Land and Environment Court of New South Wales

Walker v Minister for Planning [2007] NSWLEC 741 (27 November 2007)

Last Updated: 5 December 2007

NEW SOUTH WALES LAND AND ENVIRONMENT COURTCITATION: Walker v Minister for Planning [2007] NSWLEC 741This decision has been amended. Please see the end of the judgment for a list of the amendments.PARTIES: APPLICANT:Jill WalkerFIRST RESPONDENT:Minister for PlanningSECOND RESPONDENT:Stockland Development Pty Ltd ABN 71 000 064 835THIRD RESPONDENT:Anglican Retirement Villages- Diocese of Sydney ABN 39 922 848 563FILE NUMBER(S): 40240 of 2007CATCHWORDS: Judicial Review :- whether Minister's approval of concept plan for project and associated determinations under ss 75O(2) and 75P(1) in Part 3A of Environmental Planning and Assessment Act 1979 void - whether Minister obliged, and failed, to consider findings and recommendations in report of Commission of Inquiry as required by s 75O(2)(c) - whether Minister obliged, and failed, to consider principles of ecologically sustainable development and the impact of the proposal upon the environment including as to whether impacts of proposed flood constrained coastal plain project would be compounded by climate change flood risk - whether Minister deferred essential matters for later consideration or the concept plan approval lacked finality and whether those principles applicable to concept plan approval under Part 3AEcologically Sustainable Development (ESD): - whether Minister's concept plan approval and associated determinations under ss 75O(2) and

75P(1) in Part 3A of Environmental Planning and Assessment Act 1979 void because Minister failed to take into account ESD and impact of proposal on environment - whether ESD mandatory consideration - whether Minister failed to consider ESD principles by not considering whether impacts of proposed flood constrained coastal plain project would be compounded by climate change – whether Minister failed to consider ESD principles re impact of proposal on Endangered Ecological Communities because there was no up to date mapping to verify their extent and nature LEGISLATION CITED: Coastal Protection Act 1979 ss 3(b), 37A, 54AConstitution Act 1902 (NSW), s 35CAEnergy Services Corporation Act 1995, ss 5, 8Environmental Planning and Assessment Act 1979, Pt 3A and ss 4, 5, 76A, 79C, 119Environmental Planning and Assessment Regulation 2000, cl 8B, Schedule 2 cl 6(1)Fire Brigades Act 1989, s 10AFisheries Management Act 1994, ss 3, 7E, 57, 143Interpretation Act 1987, s 34Land and Environment Court Act 1979, s 39(4) and (2)National Parks and Wildlife Act 1974, s 2A(2)Protection of the Environment Administration Act 1991, s 6(2)Rural Fires Act 1997, ss 3 and 9State Environmental Planning Policy (Major Projects) 2005Sydney Harbour Foreshore Authority Act 1998, s 15Water Management Act 2000, s 3 CASES CITED: Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources [2007] FCA 1480Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] EWCA Civ 1; [1948] 1 KB 223Attorney-General (NSW) v Quin [1990] HCA 21; (1990) 170 CLR 1Australian Conservation Foundation v Latrobe City Council [2004] VCAT 2029; (2004) 140 LGERA 100Axer Pty Ltd v Environment Protection Authority (1993) 113 LGERA 357Azriel v NSW Land and Housing Corporation [2006] NSWCA 372Belmorgan Property Development Pty Ltd v GPT Re Ltd [2007] NSWCA 171; (2007) 153 LGERA 450Bentley v BGP Properties Pty Ltd [2006] NSWLEC 34; (2006) 145 LGERA 234BGP Properties Pty Ltd v Lake Macquarie City Council [2004] NSWLEC 399; (2004) 138 LGERA 237Brayson Motors Pty Ltd (in liq) v Federal Commissioner of Taxation [1985] HCA 20; (1985) 156 CLR 651BT Goldsmith Planning Services Pty Ltd v Blacktown City Council [2005] NSWLEC 210Calvert Cliffs' Coordinating Commission v US Atomic Energy Commission 449 F. 2d 1109Carstens v Pittwater Council (1999) 111 LGERA 1Castle Constructions Pty Ltd v North Sydney Council [2007] NSWLEC 459City of Unley v Claude Neon Ltd (1983) 49 LGRA 65Country Energy v Williams [2005] NSWCA 318;

(2005) 63 NSWLR 699, 141 LGERA 426Deputy Federal Commissioner of Taxation (SA) v Ellis & Clark Ltd [1934] HCA 54; (1934) 52 CLR 85Dimmock v Secretary of State for Education and Skills [2007] EWHC 2288Drake-Brockman v Minister for Planning [2007] NSWLEC 490F & D Bonaccorso Pty Ltd v City of Canada Bay Council [No 2] [2007] NSWLEC 537Farah v Warringah Council [2006] NSWLEC 191Flanagan v Commissioner of Australian Federal Police (1996) 60 FCR 149Foster v Minister for Customs and Justice [2000] HCA 38; (2000) 200 CLR 442Friends of Hinchinbrook Society Inc v Minister for Environment (No 2) (1997) 93 LGERA 249Gales Holdings Pty Ltd v Tweed Shire Council (2006) 146 LGERA 236Gray v The Minister for Planning [2006] NSWLEC 720; (2006) 152 LGERA 258Greenpeace Australia Ltd v Redbank Power Company Pty Ltd and Singleton Council (1994) 86 LGERA 143Johnco Nominees Pty Ltd v Albury-Wodonga (NSW) Corporation [1977] 1 NSWLR 43Kindimindi Investments Pty Ltd v Lane Cove Council [2006] NSWCA 23; (2006) 143 LGERA 277Leatch v National Parks and Wildlife Services (1993) 81 LGERA 270Massachusetts v Environmental Protection Agency (2007) 127 S.Ct. 1438McDougall v Warringah Shire Council (1993) 30 NSWLR 258Mid Western Community Action Group Inc v Mid-Western Regional Council & Stockland Development Pty Ltd [2007] NSWLEC 411Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40; (1986) 162 CLR 24Minister for Immigration and Multicultural Affairs v A [1999] FCA 1679; (1999) 91 FCR 435Minister for Immigration and Multicultural Affairs v Yusuf [2001] HCA 30; (2001) 206 CLR 323Mison v Randwick Municipal Council (1991) 23 NSWLR 734Murrumbidgee Ground-Water Preservation Association v Minister for Natural Resources [2004] NSWLEC 122Murrumbidgee Groundwater Preservation Association Inc v Minister of Natural Resources [2005] NSWCA 10; (2005) 138 LGERA 11Nicholls v Director-General of National Parks and Wildlife (1994) 84 LGERA 397Parramatta City Council v Hale (1982) 47 LGRA 319 Parramatta City Council v Pestell [1972] HCA 59; (1972) 128 CLR 305People of the State of California v General Motors Corporation and Ors (2007) WL 2726871Port Stephens Pearls Pty Ltd v Minister for Infrastructure and Planning [2005] NSWLEC 426Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355 Providence Projects Pty Ltd v Gosford City Council (2006) 147 LGERA 274Queensland Conservation Council Inc v Xstrata Coal Queensland Pty

