms of the impacts of climate change/global warming it appears surprising that this threshold of serious irreversible environmental damage which can be classified as relatively certain because the causal link between the action and the damage, the probability of their occurrence calculated and the impact insured against has been met. If the effect of the

Director-General's submission is that this threshold has been met then it appears that preventative measures are accepted as necessary. That would suggest that scope 3 emissions are all the more necessary as part of the environmental assessment process.131 If the precautionary principle does have a role to play, as I suspect it does, inherent in the precautionary principle as set out in s 6(2) of the PEA Act, at [95], is the need for careful evaluation to avoid serious or irreversible damage to the environment and an assessment of the risk weighted consequences for various options. The role of environmental assessment is to assist in providing information to the decision-maker to enable him or her to consider that scientific uncertainty in relation to the serious, irreversible environmental threat, in this case climate change/global warming, as identified above at par 116 in the passage from *Bentley*. That passage in turn refers to numerous sources for the conclusions contained therein. The role of environmental assessment as a "precautionary enabling device" is discussed by J Cameron "The precautionary principle: Core meaning, constitutional framework and procedures for implementation" in R Harding and E Fisher (eds), *Perspectives on the Precautionary Principle*, Federation Press, Leichhardt, 1999, pp 52-54. Amongst several matters identified as necessary to include in environmental assessments to inform the precautionary approach A Deville and R Harding, *Applying the Precautionary Principle* (Federation Press, 1997) identify that long term, ongoing or cumulative impacts of a project including the use and disposal of associated products and by products should be assessed (at p 54). *Telstra v Hornsby* also refers at [130] - [131] to the factors which need to be considered in assessing the seriousness or irreversibility of environmental damage. Further at [140] -[141] the judgment identifies factors necessary to consider in assessing the level of scientific uncertainty about the environmental threat. 132 It is beyond the scope of this case that I consider whether the detailed GHG analysis provided by Centennial whether with or without scope 3 emissions enables an analysis of such factors to be undertaken. The Applicant has accepted that had the environmental assessment included in Centennial's response document he would not have taken this action.133 As this case focuses on the environmental assessment stage not the final decision whether the project should be approved, the extent to which the precautionary principle applies is as yet undetermined. What is required is that the Director-General ensure that there is sufficient information before the Minister to enable his

consideration of all relevant matters so that if there is serious or irreversible environmental damage from climate change/global warming and there is scientific uncertainty about the impact he can determine if there are measures he should consider to prevent environmental degradation in relation to this project. 134 The precautionary principle is part of the bundle of ESD principles identified in s 6(2) of the PEA Act such as intergenerational equity and the conservation of biological diversity and ecological integrity. While not all of these were relied on by the Applicant I observe that there is a clear connection between climate change/global warming resulting in possibly permanent climatic change and the conservation of biological diversity and ecological integrity which are likely to be impacted upon. I have referred earlier to the principle of intergenerational equity (par 122) and observe that the approach to environmental assessment required by the application of the precautionary principle requires knowledge of impacts which are cumulative, on going and long term. In the context of climate change/global warming there is considerable overlap between the environmental assessment requirements to enable these two aspects of ESD to be adequately dealt with. 135 I also conclude that the Director-General failed to take into account the precautionary principle when he decided that the environmental assessment of Centennial was adequate, as already found in relation to intergenerational equity at par 126. This was a failure to comply with a legal requirement.*Other arguments*136 I agree with the Respondents' arguments that ESD principles do not require that the GHG issue, including downstream emissions, override all other considerations. This was recognised by Preston J in *Telstra v Hornsby* at [154] referring particularly to the precautionary principle. Preston J also quoted in this regard and the findings of Pearlman J in *Greenpeace Australia Ltd v Redbank Power Company Pty Ltd* (1994) 86 LGERA 143 at 154, a merit review case under Pt 4 of the EP&A Act which considered the impact of greenhouse gas emissions from a proposed power station. The Minister will decide how the ESD principles in their entirety are to be applied in relation to the Anvil Hill Project in terms of the integration of environmental and economic decision making the principle of ESD requires. I do not consider the Applicant's case can be so characterised however, as what he seeks to do is have scope 3 emissions included in the environmental assessment process so that the information can be considered by the Director-General and ultimately the Minister. 137 The

