Land and Environment Court

New South Wales

Medium Neutral Citation:	**Hunter Community Environment Centre Inc v Minister for Planning [2012] NSWLEC 195**
Hearing dates:	9 - 10 May 2012
Decision date:	24 August 2012
Before:	Pain J
Decision:	The Court makes the following orders: 1. The Applicant's amended summons filed in Court on 9 February 2012 is dismissed. 2. Costs are reserved.
Catchwords:	JUDICIAL REVIEW - approval of major project under Pt 3A - whether failure to provide to Minister statement relating to compliance with environmental assessment requirements for power station rehabilitation project - whether misleading statement relating to compliance made by the Director-General in relation to fly ash disposal measures - whether Minister's approval invalid
Legislation Cited:	Environmental Planning and Assessment Act 1979 Pt 3A Environmental Planning Legislation Amendment Act 2006 Environmental Planning and Assessment Regulation 2000 Interpretation Act 1987 s 33
Cases Cited:	Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue [2009] HCA 41; (2009) 239 CLR 27 Australian Broadcasting Tribunal v Bond [1990] HCA 33; (1990) 170 CLR 321 Azzopardi v Tasman UEB Industries Ltd (1985) 4 NSWLR 139 Chisholm v Pittwater Council [2001] NSWCA 104 Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation [1981] HCA 26; (1981) 147 CLR 297

	Drake-Brockman v Minister for Planning [2007] NSWLEC 490; (2007) 158 LGERA 349 Gray v Minister for Planning [2006] NSWLEC 720; (2006) 152 LGERA 258 Haughton v Minister for Planning [2011] NSWLEC 217; (2011) 185 LGERA 373 IW v City of Perth [1997] HCA 30; (1997) 191 CLR 1 Kennedy v NSW Minister for Planning [2010] NSWLEC 129; (2010) 176 LGERA 395 McBride v Monzie Pty Ltd [2007] FCA 1947; (2007) 164 FCR 559 McGinn v Ashfield Council [2012] NSWCA 238 Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40; (1986) 162 CLR 24 Minister for Immigration and Ethnic Affairs v Haj-Ismail [1982] FCA 51; (1982) 40 ALR 341 Minister for Immigration and Multicultural Affairs v Yusuf [2001] HCA 30; (2001) 206 CLR 323 Minister for Planning v Walker [2008] NSWCA 224; (2008) 161 LGERA 423 Project Blue Sky Inc v Australian Broadcasting Tribunal [1998] HCA 28; (1998) 194 CLR 355 Rivers SOS Inc v Minister for Planning [2009] NSWLEC 213; (2009) 178 LGERA 347 Sezdirmezoglu v Acting Minister for Immigration and Ethnic Affairs [1983] FCA 267; (1983) 51 ALR 561 Wilson v State Rail Authority of New South Wales [2010] NSWCA 198; (2010) 78 NSWLR 704
Texts Cited:	Macquarie Dictionary, 5th ed (2009) Macquarie Library (electronic source)
Category:	Principal judgment
Parties:	Hunter Community Environment Centre (Applicant) Minister for Planning (First Respondent) Delta Electricity (Second Respondent)
Representation:	Ms M Perry QC with Ms S Pritchard (Applicant) Mr S Free with Mr J Hutton (First Respondent) Mr J Lazarus (Second Respondent) Environmental Defender's Office Ltd (Applicant) Department of Planning, Legal Services (First Respondent) Clayton Utz (Second Respondent)
File Number(s):	40922 of 2010

JUDGMENT

1 Hunter Community Environment Community Centre Inc (the Applicant), challenges the decision of the Minister for Planning (the Minister), the First Respondent, to approve Delta Electricity's (the Second Respondent's) major project application under Pt 3A of the *Environmental Planning and Assessment Act* 1979 (the EPA Act). Approval was given on 11 October 2010 for the Munmorah Power Station Rehabilitation project MP 09_0117 (the project). Part 3A has since been repealed.

2 The project is also a critical infrastructure project under s 75C of the EPA Act. No issue arises from that designation for current purposes as the Court's jurisdiction (following *Haughton v Minister for Planning* [2011] NSWLEC 217; (2011) 185 LGERA 373 per Craig J) and the Applicant's standing to take these judicial review proceedings was not disputed at the time of the hearing.

3 The grounds of review alleged in the Second Further Amended Points of Claim (SFAPOC) filed in Court on 9 May 2012 firstly, a failure to comply with s 75I(2)(g) which requires the Director-General's (DG's) report to the Minister to include a statement relating to compliance with environmental assessment requirements (EARs). Secondly, the Applicant alleges that the statement of compliance in the DG's report is misleading in relation to fly ash disposal measures. Not all the grounds identified in the SFAPOC were pressed. The Applicant submitted that either ground, if established, gives rise to invalidity of the project approval. Relief sought in the amended summons filed in Court on 9 February 2012 is a declaration of invalidity of the project approval and consequential orders.

4 Munmorah Power Station is located on land owned by the Second Respondent in the Wyong Local Government Area, approximately 40km southwest of Newcastle. It originally consisted of four 350 megawatt (MW) turbines which were decommissioned between 1967 and 1969 and down rated to 300MW in 1984. In 1996 units 1 and 2 were decommissioned and in 1989 - 1990 units 3 and 4 were refurbished and have operated since as an intermediate coal-fired power plant. The Second Respondent sought approval to rehabilitate units 3 and 4 by replacing and refurbishing aged and worn-out components with current available technology so as to increase the generating efficiency of the units, restore the output of each unit to its original design capacity of 350MW and to increase the operating life of the project by up to 20 years. If rehabilitated, the plant would have a total generating capacity of 700MW for base load generation, equating to approximately 4,800 gigawatt hours of electricity per annum. The Second Respondent sought approval for two fuel options, namely 100 per cent coal (the current situation) or coal supplemented by a percentage of gas up to a maximum of 75 per cent on an

energy basis.

5 The environmental assessment process under Pt 3A as in force in October 2010 must be considered. Division 2 s 75F, s 75H, s 75I and s 75J provided:

> **75F Environmental assessment requirements for approval**
>
> (1) The Minister may, after consultation with the Minister for the Environment, publish guidelines in the Gazette with respect to environmental assessment requirements for the purpose of the Minister approving projects under this Part (including levels of assessment and the public authorities and others to be consulted).
>
> (2) When an application is made for the Minister's approval for a project, the Director-General is to prepare environmental assessment requirements having regard to any such relevant guidelines in respect of the project.
>
> (3) The Director-General is to notify the proponent of the environmental assessment requirements. The Director-General may modify those requirements by further notice to the proponent.
>
> (4) In preparing the environmental assessment requirements, the Director-General is to consult relevant public authorities and have regard to the need for the requirements to assess any key issues raised by those public authorities.
>
> (5) The environmental assessment requirements may require an environmental assessment to be prepared by or on behalf of the proponent in the form approved by the Director-General.
>
> (6) The Director-General may require the proponent to include in an environmental assessment a statement of the commitments the proponent is prepared to make for environmental management and mitigation measures on the site.
>
> (7) This section is subject to section 75P.
>
> **75H Environmental assessment and public consultation**
>
> (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, Climate Change and Water, 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.

(7) If the Director-General considers that significant changes are proposed to the nature of the project, the Director-General may require the proponent to make the preferred project report available to the public.

75I Director-General's environmental assessment report

(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 the Planning Assessment Commission 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, and

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

75J Giving of approval by Minister to carry out project

(1) If:

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

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

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

(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 (and the statement relating to compliance with environmental assessment requirements) contained in the report, and

...

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

(4) A project may be approved under this Part with such modifications of the project or on such conditions as the Minister may determine.

(5) The conditions of approval for the carrying out of a project may require the proponent to comply with any obligations in a statement of commitments made by the proponent (including by entering into a planning agreement referred to in section 93F).

6 The *Environmental Planning Legislation Amendment Act* 2006 (the Amendment Act) changed s 75I and s 75J, effective from 12 January 2007. Relevantly, it added s 75I(2)(g), replaced the requirement in s 75J(1)(b) with the

requirement that the DG give his or her report to the Minister, and added into s 75J(2)(a) "(and the statement relating to compliance with environmental assessment requirements)". Section 75J(1) and (2)(a) as in force up to 12 January 2007 provided:

> **75J Giving of approval by Minister to carry out project**
>
> (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

Development assessment process

7 The development assessment process is identified in the Applicant's SFAPOC filed in Court on 9 May 2012 at par 17 - 30. The events are not disputed. On 5 June 2009, the Second Respondent submitted a preliminary environmental assessment (EA), prepared by Aurecon, to the Department of Planning (the Department). On 19 June 2009, the Second Respondent lodged an application with the Department pursuant to s 75E of the EPA Act seeking the Minister's approval to carry out the project (project application).

8 On 4 July 2009, the DG notified the Second Respondent of the DG's EARs for the project pursuant to s 75F(3) of the EPA Act. On or about 9 September 2009, the Second Respondent provided the EA in draft form, prepared by Aurecon, to the Department and in final form on 14 October 2009. Between 21 October and 20 November 2009, the EA was publicly exhibited, and the DG received 35 written public submissions. The main issue raised in the submissions concerned greenhouse gas emissions and their likely impact on climate change. On 24 November 2009, the Department wrote to the Second Respondent requesting a response to the submissions and on the independent review reports commissioned by the Department. On 22 December 2009, the Second Respondent submitted a final submissions report with a revised statement of commitments and updated air quality assessment, prepared by Aurecon, to the Department. On 20 January 2010 the Second Respondent submitted a response to the independent review reports and on 1 March 2010 it submitted a supplementary submissions report to the Department.

9 In August 2010, the DG's report was given to the Minister pursuant to s 75I for the purposes of the Minister's consideration of the project application. Recommended conditions of approval were annexed to the report. On 11 October 2010, the Department prepared a briefing note 10/08083 to the Minister. On the same date the Minister approved the project pursuant to s 75J (project approval), subject to conditions of approval set out in Sch 2, including in relation to environmental assessment requirements applicable with respect to a project application. In granting project approval, the Minister had before him briefing note attachments including plans depicting the site location and proposed site layout, key recommended conditions of approval, the recommended instrument of approval and the DG's report.