Ltd [2007] QCA 338Re Xstrata Coal Queensland Pty Ltd and Ors [2007] QLRT 33Save our Street Inc v Settree [2006] NSWLEC 570; (2006) 149 LGERA 30Taralga Landscape Guardians Inc v Minister for Planning [2007] NSWLEC 59Telstra Corp Ltd v Hornsby Shire Council [2006] NSWLEC 133; (2006) 146 LGERA 10Thornton v Adelaide Hills Council (2006) 151 LGERA 1Town Planning Board v Society for the Protection of the Harbour Ltd [2004] 1 HKLRD 396Transport Action Group Against Motorways Inc v Roads and Traffic Authority (1999) 46 NSWLRTugun Cobaki Alliance Inc v Minister for Planning and RTA [2006] NSWLEC 396. Tuna Boat Owners Association of SA Inc v Development Assessment Commission [2000] SASC 238; (2000) 110 LGERA 1Warehouse Group (Australia) Pty Ltd v Woolworths Ltd [2005] NSWCA 269; (2005) 141 LGERA 376Weal v Bathurst City Council [2000] NSWCA 88; (2001) 111 LGERA 181Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage [2006] FCA 736; (2006) 232 ALR 510Winn v Director-General National Parks and Wildlife [2001] NSWCA 17; (2001) 130 LGERA 508Woolworths Ltd v Pallas Newco Pty Ltd [2004] NSWCA 422; (2004) 61 NSWLR 707Zhang v Canterbury City Council [2001] NSWCA 167; (2001) 51 NSWLR 589CORAM: Biscoe JDATES OF HEARING: 18 and 19 September 2007JUDGMENT DATE: 27 November 2007LEGAL REPRESENTATIVESAPPLICANT:Mr M H Baird and Mr G Young, barristersSOLICITORS:Environmental Defender's Office FIRST RESPONDENT:Ms S Duggan and Mr M Seymour, barristersSOLICITORS:Department of PlanningSECOND RESPONDENT:Mr P R Clay, barristerSOLICITORS:Herbert Geer & RundleTHIRD RESPONDENT:Mr T G Howard, barristerSOLICITORS:Minter EllisonJUDGMENT:

THE LAND AND ENVIRONMENT COURTOF NEW SOUTH WALESBISCOE J27 November 2007 40240 of 2007JILL WALKER v MINISTER FOR PLANNING AND ORS.JUDGMENT1 HIS HONOUR: The applicant challenges the validity of a concept plan approval by the Minister for Planning, the first respondent, under s 75O(1) of the *Environmental Planning and Assessment Act 1979* (NSW) (***EPA Act***) and ancillary determinations under s 75P(1)(a) and (b). The concept

plan, which was approved on 21 December 2006, is for a residential subdivision and a retirement development on approximately 25 hectares at Sandon Point. The two proponents of the concept plan are Stockland Development Pty Ltd and Anglican Retirement Villages – Diocese of Sydney, respectively the second and third respondents. 2 There are three grounds of challenge:(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.3 The area known as Sandon Point comprises about 53 hectares of mostly cleared coastal plain 14 kilometres north of Wollongong City between Bulli to the south and Thirroul to the north. The concept plan is for the development of the western part of Sandon Point comprising five lots owned by Stockland Development Pty Ltd and Cookson Plibrico Pty Ltd. The western boundary of the proposed development site is a length of the Illawarra Railway line. The eastern boundary abuts parcels of land that back onto Macauley's Beach. **The statutory scheme**4 Part 3A of the *EPA Act* applies to major infrastructure and other significant development proposals in New South Wales. It was introduced by the *Environmental Planning and Assessment Amendment (Infrastructure and other Planning Reform) Act 2005* and came into force on 1 August 2005. It has been amended on a number of occasions. The relevant version of Part 3A, which applied at the time that the application for concept plan approval was lodged on 15 June 2006 and up to the date of approval on 21 December 2006, pre-dates significant changes which came into force on 12 January 2007. A person is prohibited from carrying out a development that is a project to which Part 3A applies unless the Minister has approved of the carrying out of the project: s 75D. "*Project*" is defined to mean "*development*" that is declared under s 75B to be a project to which Part 3A applies: s 75A. 5 Part 3A recognises a two part process. First, the approval of a concept plan which the Minister may authorise or require the proponent to submit: Division 3. Second, the approval of a project application: Division 2. As part of the process of

approval of a concept plan, the Director-General's environmental assessment requirements may require the proponent to include in the assessment a statement of "*commitments*" that the proponent is prepared to make for environmental management and mitigation issues on the site: s 75F incorporated by s 75N. In approving a concept plan, the Minister may require further assessment of aspects of the development: s 75P(1)(a); 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 the Act: s 75P(1)(b); or may determine that no further environmental assessment is required for the project or any particular stage of the project: s 75P(1)(c). In the case of Sandon Point, the Minister has determined that further project approvals are required: approval of any development over $5 million is to be determined by the Minister under Part 3A; approval of any development under that amount is to be determined by under Part 4 or Part 5. Council approval under Part 4 must "*be generally consistent with the terms of the approval of the concept plan*": s 75P(2)(a).6 More particularly, the process of environmental assessment and approval to carry out a project under Part 3A is governed by s 75B and Division 2 (ss 75D – 75L) which prescribe the following elements:a) a development may be declared to be a project to which Part 3A applies by State environmental planning policy or by a gazetted order of the Minister: s 75B, which relevantly provided:**75B Projects to which Part applies(1) General**This Part applies to the carrying out of development that is declared under this section to be a project to which this Part applies:

(a) by a State environmental planning policy, or(b) by order of the Minister published in the Gazette (including by an order that amends such a policy).

The carrying out of particular or a class of development, or development for a program or plan of works or activities, may be so declared.**(2) Kinds of projects**

The following kind of development may be declared to be a project to which this Part applies:

(a) major infrastructure or other development that, in the opinion of the Minister, is of State or regional environmental planning significance,(b) major infrastructure or other development that is an activity for which the

proponent is also the determining authority (within the meaning of Part 5) and that, in the opinion of the proponent, would (but for this Part) require an environmental impact statement to be obtained under that Part.b) an application by the proponent for approval of the Minister to carry out the project: s 75E;c) the Director-General is to prepare, and notify the proponent of, the Director General's environmental assessment requirements for approval of the project by the Minister: s 75F. The requirements may state that an environmental assessment is to be prepared and may require the proponent to include in the assessment a statement of the commitments the proponent is prepared to make for environmental management and mitigation issues on the site;d) the Minister may constitute an expert panel or bureaucratic panel to assess any aspect of the project referred to the panel by the Minister: s 75G;e) the proponent is to submit the required environmental assessment to the Director-General who, after accepting it, is to make it publicly available for at least 30 days: s 75H. The Director-General is to provide copies of submissions received or a report of the issues raised in the submissions (inter alia) to the proponent. The Director-General may require the proponent to submit a response, a preferred project report that outlines changes to minimise its environmental impact and any revised statement of commitments; f) the Director-General is to give an environmental assessment report on the project to the Minister for the purposes of the Minister's consideration of the application for approval to carry out the project: s 75I. The report is to include (inter alia) a copy of the proponent's environmental assessment and any preferred project report; any environmental assessment undertaken by the Director-General or other matter the Director-General considers appropriate and any statement relating to environmental assessment requirements under Division 2 with respect to the project; g) the Minister may approve or disapprove of the carrying out of the project with such modifications or any such condition as the Minister may determine: s 75J, which provides:**75J Giving of approval by Minister to carry out project**(1) If:

(a) the proponent has duly applied to the Minister for approval under this Part to carry out a project, and(b) the environmental assessment requirements under this Division with respect to the project have been complied with,the Minister may approve or disapprove of the carrying out of the project.(2) The Minister, when deciding whether or not to approve

the carrying out of a project, is to consider:(a) the Director-General's report on the project and the reports, advice and recommendations contained in the report, and(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 approve of the carrying out of 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) A project may be approved under this Part with such modifications of the project or on such conditions as the Minister may determine.7 The Minister may approve an antecedent concept plan for the project under Division 3 (ss 75M – 75Q) of Part 3A, which incorporates ss 75F – 75I. At the relevant time, Division 3 included the following provisions:**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.8 It is relevant in the present case that s 75N applied ss 75F and s 75I to the concept plan approval procedure. Sections 75F and 75I provided: **75F Environmental assessment requirements for approval**(1) The Minister may, after consultation with the Minister for the Environment, publish guidelines in the Gazette with respect to environmental assessment requirements for the purpose of the Minister approving projects under this Part (including levels of assessment and the public authorities and others to be consulted).(2) When an application is made for the Minister's approval for a project, the Director-General is to prepare environmental assessment requirements having regard to any such relevant guidelines in respect of the project. (3) The Director-General is to notify the proponent of the environmental assessment requirements. The Director-General may modify those requirements by further notice to the proponent. (4) In preparing the environmental assessment requirements, the Director-General is to consult relevant public authorities and have regard to the need for the requirements to assess any key issues raised by those public authorities. (5) The environmental assessment requirements may require an environmental assessment to be prepared by or on behalf of the proponent in the form approved by the Director-General. (6) The Director-General may require the proponent to include in an environmental assessment a statement of the commitments the proponent is prepared to make for environmental management and mitigation measures on the site. (7) This section is subject to section 75P. **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. There are no *"guidelines"* as referred to in s 75F9 Section 119(1)(e) is significant in relation to the first ground of challenge. Paragraph (e) refers to and was introduced by the same act as introduced, Part 3A. Section 119(1) provides:**119 Public inquiry**(1) The Minister may at any time direct that an inquiry be held, in accordance with this section, by a Commission of Inquiry appointed under subsection (2) with respect to:(a) any matter relating to the administration and implementation of the provisions of this Act or any environmental planning instrument or relating to the administration and implementation of the provisions of any other Act administered by the Minister,(b) all or any of the environmental aspects of proposed development the subject of a development application (whether or not it is designated development), or of a part of any such proposed development, or(c) all or any of the environmental aspects of an activity referred to in section 112 (1), or of a part of any such activity, or(d) a proposal to constitute, alter or abolish a development area under section 132 or 133, or(e) **all or any of the environmental aspects of a project under Part 3A**. (emphasis added)10 Clause 8B of the *Environmental Planning and Assessment Regulation 2000*, promulgated pursuant to s 75Z requires the Director-General to include in the s 75I environmental assessment report to the Minister:(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.(emphasis added)11 State Environmental Planning Policy (Major Projects) 2005 (**Major Projects SEPP**) concerns Part 3A and at the relevant time included the following provisions:**2 Aims of Policy**The aims of this Policy are as follows:(a) to identify development to which the development assessment and approval process under Part 3A of the Act applies,(b) to identify any such development that is a critical infrastructure project for the purposes of Part 3A of the Act,(c) to facilitate the development, redevelopment or protection of important urban, coastal and regional sites of economic, environmental or social significance to the State so as to facilitate the orderly use, development or conservation of those State significant sites for the benefit of the State,(d) to facilitate service delivery outcomes for a range of public services and to provide for the development of major sites for a public purpose or redevelopment of major sites no longer appropriate or suitable for public purposes,(e) to rationalise and clarify the provisions making the Minister the approval authority for development and sites of State significance, and to keep those provisions under review so that the approval process is devolved to councils when State planning objectives have been achieved. ...**6 Identification of Part 3A projects**(1) Development that, in the opinion of the Minister, is development of a kind:(a) that is described in Schedule 1 or 2, or(b) that is described in Schedule 3 as a project to which Part 3A of the Act applies, or(c) to the extent that it is not otherwise described in Schedules 1–3, that is described in Schedule 5,is declared to be a project to which Part 3A of the Act applies.....**8 Procedure for addition of new State significant sites**(1) For the purposes of considering a proposed amendment to Schedule 3, the Minister may initiate an investigation into the proposal by requiring the Director-General to undertake a study or to make arrangements for a study to be undertaken for the purpose of determining: (a) whether any development on the site should be declared to be a project to which Part 3A of the Act applies, and(b) the appropriate development controls for the site. (2) Any such study is to assess: (a) the State or regional planning significance of the site, and(b) the suitability of the site for any proposed land use taking into consideration environmental, social and economic factors, the principles of ecologically sustainable development and any State or regional planning strategy, and(c) the implications of any proposed land use for local and regional land use, infrastructure, service

delivery and natural resource planning, and(d) any other matters required by the Director-General. (3) The Director-General is to make arrangements for any such study to be publicly exhibited with an invitation to the public to make written submissions. (4) The Minister may direct that an inquiry be held as part of the investigation into a potential State significant site. (5) The Director-General is to provide the Minister with a copy of any such study and any recommendations relating to it. (6) This clause does not preclude an amendment of Schedule 3 without compliance with this clause.12 The objects of the *EPA Act* include encouragement of protection of the environment and encouragement of ESD: s 5(a)(vi) and (vii). ESD is defined in s 4(1) as having the same meaning as it has in s 6(2) of the *Protection of the Environment Administration Act 1991* (NSW). The definition of the "*environment*" in s 4(1) is broad and non-exhaustive: it "*includes all aspects of the surroundings of humans, whether affecting any human as an individual or in his or her social groupings*".**BACKGROUND**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, subsections 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 Section 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 section 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 Part 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 Part 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 Part 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 Schedule 1 of the *State Environmental Planning Policy (Major Projects) 2005* – namely Clause 13, Part 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 Part 3A of the *Environmental Planning and Assessment Act 1979* applies for the purpose of Section 75B of that Act.In forming this opinion, I have also determined that pursuant to Clause 13(1) of Schedule 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 Limited 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 Limited 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 Part 4 or Part 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 Limited 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 Limited 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 section 75O(1) of the Act, the Concept Plan for the project as described in Schedule 1, subject to the modifications set out in Schedule 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 section 75P(1)(a), to be subject to Part 3A of the Act;(ii) less than $5 million is, pursuant to section 75P(1)(b), to be subject to Part 4 or Part 5 of the Act; (c) That 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, under section 75P(2)(a) of the Act. 29 The challenge in the present case is to the validity of the approvals referred to in paragraphs (a) and (b) of the Minister's determination. 30 The project described in Schedule 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.**FIRST GROUND OF CHALLENGE: FAILURE TO CONSIDER MANDATORY RELEVANT CONSIDERATION: FINDINGS AND RECOMMENDATIONS OF COMMISSION OF INQUIRY AS REQUIRED BY Section 75O**31 In order to succeed on the first and second grounds of challenge, the applicant must make good two factual propositions. First, that a relevant mandatory consideration was not taken into account. Second, that the error was material such as to justify the intervention of the Court. It need not be shown to be of critical or decisive significance in the decision; on the other hand, *de minimis non*