submission was made by the Director-General that raising climate change/global warming as an issue is enough to satisfy any requirement that intergenerational equity was taken into account, because climate change/global warming was inherently concerned with impacts on future generations. Simply raising an issue such as climate change/global warming is unlikely to satisfy a requirement that intergenerational equity or the precautionary principle has been considered in the absence of any analysis of the impact of activities which potentially contribute in the NSW context in a substantial way to climate change/global warming. It is clear of course in this case that there has been some assessment given the provision of scope 1 and 2 emissions in the environmental assessment. 138 Environmental assessment is intended to enable decision makers to be properly informed about the future environmental consequences of the project before them. The environmental assessment is a prediction of what the impacts might be given that the project is yet to be built. It is not appropriate to limit the scope of the environmental assessment on the basis that GHG emissions may or may not be subject to regulation in the future whether in NSW or overseas. The fact that it is difficult to quantify an impact with precision does not mean it should not be done. In any event, scope 3 emission methodology has been developed and can be applied and its limitations as identified in various protocols taken into account in the environmental assessment process.139 As identified at par 135, Preston J in *Telstra v Hornsby* at 154 stated that if the precautionary principle did apply so that there was a shifting of the evidentiary burden of proof to a proponent in relation to environmental damage this is but one of the factors a decision maker under the EP&A Act must consider and is not determinative of the outcome of that decision making process. The Minister in this case will decide if the coal mine should be approved at all and if approved, subject to what conditions. For example, if approving the project he could limit the time period for the operation of the mine to a different time period to that sought by the Applicant. Under s 75J(4) at [10] he has wide discretion to impose conditions he considers appropriate having considered the matters identified in s 75J(2) and s 75J(1) having been complied with, which includes that the environmental assessment requirements under Part 3A are complied with by the proponent. *Operation of s 75X(5)*140 Section 75X(5) provides:*The only requirement of this Part that is mandatory in connection with the validity of an approval of a project or of a concept plan for a project is a requirement*

that an environmental assessment with respect to the project is made publicly available under section 75H...141 The Respondents argued that 75X renders the Applicant's case untenable and relied on Jagot J in *Tugun Cobaki Alliance Inc v Minister for Planning and RTA* [2006] NSWLEC 396 where her Honour held at [184]: *...the section is to be construed as an expression of Parliament's intention that the only provision breach of which will necessarily lead to invalidity is s 75H(3). The consequences of breach of all other provisions, however, are left at large. A far clearer expression of Parliamentary intention than an implied negative corollary arising from the word "only" would be required to effect any other meaning. As such, the consequences of breach of all other provisions will be determined in the ordinary course consistent with the principles laid down in* Project Blue Sky.142 *Project Blue Sky v Australian Broadcasting Authority [1998] HCA 28;* (1998) 194 CLR 355 at [93]: *...A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales. In determining the question of purpose, regard must be had to "the language of the relevant provision and the scope and object of the whole statute"*.143 For the reasons set out above I consider that the failure to take into account ESD principles in relation to the decision by the Director-General that Centennial's environmental assessment was adequate is a decision which may give rise to invalidity. In light of the objects of the EP&A Act under consideration in this case and the significance of the Director-General's role in the environmental assessment process under Pt 3A I consider s 75X(5) does not prevent this challenge.144 I consider the Applicant succeeds in relation to the second argument he raised.*Exercise of discretion whether to grant relief*145 I have held that the Applicant is successful on the second ground he has raised, namely that the Director-General failed to take into account ESD principles, in particular the principle of intergenerational equity and the precautionary principle, when he formed the view that Centennial's environmental assessment was adequate. It is necessary that I consider whether I should exercise the broad discretion I have under s 124(1) of the EP&A Act to grant the relief sought by the Applicant. I will make the declaration in the terms sought in Prayer 1 of the Amended Application Class 4. 146 I also need to consider if I should set aside the decision of the Director-General to place the environmental assessment, lodged by