10 The parties identified parts of the environmental assessment process relevant to the two grounds of review. The first ground required consideration of the DG's report sent to the Minister under s 75I. The second ground focussed on the treatment of fly ash disposal options in the environmental assessment process and these sections of the DG's report are referred to when that ground is considered.

EVIDENCE

11 The parties jointly tendered a two volume bundle of documents (exhibit A). The DG's EARs and the DG's report were referred to in some detail in argument and accordingly are set out or summarised below. The DG's EARs (exhibit A tab 5) states in part:

General Requirements	The Environmental Assessment must include: an executive summary; a description of the proposal including: details of project construction, operation, decommissioning, staging and key ancillary infrastructure including fuel delivery and storage, waste disposal (e.g. ash) and water management; details of the extent to which existing infrastructure and facilities at the Munmorah and/ or Vales Point Power Stations would be used for the project; identification of fuel source options for the project and feasibility of those options; and supporting maps/plans clearly identifying existing environmental features (e.g. watercourses, vegetation), infrastructure and landuse (including nearby residences and any approved sensitive landuse) and the siting of the project in the context of this existing environment; consideration of any relevant statutory provisions including the consistency of the project with the objects of the *Environmental Planning and Assessment Act 1979*; an assessment of the key issues outlined below, during construction, operation and decommissioning (as relevant). The Environmental Assessment must assess the worst case as well as representative impact for all key issues considering cumulative impacts, as applicable, from the nearby Munmorah (Colongra), Vales Point and Eraring Power Stations and considering coal and gas fired generation scenarios; a draft Statement of Commitments detailing measures for environmental mitigation, management and monitoring for the project; a conclusion justifying the project taking into consideration the environmental, social and economic impacts of the project; the suitability of the site; and the public interest; ...
	The EA must include assessment of the following key issues:

Key Assessment Requirements	... Greenhouse Gases - the Environmental Assessment must include a comprehensive greenhouse gas assessment undertaken in accordance with the methodology specified in the *National Greenhouse Accounts (NGA) Factors* (Department of Climate Change, November 2008) including: quantification of emissions (in tonnes of carbon dioxide equivalent) in accordance with the *Greenhouse Gas Protocol: Corporate Standard (World Council for Sustainable Business Development & World Resources Institute)* including: direct emissions (Scope 1), indirect emissions from electricity (Scope 2) and any significant up or down stream emissions (Scope 3) considering all stages of the project (construction, operation and decommissioning); comparison of predicted emissions intensity and thermal efficiency against best achievable practice and current NSW averages for the activity, and of predicted emissions against total annual national emissions (expressed as a percentage of total national greenhouse gases production per year over the life of the project); evaluation of the availability and feasibility of measures to reduce and/or offset the greenhouse emissions of the project including options for carbon capture and storage. Where current available mitigation technology is not technically or economically feasible, the Environmental Assessment must demonstrate that the proposal will use best available technology, including carbon capture readiness, and identify options for triggers that would require staged implementation of emerging mitigation technologies; and evaluation of the project in the light of carbon emission prices of $10, $235 and $50 per tonne under the proposed Commonwealth Carbon Pollution Reduction Scheme, both with and without proposed mitigation measures. ... Air Quality Impacts - the Environmental Assessment must include a comprehensive air quality impact assessment prepared in accordance with the *Approved Methods for the Modelling and Assessment of Air Pollutants in New South Wales* (DECC, 2005) (Approved Methods) considering worst

case operating scenarios and meteorological conditions, representative monitoring and receiving locations and cumulative impacts, as applicable, from the nearby Munmorah (Colongra), Vales Point and Eraring Power Stations. The Environmental Assessment must address air quality impacts at a local, regional and interregional level and the potential impacts of emissions on photochemical smog formation in the Sydney basin. The assessment must demonstrate that the project would meet the impact assessment criteria in Section 7 of the Approved Methods and the requirements of the *Protection of the Environment Operations (Clean Air) Regulation 2002*. The Environmental Assessment must clearly demonstrate that the project has been designed to include the application of Best Available Control Technology (BACT) in relation to air emissions, including an assessment of the feasibility, effectiveness and reliability of proposed measures and any residual impacts after these measures have been implemented. The Environmental Assessment must include details of how the performance and efficiency of the project would be monitored and managed against established performance standards.

Noise and Vibration Impacts - the Environmental Assessment must include a comprehensive operational noise impact assessment for the project, prepared in accordance with *NSW Industrial Noise Policy* (EPA, 2000) considering worst case operating scenarios and meteorological conditions, representative monitoring and receiver locations, and cumulative impacts from the nearby Munmorah (Colongra), Vales Point and Eraring Power Stations and from the upgrade of the Vales Point to Munmorah Power Station coal conveyer. The assessment must consider the potential for low frequency noise generation and peak noise impacts (with the potential to cause sleep disturbance). The Environmental Assessment must also consider the potential for:

construction noise impacts consistent with the DECC's "construction noise - existing guidelines" available electronically at http://www.environment.nsw.gov.au/noise/constructnoise.htm

vibration impacts during construction and operation consistent with *Assessing Vibration: A Technical Guideline* (DECC, 2006); and

traffic generated noise during construction and operation consistent with *Environmental Criteria for Road Traffic Noise* (EPA, 1999)

The Environmental Assessment must clearly outline the noise mitigation, monitoring and management measures the Proponent intends to apply to the project. This must include an assessment of the feasibility, effectiveness and reliability of proposed measures and any residual impacts after these measures have been implemented.

...

Water Cycle Management - the Environmental Assessment must:

include a water balance for the project identifying the maximum water use, wastewater generation and disposal requirements for the operation of the project;

demonstrate the availability of viable water sources to sustainabley meet the water requirements of the project for the life of the project, considering the security of supply and current and future water demand in the region; and

provide an assessment of the likely risks to water quality (including temperature) associated with the project considering key ancillary components (such as ash disposal), including demonstration that the cooling water disposal requirement of the project would not significantly impact on the water quality, aquatic ecology or recreational values of the Tuggerah Lakes System (including Budgewoi and Munmorah Lakes).

Waste Management - identification of the major waste streams to be generated by the proposal (including brine concentration and coal ash) and measures for its management and disposal including options for recycling and reuse where reasonable and feasible.

...

12 Sections 1 to 4 of the DG's report (exhibit A tab 44) sets out the background to the project, a description of the proposed development, the relevant statutory context, and the issues raised in submissions during the public consultation process. Section 3.5 "Minister's Approval Power" states:

> The Proponent submitted an Environmental Assessment with the Director-General in October 2009. Pursuant to section 75H and 75I(2)(g) of the Act, the Director-General was satisfied that the Environmental Assessment had addressed the environmental requirements issued on 4 July 2009. A copy of the Environmental Assessment is attached (see Appendix D).
>
> The environmental assessment was placed on public exhibition from 21 October 2009 until 20 November 2009 and submissions invited in accordance with Section 75H of the Act. The Environmental Assessment was also made publicly available on the Department's website.
>
> Following the exhibition period, the Director-General directed the Proponent to respond to the issue raised in the submissions. As the project will require an Environment Protection Licence under the *Protection of the Environment Operations Act* 1997, a copy of the submissions were also provided to the Department of Environment, Climate Change and Water, pursuant to Section 75GH of the Act. The Submissions Report (see Appendix C) prepared by the Proponent was subsequently made publicly available on the Department's website.
>
> The Department has met all its legal obligations so that the Minister can make a determination regarding the project.

13 Section 5, "Assessment of Environmental Impacts", states that "after consideration of the Environmental Assessment, submissions received, Submissions Report and Statement of Commitments, the Department has identified" that the key environmental issues associated with the proposal are greenhouse gas, air quality, operational noise and water and aquatic ecology. The Department considered that all other issues were "adequately addressed by the Proponent's Submissions Report and Statement of Commitments." The report dealt extensively with the key issues, discussing greenhouse gas at p 1035 - 1044, air quality at p 1044 - 1050, operational noise at p 1050 - 1054, water quality and ecology at p 1054 - 1057. The report relevantly stated:

> 5.1 Greenhouse Gas
>
> ...
>
> *Department's consideration*
>
> The Department has reviewed the Environmental Assessment, independent review of the greenhouse gas assessment and the Proponent's response to the independent review, as well as the submissions received on this issue. The Department considers that the assessment undertaken is sufficient to identify the likely greenhouse gas emissions resulting from the proposal.
>
> ...
>
> *Conclusion*
>
> ...

On balance, therefore, the Department has recommended that the project be approved subject to a number of conditions and feasible measures to minimise greenhouse gas emissions, and to demonstrate that they are investigating carbon reduction technologies that could be feasibly retrofitted to the plant, as well as other emission reduction or offset measures, to reduce or eliminate greenhouse gas emissions.

5.2 Air Quality

...

Department's consideration

Based on the Proponent's revised air quality assessment, the Department is satisfied that the Proponent has demonstrated that the Munmorah Power Station can be rehabilitated, either as a 100% coal or dual-fuel option, to achieve compliance with each of the currently regulated stack emission limits for Group 6 facilities. Consequently, the Department has recommended conditions of approval imposing these air quality limits on the project ... The Department is also satisfied that the Proponent has undertaken an assessment consistent with the *Approved Methods for the Modelling and Assessment of Air Pollutants in New South Wales* (DECC, 2005) ...

Conclusion

In summary and with consideration to the recommended conditions of approval, the Department is satisfied that the air quality impacts of the project can be regulated consistent with acceptable amenity and human health standards.

5.3 Operational Noise

...

