NEW SOUTH WALES COURT OF APPEAL

Minister for Planning v Walker and Others

[2008] NSWCA 224

Hodgson, Campbell and Bell JJA

24 July, 24 September 2008

Administrative Law — Administrative process — Ecologically sustainable development (ESD) — Development assessment — Considerations — Mandatory considerations — Failure to take mandatory considerations into account — "Public interest" — Flood prone land — Climate change — Conditions of validity — Whether determining authority must consider public interest — Whether determining authority must consider ESD principles — Material relevancy — Environmental Planning and Assessment Act 1979 (NSW), ss 4, 5, 7, 75A, 75B, 75D, 75F, 75G, 75H, 75I, 75J, 75K, 75L, 75M, 75N, 75O, 75P, 75Q, 75W, 75X, 79C — Environmental Planning and Assessment Regulation 2000 (NSW), cll 8B, 8C — Protection of the Environment Administration Act 1991 (NSW), s 6.

Ecologically Sustainable Development — Precautionary principle — Intergenerational equity — Concept plan — Major project — Assessment report — Discretion — Considerations — Mandatory considerations — Objects of environmental planning legislation — "Public interest" — Flood prone land — Climate change — Conditions of validity — Whether determining authority must consider public interest — Whether determining authority must consider ESD principles — Failure to take mandatory considerations into account — Material relevancy — Environmental Planning and Assessment Act 1979 (NSW), ss 4, 5, 7, 75A, 75B, 75D, 75F, 75G, 75H, 75I, 75J, 75K, 75L, 75M, 75N, 75O, 75P, 75Q, 75W, 75X, 79C — Environmental Planning and Assessment Regulation 2000 (NSW), cll 8B, 8C — Protection of the Environment Administration Act 1991 (NSW), s 6.

Words and Phrases — "Public interest" — Ecologically sustainable development — Environmental Impact assessment — Concept plan — Major project — Assessment report — Discretion — Considerations — Mandatory considerations — Objects of environmental planning legislation — Public interest — Flood prone land — Climate change — Conditions of validity — Whether determining authority must consider public interest — Whether determining authority must consider ESD principles — Failure to take mandatory considerations into account — Material relevancy — Environmental Planning and Assessment Act 1979

(NSW), ss 4, 5, 7, 75A, 75B, 75D, 75F, 75G, 75H, 75I, 75J, 75K, 75L, 75M, 75N, 75O, 75P, 75Q, 75W, 75X, 79C — Environmental Planning and Assessment Regulation 2000 (NSW), cll 8B, 8C — Protection of the Environment Administration Act 1991 (NSW), s 6.

In 2006, the appellant gave approval to a concept plan for a development project under s 75O of the *Environmental Planning and Assessment Act 1979* (NSW) (EP&A Act). The project was classified as a "major project" for the purposes of EP&A Act assessment. The project comprised the rezoning and subdivision of land at Sandon Point into multiple lots for residential housing and an aged care facility. Flooding was identified as a major constraint on the development of the site. The Land and Environment Court of NSW declared the approval void on the basis that in granting approval the appellant failed to take into account the implied mandatory considerations of ESD and the impact of the proposal upon the environment including, among other things, whether the flooding impacts of the project would be compounded by climate change.

Section 5 of the EP&A Act provided:

> The objects of this Act are:
>
> (a) to encourage:
>
> …
>
> (vii) ecologically sustainable development, and …

The definition of "ecologically sustainable development" was defined in s 4(1) of the EP&A Act as having, "except insofar as the context or subject matter otherwise indicates or requires", "the same meaning as it had in s 6(2) of the *Protection of the Environment Administration Act 1991*".

Section 6 of the *Protection of the Environment Administration Act 1991* (NSW) relevantly provided:

> 6 Objectives of the Authority
>
> (1) …
>
> (2) For the purposes of subsection (1) (a), ecologically sustainable development requires the effective integration of economic and environmental considerations in decision-making processes. Ecologically sustainable development can be achieved through the implementation of the following principles and programs:
>
> (a) the precautionary principle – namely, that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.In the application of the precautionary principle, public and private decisions should be guided by:
>
> (i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and
>
> (ii) an assessment of the risk-weighted consequences of various options,
>
> (b) inter-generational equity – namely, that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations,
>
> (c) conservation of biological diversity and ecological

integrity – namely, that conservation of biological diversity and ecological integrity should be a fundamental consideration,

(d) improved valuation, pricing and incentive mechanisms – namely, that environmental factors should be included in the valuation of assets and services, such as:

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

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

(iii) environmental goals, having been established, should be pursued in the most cost effective way, by establishing incentive structures, including market mechanisms, that enable those best placed to maximise benefits or minimise costs to develop their own solutions and responses to environmental problems.

Section 75I of the EP&A Act provided:

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

…

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

Clause 8B of the *Environmental Planning and Assessment Regulation 2000* (NSW) (EPA Regulation) provided:

8B Matters for environmental assessment and Ministerial consideration

The Director-General's report under section 75I of the Act in relation to a project is to include the following matters (to the extent that those matters are not otherwise included in that report in accordance with the requirements of that section):

(a) an assessment of the environmental impact of the project,

(b) any aspect of the public interest that the Director-General considers relevant to the project,

(c) the suitability of the site for the project,

(d) copies of submissions received by the Director-General in connection with public consultation under section 75H or a summary of the issues raised in those submissions.

Section 75M of the EP&A Act provided:

75M Submission of concept plan for project

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

(2) The concept plan is to:

(a) outline the scope of the project and any development options, and

(b) set out any proposal for the staged implementation of the project, and

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

A detailed description of the project is not required.

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

(4) If an environmental planning instrument requires the preparation of a development control plan before any particular or kind of development is carried out on any land, the obligation may be satisfied for a project by the submission and approval of a concept plan in respect of the land concerned (but only if the Minister authorises or requires the submission of the concept plan).

Section 75O of the EP&A Act provided:

75O Giving of approval for concept plan

(1) If:

(a) the proponent submits a concept plan for a project, and

(b) the environmental assessment requirements under this Division with respect to giving approval for the concept plan have been complied with, the Minister may give or refuse to give approval for the concept plan for the project.

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

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

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

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

Section 75X of the EP&A Act relevantly provided that if the proponent of a project was the Minister, the project must be the subject of an inquiry held in accordance with s 119 or of a report of a panel of experts under s 75G. Subsection (2) listed documents in relation to a project which were to be made publicly available by the Director-General. Subsection (3) provided that the Minister might, but was not required to, give reasons to the proponent for, inter alia, any disapproval, or modifications of, a concept plan for a project. Subsection (4) provided that the validity of an approval or other decision under Pt 3A could not be questioned in any legal proceedings except those commenced in the Court within three months after public notice of the decision was given. Subsection (5) provided that the only requirement of Pt 3A that was mandatory in connection with the validity of an approval of a project or of a concept plan for a project was a requirement that an environmental assessment with respect to the project was made publicly available under s 75H (or under that section as applied by s 75N).

Held: (1) Section 79X of the EP&A Act should not be considered as precluding relief where the Court comes to the conclusion that a purported approval of a project, or of a concept plan for a project, is not in truth such an approval. Further, if the Minister purported to give an approval that was prohibited by s 75O(3), it would not be valid. And if a Minister purported to give an approval without considering the Director-General's report, as required by s 75O(2), again it would not be valid. Whether or not s 75O(2) is treated as "mandatory", failure to follow such a simple and basic requirement would not be consistent with a bona fide attempt to exercise the power.

R v Hickman; Ex parte Fox (1945) 70 CLR 598, referred to.

(2) In circumstances where the Minister makes no submissions to the contrary, it is appropriate to proceed on the basis that validity of the approval can be challenged on grounds generally available for challenging administrative decisions, including manifest unreasonableness (not relied on in this case) and failure to take into account considerations which the decision-maker is bound to take into account.

(3) It is a condition of validity that the Minister consider the public interest. Although that requirement is not explicitly stated in the EP&A Act, it is central to the task of a Minister fulfilling functions under a statute like the EP&A Act. Any attempt to exercise powers in which a Minister does not have regard to the public interest can not be a bona fide attempt to exercise his or her powers.

R v Hickman; Ex parte Fox (1945) 70 CLR 598, applied.

(4) However, consideration of the public interest operates at a very high level of generality, and does not of itself require that regard be had to any particular aspect of the public interest.

Walsh v Parramatta City Council [2007] NSWLEC 255, referred to.

(5) The "mandatory" requirement that the Minister have regard to the public interest does not of itself make it mandatory (a condition of validity) that the Minister have regard to any particular aspect of the public interest, such as one or more of the principles of ESD. Whether or not it is mandatory to have regard to one or more of the principles of ESD must depend on statutory construction.

(6) It is difficult to discern a legislative intention that decisions by the Minister be void if the Minister fails to take into account an object of the EP&A Act which is not materially relevant to the decision in question. A failure by the Minister to consider whether a particular object is relevant to a particular decision, or an incorrect decision that such object is not relevant, will not without more make a decision void. If that view is correct in relation to an object of the EP&A Act, then it must also be correct in relation to other objects of that Act, including the principles of ESD.