curat lex: ***Parramatta City Council v Hale*** (1982) 47 LGRA 319 at 335 per Street CJ; ***Kindimindi Investments Pty Ltd v Lane Cove Council [2006] NSWCA 23;*** (2006) 143 LGERA 277 at 295 [66] per Basten JA (with whom Handley JA and Hunt AJA agreed). If those two factual propositions are made good, then the concept plan approval and associated determinations are invalid and, subject to discretionary considerations as to the granting of relief, liable to be declared invalid: ***Johnco Nominees Pty Ltd v Albury-Wodonga (NSW) Corporation*** [1977] 1 NSWLR 43 at 51 – 52 per Street CJ.32 Mere advertence to a matter required to be taken into consideration is not sufficient: ***Zhang v Canterbury City Council [2001] NSWCA 167;*** (2001) 51 NSWLR 589 at [64] per Spigelman CJ (Meagher, Beazley JJA agreeing). It is well established that the consideration must be "*proper, genuine and realistic*": ***Belmorgan Property Development Pty Ltd v GPT Re Ltd*** [2007] NSWCA 171; (2007) 153 LGERA 450 at [28] per Tobias JA (Beazley JA agreeing). Those epithets need to be applied cautiously lest they encourage a slide into impermissible merits review: ***Kindimindi*** at [74] – [79]; ***Zhang*** at [62]; ***Azriel v NSW Land and Housing Corporation*** [2006] NSWCA 372 at [49] – [51]; ***Belmorgan*** at [76] per Basten JA. In ***Belmorgan*** at [77] – [78], Basten JA ascribed meanings to the words "*proper*" and "*genuine*" but concluded that "*realistic*" had no ready meaning in the context of judicial review. The authorities concerning failure to have regard to mandatory considerations were reviewed by me in ***F & D Bonaccorso Pty Ltd v City of Canada Bay Council [No 2]*** [2007] NSWLEC 537 at [22] – [32].33 Section 75X(5) of the EPA Act is not a bar to the applicant's grounds of challenge based on failure to consider mandatory relevant considerations nor was any submission made that it was a bar: ***Tugun Cobaki Alliance Inc v Minister for Planning and RTA*** [2006] NSWLEC 396 at [179] - [184] (Jagot J); ***Gray v Minister for Planning*** [2006] NSWLEC 720; (2006) 152 LGERA 258 at [140] – [144] (Pain J). Section 75X(5) provides: *"The only requirement of this Part that is mandatory in connection with the validity of an approval of a project or of a concept plan for a project is a requirement that an environmental assessment with respect to the project is made publicly available under s 75H..."* In ***Tugun*** at [184] Jagot J held: ...the section is to be construed as an expression of Parliament's intention that the only provision breach of which will necessarily lead to invalidity is s 75H(3). The consequences of breach of all other provisions, however, are left at large. A far clearer expression of

Parliamentary intention than an implied negative corollary arising from the word "only" would be required to effect any other meaning. As such, the consequences of breach of all other provisions will be determined in the ordinary course consistent with the principles laid down in *Project Blue Sky*.34 In ***Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28;*** (1998) 194 CLR 355 at [93] it was held (omitting citations): A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales. In determining the question of purpose, regard must be had to *the language of the relevant provision and the scope and object of the whole statute*.35 The first ground of challenge is that the findings and recommendations of the Commission of Inquiry were mandatory considerations under s 75O(2)(c) of the *EPA Act* and that the Minister did not consider them in relation to Aboriginal heritage, flora and fauna, riparian corridor function and planning, and floodplain management. 36 Section 75O(2)(c) provides:(2) The Minister, when deciding whether or not to give approval for the concept plan, is to consider:...(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.37 In my opinion, there are two answers to this ground of challenge. First, the findings and recommendations of the Commission of Inquiry were not mandatory considerations because that was not an inquiry to which s 75O(2)(c) refers. In particular, it was not an inquiry with respect to "*the project*" the subject of the concept plan which these proceedings are concerned. Second, in any event, the Minister did consider the findings and recommendations of the Commission of Inquiry because they were referred to in the Director-General's Environmental Assessment Report which was before the Minister.38 As to the first answer, s 119(1) (set out above at [9]) empowers the Minister to direct that an enquiry be held with respect to five matters. The fifth matter, in s 119(1)(e), is "*all or any of the environmental aspects of a project under Part* 3A". The Commission of Inquiry was appointed in 2002 expressly pursuant to the Minister's direction under s 119(1)(b), not s 119(1)(e): see [14] above. Its terms of reference were not with respect to the proposed development the subject of the concept plan approval. Rather, its terms of reference were "*to make recommendations on the preferred land uses, planning outcomes and*

management options" for certain land at Sandon Point, *"having regard to its values and constraints in the broader context of the surrounding urban and non-urban environment*": see [15] above. The Commission of Inquiry reported in 2003. It was not until 2005 that Part 3A and s 119(1)(e), which are obviously related, were enacted. The subject "*project*", as defined, referred to in ss 75O(2)(c) and 119(1)(e), did not exist until 2006. That is because "*project*" is defined by s 75A to mean "*a development that is declared under s 75B to be a project*". The subject proposed development was not declared to be a project under s 75B until 2006: see [21] above. Since s 119(1)(e) and Part 3A did not exist until after the Commission of Inquiry reported, it was impossible for the inquiry to have been into "*the project*", as defined. 39 In my opinion, the reference in s 75O(2)(c) to "*an inquiry be held in accordance with s 119 with respect to the project*" is an inquiry pursuant to s 119(1)(e). The language of each of those provisions is identical to the extent that the inquiry is "*with respect to*" the project or the environmental aspects of the project. There has been no inquiry pursuant to s 119(1)(e) with respect to the subject project.40 The applicant sought support in an observation by Jagot J in ***Drake-Brockman v Minister for Planning*** [2007] NSWLEC 490 that Part 3A does not require steps to be completed in any particular order so that submission of a "*scoping paper*" for a project, although ineffective when submitted, could be retrospectively constituted as a concept plan when the Minister subsequently authorised submission of a concept plan. The applicant submitted that, equally, it could be said that an inquiry in relation to a development may create obligations under s 75O(2)(c) when that development later came to be considered as a concept plan application under Part 3A. ***Drake-Brockman*** is distinguishable. The procedural steps considered in that case were all taken after the enactment of, and fell within, Part 3A and the only complaint was that they were not in the correct sequence. That does not assist the applicant's proposition in the present case that the appointment of a Commission of Inquiry years before the enactment of Part 3A is an action taken under Part 3A.41 For these reasons, in my opinion, s 75O(2)(c) did not oblige the Minister to consider the findings and recommendations in the Commission of Inquiry report.42 The second answer to this ground of challenge, in my opinion, is that, in any event, the Minister did consider the findings and recommendations in the Commission of Inquiry Report. The Director-General's Environmental Assessment Report refers to the Commission of Inquiry in the context of

the history of the planning considerations in respect of the subject land, including consideration of the site before and after the Commission of Inquiry had made its recommendations. In particular, the Director-General's Environmental Assessment Report recorded that:(a) the Commission of Inquiry report was provided to the Minister in September 2003;(b) the Commission of Inquiry made 80 findings and recommendations and found four key issues, which the Director-General's Environmental Assessment Report summarised. The Commission of Inquiry's recommended land use zoning for Sandon Point was shown in Figure 6 in the Director-General's Environmental Assessment Report and it was noted that this considerably reduced the area which could be developed and retained an industrial zoning (section 2.5.3);(c) the Commission of Inquiry report was criticised for failing to consider whether its recommendations could be implemented and "*[t]his criticism by Council, other landholders and the Department was that the CoI recommendations provided negligible incentives for landowners to develop Sandon Point. For the Department and Council, this would mean Sandon Point would remain undeveloped and the environmental* gains *identified in the COI would never be realised. This seems to be given some credence by the lack of subsequent development*" (section 2.5.4);(d) following these criticisms in 2005, the then Minister appointed Charles Hill of Planning Workshop Australia to provide an independent review of those findings and recommendations (section 2.5.4). The Charles Hill Report was submitted to the Minister in November 2005, following which a process of further consideration commenced which ultimately led to the Minister approving the concept plan assessment under Part 3A;(e) the Commission of Inquiry recommendations were addressed in the Director-General's Environmental Assessment Report in the specific contexts of creek design and flooding/flora and fauna (section 6.2.2) and Aboriginal cultural heritage (section 6.2.4);(f) the Commission of Inquiry Report is also referred to in the Environmental Assessment Scoping Report, the State Significant Site Study and the concept plan, all of which are referred to in the Director-General's Environmental Assessment Report.43 Nevertheless, the applicant submitted that, in order for it to be said that the Minister had taken the Commission of Inquiry recommendations and findings into consideration, it was necessary as a threshold for the Director-General's Environmental Assessment Report to have reproduced its 80 recommendations or findings in a way which enabled the Minister to