Department's consideration

The Department has reviewed the noise impact assessment undertaken by the Proponent and considers that it provides an adequate level of assessment to determine whether noise and vibration is expected to be a major issue for the proposal. The Department has considered the comments made by Heggies [Pty Ltd] as part of the independent review however has accepted that the Proponent's project specific noise goals have been based on noise monitoring results undertaken at the nearest residential receiver. In additional, the Department notes that DECCW has also accepted the Proponent's noise monitoring results and project specific noise levels.

5.4 Water Quality and Aquatic Ecology

...

Consideration

The Department has reviewed the Environmental Assessment, the submissions received and the Proponent's response to the issues raised and considers that the Proponent should be required to undertake an ongoing monitoring program with respect to water quality near the discharge point for cooling water and for monitoring of seagrass distribution and health within the northern area of Lake Budgewoi. ...

14 Section 6 "Conclusions and Recommendations" states in part:

The Department has undertaken a detailed assessment of the proposed refurbishment of the Munmorah Power Station having regard to the Proponent's Environmental Assessment, Submissions Report, the issues raised in agency and public submissions and the independent reviews which were commissioned by the Department to review the greenhouse gas assessment, the air quality assessment and the noise impact assessment.

The Department considers that the Proponent has undertaken an adequate and appropriate level of environmental assessment and the Department is satisfied that it can recommend project approval subject to specific conditions. On balance, the Department considers the project to be justified and in the public interest and should be approved subject to the Department's recommended conditions of approval and the Proponent's Statement of Commitments.

Drake-Brockman v Minister for Planning

15 Issues raised by the first ground of review were considered in *Drake-Brockman v Minister for Planning* [2007] NSWLEC 490; (2007) 158 LGERA 349 and the decision was referred to extensively by the parties. Jagot J held at [94], [95], [97], [99] - [110]:

> 94 Section 75I(2)(g) requires the report to include a statement relating to compliance with the environmental assessment requirements under this Division with respect to the project. There is no justification for reading into this provision a requirement that the Director-General prepare this statement. For example, the Minister may authorise the panel to do so under s 75G. A panel is able to "assess any aspect of a project referred to the panel by the Minister". The Director-General may also request a proponent to prepare this statement. The Director-General may request an officer of another public authority to do so (s 17 of the EPA Act). Where the Director-General is required to perform the task, Pt 3A makes it clear. Section 75I(2)(g) places no obligation on the Director-General other than to include the statement in the report.
>
> 95 Pt 3A also identifies powers dependent on opinions being formed or states of mind held (see, for example, s 75B(2)(a) and (b), s 75H(2), s 75H(7) and s 75I(2)(f)). Section 75I(2)(g) does not include any reference to an opinion, state of mind or consideration. While the whole of s 75I(2) is dependent on human action and thought, there is a well-established and important difference in judicial review of administrative action between provisions involving states of mind and other provisions (see the summary in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [130]-[139] per Gummow J). Contrary to the applicant's submissions, s 75I(2)(g) does not impose any obligation on the Director-General to form an opinion about the matter nominated in that sub-section. The section cannot do so because it does not oblige the Director-General to prepare the statement. Moreover, it appears in a list where the Director-General could not prepare five of the seven documents nominated.
>
> ...
>
> 97 The apparent problem of an entire report both addressing a nominated matter and including that matter is a diversion. It is true that s 75I(1) identifies a report for the purposes of the Minister's consideration and s 75I(2) identifies the matters to be included in the report. Nevertheless, the provisions indicate that they are not all mutually exclusive. For example, a report for the purposes of the Minister's consideration under s 75I(1), in many cases, will be constituted by the Director-General's environmental assessment under s 75I(2)(f). Section 75I(2)(f) does not require the Director-General to prepare such an assessment but if the Director-General does so it is difficult to see why that assessment would not be capable of satisfying both ss 75I(1) and 75I(2)(f). Similarly, insofar as an assessment amounts to a statement within the meaning of s 75I(2)(g) or the converse there is no reason to assume that the statutory provisions prevent the same document from satisfying both subsections.
>
> ...
>
> 99 The applicant's concern that there must be a statement in one location to the effect that "there has/has not been compliance with the environmental assessment requirements under this Division" or the Minister will not readily be able to discharge his obligations of consideration under s 75O(2)(a) is also not sustainable.

100 First, s 75I(2)(g) does not require the report to include a certification of compliance or non-compliance. What is required is a statement "relating to" the nominated matter. The words "relating to" have been described as vague, indeterminate, with "no expression more general or far-reaching'', so that they must take meaning from their context (*Oceanic Life Ltd v Chief Commissioner of Stamp Duties* (1999) 168 ALR 211 at [56] per Fitzgerald JA citing *Commissioner of Inland Revenue v Maple & Co (Paris) Ltd* [1908] AC 22 at 26, *Tooheys Limited v Commissioner of Stamp Duties (NSW)* (1961) 105 CLR 602 at 620 and various other decisions). The reference to a statement "relating to" the nominated matter speaks against the applicant's inflexible approach to the provision.

101 Secondly, the substance of the statement is important. If, as the applicant's submissions assumed, the "environmental assessment requirements under this Division" were the Director-General's requirements under s 75F(2) then they would consist of issues the Director-General required the proponent's environmental assessment to address. Given the nature of development capable of being declared to be a project under s 75B the question whether the assessment complied with those requirements would ordinarily involve a complex evaluative exercise. ...

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

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

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

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

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

107 If s 75I(2)(g) is concerned solely with the Director-General's environmental assessment requirements then the Director-General's report satisfied s 75I(2)(g). Section 4.4 of the report provided a short summary of the key issues in those requirements. Section 6.1 of the report stated that it had been prepared after reviewing various documents including the proponent's environmental assessment. The proponent's environmental assessment was itself included in the Director-General's report as an appendix (in disc form). The primary purpose of the proponent's environmental assessment was to address the Director-General's environmental assessment requirements. The proponent's environmental assessment did so at length. To assist the reader it also identified the Director-General's environmental assessment requirements and provided, in tabular form, either a cross-reference to another part of the assessment addressing the requirement or a summary explanation of the manner in which the requirement had been addressed (see section 16 and tables 12 and 13). Section 6.1 of the Director-General's report concluded with the statement "Unless noted to the contrary, the Department is satisfied the responses provided by the Proponent in their EA and the additional response to issues raised in submissions are reasonable". The notations to the contrary are contained in section 6.2, following the format referred to above (issue, raised by, consideration and resolution). The issues addressed in section 6.2 of the Director-General's report clearly "relate to" the Director-General's environmental assessment requirements. The applicant's table identifying requirements allegedly omitted from the report failed to recognise that the report's substantive provisions operated by exception, with all other responses by the proponent being considered "reasonable". I do not accept the applicant's submissions to the contrary.

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

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

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

GROUND 1 – FAILURE TO PROVIDE A STATEMENT IN RELATION TO COMPLIANCE WITH ENVIRONMENTAL ASSESSMENT REQUIREMENTS

Applicant's submissions

16 The purported statement relating to compliance in the DG's report did not comply with s 75I(2)(g) and jurisdiction did not therefore exist for the Minister's decision to approve the project under s 75J. That purported statement is the first paragraph of section 3.5 "Minister's Approval Power" (except the last sentence) quoted at par 12 above. The purported statement only advises that the EARs have been addressed. The statement answers a different question relevant to the exercise of power under s 75H(2) not s 75I(2)(g). The DG's report did not comply with the requirements of s 75I and

the precondition in s 75J(1)(a) was not met. No statement relating to compliance with the EARs was before the Minister as required by s 75J(2)(a). The Minister was uninformed by the extent of compliance notwithstanding the centrality of the EARs to the assessment process. This is not just semantic or an impermissible "fine-tooth comb" approach.

17 *Drake-Brockman* at [106] identifies that the DG's report must include a "written communication relating to compliance with the nominated matter" and must be "'readily discernible as a single entity' and not a mere 'hodgepodge'". That test is met in this case. The facts of *Drake-Brockman* required Jagot J to consider whether a statement may be constituted by a series of documents, which does not arise here.

18 Should a contrary view be taken, *Drake-Brockman* at [94], [95], [97], [107] - [110] was incorrectly decided and should not be followed. The principle of judicial comity requires a judge to follow a decision of another judge of the same court unless the judge considers the decision is wrong. Sections 75I(2)(g) and 75J(2) envisage a statement as something that is included in the report rather than the report itself (cf *Drake-Brockman* at [97]). *Drake-Brockman* is wrong because to contend the DG's report as a whole may satisfy the statutory description would deprive the jurisdictional fact in s 75I(2)(g) of any real content and defeat the NSW Parliament's intention of that section imposing an additional requirement to be included in the DG's report. If that could be the case there would be no need for s 75I(2)(g). The question of whether an assessment complied with the EARs is identified in *Drake-Brockman* at [101] as ordinarily a complex evaluative exercise. A single sentence certification might be unhelpful or insufficient to meet the statutory requirement in some cases. It does not mean that a requirement to include a distinct and clearly ascertainable statement relating to compliance would be so impractical or unduly onerous that it could not have been Parliament's intent. Prior to the commencement of the Amendment Act, at some point a decision had to be made as to whether each of the EARs were in fact complied with.

19 The principles of statutory construction are well settled. The language of the statute must be considered. Compliance is the "act of complying" and comply means "to act in accordance with requirements, conditions etc": *Macquarie Dictionary,* 5th ed (2009) Macquarie Library (electronic source). "Address" has a different meaning to "comply". A statement "relating to" compliance is not necessarily a statement of compliance as those words contain no assumption as to compliance, leaving it open to the DG to identify areas of non-compliance or partial compliance in the statement, as well as areas of compliance: cf *Drake-Brockman* at [100]. The difference between the two is illustrated by the fact that EARs do not merely deal with issues but may impose requirements and standards. Parliament must have deliberately

chosen different language in s 75H and s 75I so that the two tests should not be conflated. While no form has been specified by Parliament, the Respondents' approach would have no form at all.