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

(7) Failure to consider the public interest will void a decision of the Minister under ss 75O and 75P of the EP&A Act. However, the primary judge did not find that the Minister did not consider the public interest, nor could such a finding could be made. The Minister took into account the Director-General's report, much of which related to matters concerning the public interest.

Obiter: If it is considered mandatory to consider ESD principles, the evidence is sufficient to draw the inference that those principles were not considered. While consideration of ESD principles do not require explicit formulation of issues in terms of the four principles and programs specified in s 6(2) of the *Protection of the Environment Administration Act*, consideration of ESD principles do require that the substance of the matters referred to in those four principles and programs be addressed. The Director-General's report did address some matters relevant to these principles and programs, but did not address them in a way that dealt with their substance.

This is particularly the case in relation to the precautionary principle and inter-generational equity. Consideration of these matters in relation to this project would have required consideration of long-term threats of serious or irreversible environmental damage, not inhibited by lack of full scientific certainty, and that this almost inevitably would have involved consideration of the effect of climate change flood risk.

Cases Cited

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

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

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

Berowra Creek Inc, Association for v Minister for Planning (2003) 124 LGERA 99.

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

Brayson Motors Pty Ltd (In liq) v Federal Commissioner of Taxation (1985) 156 CLR 651.

Bruce v Cole (1998) 45 NSWLR 163.

Carr v Western Australia (2007) 232 CLR 138.

Carstens v Pittwater Council (1999) 111 LGERA 1.

Flanagan v Commissioner of Australian Federal Police (1996) 60 FCR 149.

Gerlach v Clifton Bricks Pty Ltd (2002) 209 CLR 478.

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

Immigration and Multicultural Affairs, Minister for v A (1999) 91 FCR 435.

Immigration and Multicultural Affairs, Minister for v Yusuf (2001) 206 CLR 323.

Insurance Australia Ltd t/as NRMA Insurance v Motor Accidents Authority (NSW) [2007] NSWCA 314.

Khan v Minister for Immigration and Ethnic Affairs (1987) 14 ALD 291.

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

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

Notaras v Waverley Council (2007) 161 LGERA 230.

Parramatta City Council v Hale (1982) 47 LGRA 319.

Port Stephens Pearls Pty Ltd v Minister for Infrastructure and Planning [2005] NSWLEC 426.

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

R v Hickman; Ex parte Fox (1945) 70 CLR 598.

Taxation (SA), Deputy Federal Commissioner of v Ellis & Clark Ltd (1934) 52 CLR 85.

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

Tickner v Bropho (1993) 40 FCR 183.

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

Walsh v Parramatta City Council (2007) 161 LGERA 118.

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

Woollahra Municipal Council v Minister for Environment (1991) 23 NSWLR 710; 73 LGRA 379.

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

Appeal

The first respondent successfully challenged the validity of an concept plan approval granted by the appellant Minister. The appellant appealed against that decision. The facts of the case are set out in the judgment.

J Griffiths SC and *S Duggan*, for the appellant.

CE Adamson SC, *MH Baird* and *C Lehehan*, for the first respondent.

Submitting appearance, for the second and third respondents.

Cur adv vult

24 September 2008

Hodgson J.

1 On 29 November 2007, pursuant to reasons given on 27 November 2007, Biscoe J in the Land and Environment Court made orders disposing of proceedings in which the first respondent (Ms Walker) had sought declarations and orders against the appellant (the Minister), the second respondent (Stockland) and the third respondent (Villages). The primary judge made the following declarations:

> 1. The first respondent's approval on 21 December 2006, under s 750(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act), of the Concept Plan in application number MP 06-0094 for a project for redevelopment of land at Sandon Point, is void and of no effect.
> 2. The first respondent's determinations on 21 December 2006 that approval to carry out the remainder of the project or stages of the project with a capital investment value
>
> (i) of $5 million or more is, pursuant to s 75P(1)(a) of the EPA Act, to be subject to Part 3A of the EPA Act,
>
> (ii) of less than $5 million is, pursuant to s 75P(1)(b) of the EPA Act, to be subject to Part 4 or Part 5 of the EPA Act,
>
> are void and of no effect.

2 The primary judge also made orders as to the costs of the proceedings.

3 The Minister has appealed from those orders.

Statutory provisions

4 As will have appeared from the declarations appealed from, the case concerns the validity of an approval and determination made by the Minister on 21 December 2006 under s 75O and s 75P of the *Environmental Planning and Assessment Act 1979* (NSW) (EPA Act), these being sections that appear in Part 3A of the EPA Act. It is convenient to set out here the main statutory provisions that bear on this question of validity.

5 Part 3A applies to the carrying out of certain major infrastructure and other significant development projects in New South Wales. It was introduced by an amendment to the EPA Act coming into force on 1 August 2005. The version of the EPA Act applying in this case and to which I will refer is that in force before significant changes were made, to Part 3A in particular, as from 12 January 2007.

6 Before setting out relevant provisions of Part 3A, it is convenient to refer to other provisions of the EPA Act bearing on this case.

7 First, there was the definition of "ecologically sustainable development" in s 4(1) as having, "except insofar as the context or subject matter otherwise indicates or requires", "the same meaning as it has in s 6(2) of the *Protection of the Environment Administration Act 1991*." That provision is (and was at relevant times) as follows:

> 6 Objectives of the Authority
>
> (1) …
>
> (2) For the purposes of subsection (1) (a), ecologically sustainable development requires the effective integration of economic and environmental considerations in decision-making processes. Ecologically sustainable development can be achieved through the implementation of the following principles and programs:
>
> (a) the precautionary principle – namely, that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.In the application of the precautionary principle, public and private decisions should be guided by:
>
> (i) careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment, and
>
> (ii) an assessment of the risk-weighted consequences of various options,
>
> (b) inter-generational equity – namely, that the present generation should ensure that the health, diversity and productivity of the environment are maintained or enhanced for the benefit of future generations,
>
> (c) conservation of biological diversity and ecological integrity – namely, that conservation of biological diversity and ecological integrity should be a fundamental consideration,
>
> (d) improved valuation, pricing and incentive mechanisms – namely, that environmental factors should be included in the valuation of assets and services, such as:
>
> (i) polluter pays – that is, those who generate pollution and waste should bear the cost of containment, avoidance or abatement,
>
> (ii) the users of goods and services should pay prices based on the full life cycle of costs of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any waste,
>
> (iii) environmental goals, having been established, should be pursued in the most cost effective way, by establishing incentive structures, including market mechanisms, that enable those best placed to maximise benefits or minimise costs to develop their own solutions and responses to environmental problems.

8 Next, there were s 5, setting out the objects of the EPA Act, and s 7, dealing with the responsibility of the Minister:

5 Objects

The objects of this Act are:

(a) to encourage:

(i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,

(ii) the promotion and co-ordination of the orderly and economic use and development of land,

(iii) the protection, provision and co-ordination of communication and utility services,

(iv) the provision of land for public purposes,

(v) the provision and co-ordination of community services and facilities, and

(vi) the protection of the environment, including the protection and conservation of native animals and plants, including threatened species, populations and ecological communities, and their habitats, and

(vii) ecologically sustainable development, and

(viii) the provision and maintenance of affordable housing, and

(b) to promote the sharing of the responsibility for environmental planning between the different levels of government in the State, and

(c) to provide increased opportunity for public involvement and participation in environmental planning and assessment.

…

7 Responsibility of the Minister

Without affecting the functions that the Minister has apart from this section, the Minister is charged with the responsibility of promoting and co-ordinating environmental planning and assessment for the purpose of carrying out the objects of this Act and, in discharging that responsibility, shall have and may exercise the following functions:

(a) to carry out research into problems of environmental planning and assessment and disseminate information including the issue of memoranda, reports, bulletins, maps or plans relating to environmental planning and assessment,

(b) to advise councils upon all matters concerning the principles of environmental planning and assessment and the implementation thereof in local environmental plans,

(c) to promote the co-ordination of the provision of public utility and community services and facilities within the State,

(d) to promote planning of the distribution of population and economic activity within the State,

(e) to investigate the social aspects of economic activity and population distribution in relation to the distribution of utility services and facilities, and

(f) to monitor progress and performance in environmental planning and assessment, and to initiate the taking of remedial action where necessary.

9 Turning to Part 3A, "project" was defined in s 75A to mean "development that is declared under section 75B to be a project to which this Part applies". Section 75B provided, among other things, that Part 3A applied to the carrying

out of development that was declared under that section to be a project to which the Part applied by a State environmental planning policy; and that was in fact the case with the project referred to in the orders appealed from.

10 Division 2 of Part 3A dealt with the approval of projects. Relevant sections were s 75D and s 75F-75I:

> 75D Minister's approval required for projects
>
> (1) A person is not to carry out development that is a project to which this Part applies unless the Minister has approved of the carrying out of the project under this Part.
>
> (2) The person is to comply with any conditions to which such an approval is subject.
>
> …
>
> 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.
>
> *Note*. Section 75P enables the Minister to determine environmental assessment requirements for approval to carry out the project or any stage of the project when giving approval to a concept plan for the project under Division 3.
>
> 75G Independent hearing and assessment panels
>
> (1) The Minister may constitute:
>
> (a) a panel of experts, or
>
> (b) a panel of officers representing the Department and other relevant public authorities,
>
> to assess any aspect of a project referred to the panel by the Minister.
>
> (2) The members of a panel of experts are not to be officers of the Department or of other public authorities having regulatory functions in connection with the project.
>
> (3) The members of a panel of officers are to be nominated by the respective chief executive officers of the public authorities that the Minister nominates to constitute the panel.