give "*genuine*" consideration to whether they should be followed in preference to either the findings of the Charles Hill report or the findings of the Director-General himself. I do not accept that the Director-General did not give "*genuine*" consideration to the findings and recommendations of the Commission of Inquiry, as well as to the Charles Hill Report. 44 For these reasons, I reject the first ground of challenge.**SECOND GROUND OF CHALLENGE: FAILURE TO CONSIDER MANDATORY RELEVANT CONSIDERATIONS: ecologically sustainable development**45 The second ground of challenge is that the Minister failed to take implied mandatory considerations into account, namely, ESD and the impact of the proposal on the environment, in several respects.46 The goal of ESD is critical to the survival and well-being of the human race and other species, a view I recently expressed in ***F & D Bonaccorso Pty Ltd v City of Canada Bay Council (No 2)*** [2007] NSWLEC 537 at [59]. The concept of ESD is to be understood in New South Wales by reference to the principles of ESD in s 6(2) of the *Protection of the Environment Administration Act 1991* (NSW), which has been adopted by reference in the *EPA Act* s 4(1) and in other New South Wales statutes. Before considering those principles and the applicant's ESD case in detail, I will review the development of the concept and principles of ESD globally and in Australia.**ESD: A Global Phenomenon**47 In the last decade of the twentieth century and the first decade of the twenty-first century, the seed of ESD was planted in numerous Australian statutes and has blossomed in a significant number of cases. 48 This has been part of a global phenomenon. The concept of ESD evolved in a number of documents adopted at international conferences on the environment beginning in 1972 at the United Nations Conference on the Human Environment in Stockholm attended by 113 nations. This Conference created two instruments: the *Declaration on the Human Environment* which proclaimed 26 principles for international cooperation; and the *Action Plan for the Human Environment*. Principle 13 of the former touched on ESD as follows: In order to achieve a more rational management of resources and thus to improve the environment, States should adopt an integrated and coordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve the environment for the benefit of their population.49 In 1980, the *World Conservation Strategy,* prepared by the International Union for Conservation of Nature and Natural Resources (now known as the World

Conservation Union), aimed to achieve three main objectives of living resource conservation: to maintain essential ecological processes and life-support systems; to promote genetic diversity; and to ensure the sustainable utilisation of species and ecosystems. This strategy identified the failure to integrate conservation with development as one of the main obstacles to achieving conservation. It made the following legislative proposal (section 11 paras 8 and 9):There should be specific legislation aimed at achieving the objectives of conservation by providing for both the sustainable utilisation and the protection of living resources and of their support systems. Comprehensive conservation legislation should provide for the planning of land and water uses and should regulate both direct impacts on the resource, such as exploitation and habitat removal, and indirect ones, such as pollution or introduction of exotic species. In addition, it should include requirements to undertake ecosystem evaluations, environmental assessments, and like mechanisms to ensure the incorporation of ecological considerations into policy making. The law should also provide for the participation of citizens in the elaboration of policies, for the provision of sufficient information for participation to be effective, and for legal recourse to implement these rights. In addition there is a need to revise traditional concepts of the law of remedy, which currently envisage compensation only for economic loss, narrowly defined, and do not provide for indirect or long term damage to individuals and communities through the depletion of species or the destruction or degradation of ecosystems. Special attention should be paid to the enforcement of conservation law.50 In response, in 1983, Australia adopted the *National Conservation Strategy for Australia: Living Resource Conservation for Sustainable Development*. Also in 1983, the United Nations established the World Commission on Environment and Development. 51 In 1987 the World Commission on Environment and Development, established by the United Nations, published an influential report, *Our Common Future* (commonly referred to as the *Brundtland Report*), which called for the promotion of sustainable development that would guarantee "*the security, well-being and very survival of the planet*" (p 23). It defined *"sustainable development"* as development that meets the needs of the present while not compromising the ability of future generations to meet their own needs (p 8). This has come to be known as inter-generational equity and has endured as the fundamental principle of ESD. The report noted that : "*The burning of fossil fuels puts into the*

atmosphere carbon dioxide, which is causing gradual global warming. This greenhouse effect *may by early next century have increased average global temperatures enough to shift agricultural production areas, raise sea levels to flood coastal cities, and disrupt national economies"* (p 2). The report recognised that the world's current pattern of economic growth was not ecologically sustainable. It contained proposals for long term environmental strategies for achieving ESD. The report emphasised that the environment and development must no longer be regarded as separate concerns but were interlocked. 52 In response to the Brundtland Report's recommendations, the *"Earth Summit"*, the United Nations Conference on the Environment and Development, was held in Rio de Janeiro in June 1992. Its mandate was to "*elaborate strategies and measures to halt and reverse the effects of environmental degradation in the context of increased national and international efforts to promote sustainable and environmentally sound development in all countries*" (Resolution 44/228 of the United Nations General Assembly 85th Plenary Meeting, 22 December 1989). Australia was among the 172 nations represented. Documents created at the conference included the *Rio Declaration* which was a statement of 27 general principles; *Agenda 21* which was a lengthy action plan; the *United Nations Framework Convention on Climate Change;* the *Convention on Biological Diversity*; and an agreed *Statement of Principles on Forests*. Four of the Rio Declaration principles are substantially reflected in subsequent Australian legislation, namely: Principle 3. The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations. Principle 4. In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it. Principle 15. In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.Principle 16. National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment. 53 The central concept of ESD, the

integration of environmental protection and development, appeared in Principle 4. Three of the four principles of ESD - the principle of intergenerational and intra-generational equity, the precautionary principle and the internalisation of environmental costs principle - were embodied in, respectively, Principles 3, 15, and 16. However, Principle 16 was qualified. The fourth ESD principle, the principle of conservation of biological diversity, was reflected in the accompanying *Convention on Biological Diversity* where Articles 1 and 14 relevantly stated: 1. The objectives of this Convention, to be pursued in accordance with its relevant provisions, are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding....14. Each contracting Party, as far as possible and as appropriate shall:(a) Introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures;(b) Introduce appropriate arrangements to ensure that the environmental consequences of its programmes and policies that are likely to have significant adverse impacts on biological diversity are duly taken into account. ...54 The role of the law in relation to sustainable development was stated in Principle 11 of the Rio Declaration: States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and development context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries55 *Agenda 21* described itself as a "*blueprint for action in all areas relating to the sustainable development of the planet*". It provided mechanisms, in the form of policy, plans, programs and guidelines, for national governments to apply the principles contained in the *Rio Declaration*. Chapter 8 of *Agenda 21* provided that laws and regulations suited to the conditions of each country were among the most important instruments for transforming environment and development policies into action. Chapter 28 acknowledged the importance of local authorities in furthering ESD and contemplated,