20 The type of statement satisfying s 75I(2)(g) will vary according to the circumstances. In some cases, a statement that there has or has not been compliance with the EARs will suffice especially where there has been compliance with the EARs. Parliament can be taken to have intended that the requirement serve some useful purpose and hence that specific areas of non-compliance be identified. None of the statements identified by the Respondents is capable of constituting a statement within the meaning of the jurisdictional precondition in s 75I(2)(g) to an exercise of the Minister's approval power.

21 The Applicant's approach is confirmed by the Amendment Act which inserted s 75I(2)(g). Previously the Minister could approve a project only if the EARs had been complied with under s 75J(1)(b). It is not now a precondition to acceptance of the proponent's EA. This approach is also confirmed by the nature and structure of the process leading up to the Minister making a decision. The Amendment Act intended to provide an important safeguard against the loss of the stricter requirement that the EA comply with the EARs.

Timing

22 The purported statement does not relate to compliance at the relevant time as it refers to the proponent's EA dated October 2009 rather than the time the DG's report was prepared, August 2010. The assessment process involves a number of steps beyond the initial assessment whereby further information relevant to assessment is collected by the DG including through public submissions and potentially through such means as independent expert advice and the DG's own EA. There is strong textual support for a construction that directs attention to the point in time when the DG's report is given to the Minister. Environmental assessment requirements inform the Minister's decision whether to approve or reject a project. The totality of the environmental assessment process should be considered by the Minister at the time of his or her decision. This construction is consistent with Jagot J's reasoning in *Drake-Brockman* at [107] - [108]. It is unclear what useful statutory purpose is served by a construction which, by focussing on an anterior point in time, means the DG and the Minister can ignore further relevant information which arises between the submissions of a proponent's initial EA to the Department and the DG's report to the Minister.

Minister's submissions

23 The statement in section 3.5 of the DG's report is plainly sufficient to satisfy the statutory requirement in s 75I(2)(g). The Applicant contends that the statement falls short because it describes the DG's satisfaction that the EARs had been "addressed" in the EA. The semantic distinction underpinning the Applicant's argument is inconsistent with both text and context. There is considerable flexibility in the phrase "a statement relating to compliance with the environmental assessment requirements" under Div 2 of Pt 3A. The statute does not prescribe the form which the statement must take per *Drake-Brockman* at [100].

24 A statement that the EARs have been "addressed" by the proponent in its EA plainly fits the description of being a statement "relating to" compliance with those requirements. This is made abundantly clear when regard is had to the broader statutory scheme in Div 2 of Pt 3A for undertaking environmental assessments. The DG is to prepare EARs following the receipt of a project application: s 75F(2). The DG is to notify the proponent of the EARs: s 75F(3). The proponent is required to submit to the DG the EA required under Div 2: s 75H(2). The DG may then consider whether the EA adequately addresses the EARs. If the DG considers that the EA does not adequately address the EARs then the DG may require the proponent to submit a revised environmental assessment "to address the matters notified to the proponent": s 75H(2). An environmental assessment is not made publicly available until it has been accepted by the DG: s 75H(3). In this statutory context a statement relating to compliance can take the form of a statement that the EARs have been addressed.

25 The point may be illustrated by reference to the facts of the present case. The EARs issued to the proponent took the form of a list of matters that were required to be included in the proponent's EA, including an assessment of various identified "key issues". The proponent was therefore required by the EARs to produce an environmental assessment that included the specified matters. When it came to the point of preparing the DG's report and a statement relating to "compliance with" the EARs, it was fitting that the DG should address the question of "compliance" by considering whether the EA had "addressed" the EARs. That approach went to the heart of the requirements and the adequacy of the environmental assessment prepared in purported compliance with those requirements. The Applicant's case is contrary to *Drake-Brockman* at [109]. That decision should be followed unless the Court considers it is wrong, the relevant principle of judicial comity being identified and discussed in *Rivers SOS Inc v Minister for Planning* [2009] NSWLEC 213; (2009) 178 LGERA 347 at [90].

26 The Applicant's submission that the statement incorrectly relates to the October 2009 environmental assessment ignores the statutory scheme in Pt 3A. The statement in the DG's report is a statement about compliance with the EARs under Div 2 as it is concerned with whether the proponent had submitted an environmental assessment which met the requirements notified by the DG pursuant to s 75F. That is sufficient to satisfy the requirements in s 75I(2)(g). Even if the phrase is capable of having a broader meaning and the events which occurred post October 2009 to supplement the process of environmental assessment are also capable of being characterised as being an aspect of the environmental assessment requirements under Div 2 of Pt 3A, the inclusion of the statement about compliance with the EARs is sufficient to satisfy the statutory requirement. In any event, the DG's report also included statements about the subsequent processes undertaken.

Second Respondent's submissions

27 The Minister's submissions are adopted. For the Applicant to succeed *Drake-Brockman* must be found to be wrong in three respects as her Honour's conclusion was founded on three findings in [109] (considered by the Minister), [107] - [108] and [110]. All findings are ratio per *McBride v Monzie Pty Ltd* [2007] FCA 1947; (2007) 164 FCR 559 at [6] per Finkelstein J. Jagot J's findings are directly applicable to this matter. They should be applied both in the interests of judicial comity and because they are correct.

28 Contrary to the Applicant's submissions, the Amendment Act reduced the significance of compliance with the EARs in the statutory scheme. The effect and clear intent of the amendments is that as long as the DG's report including the statement relating to compliance is considered by the Minister, no invalidity of an approval can arise on the basis of failure to comply with the EARs.

29 Primarily, the statement in section 3.5 of the report was sufficient to satisfy the requirement in s.75I(2)(g). That is plainly a statement "relating to" compliance with the EARs: see *DrakeBrockman* at [109]. There is no difference between whether a proponent's EA "addresses" or "complies with" the EARs. Both processes require review of the EA in order to determine whether it contains or deals with the required content or analysis. The bulk of the EARs issued by the DG relate to various analyses or assessments that must be "included", meaning addressed, in the EA. A statement that the EA has "addressed" the EARs must "relate to" compliance with those requirements. A statement relating to compliance is not a statement of compliance.

30 The first two sentences in *Drake-Brockman* at [106] apply in this case also. In relation to [107] there is a similar statement in the EA in this case to that considered by Jagot J. Her conclusion is directed to the satisfaction of the

department with the content of the EA being good enough to satisfy the requisite statement. Alternatively, consistent with *Drake-Brockman* at [107] - [108], statements in the body of the DG's report to the effect that issues associated with the proposal were adequately addressed by the proponent constituted statements relating to compliance with the EARs. There is no requirement for the statement to be in one place: *Drake-Brockman* at [99]. The DG's report is detailed and a substantial document of some 50 pages plus annexures. Section 5 "Assessment of Environmental Impacts" contains numerous examples considering matters referred to in the EARs in relation to the key issues of greenhouse gas, air quality, operational noise, water quality and aquatic ecology. This is similar to section 6.1 in the environmental assessment considered in *Drake-Brockman.* Section 6 "Conclusions and Recommendations" of the DG's report also satisfies s 75I(2)(g). References to singular can be taken as references to plural: *Interpretation Act* 1987 s 8(b).

31 There is no requirement that the statement relating to compliance relate to compliance at the time of the DG's report. The evidence does not support the inference that the statement in section 3.5 is solely referable to the time at which the EA was submitted. If the DG forms the view that the EA adequately addressed the EARs as at October 2009 there is no purpose served in requiring him to address that issue twice.

CONSIDERATION

32 The scope of judicial review in reviewing legal errors in administrative decision-making includes a failure to comply with mandatory statutory provisions. Recently in *McGinn v Ashfield Council* [2012] NSWCA 238 McColl JA (Sackville JA agreeing) stated at [16]:

> judicial review ... "ordinarily does not extend to findings of fact as such" (*Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321 (at 341)) or to "the merits of administrative action, to the extent that they can be distinguished from legality": *Attorney-General (NSW) v Quin* [1990] HCA 21; (1990) 170 CLR 1 (at 36) per Brennan J.

33 These judicial review proceedings raise issues of statutory construction given the nature of the Applicant's challenge to a statement relating to compliance in the DG's report produced pursuant to Pt 3A of the EPA Act. The principles applicable to statutory construction have received much judicial consideration. Section 33 of the *Interpretation Act* 1987 requires a construction which promotes the purpose or object of an Act over one which would not. In *Project Blue Sky Inc v Australian Broadcasting Tribunal* [1998] HCA 28; (1998) 194 CLR 355 McHugh, Gummow, Kirby and Hayne JJ stated at 381 - 382 that the "primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute", that a "legislative instrument must be construed

on the prima facie basis that its provisions are intended to give effect to harmonious goals" and that "a court construing a statutory provision must strive to give meaning to every word of the provision". See also *IW v City of Perth* [1997] HCA 30; (1997) 191 CLR 1 at 12 per Brennan CJ and McHugh J; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*[2009] HCA 41; (2009) 239 CLR 27 at [47] per Hayne, Heydon, Crennan and Kiefel JJ; and *Wilson v State Rail Authority of New South Wales*[2010] NSWCA 198; (2010) 78 NSWLR 704 at [12] - [13] per Allsop P.

34 The Applicant's approach was said to promote transparency and accountability in decision-making, identified as an objective in s 5(c) of the EPA Act and the mandatory public consultation in s 75H, and better environmental protection outcomes because departures from the EARs are required to be identified and considered. Ultimately the plain meaning, if discernible, of the words of the statute must be applied, mindful of this context: *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* [1981] HCA 26; (1981) 147 CLR 297 at 305 per Gibbs CJ, at 310 per Stephen J, at 320 per Mason and Wilson JJ and at 336 per Aicken J (in dissent but not on this point).