(4) For the purposes of an assessment, a panel may receive or hear submissions from interested persons and submit a report to the Director-General within the time required by the Minister.

(5) A panel is to exercise its functions in accordance with arrangements approved by the Minister. However, a panel is not subject to the direction of the Minister on the findings or recommendations in its report.

(6) The Department is to provide staff and facilities for the purpose of enabling a panel to exercise its functions.

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 and Conservation, and

(c) any other public authority the Director-General considers appropriate.

(6) The Director-General may require the proponent to submit to the Director-General:

(a) a response to the issues raised in those submissions, and

(b) a preferred project report that outlines any proposed changes to the project to minimise its environmental impact, and

(c) any revised statement of commitments.

(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 a panel constituted under section 75G in respect of the project, and

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

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

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

11 Division 2 also included s 75J, providing for the giving of approval by the Minister to carry out a project; s 75K, providing in certain circumstances for an appeal to the Land and Environment Court by a proponent of a development who was dissatisfied with the Minister's determination under s 75J; and s 75L, providing in certain circumstances for an appeal to the Land and Environment Court by an objector. However, there is no appeal by an objector if the project is one for which approval has been given to a concept plan under s 75O; so that one effect of such an approval is the removal of the opportunity of an appeal by an objector.

12 Division 3 of Part 3A dealt with concept plans for certain projects, and relevantly included s 75M-75P:

75M Submission of concept plan for project

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

(2) The concept plan is to:

(a) outline the scope of the project and any development options, and

(b) set out any proposal for the staged implementation of the project, and

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

A detailed description of the project is not required.

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

(4) If an environmental planning instrument requires the preparation of a development control plan before any particular or kind of development is carried out on any land, the obligation may be satisfied for a project by the submission and approval of a concept plan in respect of the land concerned (but only if the Minister authorises or requires the submission of the concept plan).

75N Environmental assessment, panel report, public consultation and Director-General's report for concept plan

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

75O Giving of approval for concept plan

(1) If:

(a) the proponent submits a concept plan for a project, and

(b) the environmental assessment requirements under this Division with respect to giving approval for the concept plan have been complied with, the Minister may give or refuse to give approval for the concept plan for the project.

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

(3) The Minister cannot give approval for the concept plan for a project:
  (a) that is not a critical infrastructure project, and
  (b) that would (but for this Part) be wholly prohibited under an environmental planning instrument by the operation of section 76B.

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

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

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

(2) If the Minister determines that approval to carry out the project or any particular stage of the project is to be subject to the other provisions of this Act, the following provisions apply:
  (a) the determination of a development application for the project or that stage of the project under Part 4 is to be generally consistent with the terms of the approval of the concept plan,
  (b) the project or that stage of the project is not integrated development for the purposes of Part 4,
  (c) any further environmental assessment of the project or that stage of the project under Part 4 or Part 5 is to be undertaken in accordance with the requirements determined by the Minister when approving the concept plan (despite anything to the contrary in that Part),
  (d) the Minister may, by order, declare that that stage of the project (or any part of it) is exempt or complying development for the purposes of this Act,
  (e) the Minister may, by order, declare that that stage of the project (or any part of it) is not designated development for the purposes of this Act,
  (f) the Minister may, by order, revoke or amend (as the case requires) the declaration of the project under this Part.

An order under paragraph (d), (e) or (f) is to be published in the Gazette and has effect according to its tenor.

13 Division 3 also included s 75Q, providing in certain circumstances for an appeal to the Land and Environment Court by a proponent dissatisfied with the Minister's determination.

14 Division 5 of Part 3A contained miscellaneous provisions, including s 75W and 75X:

75W Modification of Minister's approval

(1) In this section:*Minister's approval* means an approval to carry out a project under this Part, and includes an approval of a concept plan.

modification of approval means changing the terms of a Minister's approval, including:

(a) revoking or varying a condition of the approval or imposing an additional condition of the approval, and

(b) changing the terms of any determination made by the Minister under Division 3 in connection with the approval.

(2) The proponent may request the Minister to modify the Minister's approval for a project. The Minister's approval for a modification is not required if the project as modified will be consistent with the existing approval under this Part.

(3) The request for the Minister's approval is to be lodged with the Director-General. The Director-General may notify the proponent of environmental assessment requirements with respect to the proposed modification that the proponent must comply with before the matter will be considered by the Minister.

(4) The Minister may modify the approval (with or without conditions) or disapprove of the modification.

(5) The proponent of a project to which section 75K applies who is dissatisfied with the determination of a request under this section with respect to the project (or with the failure of the Minister to determine the request within 40 days after it is made) may, within the time prescribed by the regulations, appeal to the Court. The Court may determine any such appeal.

(6) Subsection (5) does not apply to a request to modify:

(a) an approval granted by or as directed by the Court on appeal, or

(b) a determination made by the Minister under Division 3 in connection with the approval of a concept plan.

(7) This section does not limit the circumstances in which the Minister may modify a determination made by the Minister under Division 3 in connection with the approval of a concept plan.

75X Miscellaneous provisions relating to approvals under this Part

(1) If the proponent of a project (or proposed project) is the Minister or the corporation constituted by section 8(1), the project must be the subject of an inquiry held in accordance with section 119 or of a report of a panel of experts under section 75G.

(2) The following documents under this Part in relation to a project are to be made publicly available by the Director-General:

(a) applications to carry out projects,

(b) environmental assessment requirements for a project determined by the Director-General or the Minister,

(c) environmental assessment reports of the Director-General to the Minister,

(d) approvals to carry out projects given by the Minister,
(e) concept plans submitted for the Minister's approval (and approvals of concept plans),
(f) requests for modifications of approvals given by the Minister and any modifications made by the Minister.

(3) The Minister may, but is not required to, give reasons to the proponent for:
(a) any disapproval, or conditions or modifications, of a project, or
(b) any disapproval, or modifications of, a concept plan for a project, or
(c) any conditions of approval of a modification of the approval of a project.

(4) The validity of an approval or other decision under this Part cannot be questioned in any legal proceedings in which the decision may be challenged except those commenced in the Court within 3 months after public notice of the decision was given.

(5) The only requirement of this Part that is mandatory in connection with the validity of an approval of a project or of a concept plan for a project is a requirement that an environmental assessment with respect to the project is made publicly available under section 75H (or under that section as applied by section 75N). This subsection does not affect the operation of section 75T in relation to a critical infrastructure project.

15 In conjunction with the introduction of these provisions of Part 3A, the *Environmental Planning and Assessment Regulation 2000* (NSW) (EPA Regulation) was amended by the addition of Part 1A, which included cll 8B and 8C:

8B Matters for environmental assessment and Ministerial consideration

The Director-General's report under section 75I of the Act in relation to a project is to include the following matters (to the extent that those matters are not otherwise included in that report in accordance with the requirements of that section):

(a) an assessment of the environmental impact of the project,
(b) any aspect of the public interest that the Director-General considers relevant to the project,
(c) the suitability of the site for the project,
(d) copies of submissions received by the Director-General in connection with public consultation under section 75H or a summary of the issues raised in those submissions.

Note. Section 75J (2) of the Act requires the Minister to consider the Director-General's report (and the reports, advice and recommendations contained in it) when deciding whether or not to approve the carrying out of a project.

8C Time limits for dealing with applications and other matters

The following time limits are prescribed for dealing with applications and other matters under Part 3A of the Act:

(a) The time within which the Director-General is to notify the proponent of environmental assessment requirements with respect to a project or concept plan is 28 days after the proponent requests the Director-General to prepare those requirements.
(b) The time within which the Director-General is to accept the environmental assessment with respect to a project or concept plan, or require the proponent to submit a revised environmental assessment, under section 75H of the Act is 21 days after the environmental assessment is received by the Director-General.

(c) The time within which the Director-General is required to send copies of submissions received or a report of the issues raised in those submissions to the proponent and others under section 75H (5) of the Act (or to notify the proponent that no submissions were received) is 10 days after the end of the public consultation period for the project or concept plan.