among other things, the establishment of *Agenda 21* programmes in local government jurisdictions and the implementation of local authority programmes, policies and laws. Principle 10 of the *Rio Declaration* proclaimed that environmental issues were best handled with informed public participation. Similarly, *Agenda 21* in Chapter 23 emphasised that "*one of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making*". 56 In 1993, a United Nations Commission on Sustainable Development was created to progressively administer the implementation of *Agenda 21*. Many nations, including Australia, committed to reporting regularly to the Commission on their actions to achieve sustainable development. 57 The 2000 *Millennium Declaration* adopted by the United Nations General Assembly identified fundamental values that were essential to international relations in the twenty first century including:Respect for nature. Prudence must be shown in the management of all living species and natural resources, in accordance with the precepts of sustainable development. Only in this way can the immeasurable riches provided to us by nature be preserved and passed on to our descendants. The current unsustainable patterns of production and consumption must be changed in the interest of our future welfare and that of our descendants. The *Millennium Declaration* identified objectives to translate these values into action, one of which was "*Protecting our common environment*". 58 In 2002, the World Summit on Sustainable Development took place in Johannesburg, South Africa, and adopted the *Johannesburg Declaration on Sustainable Development* and the *Johannesburg Plan of Implementation*. The former affirmed a will to "*assume a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development – economic development, social development and environmental protection – at the local, national, regional and global levels*". Thus, social development came to be highlighted as one of the pillars of ESD, joining economic development and environmental protection. 59 The Global Judges Symposium held in conjunction with the Johannesburg World Summit adopted the *Johannesburg Principles on the Role of Law and Sustainable Development*. The Symposium agreed four principles to guide the judiciary in promoting the goals of sustainable development through the application of the rule of law and the democratic process:1) A full commitment to contributing towards the realization of the goals of

sustainable development through the judicial mandate to implement, develop and enforce the law, and to uphold the Rule of Law and the democratic process, 2) To realise the goals of the Millenium Declaration of the United Nations General Assembly which depend upon the implementation of national and international legal regimes that have been established for achieving the goals of sustainable development, 3) In the field of environmental law there is an urgent need for a concerted and sustained programme of work focused on education, training and dissemination of information, including regional and sub-regional judicial colloquia, and4) That collaboration among members of the Judiciary and others engaged in the judicial process within and across regions is essential to achieve a significant improvement in compliance with, implementation, development and enforcement of environmental law. 60 For the realisation of these principles, the Global Judges Symposium proposed that the program of work should include the following: a) The improvement of the capacity of those involved in the process of promoting, implementing, developing and enforcing environmental law, such as judges, prosecutors, legislators and others, to carry out their functions on a well informed basis, equipped with the necessary skills, information and material,b) The improvement in the level of public participation in environmental decision- making, access to justice for the settlement of environmental disputes and the defense and enforcement of environmental rights, and public access to relevant information, c) The strengthening of sub-regional, regional and global collaboration for the mutual benefit of all peoples of the world and exchange of information among national Judiciaries with a view to benefiting from each other's knowledge, experience and expertise, d) The strengthening of environmental law education in schools and universities, including research and analysis as essential to realizing sustainable development, e) The achievement of sustained improvement in compliance with and enforcement and development of environmental law,f) The strengthening of the capacity of organizations and initiatives, including the media, which seek to enable the public to fully engage on a well-informed basis, in focusing attention on issues relating to environmental protection and sustainable development,g) An Ad Hoc Committee of Judges consisting of Judges representing geographical regions, legal systems and international courts and tribunals and headed by the Chief Justice of South Africa, should keep under review and publicise the emerging environmental jurisprudence and provide

information thereon,h) UNEP and its partner agencies, including civil society organizations should provide support to the Ad Hoc Committee of Judges in accomplishing its task, i) Governments of the developed countries and the donor community, including international financial institutions and foundations, should give priority to financing the implementation of the above principles and the programme of work,j) The Executive Director of UNEP should continue to provide leadership within the framework of the Montevideo Programme III, to the development and implementation of the programme designed to improve the implementation, development and enforcement of environmental law including, within the applicable law of liability and compensation for environmental harm under multilateral environmental agreements and national law, military activities and the environment, and the legal aspects of the nexus between poverty and environmental degradation, andk) This Statement should be presented by the Chief Justice of South Africa to the Secretary-General of the United Nations as a contribution of the Global Judges Symposium to the forthcoming World Summit on Sustainable Development, and for broad dissemination thereof to all member States of the United Nations. **ESD: Australian Developments**61 Impetus for Australian legislation on ESD came from three 1992 instruments: the *Rio Declaration* of June 1992; the *Intergovernmental Agreement on the Environment* between the Commonwealth, States and Territories of Australia and the Australian Local Government Association of May 1992; and the *National Strategy for Ecologically Sustainable Development* of December 1992. 62 Section 3 of the *Intergovernmental Agreement on the Environment* provided: SECTION 3 - PRINCIPLES OF ENVIRONMENTAL POLICY3.1 The parties agree that the development and implementation of environmental policy and programs by all levels of Government should be guided by the following considerations and principles.

3.2 The parties consider that the adoption of sound environmental practices and procedures, as a basis for ecologically sustainable development, will benefit both the Australian people and environment, and the international community and environment. This requires the effective integration of economic and environmental considerations in decision-making processes, in order to improve community well-being and to benefit future generations

3.3 The parties consider that strong, growing and diversified economies (committed to the principles of ecologically sustainable development) can enhance the capacity for environmental protection. In order to achieve sustainable economic development, there is a need for a country's international competitiveness to be maintained and enhanced in an environmentally sound manner.

3.4 Accordingly, the parties agree that environmental considerations will be integrated into Government decision-making processes at all levels by, among other things:

(i) ensuring that environmental issues associated with a proposed project, program or policy will be taken into consideration in the decision making process;

(ii) ensuring that there is a proper examination of matters which significantly affect the environment; and

(iii) ensuring that measures adopted should be cost-effective and not be disproportionate to the significance of the environmental problems being addressed.

3.5 The parties further agree that, in order to promote the above approach, the principles set out below should inform policy making and program implementation.

3.5.1 precautionary principle -

Where 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.

3.5.2 intergenerational equity -

the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations.

3.5.3 conservation of biological diversity and ecological integrity -

conservation of biological diversity and ecological integrity should be a fundamental consideration.

3.5.4 improved valuation, pricing and incentive mechanisms -· environmental factors should be included in the valuation of assets and services. · polluter pays i.e. those who generate pollution and waste should bear the cost of containment, avoidance, or abatement · the users of goods and services should pay prices based on the full life cycle costs of providing goods and services, including the use of natural resources and assets and the ultimate disposal of any wastes · environmental goals, having been established, should be pursued in the most cost effective way, by establishing incentive structures, including market mechanisms, which enable those best placed to maximise benefits and/or minimise costs to develop their own solutions and responses to environmental problems. 63 It can be seen that section 3.5 incorporates the four recognised principles of ESD: the precautionary principle, intergenerational equity, conservation of biological diversity and ecological integrity, and improved valuation, pricing and incentive mechanisms. The principle of intra-generational equity is not expressly mentioned. However, it may be included by implication on the basis that it is necessarily incorporated within the notion of inter-generational equity. The implication is supported by one of the recitals to the first part of the *Intergovernmental Agreement* where it is recognised that the concept of ESD provides potential for integration of environmental and economic considerations in decision making and for "*balancing the interests of current and future generations*". Those inclusions and the omission later carried through to New South Wales legislation. The precautionary principle is expressed in the *Intergovernmental Agreement* in similar terms to Principle 15 of the Rio Declaration. 64 Implementation and application of the principles are addressed in nine schedules to the Intergovernmental Agreement dealing with specific areas of environmental policy and management. They are: (1) data collection and handling; (2) resource assessment, land use decisions and approval processes; (3) environmental impact assessment; (4) national