35 The Applicant stressed the importance in the statutory scheme of the statement relating to compliance in light of s 75J(2)(a) and I do not consider that was a matter in dispute. The DG's report to the Minister must include certain documents and a statement relating to compliance for the purposes of the Minister considering an application for approval of a project (s 75I(2)). The report is a precondition to the exercise of the Minister's power of approval given s 75J(1)(b) and in that respect is a mandatory relevant consideration. The Applicant argues that a sentence in section 3.5 of the DG's report, which it identifies as the purported statement relating to compliance, does not comply with s 75I(2)(g). If correct, s 75J(2)(a) was not complied with by the Minister when project approval was granted. No form for a statement relating to compliance is specified in the EPA Act. The Applicant criticised the wording of the sentence in section 3.5 of the DG's report because it refers to the EARs issued on 4 July 2009 being "addressed", a word which appears in s 75H(2) but not s 75I(2)(g) which refers to compliance.

36 As the Minister submitted the Applicant appeared to be proposing that the only statement satisfying s 75I(2)(g) is one which states in terms that there has or has not been compliance with the EARs. That is formalistic and not consistent with the broad meaning of "relating to" compliance, see *Drake-Brockman* at [100] (par 15 above). While the Applicant rejected that submission as not nuanced enough it was difficult to perceive what the Applicant thought would suffice other than that the word comply had to be used. It firstly said what was necessary would depend on the facts of each case but its counsel also submitted that, by inference from the statutory scheme, a statement had to state whether or not the EARs had been complied with. That submission is at

odds with *Drake-Brockman* at [109] in particular and not supported by the changes implemented under the Amendment Act.

37 The Applicant also submitted that where there is a statement relating to compliance it is not appropriate that any additional material in the DG's report be considered to determine whether s 75I(2)(g) has been satisfied. Nothing in the statute directs the manner of consideration of the DG's report so that the Applicant's construction, if correct, must arise by inference from the statutory context. That submission is also contrary to the findings in *Drake-Brockman*.

38 The parties' submissions required close consideration of *Drake-Brockman*, extracted above at par 16. The facts in *Drake-Brockman* differed from this case in that there was no identifiable express statement relating to compliance with s 75I(2)(g) in the DG's report. In *Drake-Brockman* the applicant submitted that the statement required certification of compliance. The Applicant sought to distinguish *Drake-Brockman* on the basis that where there is a statement in one location identifiable for the purposes of s 75I(2)(g), it did not suggest a wider inquiry ought to be undertaken to determine whether the remainder of the report or other documents or parts of documents might remedy any deficiency in the statement so provided. The Applicant embraced part of Jagot J's reasoning at [106] while criticising other parts.

39 *Drake-Brockman* considered extensively and comprehensively the statutory construction of "a statement relating to compliance" referred to in s 75I(2)(g) and the reasoning applies to the facts of this case. Unless I decide that decision is wrong, it is determinative as against the Applicant's first ground of judicial review. As the various authorities referred to in the parties' submissions identify, summarised usefully in *Rivers SOS* at [90], the principles of judicial comity require that I should follow the earlier decision of another judge of this Court, although not bound by it, unless it appears on close consideration to be wrong.

40 The Second Respondent's counsel identified three findings by Jagot J at [107] - [108], [109] and [110] which are all part of the ratio of the judgment: see *Monzie* at [6]. Given the facts of the case before me I need only consider [107] - [108] and [109]. The Respondents relied on Jagot J's reasoning at [94] - [95] where her Honour considered that there was no requirement that the DG prepare the statement in s 75I(2)(g), the only obligation on the DG being to include the statement in the report. In [95] her Honour considered there was no obligation imposed on the DG to form an opinion about the matter nominated in that subsection. I need not consider her Honour's finding in [110], based on [94] - [95], that the statement relating to compliance in s 75I(2)(g) can be that of a third party as that does not arise on the facts in this case.

41 Of most relevance to the facts of this case is her Honour's rejection of the applicant's submission that there must be a single statement that there has or has not been compliance with the EARs in [99] for reasons canvassed in [100] - [105], with her conclusion in [106]. I have already applied her Honour's reasoning in [100] concerning "relating to" at par 36. Considering the substance of the statement in [101], her Honour identified that the applicant's submissions assumed that "the environmental assessment requirements under this Division" were the DG's EARs under s 75F(2) (unlike the Applicant in this case which raised the time to which the statement must be directed as an issue). The EARs would consist of issues the DG required the proponent to address in its EA. Compliance with requirements would usually be a complex evaluative exercise and be contrary to the certification for which the applicant contended given this broader context ([101]). The requirement for a statement is also found elsewhere in the EPA Act and Environmental Planning and Assessment Regulation 2000, suggesting that a statement is not necessarily as confined in the context of the EPA Act as the applicant argued ([102]). The singular includes the plural applying s 8(b) of the Interpretation Act, applied by the Court of Appeal in relation to a conservation plan in *Chisholm v Pittwater Council* [2001] NSWCA 104, noted by Jagot J in [103]. The ordinary meaning of "statement" extends beyond the form of certification proposed by the applicant ([103]). The applicant's submissions lead to a highly artificial result, particularly as the applicant conceded that a single additional sentence that the project did or did not comply with EARs would have satisfied s 75I(2)(g) ([105]).

42 In [106] her Honour held that s 75I(2)(g) required a written communication relating to compliance. The written communication could be constituted by a document or series of documents provided that it was "'readily discernible as a single entity'" and "'not a mere hodgepodge'". The report itself could be the relevant communication. In [107] her Honour held that if s 75I(2)(g) was concerned solely with the DG's EARs then the DG's report satisfied s 75I(2)(g) in that case. At [108] the DG held that statements in the DG's report were a readily discernible written statement relating to compliance with the DG's EARs for that project. In [109] her Honour found that the DG's statement confirming that the EA was adequate for the purposes of exhibition under s 75H(2) and (3) is also a statement relating to compliance for the purposes of s 75I(2)(g). Further, s 75I(2)(g) does not require a statement of whether or not the project complies with the requirements.

43 Applying her Honour's reasoning in [100] - [106] and [108], in which I can find no discernible error, the Applicant's approach to the construction and application of s 75I(2)(g) is not correct. As the Applicant accepted (see par 18 above) whether a proponent's assessment complies with the EARs is a

complex evaluative exercise as Jagot J recognised at [101]. When other parts of the DG's report are also considered there was such an exercise undertaken. When additional material in the DG's report in the remainder of sections 3, 5 and 6 is considered there are numerous statements relating to compliance with the EARs.

44 Extracts from those sections are set out above at par 13 in relation to greenhouse gas, air quality, operational noise, and water quality and aquatic ecology. Section 5.1 "Greenhouse Gas" states that the Department reviewed the EA, an independent review of the greenhouse gas assessment, the proponent's response to the independent review and submissions received. The Department considered that the assessment undertaken was sufficient to identify the likely greenhouse gas emissions resulting from the proposal. Section 5.2 "Air Quality" states the Department was satisfied that the proponent undertook an assessment consistent with the Approved Methods for the Modelling and Assessment of Air Pollutants in NSW (DECC 2005), as the air quality EAR required be done. Section 5.3 "Operational Noise" states that the Department reviewed the proponent's noise impact assessment and considered it provided an adequate level of assessment. Section 5.4 "Water Quality and Aquatic Ecology" states that the Department reviewed the EA, the submissions received and the proponent's response and considered that an ongoing monitoring program of water quality was needed. The concluding section, section 6, states that the Department considered that the proponent undertook an adequate and appropriate level of environmental assessment.

45 The Applicant submitted generally that the EARs required standards to be met and specific measures to be in existence. The standards required in the EARs relate largely to the method of assessment required to be used. As can be seen from the EARs for greenhouse gas, air quality and noise and vibration set out above at par 12, the EARs required the assessment to be conducted in accordance with a specified methodology and identified matters that had to be included. For water cycle management the EAR specified matters which had to be assessed. The standards relate to the nature of the environmental assessment to be undertaken. The Department's responses to the EA, that these assessments were appropriate and adequate, are statements relating to compliance with the EARs. Beyond making a general submission, whether the EARs required specific measures to be in existence was not explored by the Applicant in relation to this ground. That is considered in relation to the second ground of review below, water disposal only.

46 The Applicant criticises *Drake-Brockman* because that approach was said to deprive the requirement for a statement relating to compliance of meaning in the statutory context. Applying the reasoning in *Drake-Brockman*, the Respondents' submissions that the DG's report contains statements relating to compliance with the EARs issued under s 75F(3) of the EPA Act are correct.

That conclusion does not deprive the requirement in s 75I(2)(g) of meaning. To limit consideration of whether the DG's report provides the required statement to a single sentence is artificial, does not arise by inference from the statutory scheme and does not reflect the statutory provision of a statement relating to compliance.

47 Because there was no single sentence in *Drake-Brockman*, indeed that was the criticism mounted in that case, Jagot J did not have to directly consider the issue here of whether the single sentence in section 3.5, which refers to "address", satisfies s 75I(2)(g) as the Respondents submitted. Her Honour's reasoning in [109] in particular considered that other statements in the DG's report before her Honour satisfied that requirement given the wide meaning of "relating to". Her Honour specifically held that s 75I(2)(g) does not require a statement as to whether or not the project complies with the EARs. That reasoning suggests that the Applicant's argument that "address" is not adequate is not correct given the statutory scheme. This conclusion is supported by the Minister's submissions set out above at par 25 and 26. My observations on this aspect of the case are necessarily obiter given my finding in the previous paragraph that the whole of the DG's report should be considered.

48 The Applicant submitted that its interpretation was supported by the changes effected to s 75I and s 75J by the Amendment Act. These changes removed a more onerous requirement in s 75J(1)(b). The Applicant submitted that "a statement relating to compliance" was intended to provide an important safeguard against the loss of the stricter requirement that the EA comply with the EARs before the application for approval is determined by the Minister. This construction was said to promote transparency and accountability. These submissions can be accepted but they do not necessarily lead to adoption of the Applicant's construction. As the Respondents submitted, the Applicant's construction attempts to continue a similar regime to that which existed before the amendments were made. The Amendment Act changes to s 75I and 75J confirm the Respondents' approach to construction.

49 I do not need to determine the Second Respondent's submission that sections of the EA annexed to the DG's report also constituted the requisite statement(s) made in reliance on [94] - [95] of *Drake-Brockman*.