Background

16 The background to the proceedings was summarised by the primary judge as follows (in which Ms Walker is referred to as the applicant, and Stockland and Villages are referred to respectively as the second respondent and the third respondent):

> [13] By letter dated 30 October 2002, the Minister for Planning advised the local council that he had declared development at Sandon Point to be State significant under s 76A(7) of the EPA Act. This made the Minister the consent authority: s 76A(9). However, subs 76A(7) and (9) (inter alia) were repealed in 2005: *Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Act 2005*.
>
> [14] On 11 December 2002 the Minister for Planning issued a "Direction under s 119(1)(b)" of the *EPA Act* for a Commission of Inquiry to be held in accordance with s 119(1)(b) of the Act into certain land at Sandon Point. In the context of the applicant's first ground of challenge it is necessary to consider its precise terms, as follows:I, the Minister for Planning, under s 119(1)(b) of the *Environmental Planning and Assessment Act 1979*, *direct that a Commission of Inquiry be held in accordance with* s 119 of the Act, into certain land at Sandon Point, in the Wollongong local government area, in accordance with the terms of reference described in the Schedule.
>
> [15] Those terms of reference were:To make recommendations on the preferred land uses, planning outcomes and management options for the land as shown edged heavy black on the map identified as Attachment A (dated November 2002), having regard to its values and constraints in the broader context of the surrounding urban and non urban environment.
>
> [16] That map showed land at Sandon Point, including the land which some years later became the land the subject of the application for concept plan approval with which these proceedings are concerned.
>
> [17] The Commission of Inquiry provided its report in September 2003. It found that residential development should be restricted to permit the outstanding cultural and ecological values of the site to be preserved. The Commissioners stated in their covering letter to the Minister:… the CoI area has significant inherent cultural, ecological and social values as indicated by the extensive evidence before the Commission. These values are too important to be compromised by the level of development proposed for residential purposes in Council's draft DCP or Stockland's draft Master Plan, notwithstanding the limited availability of land and the importance of providing for additional residential development in the northern Illawarra … The findings and recommendations in this report provide a strategic basis to implement sustainable coastal planning principles, protect significant Aboriginal heritage values, conserve and enhance ecological processes, ensure scarce employment opportunities are maintained, and enable an appropriate level of residential development.
>
> [18] On 23 May 2005, Charles Hill of Planning Workshop Australia was appointed by the Minister for Planning to provide an independent review of the findings and recommendations of the Commission of Inquiry. This review did not have any statutory status. Mr Hill's report recommended a

larger development footprint on the Sandon Point lands. Mr Hill recommended that rezoning for development should be allowed on terms that more than 60 percent should be left as open space and brought mostly into public ownership; and that some hectares towards the western boundary should be deemed suitable for medium density residential development, including aged care facilities.

[19] On 12 December 2005, the Department of Planning wrote to Wollongong City Council advising that the Minister for Planning had agreed to consider Sandon Point as a potential State Significant Site under the Major Projects SEPP; that it was expected that a concept plan will be lodged under Pt 3A of the EPA Act; and that the Minister had agreed to consider both the rezoning and concept plan concurrently.

[20] On 6 March 2006, HLA Envirosciences Pty Ltd wrote to the Department of Planning on behalf of the second and third respondents requesting the Minister to declare that the proposed development of Sandon Point was a "major project" pursuant to Pt 3A of the EPA Act (see s 75B). It submitted that the development fell within the class of development defined as "major projects" in cl 13 of the Group 5 class of development listed in Schedule 1 to the Major Projects SEPP viz: "Development for the purpose of residential, commercial or retail projects with a capital investment value of more than $50 million that the Minister determines are important in achieving State or regional planning objectives". If the Minister determined that it was a major project, the letter requested that the Minister also authorise the lodgement of a concept application for the project.

[21] On 2 April 2006, the Minister formed the opinion for the purposes of cl 6 of the Major Projects SEPP that the proposed development was of a kind described in Schedule 1 to the Major Projects SEPP and was thus declared to be a project to which Pt 3A of the EPA Act applies for the purposes of s 75B of the EPA Act. The record of that opinion was signed by the Minister and was in the following terms:I, the Minister for Planning, have formed the opinion that the development described in the Schedule below, is development of a kind that is described in Sch 1 of the *State Environmental Planning Policy (Major Projects) 2005* – namely cl 13, Pt 5 – development for the purposes of residential, commercial, or retail projects with a capital investment value of more than $50 million that the Minister determines are important in achieving State and regional planning objectives – and is thus declared to be a project to which Pt 3A of the *Environmental Planning and Assessment Act 1979* applies for the purpose of s 75B of that Act.

In forming this opinion, I have also determined that pursuant to cl 13(1) of Sch 1 of the *State Environmental Planning Policy (Major Projects) 2005* that the development described in the schedule below does satisfy State or regional planning objectives.

Schedule

A proposal to subdivide the land for subsequent development of residential dwellings and construct a retirement development incorporating a residential aged care facility generally described in a letter dated 6 March 2006 from HLA-Envirosciences Pty Ltd (on behalf of the proponents Stockland and Anglican Retirement Villages).

[22] On the same date, the Minister authorised the submission of a concept plan for the Sandon Point site under s 75M.

[23] On 24 April 2006, the Director-General of the Department of Planning provided to HLA Envirosciences Pty Ltd the Director-General's environmental assessment requirements with regard to the concept plan.

This was in accordance with ss 75F(2) and (3), as applied by s 75N. One of the general requirements was "a draft Statement of Commitments, outlining environmental management, mitigation and monitoring measures". The covering letter stated that once HLA Envirosciences Pty Ltd lodged its environmental assessment for the concept plan, it would be the subject of a test of adequacy to determine whether it satisfies the Director-General's requirements. The letter requested that HLA Envirosciences Pty Ltd prepare a study to justify the inclusion of Sandon Point as a State Significant Site under the Major Projects SEPP.

[24] On 15 June 2006, the second and third respondents submitted a concept plan for the project for the approval of the Minister under s 75O together with an Environmental Assessment for Major Project and State Significant Site Study.

[25] By letter dated 19 June 2006, the Director, Strategic Assessments of the Department of Planning advised HLA Envirosciences Pty Ltd that the Environmental Assessment generally satisfied the Director-General's requirements and that they had commenced the process of exhibiting the Environmental Assessment (required by s 75H(3) as applied under s 75N). The letter also stated that the State Significant Site Study adequately addressed the matters in cl 8 of the Major Projects SEPP and the letter of 24 April 2006. The Environmental Assessment and the study were placed on public exhibition for comment.

[26] In December 2006, the Director-General's Environmental Assessment Report was prepared in accordance with the requirement of s 75(I) (applied under s 75N). It recommended to the Minister that:

(a) approval be given to the concept plan subject to modifications;

(b) rezoning of Sandon Point be pursued to give effect to the concept plan, given that Sandon Point is a matter of significance for the environmental planning of the State; and

(c) approval to carry out development with a capital investment value of less than $5 million is, pursuant to s 75P(1)(b), to be dealt with under either Pt 4 or Pt 5.

[27] The Director-General's Environmental Assessment Report considered the Commission of Inquiry's report and its 80 findings and recommendations. It summarised the four key issues found by the Commission of Inquiry and showed its recommended land use zoning. It also considered the Charles Hill report. It discussed "Key Issues" including creek design and flooding, aboriginal cultural heritage and flora and fauna. It included the following reports:

(a) Volume 1: Overview report, Concept Plan Application Sandon Point, prepared by HLA Envirosciences Pty Ltd;

(b) Volume 2: Environmental Assessment Report, Sandon Point, prepared by Don Fox Planning Pty Ltd on behalf of Stockland Developments Pty Ltd;

(c) Volume 3: Environmental Assessment Report, Cookson Plibrico Site, Concept Plan Application for Anglican Retirement Villages, prepared by JBA Urban Planning Consultants Pty Ltd Appendix G to this report was a Flora and Fauna Assessment of the proposed Concept Master Plan prepared by Cumberland Ecology;

(d) Volume 4: Sandon Point Submission to the Minister for Planning on a Planning Agreement for Infrastructure prepared by Don Fox Planning Pty Ltd and JBA Urban Planning Consultants Pty Ltd on behalf of Stockland Developments Pty Ltd and Anglican Retirement Villages.

[28] On 21 December 2006, the Minister, having considered the Director-General's Environmental Assessment Report, made the following determination:I, the Minister for Planning, under the *Environmental Planning and Assessment Act 1979* (the Act) determine:

(a) To grant approval, under s 75O(1) of the Act, the Concept Plan for the project as described in Sch 1, subject to the modifications set out in Sch 2.

(b) That approval to carry out the remainder of the project or stages of the projects with capital investment value:

(i) of $5 million or more is, pursuant to s 75P(1)(a), to be subject to Pt 3A of the Act;

(ii) less than $5 million is, pursuant to s 75P(1)(b), to be subject to Pt 4 or Pt 5 of the Act;

(c) That a development application for the project or that stage of the project under Pt 4 is to be generally consistent with the terms of the approval of the Concept Plan, under s 75P(2)(a) of the Act.

[29] The challenge in the present case is to the validity of the approvals referred to in paras (a) and (b) of the Minister's determination.

[30] The project described in Sch 1 to the Minister's determination comprised the following:

a) on the second respondent's land, subdivision into:

(i) a maximum of 180 detached dwelling lots;

(ii) a superlot to create up to 80 apartments;

(iii) 2 superlots for up to 25 town houses;

(iv) potential for development of up to 285 dwellings on the proposed lots;

b) by the third respondent:

(i) a residential aged care facility of up to four storeys containing up to 120 beds;

(ii) apartment buildings of up to three storeys containing up to 250 independent living units;

(iii) community facilities and services to support residents of the retirement village.