environment protection measures; (5) climate change; (6) biological diversity; (7) national estate; (8) world heritage; and (9) nature conservation. 65 Schedule 3.3(iii) of the *Intergovernmental Agreement* provided that all levels of government would ensure that their environmental impact assessment processes were based on, inter alia, assessing authorities providing all participants in the process with guidance on the criteria for environmental acceptability of potential impacts, including the concept of ESD. Schedule 2 includes the following provisions:1. The parties agree that the concept of ecologically sustainable development should be used by all levels of Government in the assessment of natural resources, land use decisions and approval processes.2. The parties agree that it is the role of government to establish the policy, legislative and administrative framework to determine the permissibility of any land use, resource use or development proposal having regard to the appropriate, efficient and ecologically sustainable use of natural resources (including land, coastal and marine resources).66 In December 1992, as foreshadowed in the *Intergovernmental Agreement* of May 1992 and following the Rio Conference a month later, the Australian *National Strategy for Ecologically Sustainable Development* was endorsed by the Council of Australian Governments. It sets out the broad strategic and policy framework under which governments would cooperatively make decisions and take actions to pursue ESD. It states that it was to be used by governments to guide policy and decision-making, particularly in key industry sectors which rely on the utilisation of natural resources. The *National Strategy's* goal, core objectives and guiding principles are defined as follows: **Australia's goal, core objectives and guiding principles for the StrategyThe Goal is:**Development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends.**The Core Objectives are:**- to enhance individual and community well-being and welfare by following a path of economic development that safeguards the welfare of future generations - to provide for equity within and between generations - to protect biological diversity and maintain essential ecological processes and life-support systems **The Guiding Principles are:**- decision making processes should effectively integrate both long and short-term economic, environmental, social and equity considerations - where 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 - the global dimension of environmental impacts of actions and policies should be recognised and considered - the need to develop a strong, growing and diversified economy which can enhance the capacity for environmental protection should be recognised - the need to maintain and enhance international competitiveness in an environmentally sound manner should be recognised - cost effective and flexible policy instruments should be adopted, such as improved valuation, pricing and incentive mechanisms - decisions and actions should provide for broad community involvement on issues which affect them These guiding principles and core objectives need to be considered as a package. No objective or principle should predominate over the others. A balanced approach is required that takes into account all these objectives and principles to pursue the goal of ESD.**Who will be affected by ESD?**Every one of us has a role to play in national efforts to embrace ESD. The participation of every Australian - through all levels of government, business, unions and the community - is central to the effective implementation of ESD in Australia.67 Both the *Intergovernmental Agreement* and the *National Strategy* acknowledge that while the Australian Local Government Association endorsed the ESD policy and promised that it would do all within its power to ensure compliance, it could not bind local government authorities to observe its terms. Nevertheless, it has been held by this Court that a proper exercise of the powers of local government authorities would mean that they (and the Court on a merits appeal) would apply the ESD policy unless there were cogent reasons to depart from it: ***BGP Properties Pty Ltd v Lake Macquarie City Council*** [2004] NSWLEC 399; (2004) 138 LGERA 237 at [93] per McClellan CJ.68 In 1996 the *National Strategy for the Conservation of Australia's Biological Diversity* was adopted. This document commits the Australian government to implement it as a matter of urgency, subject to budgetary priorities and constraints in individual jurisdictions. The stated goal is to protect biological diversity and maintain ecological processes and systems. It recognises ESD and adopts the following principles as a basis for its objectives and actions and as a guide for implementation: 1. Biological diversity is best conserved in-situ. 2. Although all levels of government have clear responsibility, the cooperation of conservation groups, resource users, indigenous peoples, and the community in general is critical to the conservation of biological diversity. 3. It is vital to anticipate, prevent and attack at source the causes

of significant reduction or loss of biological diversity. 4. Processes for and decisions about the allocation and use of Australia's resources should be efficient, equitable and transparent. 5. Lack of full knowledge should not be an excuse for postponing action to conserve biological diversity. 6. The conservation of Australia's biological diversity is affected by international activities and requires actions extending beyond Australia's national jurisdiction. 7. Australians operating beyond our national jurisdiction should respect the principles of conservation and ecologically sustainable use of biological diversity and act in accordance with any relevant national or international laws. 8. Central to the conservation of Australia's biological diversity is the establishment of a comprehensive, representative and adequate system of ecologically viable protected areas integrated with the sympathetic management of all other areas, including agricultural and other resource production systems. 9. The close, traditional association of Australia's indigenous peoples with components of biological diversity should be recognised, as should the desirability of sharing equitably benefits arising from the innovative use of traditional knowledge of biological diversity.**ESD: New South Wales Legislation**69 As early as December 1991, there was a New South Wales statute which referred to ESD. This was in s 6, the objects provision, of the *Protection of the Environment Administration Act 1991*. Following the May 1992 Australian *Intergovernmental Agreement on the Environment*, the June 1992 *Rio Declaration* and the December 1992 Australian *National Strategy for Ecologically Sustainable Development*, all nine Australian jurisdictions now have legislation which incorporates ESD principles. As at November 2007, New South Wales alone had 55 Acts and Regulations which refer to ESD and the Commonwealth had 19. They are listed in the Appendix to this judgment (not listed are a number of Commonwealth Appropriation Acts which refer to ESD).70 New South Wales legislation does not mandate ESD as an outcome but, in varying ways, as part of a process. The most prevalent treatment is to refer to ESD or the principles of ESD or their encouragement in the objects clause of the statute; or to provide, expressly or impliedly, that the decision-maker is obliged to take ESD or the principles of ESD into account as part of the decision-making process, or both. An example of both is found in the *EPA Act* in the context of Part 4. 71 One of the objects of the *EPA Act* in s 5(a) is to encourage ESD, but that object is not stated to override any other object: **5** 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. (emphasis added)72 The object of encouragement of ESD was inserted into s 5(a) of the *EPA Act* on 1 July 1998. A definition of ESD was inserted into s 4(1) of the *EPA Act* on 1 August 2005. Section 4(1) defined ESD as having the same meaning as it has in s 6(2) of the *Protection of the Environment Administration Act 1991* (NSW) which provides as follows: 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. 73 According to that provision, ESD requires the effective integration of resources and environmental considerations in decision-making processes. The reference to ESD in the *EPA Act* and many other NSW statutes provides an explicit recognition that each is but one piece of legislation which must operate in conformity with other legislation governing land development activities: cf ***Country Energy v Williams*** ***[2005] NSWCA 318;*** (2005) 63 NSWLR 699, 141 LGERA 426 at [65] per Basten JA (Spigelman CJ and Giles JA agreeing).74 ESD or its encouragement is not an exclusive legislative goal of the *EPA Act*. The legislative goal is that encouragement of ESD, including precaution regarding the environment, is to take its place along with other considerations so as to ensure an environmentally informed decision-making process. 75 Environmental impact assessment, which the Director-General is required to address in his report under Part 3A, is aimed at enabling an informed decision to be made, taking into account precaution regarding the environment. As Judge Wright, speaking for the court, said in one of the first US cases interpreting the *National Environmental Policy Act* 1969 requiring environmental impact assessments before certain federal actions, ***Calvert Cliffs' Coordinating Commission v US Atomic Energy Commission*** 449 F. 2d 1109, 1112 (DC Cir 1971): "*Congress did not establish environmental protection as an exclusive goal; rather, it desired a reordering of priorities, so that environmental costs and benefits [would] assume their proper place along with other considerations*". This ensures