Timing

50 The Applicant also submitted that "the statement relating to compliance with the environmental assessment requirements under this Division" must be directed to the time when the DG's report is given to the Minister, not solely to when the DG considers the proponent's EA submitted under s 75H(1). The Applicant supported this contention by arguing that the totality of the

environmental assessment process is to be considered by the Minister in determining whether to approve or reject the carrying out of the project. That construction was said to be supported by Jagot J in *Drake-Brockman* at [107] - [108]. The opening sentence at [107] states "If s 75I(2)(g) is concerned solely with the Director-General's environmental assessment requirements then the Director-General's report satisfied s 75I(2)(g)." Her Honour's reasoning continues on that basis. These paragraphs do not support or detract from the Applicant's construction.

51 No time frame to be addressed by a statement is specified in s 75I(2)(g). The "environmental assessment requirements under this Division" include a proponent's EA under s 75H(1) which must address the EARs specified under s 75F(2). Other such requirements of the proponent may include a revised environmental assessment under s 75H(2), a response to private individuals and public authorities' submissions under subsection (3) and a preferred project report that outlines any proposed changes to the project to minimise its environmental impact under s 75H(6)(b). The Respondents submitted that the most obvious construction of s 75I(2)(g) is that the statement must relate to the proponent's EA's compliance with the EARs. Section 75I(2)(g) is worded more broadly in that it refers to the environmental assessment requirements of the Division which may be more extensive than the EA as identified immediately above (at [105]). Equally, here as the Second Respondent submitted, the section does not require that the statement relate to the time of the DG's report. The Applicant's submission that assessment of compliance with s 75I(2)(g) must be directed to the time of the DG's report may not apply in all cases. Given the reference to "environmental assessment requirements under this Division", the time to which a statement is directed will depend on the particular circumstances. Compliance with the EARs in the proponent's EA is the starting point and may be the end point if further requirements for environmental assessment by a proponent have not been imposed under s 75H.

52 In this case, and in keeping with my earlier finding based on *Drake-Brockman* that the whole of the DG's report should be considered, if section 3.5 of the DG's report does identify the entirety of the assessment process undertaken including preparation of the EA and later processes in any event. That section noted that following the exhibition period for the EA, the DG directed the proponent, pursuant to s 75H(6)(a), to respond to the issues raised in the submissions and the proponent did so. Further, as identified above in par 13, in sections of the DG's report the EA and subsequent processes were considered by the Department in its assessments of the key issues of greenhouse gas, air quality, operational noise, and water quality and aquatic ecology. In conclusion (section 6 of the report) the Department considered that the proponent had "undertaken an adequate and appropriate level of

environmental assessment" (see par 14 above). These further statements in the DG's report are also statements relating to compliance with the environmental requirements under the Division.

53 While I generally agree, with some qualifications, with the Applicant's submission concerning the timing requirements of s 75I(2)(g), the DG's report complies with that section. The Applicant is unsuccessful on this ground of judicial review.

GROUND 2 - MISLEADING STATEMENT OF COMPLIANCE/MISAPPREHENSION AS TO MATERIAL MATTERS OF FACT

54 The second ground alleges that the statement of compliance with the DG's report is misleading in relation to fly ash disposal measures.

Evidence

55 The EARs concerning waste management are set out above in the table at par 11 and require that measures for disposal be identified including options for recycling and reuse where reasonable and feasible. The Second Respondent's EA states that ash production volumes are dependent on annual power production requirements, power plant design and performance, coal properties (particularly percentage of ash content) and ash sales. Based on these requirements, Aurecon identified scenarios indicative of future coal characteristics and of future planned ash sales: range of coal with varying ash content (22 and 24 per cent); 20 per cent ash sales from Vales Point Power Station (it was estimated that approximately 17 per cent of ash is currently sold); 20 per cent ash sales from Munmorah Power Station (no ash is currently sold from this power station). Table 9.6 indicates the estimated time when ash storage at Vales Point ash dam will be exhausted based on an ash content of 24 per cent depending on the percentage of gas input energy. In the base case, if Munmorah Power Station is not rehabilitated and the project does not go ahead, the Vales Point ash dam would be exhausted in 19 - 20 years. The scenarios are as follows:

(i) with 0 per cent gas input energy and no fly ash sales from Munmorah Power Station, the Vales Point ash dam would be exhausted in approximately 9 - 10 years (worst case scenario) but if 20 per cent fly ash sales, this would be in 12 - 13 years

(ii) with 25 per cent gas input energy and no fly ash sales, it would exhaust in 10 - 11 years and with 20 per cent fly ash sales, in 13 - 14 years

(iii) with 50 per cent gas input energy and no fly ash sales, it would exhaust in 11 - 12 years and with 20 per cent fly ash sales, in 16 - 17 years

(iv) with 75 per cent gas input energy and no fly ash sales, it would exhaust in 13 - 14 years, and with 20 per cent fly ash sales, in 20 - 21 years (best case scenario which is beyond the 20 year life of the project).

56 In section 9.6.2 "Ash disposal options considered" the EA lists seven options described as viable for fly ash disposal from Munmorah Power Station:

(i) retain the current lean slurry disposal systems at Vales Point and Munmorah with additional ash terracing to increase storage capacity

(ii) install a dry ash collection system with pneumatic conveyer to transport fly ash to Vales Point and to Munmorah ash dams

(iii) install a dry ash collection system and use trucks to transport fly ash to Vales Point and Munmorah ash dams

(iv) install a dry ash collection system with enclosed conveyer to transport fly ash to Vales Point and Munmorah ash dams

(v) install a dry ash collection system with dense slurry mixing and pumping into Vales Point and Munmorah ash dams

(vi) dense flurry pumping fly ash to a nearby disused mine site for back-filling

(vii) additional ash terracing, fencing and or/turkeys-nest emplacements for all the above options on top of existing ash placements to enable higher stacking of fly ash.

57 Section 9.6.3 "Discussion" states that of the 8.77 million cubic metres of fly ash that will be produced by the project, 840,000 cubic metres can be disposed of using current methods in the Vales Point ash dam assuming 26 per cent ash content of coal and current 17 per cent sales at Vales Point ash dam. Alternatives for fly ash disposal could be required as early as 2011 based on the worst-case scenarios. However, until 2019, depending on ash sales, fly ash could be directed to the Munmorah ash dam which has a capacity of 2.8 million cubic metres. It further states,

> A preliminary investigation has shown that alternative technologies for the storage of worst case surplus ash are viable at a conceptual level, but will need to be considered in more detail, to confirm their viability as a preferred option.

58 Section 9.9 "Conclusions" states

> Currently fly ash is disposed of at Vales Point ash dam and furnace ash from Munmorah Power Station is disposed of in Munmorah ash dam. Munmorah ash dam has a capacity of 2.8 million m3 which is expected to be more than sufficient to store furnace ash for the proposed 20 year life extension of the power station.
>
> Fly ash from Munmorah Power Station will continue to be disposed of at Vales Point ash dam while surplus storage beyond the projected life of Vales point Power Station is available. Beyond this (estimated 6-7 years), fly ash disposal from Munmorah will require the development of new ash storage options. The necessary planning approvals for additional storage of Munmorah fly ash will be sought as required.

59 The EA included a draft statement of commitments. The revised statement of commitments contained in the Second Respondent's submissions report states at item 18 that the Second Respondent will "initiate the detailed investigation and consideration of alternative arrangements for the storage of ash beyond the surplus capacity available in Vales Point Ash Dam".

60 In describing the project in section 2.1 the DG's report states under "Ash Disposal":

> Depending on the fuel option chosen, the ash content of the coal utilised and level of future ash sales for beneficial re-use (e.g. in the cement and concrete industries), the Proponent has identified that the existing ash dams at Munmorah Power Station and Vales Point Power Station may not have sufficient capacity to meet the future ash disposal requirements of the project as well as that generated from the ongoing operation of the Vales Point Power Station (expected to remain operational until approximately 2029), assuming existing ash disposal methods of wet slurry disposal ...

Table 1 ash dam capacity in years (assuming existing ash disposal measures)

Fuel Type (assuming 24% ash content in coal)	Case 1: Existing level of fly ash sales (~20%) from Vales Point and nil sales from Munmorah	Case 2: Existing level of fly ash sales (~20%) from Vales Point and similar level of sales from Munmorah
100% coal (0% gas)	10 years	13 years
75% coal (25% gas)	11 years	14 years
50% coal (50% gas)	12 years	17 years
25% coal (75% gas)	14 years	21 years (sufficient capacity)

To address the deficit in capacity, the Proponent has identified a number of options that may be implemented on site to increase dam storage capacity, all of which involve retention generally within the existing dam footprint.

These include:

continuation of wet slurry disposal with increased use of ash terracing and raising the dam height to increase the storage area;

change of disposal method from wet slurry to dry ash storage with various options for dry ash transport to the dams including trucks or conveyer; and

disposal of ash nearby disused mine void(s).

The Proponent has not identified a preferred ash disposal at this stage noting that this would be further considered once factors influencing ash disposal requirements (including fuel option chosen and level of reuse) have been better resolved. Further, as additional storage capacity is unlikely to be required for at least 10 years (even under the worst case scenario), the Proponent has deferred a decision on a final disposal option to allow maximum flexibility in determining a suitable option taking into account any advances in storage or disposal technology and/ or re-use opportunities which may develop over this time. The Proponent may need additional planning approvals for the final ash disposal option, depending on the scale and nature of development (including associated infrastructure such as conveyers/ pipelines) and impacts involved.