Decision of primary judge

17 The primary judge set out the three grounds of challenge relied on by Ms Walker:

(a) the Minister failed to consider an express mandatory consideration under s 75O(2)(c), namely, the findings and recommendations in a 2003 report of a Commission of Inquiry into Sandon Point;

(b) the Minister failed to take into account implied mandatory considerations, namely, the principles of ecologically sustainable development (ESD) and the impact of the proposal upon the environment in several respects, including whether the flooding impacts of the project would be compounded by climate change;

(c) the Minister deferred essential matters for later consideration or the concept plan approval lacked finality.

18 The primary judge rejected the first and third of these grounds, and there is no challenge on appeal to that aspect of his decision.

19 As regards the second ground, the primary judge undertook a careful review of the development of the concept of environmentally sustainable development

(ESD), its adoption in international conferences and declarations, and its adoption in Australian inter-governmental agreements and strategies, and also in Australian legislation and case law.

20 The primary judge noted (at [120]) the contention of Ms Walker that the Minister had failed to consider ESD by failing to consider whether the impacts of the proposed development would be compounded by climate change, in particular by failing to consider whether changed weather patterns would lead to an increased flood risk in circumstances where flooding was identified as a major constraint on the development of the land (this consideration being called by the primary judge "climate change flood risk").

21 The primary judge referred to cases in the United States of America and in Australia treating greenhouse gas emissions and climate change as relevant to environmental decision-making. He set out paragraphs in Ms Walker's Points of Claim supporting her claim that the Minister's decision was invalid, including the following paragraph relevant to this appeal:

> 33. The Minister failed to take into account a mandatory relevant consideration, namely, the principles of ESD set out in s 6(2) of the *Protection of the Environment (Administration) Act 1991*.
>
> Particulars
>
> a. The Minister had before him the D-G's EAR which contained no reference to the principles of ESD set out in s 6(2) of the *Protection of the Environment (Administration) Act 1991*.
>
> b. The Minister had before him no other material dealing with s 6(2) of the *Protection of the Environment (Administration) Act 1991*.
>
> 34. The Minister failed to consider ESD by failing to consider whether the impacts of the proposed development would be compounded by climate change.
>
> Particulars
>
> a. The minister failed to consider whether changed weather patterns as a result of climate change would lead to an increased flood risk in connection with the proposed development, in circumstances where flooding was identified as a major constraint on the development of the site.

22 The primary judge went on to hold that it was mandatory for the Minister to consider the public interest, including principles of ESD; and he addressed the question of the level of particularity at which the Minister was obliged to consider ESD.

23 He noted that flooding was identified as a major constraint on the development of the site; and that the report of the Director-General (made pursuant to s 75I and s 75M did not refer to climate change or ESD, except to a very limited extent. He concluded his judgment on this point as follows, referring in [163] to *Gray v Minister for Planning* (2006) 152 LGERA 258; and in [164] and [167] to *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24:

> 159 There was no reference in that document, nor in any of the other voluminous documents before the Minister and the Director-General, to the climate change flood risk at issue in the present case.
>
> 160 Under cl 8B of the *Environmental Planning and Assessment Regulation 2000* the Director-General is the judge of relevance to the project of any aspect of the public interest (including ESD) to be included in the Environmental Assessment Report. In the present case, if the Director-

General had decided that the potential increased flooding impacts of climate change for which the applicant contends was not relevant to the project, I do not think that the Minister would have had an independent obligation to consider whether it was relevant. However the Director-General's Environmental Assessment Report did not mention the climate change flood risk issue. In some statutory and factual contexts, an omission by a decision-maker to mention a material matter may give rise to an inference that the administrative decision-maker has decided that it is not material: *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [5], [37], [69], [216]. No such submission was made in the present case. In the present case, in the absence of any reference to the climate change flood risk in any of the voluminous documents before the Minister or the Director-General in the Director-General's environmental assessment requirements, the inference, in my opinion, is that its relevance was not considered by the Director-General or the Minister.

161 Climate change presents a risk to the survival of the human race and other species. Consequently, it is, a deadly serious issue. It has been increasingly under public scrutiny for some years. No doubt that is because of global scientific support for the existence and risks of climate change and its anthropogenic causes. Climate change flood risk is, prima facie, a risk that is potentially relevant to a flood constrained, coastal plain development such as the subject project.

162 Was the Minister, bound to consider whether climate change flood risk was relevant to this flood constrained, coastal plain project in circumstances where the Director-General appeared not to have considered its relevance? That depends on whether an implication that the Minister was bound to do so can be found in the subject-matter, scope and purpose of the Act. The question is one of statutory construction.

163 The objects of the *EPA Act* include encouragement of ESD and protection of the environment. ESD, as defined, includes the precautionary principle and the intergenerational equity principle. One of the purposes of the *EPA Act* (as its title suggests) is assessment of impacts of development on the environment. That is the purpose of the Director-General's Environmental Assessment Report under Part 3A. The "environment" is defined broadly and non-exhaustively in s 4(1) to include "all aspects of the surroundings of humans, whether affecting any human as an individual or in his or her social groupings". According to the decision in *Gray*, the Minister is under an obligation to consider the public interest, including ESD, when making decisions under Part 3A. Clause 8B of the *Environmental Planning and Assessment Regulation 2000*, made under s 75Z, is explicit that one of the Director-General's functions is to identify relevant aspects of the public interest (which includes ESD).

164 There may be found in the subject matter, scope and purpose of this legislative scheme, as with nearly every statute conferring power to make an administrative decision, an implication that the decision is to be made on the basis of the most current material available to the decision-maker which has a direct bearing on the justice of the decision: *Minister for Aboriginal Affairs v Peko-Wallsend* at 44 -45. So too, in my opinion, with the deadly serious issue of climate change, which has loomed ever larger in the public and political eye for years. So much so that in New South Wales there is a Minister for Climate Change, Environment and Water and a Department of Environment and Climate Change, (and a Commonwealth Minister for Climate Change is expected imminently following the recent change of government).

165 While cl 8B of the EPA Regulation conditions the exercise of the Director-General's reporting function on the Director-General's formation of an opinion, that opinion must relate to whether "any aspect of the public interest … is relevant to the project". It is not a licence to ignore the text of the clause. It is a requirement to exercise discretion within statutory limits. There cannot be an exercise of the discretion if the Director-General does not consider whether an aspect of the public interest that potentially has a direct bearing on the justice of the decision is relevant. In my view, climate change flood risk may be so described in the context of the subject project.

166 In my opinion, having regard to the subject matter, scope and purpose of the *EPA Act* and the gravity of the well-known potential consequences of climate change, in circumstances where neither the Director-General's report nor any other document before the Minister appeared to have considered whether climate change flood risk was relevant to this flood constrained coastal plain project, the Minister was under an implied obligation to consider whether it was relevant and, if so, to take it into consideration when deciding whether to approve the concept plan. The Minister did not discharge that function.

167 The residual question is whether that factor was so insignificant that failure to take it into account could not have materially affected the decision: *Minister for Aboriginal Affairs v Peko-Wallsend* at 40. There was no submission to that effect. In my view, that question should be answered in the negative. It has not been suggested that there are any discretionary considerations that would weigh against granting relief and I cannot see any. Accordingly, in my opinion, the Minister's approval of the concept plan is void and the Court is justified in setting aside the impugned decision and ordering that the discretion be re-exercised according to law.

24 On that basis, the primary judge made the declarations challenged in this appeal.

Issues on appeal

25 The Minister relies on the following grounds of appeal:

1. His Honour erred in finding that for the purposes of the granting of a concept plan approval pursuant to the provisions of s 75O of the *Environmental Planning and Assessment Act 1979* ("EP&A Act") it was a mandatory relevant consideration that the Minister consider the principles of ecologically sustainable development ("ESD").
2. His Honour erred in finding that for the purposes of the granting of a concept plan approval pursuant to the provisions of s 75O of the EP&A Act it was a mandatory relevant consideration that the Minister consider whether changed weather patterns as a result of climate change would lead to an increased flood risk where flooding was identified as a major constraint on a coastal plain project ("Climate Change Flood Risk").
3. His Honour erred in finding that the absence of specific reference in the Director-General's Environmental Assessment Report to the Climate Change Flood Risk resulted in the inference that the Director-General did not consider Climate Change Flood Risk prior to the issue of the environmental assessment requirements pursuant to the provisions of s 75F and the Environmental Assessment Report as required by s 751 of the EP&A Act for the reasons that:
    a. the validity of the Director-General's report was not challenged;
    b. the finding was not open on the material before him;

c. the finding relied upon a reversal of the onus which rested with the challenger.