Centennial, on public exhibition under s 75H(3) as sought in Prayer 2 of the Amended Application Class 4. The effective result of making such a declaration is that, I surmise, the environmental assessment and the response document with scope 3 emissions now provided by Centennial to the Director-General will be placed on further public exhibition. It is clear that the information the Applicant argued should have been exhibited, being an analysis of scope 3 emissions, has been provided in response to submissions received in the public exhibition process and is part of the environmental assessment process. 147 A number of the cases referred to by the parties concerned environmental impact assessment under Pt 5 of the EP&A Act. *Prineas* and *Bell v Minister for Urban Affairs and Planning* (1997) 95 LGERA 86 considered arguments related to the adequacy of the EIS prepared under Pt 5 in those cases. As identified by the Director-General's arguments there is a different regime in place in relation to Pt 5 which contains requirements for the content of an EIS and specifies a trigger for when it must be carried out (see par 48). Pt 3A contains no similar provisions. Paragraph 49 above considers the decision of *Prineas* at first instance. On appeal, (see *Prineas v Forestry Commission of NSW* (1984) 53 LGERA 160) Hutley JA held at 163 that:*I do not find it necessary to set out all the requirements of the regulations, but an EIS in respect of a substantial activity of the kind with which this case is concerned is bound to be a formidable document involving much expense and skilled labour in its preparation. It would not be too much to say that it is almost impossible to conceive an EIS which literally complies with everything which the regulations require*. 148 *Bell,* also referred to above at par 51, considered whether off site impacts ought be considered in an EIS and concluded that certain impacts off site should have been in that case, but ultimately Bignold J did not consider the EIS so flawed that it should be declared void. 149 In this case the Applicant has not sought to attack directly the adequacy of the environmental assessment of the proponent in terms of the first declaration sought but rather the decision of the Director-General in relation to whether there is adequate compliance with the EAR. The implication of the Applicant's argument is that the environmental assessment is inadequate because it fails to include scope 3 emissions. *Prineas* and *Bell* suggest there must be some limitation on what impacts are considered in an EIS. The same findings could apply to an environmental assessment under Pt 3A.150 As held in *Prineas* and *Bell*, a document such as an EIS under Pt 5 of the EP&A Act is an important part

of the decision making process but its perfection is not required. The same findings must apply to an environmental assessment under Pt 3A. The environmental assessment prepared has been criticised by the Applicant in only one respect. It otherwise covers a wide range of issues. While there was no analysis of scope 3 emissions in the environmental assessment exhibited to the public, reference was made to the existence of such emissions and reasons given as to why they were not provided. Submissions on the issue of the downstream effects of GHG resulting from the burning of coal from the project were received before and during the public exhibition process. The response document which includes scope 3 emissions is available publicly from the Department of Planning. Subsection (2) of the Terms of Reference of the Panel of Experts (see par 25) enable downstream GHG impacts to be considered by the Panel. The Panel is required to report to the Director-General under s 75G(4) and is not subject to the direction of the Minister on the findings and recommendations in its report (s 75G(5)). In these circumstances the utility of requiring a further exhibition is questionable and I decline to exercise my discretion to make the declaration in Prayer 2. 151 I reserve the question of costs.**Orders**152 The Court makes the following declaration:1. That the view formed by the Director-General on 23 August 2006 that the environmental assessment lodged by Centennial Hunter Pty Ltd in respect of the Anvil Hill Project adequately addressed the Director-General's requirements is void and without effect.2. The question of costs is reserved.3. Exhibits may be returned.