61 In discussing public consultation, section 4.4 "Department's Consideration" contains a table summarising the Department's consideration of issues raised in public and agency submissions which relevantly states:

Ash Disposal	The Department is satisfied that the ash disposal options identified by the Proponent to address future ash disposal requirements are technically feasible noting that many of these options are currently being used successfully at other coal-fired power stations in NSW. Further, based on the Proponent's constraint analysis, the Department is satisfied the options are unlikely to pose significant environmental risks subject to appropriate management, noting the Proponent's commitment to minimise the potential for additional vegetation disturbance by increasing the dam height to gain additional storage space rather than by expansion and to confine associated infrastructure such as ash pipelines/ conveyers etc to existing disturbed corridors, where possible. Furthermore, given the existing considerable buffer distance to nearest sensitive receivers, the Department considers that any additional dust (assuming dry storage) or visual (from increase to dam height) impacts are unlikely to be intrusive and can be managed including through the implementation of appropriate rehabilitation requirements. The Department has recommended comprehensive water quality monitoring and management requirements to ensure continuous improvement of performance with respect to discharges to the Tuggerah Lakes System (Refer Section 5.4) and these would apply to any future ash disposal system implemented. To ensure that future ash disposal options are determined with due consideration to environmental constraints, the Department has, consistent with DECCW requirements, recommended a condition of approval requiring the Proponent to investigate all feasible options for future ash disposal (including maximising opportunities for reuse - to reduce the requirement for storage on site) with consideration to applicable environmental criteria.

62 In section 5 "Assessment of Environmental Impacts", the key issues identified were greenhouse gas, air quality, operational noise, and water quality and aquatic ecology. As noted in par 13, all other issues were considered by the Department to be adequately addressed by the proponent's submissions report and statement of commitments.

63 The Department's briefing note to the Minister identifies the key issues raised by public departments and agencies as including ash disposal. The Department did not include ash disposal in its identification of key issues. The

briefing note recommends approval subject to the imposition of specified conditions.

64 The conditions of project approval annexed to the DG's report requires the Second Respondent to prepare and submit for approval a long-term ash management strategy for the project which is to be developed in consultation with the then Department of Environment, Climate Change and Water (DECCW) prior to the commencement of the operation of the project (condition 6.5). The strategy is to include the following: a stipulated goal of 40 per cent reuse or recycling of ash within five years of commencement; a program for the investigation of alternative ash disposal and re-use opportunities with a particular focus on the minimisation of ash storage and disposal on site and beneficial reuse of ash; a framework for the ongoing identification and assessment of alternative ash management measures; an environmental management framework for the ongoing management of ash disposal and ash management on site; and a strategy for the reconciliation of the generating life of the project and the availability and management of ash produced. The Minister approved the project subject to the conditions including condition 6.5.

Applicant's submissions

65 In relation to waste management (specifically coal ash), the EARs required details of waste disposal (for example, ash), an assessment of key issues and a draft statement of commitments. At no relevant time did the Second Respondent propose specific "measures" for the management and disposal of coal ash. Rather, the EA concluded that:

> While it is expected that additional ash storage would be developed within the boundaries of the existing Central Coast Ash Dams, further assessment, approval and development of a preferred long term ash storage option is required. A review of potential ash storage options at a conceptual level concluded that suitable options would be able to be developed.

66 See also sections 9.5 "Ash Generation and Storage" and 9.6 "Future ash disposal options for Munmorah" in the EA, and the conclusion at 9.6.3 which stated:

> A preliminary investigation has shown that alternative technologies for the storage of the worst case surplus ash are viable at the conceptual level but will need to be considered in more detail to confirm their viability and a preferred option.

67 Following the EA, the DECCW commented on ash disposal as follows:

> The Environmental Assessment also describes a number of ash dam management options that could be applied to both Munmorah and Vales Point ash dams to increase the capacity and therefore, prolong the life of these ash dams. However, it is [sic] clearly states that these management options are at a concept phase only and further feasibility studies will need to be carried out before any commitment to future ash disposal location(s) is made by the proponent.

68 The Second Respondent's response to the comments of DECCW was simply as follows:

Noted - The proponent has made a commitment to undertake a detailed investigation and to consider alternative ash storage arrangements for ash storage beyond the surplus capacity of Vales Point Ash Dam.

69 The DG's report does not identify fly ash disposal as a key issue. The briefing note to the Minister made no reference to waste management and disposal aside from the passing reference, third dot point in describing the submissions from State and local government agencies. The issue was not identified as a key issue notwithstanding its identification as a key issue in the EARs which had not been amended. The Minister signed the briefing note, indicating his acceptance of the recommendations.

70 The DG's report prepared pursuant to s 75I(2)(g) identifies that the existing ash dams may not have sufficient capacity to meet the future ash disposal requirements of the project. It states that the proponent has identified a number of options that may be implemented on site to increase dam storage capacity but that the Second Respondent has not identified a preferred ash disposal method, despite under the worst case scenario identified in the EA section 9.6.3 that alternatives for Munmorah fly ash disposal could be required as early as 2011. The DG's report also states that additional storage capacity is unlikely to be required for at least ten years. The report does not mention that all measures were subject to the carrying out of feasibility studies. Despite no identification of a critical part of the EARs not being met the DG's report concludes that there was an appropriate and adequate level of environmental assessment. Nothing in the DG's report alerts the Minister that no measures for disposal of fly ash are proposed other than at a conceptual level. The statement relating to compliance was erroneous and misleading as it advised the Minister the EA had addressed the EARs issued on 4 July 2009 when in fact it failed in a material respect to comply with the EARs on waste management and disposal. The EARs play a key role in the assessment process and compliance with them is a material matter for the Minister's consideration.

71 While the DG stated that he was satisfied that the EARs were addressed, the requirement is for a statement relating to compliance, not a statement of the DG's state of satisfaction on matters relating to compliance. The issue is not whether the statement was misleading as to the DG's state of satisfaction but whether it was misleading as to the objective state of facts as a jurisdictional precondition to the exercise of the Minister's power. In reply to the Respondents' submissions the Applicant clarified that it did not contend that a misapprehension of material matters of fact of itself constitutes a jurisdictional error. Neither did it contend that the power to approve a project could not be exercised unless the statement relating to compliance was "correct as a matter of objective fact". Rather, the Applicant's case is that firstly, the question of compliance with the EARs was a relevant consideration

in a jurisdictional sense. Relevant considerations in a jurisdictional sense are to be implied from the statute rather than the particular facts per *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323 at [73] - [74]; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24 at 39 - 40, also 44 per Mason J. By necessary implication from the statute, particularly s 75F(1), s 75I(1) and (2)(g) and s 75J(2)(a), the Minister was required to have regard to the question of compliance with the EARs as a condition of exercising the power in s 75J(1).

72 Secondly, the Minister was misled by the DG's report in relation to the question of compliance as the assessment was not carried out as required by the EARs. The Minister then approved the project on the material misapprehension that the EA had "addressed" the EARs issued on 4 July 2009. See *Kennedy v NSW Minister for Planning* [2010] NSWLEC 129; (2010) 176 LGERA 395 at [69] per Biscoe J; *Minister for Immigration and Ethnic Affairs v Haj-Ismail* [1982] FCA 51; (1982) 40 ALR 341 per Bowen CJ, Franki and Davies JJ; and *Sezdirmezoglu v Acting Minister for Immigration and Ethnic Affairs* [1983] FCA 267; (1983) 51 ALR 561 at 573, inter alia. Consequently, by proceeding on a misapprehension of matters of material fact, the Minister failed to have regard to a relevant consideration, being the question of compliance with the EARs in relation to the management and disposal of fly ash, in a jurisdictional sense.

Minister's submissions

73 The first limb of this ground requires that the Applicant establish as a legal proposition that the matter relied on is a mandatory relevant consideration in the Minister's decision to approve the project. If established, the second limb arises of whether the Minister failed to consider that matter. The Applicant does not succeed on either limb.

74 The mandatory considerations in s 75J(2) are not exhaustive. For example, in *Minister for Planning v Walker* [2008] NSWCA 224; (2008) 161 LGERA 423 the public interest was held to be an implied consideration. It is critical here however that Parliament has dealt with EARs in s 75J(2)(a) specifically. Compliance with the EARs is a matter dealt with by the DG and a matter addressed in the DG's report by a statement relating to compliance. The Minister is not bound to go behind that statement as to whether there is compliance with the EARs. The Minister can rely on the DG for this part of the process. The Act does not require as an objective fact that there be compliance with the EARs or that the statement of compliance provided in the DG's report is accurate.

75 The history of Pt 3A is against the Applicant's approach. Parliament removed the precondition that had existed in s 75J(1)(b) by s 75I(2)(g). Part 3A as amended addresses in a significantly different way the implied obligation of the Minister

to consider the EARs given that Parliament has reallocated responsibility for that. The only jurisdictional precondition to the Minister's power is that the Minister must have been provided with and consider a report which includes a statement relating to compliance with the EARs. The legislature did not intend to condition the Minister's power to grant project approval on the DG's statement relating to compliance being objectively correct.

76 The second limb is not established as the Minister was not misled about compliance with the waste management EAR. The EA did include identification of measures for coal ash management and disposal including options for recycling and reuse where reasonable and feasible at a conceptual level, which answers the EARs. The conclusions in the EA (section 9.5, table 9.4) relating to measures for coal ash management and disposal were accurately reported to the Minister by the DG in the DG's report and in the briefing note directing the Minister's attention to the DG's report.

77 The statement by the DG that he was satisfied that the EARs had been addressed in section 3.5 was only his opinion. There is no suggestion by the Applicant that it was not his opinion or not his state of mind. The statement was not misleading in that respect.

Second Respondent's submissions

78 The Minister's submissions (at par 35 - 36 of the written submissions) are adopted. Part 3A requires that the DG provide his or her opinion in relation to the statement in the DG's report that the EARs are addressed. The Applicant does not challenge the bona fides of the DG's state of mind as to satisfaction that the EA addressed the EARs issued on 4 July 2009, which is reviewable per *Gray v Minister for Planning* [2006] NSWLEC 720; (2006) 152 LGERA 258 at [75].

79 For the statement in section 3.5 to mislead it would not address the subject at all. In light of the factual material, particularly the requirement in relation to the identification of measures, the DG's report clearly addressed that issue and that is sufficient. The Applicant's case does not distinguish between merits review and judicial review.