4. His Honour erred in finding that where the Director-General's report failed to consider Climate Change Flood Risk the Minister was under an independent obligation to consider whether Climate Change Flood Risk was relevant and, if so, to take it into consideration when deciding whether to approve the Concept Plan.
5. His Honour erred in finding that he could be satisfied that the issue of Climate Change Flood Risk was not so insignificant that the failure to take that matter into account could not have materially affected the decision under s 75O of the EP&A Act on the basis that there was no submission to the contrary effect by the Respondents as:
   a. the validity of the Director-General's report was not challenged;
   b. the finding was not open on the material before him;
   c. the finding relied upon a reversal of the onus which rested with the challenger.
6. His Honour erred in construing the reference to "public interest" in clause 8B of the *Environmental Planning and Assessment Regulation 2000* as requiring the Director-General to form an opinion as to what aspects of the principles of ESD (if any) were relevant to the project and, therefore, to be included in the Director-General's Environmental Assessment Report.
7. His Honour erred in finding that a failure to have regard to Climate Change Flood Risk resulted in the invalidity of the Minister's decision to grant a concept plan approval pursuant to s 75O of the EP&A Act.

26 Ms Walker relies on the following grounds in her Notice of Contention:

1 The Court below, having correctly concluded that the principles of ecologically sustainable development were mandatory considerations in the appellant's decision whether to grant the Concept Plan Approval, ought to have found that:
   a. the obligation to consider these matters arose from the *Environment Planning and Assessment Act 1979* as a whole and in particular sections 4, 5 (which incorporated section 6(2) of the *Protection of the Environment Administration Act 1991*) and 7;
   b. the conclusion did not depend on the wording of Clause 8B of the *Environmental Planning and Assessment Regulation 2000*; and
   c. the respondent was not obliged to identify those particular integers of ecologically sustainable development that might be relevant, had the Minister taken into account the principles of ecologically sustainable development in making the decision.

2 The Court below ought to have found that:
   a. the appellant failed to take into account the principles of ecologically sustainable development in deciding whether to approve the Concept Plan; and
   b. it was the appellant's failure to take into account the principles of ecologically sustainable development *per se* that invalidated the decision to approve the Concept Plan.

27 I will consider in turn the following issues:

(1) What, if any, are mandatory relevant considerations for a decision of the Minister under s 75O and s 75P?

(2) Was it proved that any mandatory relevant consideration was not considered by the Minister in this case?

Mandatory relevant considerations

28 I note first that the Minister did not suggest that s 75X protected the decision in this case.

29 The Court was referred to the decision of *Tugun Cobaki Alliance Inc v Minister for Planning* [2006] NSWLEC 396, in which Jagot J (at [179]-[184]) held that s 75X was an expression of Parliament's intention that the only provision breach of which will necessarily lead to invalidity is s 75H(3); and that the consequence of breach of all other provisions was left at large, to be determined in accordance with the principles laid down in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355. An equivalent provision (s 102 of the EPA Act) had previously been held by Lloyd J, in *Association for Berowra Creek Inc v Minister for Planning* (2003) 124 LGERA 99 at [53]-[55], to be limited to procedural requirements.

30 I agree with those decisions, at least to the extent that s 75X should not be considered as precluding relief where the Court comes to the conclusion that a purported approval of a project, or of a concept plan for a project, is not in truth such an approval, because something that the legislation requires if there is to be such an approval has not occurred. At the very least, if it were shown that a purported approval was not a *bona fide* attempt by the Minister to exercise his powers, then it could not be a valid approval: *R v Hickman; Ex parte Fox* (1945) 70 CLR 598. Further, if the Minister purported to give an approval that was prohibited by s 75O(3), it would not in my opinion be valid. And if a Minister purported to give an approval without considering the Director-General's report, as required by s 75O(2), again in my opinion it would not be valid. Whether or not s 75O(2) is treated as "mandatory", failure to follow such a simple and basic requirement would not be consistent with a *bona fide* attempt to exercise the power.

31 Indeed, since the public availability of the environmental assessment (which is made "mandatory" by s 75X(5)) is for the purpose of making submissions to the Director-General, it would be strange indeed if the requirements that there be a Director-General's report (s 75I, s 75N), and that the Minister consider this report (s 75O(2)), were not conditions that must be satisfied if an approval is to be valid. The terms of s 75X(4), permitting challenges to validity brought within three months, give further support to the view that s 75X(5) does not provide the only ground of invalidity.

32 Ultimately, the question of validity must be determined by construing the statute as a whole, in accordance with *Project Blue Sky*.

33 In circumstances where the Minister has made no submissions to the contrary, in my opinion it is appropriate to proceed on the basis that validity of the approval can be challenged on grounds generally available for challenging administrative decisions, including manifest unreasonableness (not relied on in this case) and failure to take into account considerations which the decision-maker is *bound* to take into account (which is relied on).

34 The question of what factors a decision-maker is bound to consider is authoritatively addressed by Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Limited* at 39-41. The primary judge set out the relevant material (omitting citations) at [148] of his judgment, as follows:

> The failure of a decision-maker to take into account a relevant consideration in the making of an administrative decision is one instance of an abuse of discretion entitling a party with sufficient standing to seek judicial review of ultra vires

administrative action. That ground now appears in s 5(2)(b) of the AD(JR) Act which, in this regard, is substantially declaratory of the common law. Together with the related ground of taking into account irrelevant considerations, it has been discussed in a number of decided cases, which have established the following propositions:

(a) The ground of failure to take into account a relevant consideration can only be made out if a decision-maker fails to take into account a consideration which he is bound to take into account in making that decision …

(b) What factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion. If the statute expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether those enumerated factors are exhaustive or merely inclusive. If the relevant factors – and in this context I use this expression to refer to the factors which the decision-maker is bound to consider – are not expressly stated, they must be determined by implication from the subject-matter, scope and purpose of the Act. In the context of judicial review on the ground of taking into account irrelevant considerations, this Court has held that, where a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined, except in so far as there may be found in the subject-matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard … By analogy, *where the ground of review is that a relevant consideration has not been taken into account and the discretion is unconfined by the terms of the statute, the court will not find that the decision-maker is bound to take a particular matter into account unless an implication that he is bound to do so is to be found in the subject-matter, scope and purpose of the Act*.

(c) Not every consideration that a decision-maker is bound to take into account but fails to take into account will justify the court setting aside the impugned decision and ordering that the discretion be re- exercised according to law. A factor might be so insignificant that the failure to take it into account could not have materially affected the decision … A similar principle has been enunciated in cases where regard has been had to irrelevant considerations in the making of an administrative decision …

(d) The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned … It follows that, in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision-maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power.

(Emphasis added.)

35 What is required to satisfy a requirement that factors be *considered* is helpfully discussed as follows by Tobias JA (Mason P and myself agreeing) in *Notaras v Waverley Council* [2007] NSWCA 333 at [117]-[120]:

[117] As I have indicated, the appellant has cast her argument in terms that the Council was required to give "proper, genuine and realistic consideration to the merits in the case". As Basten JA, with the agreement of Handley JA and Hunt AJA, observed in *Kindimindi v Lane Cove Council*

[2006] NSWCA 23; (2006) 143 LGERA 277 at 297[14], that terminology is taken from the judgment of Gummow J in *Khan v Minister for Immigration & Ethnic Affairs* (1987) 14 [A]LD 291. But as his Honour pointed out, that terminology should not be turned into an assessment of the adequacy of the consideration accorded in a particular case. That kind of challenge must be assessed on manifest unreasonableness grounds.

[118] It is instructive to note the following further observations of Basten JA in *Kindimindi* (at 297):

> 75 The dangers in giving too much weight to qualifying terminology in this area of judicial review were noted by Spigelman CJ in *Bruce v Cole* (1998) 45 NSWLR 163 at 186E:
>
> > These particular formulations must be treated with care, so that the relevant/irrelevant considerations ground is not expanded to permit review of the merits. That ground is restricted in accordance with the now classic judgment of Mason J in [*Peko Wallsend*], to matters which the decision maker was obliged to take into account.
>
> 76 In *Weal v Bathurst City Council* (2000) 111 LGERA 181, Mason P, although "attracted to" the language adopted by Gummow J in Kahn, adopted a constrained approach to review of a council's decision-making process. On the other hand, Giles JA (with whom Priestley JA agreed) stated at [80]:
>
> > Taking relevant matters into consideration called for more than simply adverting to them. There had to be an understanding of the matters and the significance of the decision to be made about them, and a process of evaluation, sufficient to warrant the description of the matters being taken into consideration …
>
> 77 This latter formulation appears to treat identification of the correct test as a matter of construction of the clause "take into consideration" in the chapeau of s 79C(1). With respect, that approach runs the risk of falling foul of the admonition contained in the judgment of Spigelman CJ in *Bruce v Cole*, with whose reasons Mason P and Sheller and Powell JJA agreed.
>
> 78 The force of the statement in *Bruce v Cole* may, however, have been mitigated to some extent by the adoption by his Honour in *Zhang v Canterbury City Council* (2001) 51 NSWLR 589 of the language of Gummow J in Kahn. Although there is reference to the passage in *Bruce v Cole* (at [62]), at [64] the Chief Justice noted, by reference to *Parramatta City Council v Hale* [(1982) 47 LGRA 319] at p 339, that "mere advertence to a matter required to be taken into consideration is not sufficient". The reference in *Hale*, at p 339, in the judgment of Moffitt P read as follows:
>
> > It was put to us that the authority could consider relevant matters and reject them. An assertion in these terms has an ambiguity likely to produce error. If the submission means that it is sufficient that the authority advert to a relevant matter and that it can then discard it, the submission must be rejected, because the requirement is that the matter shall be taken into consideration.

> 79 So much must be accepted: the danger is that adoption of the epithets such as "proper, genuine and realistic" consideration, may be understood to qualify the statutory terminology in a manner inconsistent with accepted principles in relation to judicial review. As noted in *Bruce v Cole*, they risk an assessment of the nature of the consideration which will encourage a slide into impermissible merit review …

[119] His Honour, with the agreement of Beazley JA, repeated these sentiments in *Belmorgan Property Development Pty v GPT Re Ltd* [2007] NSWCA 171; (2007) 153 LGERA 450 at 467[76]-[78], adding the following pertinent observation (at [78]):That is not to say that to give grossly inadequate weight to a matter of some importance may not provide a basis for review; however, to qualify as a ground of judicial review, such conduct must satisfy the test of manifest unreasonableness as applied to the exercise of the power: see *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1985-86) 162 CLR 24 at 41 (Mason J). It is not helpfully reflected in a supposed obligation to give "realistic" consideration to a particular matter.

See also, *Insurance Australia Ltd t/a NRMA Insurance v Motor Accidents Authority of New South Wales* [2007] NSWCA 314 at [40].

[120] A further convenient statement of the relevant principles which I would gratefully adopt is that of Preston CJ in *Walsh v Parramatta City Council* [2007] NSWLEC 255 where the Chief Judge said (omitting citations):

> 56 An applicant dissatisfied with the merit assessment and outcome of an exercise of discretionary power by a consent authority make (sic) seek to disguise a challenge on those merits in terms of recognised grounds of judicial review, such as the relevant considerations grounds. A court should see through the disguise. The court must avoid the temptation to express the conclusion in terms of a recognised ground of review while in truth making a decision on the merits …
>
> 57 The formulation of "proper genuine and realistic consideration", invoked by Mr Walsh to describe the consideration required from the Council in his submission, has been criticised by the courts. Too ready an employment of the test causes the category of judicial review of failure to consider relevant matters to elide into a review on the merits or an appeal on the facts …
>
> 58 It is not for a party affected by a decision, or a reviewing court to make an exhaustive list of the matters which a decision maker might conceivably regard as relevant then attack the decision on the ground that a particular one of them was not specifically taken into account: …
>
> 59 The considerations that are relevant are to be identified "primarily, perhaps even entirely", by reference to the statute imposing the power on the decision maker rather than the particular facts of the case that the decision maker is called on to consider …
>
> 60 The level of particularity with which a matter is identified in the statute may be significant where the failure complained of is not a failure to consider a certain subject matter, but a failure to make some enquiry about facts said to be relevant to that subject matter. For the applicant to succeed, the statute must expressly or

> impliedly oblige the decision maker to enquire and consider the subject matter at the level of particularity involved in the applicant's submission …
>
> 61 The relevant considerations ground is concerned essentially with whether the decision maker has properly applied the law. It is not a ground that is essentially concerned with the process of making the particular findings of facts upon which the decision maker acts …
>
> 62 An applicant who undertakes to establish that an administrative decision maker improperly exercised power should not be permitted under colour of doing so to enter upon an examination of the correctness of the decision, or of the sufficiency of the evidence supporting it, or of the weight of the evidence against it, or the regularity or irregularity of the manner in which the decision maker has proceeded. The correctness or incorrectness of the conclusion reached by the decision maker is entirely beside the question: …
>
> 63 Proper consideration of a relevant matter does not demand factual correctness. It is wrong to equate relevancy with factual correctness: … A wrong assessment of the consideration the decision maker takes into account is not a reviewable error of law …

36 One step in Ms Walker's argument is that the Minister is bound to consider the public interest. Ms Adamson SC, who appeared for Ms Walker, submitted that, because Pt 3A of the EPA Act and Pt 1A of the EPA Regulation were introduced together, the Court could take account of Pt 1A of the Regulation in construing the Act, and treat Regulation 8B(b) as confirming that the Minister is required to take into account the public interest.

37 I accept that, if there is a single scheme constituted by legislation and regulations, introduced together, the regulations can be considered along with the legislation in order to understand the scheme; and that this in turn may bear on the construction of the legislation: *Deputy Federal Commissioner of Taxation (SA) v Ellis & Clark Ltd* (1934) 52 CLR 85 at 89-95 per Dixon J; *Brayson Motors Pty. Ltd. (In Liq.) v Federal Commissioner of taxation* (1985) 156 CLR 651 at 652 (comment by Mason J); *Flanagan v Commissioner of Australian Federal Police* (1996) 60 FCR 149 at 196-197; *Minister for Immigration and Multicultural Affairs v A* (1999) 91 FCR 435 at [47].

38 Dr Griffiths SC for the Minister contended that, even if the Court could take into account Regulation 8B, at best that suggested a requirement that there be taken into account such aspects of the public interest as the Director-General considered relevant.

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

40 There is some confirmation of this from Regulation 8B; and also from s 79C of the EPA Act, dealing with development consents by consent authorities, which specifies the public interest as a factor to be taken into account. Similarly,

the Land and Environment Court, dealing with appeals under s 75L and s 75Q of the EPA Act, is required to have regard to the public interest: *Land and Environment Court Act 1979* (NSW), s 39(5).

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

42 There is authority that, in respect of a consent authority making a decision in accordance with s 79C of the EPA Act, and a court hearing a merits appeal from such a decision, consideration of the public interest embraces ESD: *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA 10. In that case, Preston CJ said this, at [121]-[124]:

> [121] The principles of ecologically sustainable development are to be applied when decisions are being made under any legislative enactment or instrument which adopts the principles: *Murrumbidgee Ground-Water Preservation Association v Minister for Natural Resources* [2004] NSWLEC 122 at [178]; *Bentley v BGP Properties Pty Ltd* [(2006) 145 LGERA 234] (at 243[57]).
>
> [122] The *Environmental Planning and Assessment Act* is one such legislative enactment. It expressly states that one of the objects of the *Environmental Planning and Assessment Act* is to encourage ecologically sustainable development: s 5(a)(vii). The Act defines ecologically sustainable development as having the same meaning as it has in s 6(2) of the *Protection of the Environment Administration Act*.
>
> [123] Section 79C(1) of the *Environmental Planning and Assessment Act*, which sets out the relevant matters which a consent authority must take into consideration, does not expressly refer to ecologically sustainable development. Nevertheless, it does require a consent authority to take into account "the public interest" in s 79C(1)(e). The consideration of the public interest is ample enough, having regard to the subject matter, scope and purpose of the *Environmental Planning and Assessment Act*, to embrace ecologically sustainable development.
>
> [124] Accordingly, by requiring a consent authority (or on a merits review appeal the Court) to have regard to the public interest, s 79C(1)(e) of the *Environmental Planning and Assessment Act* obliges the consent authority to have regard to the principles of ecologically sustainable development in cases where issues relevant to those principles arise: *Carstens v Pittwater Council* (1999) 111 LGERA 1 at 25; *BGP Properties Pty Ltd v Lake Macquarie City Council* (2004) 138 LGERA 237 at 262 [113]; *Port Stephens Pearls Pty Ltd v Minister for Infrastructure and Planning* [2005] NSWLEC 426 at [54].

43 I agree with that view. One consequence of it is that if, in an appeal to it concerning a s 79C decision, the Land and Environment Court found that issues relevant to the principles of ESD arose, but declined to have regard to those principles, that would be an error of law that could support an appeal to this Court. If the Land and Environment Court did not have regard to the principles of ESD because it did not consider that issues relevant to those principles arose, when on a correct view such issues did arise, then this would be at least an error of fact, if not an error of law.

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

45 Ms Adamson relied on the inclusion of encouragement of ESD in the objects of the EPA Act to support her submissions. She relied on *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478 at [70], and *Woollahra Municipal Council v Minister for Environment* (1991) 23 NSWLR 710 at 715-716; 73 LGRA 379 at 383, in support of the proposition that statutory powers are to be understood as powers to advance the objects of the legislation, and that limits to those powers are set by reference to those objects.

46 Ms Adamson relied particularly on the decision of the Full Federal Court in *Tickner v Bropho* (1993) 40 FCR 183, in which the Court considered the effect of a provision in the following terms:

> The purposes of this Act are the preservation and protection from injury or desecration of areas and objects in Australia and in Australian waters, being areas and objects that are of particular significance to Aboriginals in accordance with Aboriginal tradition.

47 Ms Adamson referred to the following passage from the judgment of Black CJ, at 192:

> It would be surprising if an Act that has as its stated purpose the preservation from injury of areas that are of particular significance to Aboriginals did not require the Minister to consider, on receipt of a valid application for a declaration, whether the subject area of the application was in fact a significant Aboriginal area. In my view, to interpret the Act in such a way as to impose no such requirement would frustrate its purpose and an interpretation that has such an affect should be rejected. The purpose of preservation could hardly be advanced if there were no requirement even to consider whether an area had the characteristics that it is an expressed purpose of the Act to preserve and protect.