CONSIDERATION

80 While the Applicant characterised its case as a classic statement of a ground of judicial review concerning a jurisdictional precondition to the Minister's power to grant approval, being a failure to consider a mandatory relevant matter, I have had some difficulty understanding how that ground of judicial review applies to the failure alleged in this case. Under s 75J(2)(a) the Minister must consider the DG's report which must include a statement relating to

compliance with the EARs. That much is agreed by the parties and is clear from the terms of that section. Given my finding in relation to the first ground, one or more statements relating to compliance in the DG's report satisfies s 75I(2)(g) and the report was before the Minister. The express terms of s 75J(2)(a) were therefore addressed. The Applicant argued that the DG's report did not identify a failure to comply with the EARs in relation to waste disposal and is therefore misleading. A ground expressed in these terms must arise by implication from the terms of the statute applying *Peko-Wallsend* principles per Mason J at 39 - 40, and Gibbs CJ at 30, according to the Applicant. The Applicant submitted that the question of compliance with the EARs was a relevant consideration in a jurisdictional sense (agreed), about which the DG's report was misleading as a material matter of fact (not agreed).

81 As the Respondents submitted, the impugned statement in section 3.5 refers to the DG's satisfaction that the EA had addressed the EARs which state of satisfaction the Applicant said it did not seek to challenge. In *Gray* at [75] I held that the DG's satisfaction as to compliance with the EARs is reviewable but the Applicant did not frame its case in those terms.

82 The Minister's counsel submitted that Pt 3A imposed no obligation on the Minister to go behind the statement relating to compliance. I do not need to rule finally on that submission in order to resolve this ground but note the Amendment Act removing the precondition to the Minister's consideration that a project complied with the EARs in s 75J(1)(b) supports that submission.

83 The Applicant's counsel also stated she did not contend that the statement relating to compliance was not "correct as a matter of objective fact". The Applicant accepted that it must demonstrate an error of law as an error in making a wrong finding of fact is not generally reviewable (per *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321 at 355; *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 at 155 - 157). It is therefore difficult to understand that statement in this case, given that the Applicant's submissions sought to demonstrate why the DG's report was misleading. There seems to be no practical difference between determining whether the DG's report is misleading and determining whether the statement relating to compliance was objectively correct. The Applicant relied on *Peko-Wallsend* where the High Court (Mason J) held there was a failure to have regard to matters of fact as a result of considering the subject matter, scope and purpose of the relevant Act. Applying a similar analysis to s 75I and s 75J does not assist to resolve the Applicant's submission that the DG's report is misleading, given that a relevant statement relating to compliance in the DG's report was before the Minister. As the Applicant accepted, the Court is not permitted in these judicial review proceedings to undertake a merits review of the DG's report to form its own view on the issues therein.

84 Assuming that there is a legally reviewable error identified by the Applicant's ground of review, it is easier to understand the second limb of the Applicant's case, as the Minister described it, of whether the Minister was misled about compliance with the waste management and disposal EAR and therefore failed to consider a relevant matter. That is how the misapprehension of fact raised in *Kennedy* was considered. *Kennedy* considered whether the relevant Minister was under a misapprehension concerning consultation with Aboriginal people. Biscoe J at [69] referred to a number of cases where administrative decisions have been held to be vitiated where the decision-maker made the decision under a misapprehension of material matters of fact, citing *Haj-Ismail* per Bowen CJ and Franki J, and Davies J (in a separate judgment) including *Peko-Wallsend*. As the Respondents submitted, all of those cases are distinguishable on their facts. For example, in *Sezdirmezoglu* relevant facts actually known to the Department of Immigration favourable to an applicant were not disclosed to the relevant Minister. The facts and statutory scheme in Pt 3A do not suggest that similar reasoning would apply to the facts in this case.

85 The parties referred in some detail to the EA and DG's report, as reflected in the summary of these documents above in par 55 - 61. In written submissions the Applicant stated that no details of ash disposal had been provided although required in the EARs, and no measures had been identified beyond the conceptual level for disposal of fly ash beyond the next six to seven years and beyond 2011 in the worst-case scenario. Consideration of this argument requires an assessment of the material in the EA and the DG's report and analysis of whether the DG's report was correct in its evaluation of the EA.

86 There is an inherent weakness in this part of the Applicant's case as it recognised that measures for disposal have been identified, as clearly they were in the EA, summarised above at par 56. The core of the criticism made is really that while measures were identified at a conceptual level there was no selection of one or more appropriate options for disposal in the EA or elsewhere. The EAR for waste disposal does not explicitly require that an option for disposal must be selected by the proponent or anyone else. The EAR concerning waste disposal states that identification of measures for management and disposal of ash is required. That has demonstrably occurred in the EA, which is directed to the assessment of environmental impacts. That is all that the EAR required.

87 The summary of the EA outlined above identifies that a range of variables affect ash production volumes such as power production levels, ash content of coal used as fuel and quantity of ash sales. Several scenarios affecting the volume of ash produced are identified in table 9.6. Seven ash disposal options are considered in section 9.6.2. Table 1, Ash dam capacity, demonstrates

depending on a number of variables the need for additional capacity ranges from 10 years to having sufficient capacity. The need to develop new fly ash disposal options after an estimated six to seven years is stated. While the Applicant focussed on 2011 in section 9.6.3, the same section identifies that fly ash can be directed to the Munmorah ash dam for an intermediate period up to 2019 (summarised in par 57 above).

88 The content of the DG's report was referred to by the parties. The part of section 4.4 referring to ash disposal is set out above at par 61. It accurately reflects the content of the EA. It identifies the number of variables which affect ash volumes produced and that there may not be sufficient capacity to meet future ash disposal requirements, identifies the various scenarios and when extra measures may be needed. The section correctly identifies that the proponent has identified a number of options that may be implemented on site to increase dam storage capacity, and that no preferred ash disposal method has been adopted at this stage. The section setting out the Department's consideration states that for ash disposal the Department is satisfied that options exist for future disposal which are technically feasible, with many being used at other coal-fired power stations in NSW.

89 The Applicant identified what it submitted were four inaccuracies in the DG's report as follows:

(i) "... the proponent has identified that the existing ash dams at Munmorah Power Station and Vales Point Power Station may not have sufficient capacity to meet the future ash disposal requirements of the project ..."

The Applicant submitted that the Second Respondent's EA (at sections 9.8 and 9.9) states that the rehabilitated Munmorah Power Station "will need to develop new ash arrangements ..."

(ii) "To address the deficit in capacity, the proponent has identified a number of options that may be implemented on site to increase dam storage capacity, all of which involve retention generally within the existing dam footprint ... The proponent has not identified a preferred ash disposal method at this stage..."

The Applicant criticised these statements on the basis that there was no mention that all were subject to feasibility studies.

(iii) "... as additional storage capacity is unlikely to be required for at least 10 years (even under the worst case scenario), the proponent has deferred a decision on a final disposal option ...".

The Applicant submitted that the worst-case scenario identified at section 9.6.3 of the EA required alternatives for Munmorah fly ash disposal as early as 2011.

(iv) Conclusions and Recommendations: "... adequate and appropriate level of environmental assessment".

The Applicant criticised this conclusion because a critical part of the EARs was not addressed. Approval condition 1.1 refers to other reports to be relied on and there is no specific requirement for coal ash disposal.

90 When the relevant sections of the EA and the DG's report set out above are read as a whole and the conditions of approval are considered, the DG's report does not mislead the Minister about compliance with the EAR in relation to ash disposal. When read in context, there is nothing misleading in the DG's report contrary to par 89(i) and (ii) as submitted by the Applicant. In relation to (iii), it appeared to be conceded by the Applicant's counsel in oral address, and is in fact in the EA, that in the worst-case scenario additional measures for disposal will not be required for some ten years (see par 55, 57 above) not by 2011. In relation to (iv), the submission that there was nothing to alert the Minister in the DG's report that there are no measures for disposal of fly ash other than options raised at a conceptual level overlooks what the EAR required. The content of the DG's report already outlined, and proposed condition 6.5 of the project approval requiring a strategy for the disposal of fly ash to be prepared before the commencement of operations, demonstrates that the Minister was properly briefed on this issue.

91 The Applicant referred to the DECCW's response to the EA and the briefing note to the Minister as supportive of its case (par 66 - 67). The DECCW's advice is explicitly adopted in the DG's report, as identified in section 4.4 set out above at par 61 and that cannot found a basis for the DG's report being misleading. The criticism that the Department did not include waste disposal in the key issues in the briefing note to the Minister is irrelevant to whether the Minister's decision was invalid because of a failure to comply with s 75J(2). The briefing note has no defined or express role under s 75J in relation to the Minister's decision and does not add anything to what is otherwise in the DG's report. There is no requirement in the EPA Act that key issues identified for the purposes of briefing the Minister must mirror those in the EARs, the latter being directed to environmental impact assessment of a proposal enabling departmental consideration as reflected in the DG's report. It is apparent that the Department, on which the DG properly relied, considered that disposal of fly ash was able to be dealt with satisfactorily in the conditions of approval and so advised the Minister in the briefing note. The Respondents correctly criticise the second limb of the Applicant's case.

92 As the Minister submitted, he accepted the DG's recommendation and imposed a condition dealing with future measures for the management and disposal of coal ash, condition 6.5. The briefing note to the Minister states that the project

is acceptable if conditions are imposed. This shows the Minister was likely to be cognisant of the issues in relation to future ash disposal. This finding disposes of the Applicant's submission of misapprehension of material fact made in reliance on *Kennedy*.

93 The Applicant is unsuccessful on this ground of judicial review. As the Applicant's judicial review challenge is unsuccessful the amended summons should be dismissed. Costs will be reserved.

ORDERS

94 The Court makes the following orders:

1. The Applicant's amended summons filed in Court on 9 February 2012 is dismissed.
2. Costs are reserved.

Decision last updated: 27 August 2012