48 Ms Adamson also relied on the following statement by French J at 229:

> The stated purpose of the Act supports the submission that the Minister, when faced with a bona fide application under s 9(1)(a), is bound to consider whether it relates to a significant Aboriginal area and whether, if so, that area is under serious and immediate threat of injury or desecration. The obligation would be discharged by a determination that one of those conditions is not satisfied.

49 Ms Adamson submitted that it was not to the point that there might, in addition, be other competing objects or purposes to which an Act gives effect. To the extent to which such objects or purposes were mandatory considerations, they would simply be further matters that must be considered by the repository of power.

50 Ms Adamson accepted that, consistently with what was said by Gleeson CJ in *Carr v Western Australia* (2007) 232 CLR 138, at [5]-[7], there is no mandatory requirement as to the weight to be given to a relevant consideration or as to the result to be achieved by giving consideration to it; but submitted that this did not detract from a requirement that a matter be considered.

51 Consistently with Ms Adamson's submissions, the view was expressed by Pain J in *Gray v Minister for Planning*, that a decision-maker under Pt 3A is obliged to consider ESD principles; and on that basis, Pain J held a decision by the Director-General that an environmental assessment adequately addressed the environmental assessment requirements (EAR) under s 75F of the EPA Act was void and of no effect. At [113]-[115], after referring to the decision in *Telstra*, Pain J said this:

> [113] The Respondents emphasised that Pt 3A was unlike Pt 4 and Pt 5, and did not contain any provision such as s 79C which contains a list of matters including the public interest which must be taken into account in granting development consent. The decision was therefore said to have no application to decisions made under Pt 3A. A number of the observations made in the judgment are directed to decision making under the *EPA Act* more generally. While not binding as they are obiter statements they have persuasive weight in my view. The Respondents' submissions by implication resisted the Applicant's argument that it was necessary for the Director-General to act in the public interest under Pt 3A when exercising his functions in accordance with the Minister's directions under s 13(2) of the EP&A Act. Reliance was placed by the Respondents on s 75R which states that Pt 4 and Pt 5 do not apply to an approved project, defined as a project approved by the Minister under Pt 3A. The precise application of this section is unclear to me given that the Anvil Hill Project is yet to be approved and is therefore not presently an approved project.
>
> [114] There is substantial case law apart from *Telstra v Hornsby* suggesting that all decisions under the EP&A Act require that ESD principles be considered in any event. *Telstra v Hornsby* is a substantial judicial pronouncement on precisely what that obligation on decision makers under the EP&A Act entails. I consider that must include decisions made under Pt 3A. It is not required that the ESD principles be referred to explicitly by a decision maker. In this case the decision under challenge is that of the Director-General in relation to an environmental impact assessment process under that Part.
>
> [115] While Pt 3A does not specify any limits on the discretion exercised by the Director-General in relation to the scope of the EAR and how these are applied in an environmental assessment I consider that he must exercise that broad discretion in accordance with the objects of the Act which includes the encouragement of ESD principles including those referred to by the Applicant. Essentially I agree with the arguments of the Applicant. The additional issue to consider however is whether that means scope 3 emissions should have been included in the environmental assessment because ESD principles do not refer to a particular environmental issue, as they are broad principles, in circumstances where there is recognition by the Director-General as seen in the departmental Minute dated 13 September 2006 that climate change/global warming is a global environmental issue to which the coal won from the project will contribute.

52 In my opinion, one difficulty with the view that failure to consider ESD principles renders void a Minister's decision, under sections such as s 75J and s 75O, is that the encouragement of ESD is just one of many objects set out in s 5 of the EPA Act, some of which seemingly would have no relevance to many decisions. For example, there would surely be some decisions to which considerations of "protection, provision and co-ordination of communication and utility services", or "provision of land for public purposes", or "provision

and co-ordination of community services and facilities", or "provision and maintenance of affordable housing", would not be relevant, or at least not materially relevant.

53 It would in my opinion be difficult to discern a legislative intention that decisions by the Minister be void if the Minister had failed to take into account an object of the EPA Act which was not materially relevant to the decision in question. In such a case, if there were any error by the Minister, it would be that he or she failed to consider that object and to reach the conclusion that it was not materially relevant. It would be strange if an error of that kind could make a decision void.

54 On the other hand, if the supposed legislative intention is that decisions by the Minister be void if the Minister had failed to take into account an object of the EPA Act in circumstances where that object was materially relevant, there would be a question as to what would be the result if the Minister did consider it, and came to the (erroneous) conclusion that it was not relevant. To hold that the result would then be that the decision was void would involve a merits review of the Minister's judgment as to relevance; while to hold that the result would be that the decision was not void, because the Minister had at least considered whether the object was relevant, would seem contrary to the supposed mandatory legislative requirement that the object be taken into account if it is relevant.

55 I think that the better view is that good decision-making would involve the Minister considering whether any of the objects of the EPA Act was relevant to the decision, and taking into account those that were considered relevant; but that a failure by the Minister to consider whether (say) "provision and maintenance of affordable housing" was relevant to a particular decision, or an incorrect decision that this object was not relevant, would not without more make a decision void. If that view is correct in relation to this object of the EPA Act, then in my opinion it must also be correct in relation to other objects, including the principles of ESD. Accordingly, I do not agree with the contrary view adopted by Pain J in *Gray*, and by the primary judge in this case.

56 However, I do suggest that the principles of ESD are likely to come to be seen as so plainly an element of the public interest, in relation to most if not all decisions, that failure to consider them will become strong evidence of failure to consider the public interest and/or to act *bona fide* in the exercise of powers granted to the Minister, and thus become capable of avoiding decisions. It was not suggested that this was already the situation at the time when the Minister's decision was made in this case, so that the decision in this case could be avoided on that basis; and I would not so conclude.

Was any mandatory consideration not considered?

57 I have held that failure to consider the public interest would avoid a decision of the Minister under s 75O and s 75P. However, the primary judge did not find that the Minister did not consider the public interest, nor do I think that such a finding could be made. The Minister took into account the Director-General's report, much of which related to matters concerning the public interest.

58 It was contended for the Minister that, even if it had been a condition of validity that the Minister consider the principles of ESD, the Minister had done so (or at least, was not shown not to have done so) in this case.

59 It is not strictly necessary for me to make a finding on this. However, had I considered that it was mandatory to consider the principles of ESD, I would

have taken the view that the evidence was sufficient to draw the inference that those principles were not considered. While I do not think that consideration of the principles of ESD requires explicit formulation of issues in the terms of the four principles and programs specified in s 6(2) of the *Protection of the Environment Administration Act 1991* (NSW), I think consideration of the principles of ESD does require that the substance of the matters referred to in those four principles and programs be addressed. The Director-General's report did address some matters relevant to these principles and programs, but in my opinion did not address them in a way that dealt with their substance.

60 This is particularly the case in relation to the precautionary principle and inter-generational equity. I agree with the primary judge that consideration of these matters in relation to this project would have required consideration of long-term threats of serious or irreversible environmental damage, not inhibited by lack of full scientific certainty, and that this almost inevitably would have involved consideration of the effect of climate change flood risk. I would infer from the contents of the Director-General's report and the other material in the case that these considerations were not addressed. On this matter, I accept the submissions of Ms Adamson.

61 I find it somewhat surprising and disturbing that the Director-General's report did not address these aspects of the principles of ESD, and that the Minister did not postpone his decision until he had a report that did so.

62 Since these aspects of ESD were not addressed by the Minister in giving his approval to the concept plan, in my opinion they will need to be addressed when development approval is sought, whether this is sought from a consent authority (in relation to stages with a capital investment value of less than $5 million), or from the Minister (in relation to stages with a capital investment value of $5 million or more). I do not think approval of the concept plan should be considered as resolving these matters in favour of the development.

63 Because of the approval of the concept plan, there will be no objector appeal available from the development approval; so in my opinion it is particularly important that the consent authority and/or the Minister conscientiously address the principles of ESD in dealing with any development application, and not regard the approval of the concept plan as carrying any weight in this consideration. It may be that failure to do so could, having regard to the content of this judgment, be considered evidence of failure to take into account the public interest.

Conclusion

64 It follows that the appeal should be allowed and the declarations made below should be set aside. I would be prepared to hear submissions as to the costs of the proceedings below and of the appeal. Accordingly, the orders I propose are:

(1) Appeal allowed.

(2) The orders made in the court below on 29 November 2007 be set aside.

(3) The proceedings in the court below be dismissed.

(4) Written submissions as to costs to be provided.

Campbell JA.

65 I agree with Hodgson JA.

Bell JA.

66 I agree with the orders proposed by Hodgson JA and with his Honour's

reasons for concluding that any failure to consider ESD principles does not operate to render void the Minister's approval under s 75O of the *Environmental Planning and Assessment Act*. I would prefer not to express a view about the matters to which his Honour addresses in paras [56]-[63] of his reasons.

Appeal allowed

Solicitor for the appellant: Department of Planning.

Solicitor for the first respondent: Environmental Defenders' Office Ltd.

Solicitors for the second respondent: *Herbert Geer & Rundle*.

Solicitors for the third respondent: *Minter Ellison Lawyers*.

BD POWELL