"*[an environmentally] informed decision-making process*": at 1115.76 Section 79C(1) of the *EPA Act* appears in Part 4 and prescribes a range of matters that a consent authority must take into consideration (as must, on a merits appeal, this Court) in determining a development application. One of those matter is "*the public interest*": s 79C(1)(e). In addition, in merits appeals to the Court (i.e in classes 1, 2 and 3 of the Court's jurisdiction) the Court is expressly told to have regard (inter alia) to the "*public interest*": s 39(4) *Land and Environment Court Act 1979*.77 Although neither section specifically refers to ESD, it has been held that the requirement of consideration of the *"public interest"* in s 79C is ample enough, having regard to the subject matter, scope and purpose of the *EPA Act*, to embrace the principles of ESD where those principles are relevant to an issue: eg ***BGP Properties v Lake Macquarie City Council*** [2004] NSWLEC 399; (2004) 138 LGERA 237 at 257 (McClellan CJ); ***Telstra Corp Ltd v Hornsby Shire Council [2006] NSWLEC 133;*** (2006) 146 LGERA 10 at [123] (Preston CJ); and ***Carstens v Pittwater Council*** (1999) 111 LGERA 1 at 25 (Lloyd J). 78 In some New South Wales statutes the ESD requirement arguably has been expressed more strongly by reference to "*applying*" the principles of ESD compared with the *EPA Act's* object "*to encourage*" ESD. For example, s 2A(2) of the *National Parks and Wildlife Act 1974* provides that its objects "*are to be achieved by applying the principles of ecologically sustainable development*", being principles identified in s 6(2) of the *Protection of the Environment Administration Act 1991*. Similarly, the *Water Management Act* 2000 s 3 provides that its objects are "*to provide for the sustainable and integrated management of the water sources of the State for the benefit of both present and future generations and in particular (a) to apply the principles of ecologically sustainable development*". There are variants of the treatment of ESD in the objects clauses of other New South Wales statutes. For example, the *Protection of the Environment Administration Act 1991* s 6(1)(a) provides that the objectives of the Environment Protection Authority are to protect, restore and enhance the quality of the environment in New South Wales, having regard to the need to maintain ESD. The *Coastal Protection Act 1979* s 3(b) provides that its objects are to provide for the protection of the coastal environment of the State for the benefit of both present and future generations and, in particular to encourage, promote and secure the orderly and balanced utilisation and conservation of the coastal region and its natural and man-made resources,

having regard to the principles of ESD. 79 Section 3 of the *Fisheries Management Act 1994* provides that its objects include ESD and, "*consistently with those objects*", its objects include the provisions of viable commercial fishing and aquaculture industries. Sections 7E, 57 and 143 require a fishery management strategy, a management plan for a share management fishery and an aquaculture industry plan to include performance indicators to monitor whether ESD is being attained. A number of New South Wales statutory authorities, such as fire brigades, are now required by statute to exercise their functions with due regard to the principles of ESD: *Fire Brigades Act 1989* s 10A; *Coastal Protection Act 1979* ss 37A and 54A; *Sydney Harbour Foreshore Authority Act 1998* s 15, *Rural Fires Act 1997* ss 3 and 9; *Energy Services Corporation Act 1995* ss 5 and 8. 80 Local environmental plans made under the *EPA Act* also commonly identify ESD as one of their aims or objectives: for example, the *North Sydney Local Environmental Plan 2001* cl 2. **ESD: Cases** 81 ESD and its supporting principles are concepts which the legislature has left to the courts to flesh out. The more significant Australian cases on ESD are reviewed below. Most have concerned the precautionary principle. Most have been in this Court which has civil and criminal jurisdiction over environmental, development, planning and other disputes. This Court's ESD decisions have been mainly in its civil jurisdiction. Its civil decisions on ESD have sometimes been in judicial review cases (like the present case), which are restricted to determining the legality of administrative decisions. But mostly they have been in its separate merits appeal jurisdiction which arises in limited circumstances and is not a traditional judicial function. There is no merits appeal jurisdiction under Part 3A of the *EPA Act*.82 Under principles of judicial review the Court generally has no business reviewing an administrative decision on its merits: ***Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40;*** (1986) 162 CLR 24 at 41 - 43**; *Town Planning Board v Society for the Protection of the Harbour Ltd*** [2004] 1 HKLRD 396 at [66]-[68] (Hong Kong Final Court of Appeal). "*The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs exercise of the repository's power*": ***Attorney-General (NSW) v Quin [1990] HCA 21;*** (1990) 170 CLR 1 at 35 – 36 per Brennan J. This has become the most frequently cited statement of principle in subsequent judgments in the High Court: ***Woolworths Ltd v Pallas Newco Pty Ltd***

[2004] NSWCA 422; (2004) 61 NSWLR 707 at 710 [8] per Spigelman CJ.83 Where it cannot be seen that the decision-maker has erred in law, or has failed to take into account relevant considerations that the decision-maker was bound to take into account or has taken into account irrelevant considerations, the Court will only intervene on the ground that the decision is shown to be manifestly unreasonable or manifestly illogical: ***Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] EWCA Civ 1;*** [1948] 1 KB 223; ***Parramatta City Council v Pestell [1972] HCA 59;*** (1972) 128 CLR 305 at 314, 322, 323; ***Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40;*** (1986) 162 CLR 24; ***Woolworths Ltd v Pallas Newco Pty Ltd [2004] NSWCA 422;*** (2004) 61 NSWLR 707 at 725 [92]; ***Save our Street Inc v Settree*** [2006] NSWLEC 570; (2006) 149 LGERA 30 at 38 [31]; ***Castle Constructions Pty Ltd v North Sydney Council*** [2007] NSWLEC 459 at [91]. 84 In contrast, when exercising its unusual merits review jurisdiction, this Court stands fully in the shoes of the administrative decision-maker: s 39(2) *Land and Environment Court Act 1979*; ***McDougall v Warringah Shire Council*** (1993) 30 NSWLR 258 at 264 per Kirby P. It is because this Court has a merits review jurisdiction (in some circumstances) that it has been able to deliver a significant number of judgments on ESD in which, standing in the shoes of the administrative decision-maker, it has determined the dispute on the merits. However, as Jagot J said in ***Drake-Brockman v Minister for Planning*** [2007] NSWLEC 490 at [124], "*care must be taken in applying observations about the level or extent of assessment of issues found to be appropriate in merits appeals to other contexts. Specifically, observations made by the Court in it merits jurisdiction cannot be understood as mandating a particular outcome in judicial review proceedings. This is evident from the emphasis on the particular factual context in the outcomes apparent from those decisions*".***Early cases***85 The first Australian case on an ESD principle was ***Leatch v National Parks and Wildlife Services*** (1993) 81 LGERA 270. The Shoalhaven City Council proposed to construct a road in an area known to be a habitat of the Giant Burrowing Frog which was listed as an endangered species. The council applied to the Director-General of the National Parks and Wildlife Service for a licence to "*take or kill*" endangered fauna, as was required by the *National Parks and Wildlife Act 1974*. Section 5 (since amended) defined "*take*" to include the disturbance, injury or "*significant modification of the habitat of the fauna which is*

likely to adversely affect its essential behavioural patterns". The licence was granted on conditions. An objector appealed on the merits of the decision to this Court. Neither the *National Parks and Wildlife Act 1974* or the *Land and Environment Court Act 1979* expressly referred to ESD or the precautionary principle. Stein J decided that the licence should not be granted. His Honour noted that the precautionary principle had been referred to in almost every recent international agreement including the *Rio Declaration* of 1992, as well as the Australian *Intergovernmental Agreement on the Environment* of 1992. However, Stein J declined to enter into a debate as to whether it had become part of Australian domestic law by incorporation of international law. 86 The precautionary principle at that time appears to have been incorporated into only one New South Wales statute, the *Protection of the Environment Administration Act 1991* s 6(2)(a). However, that statute was not relevant to the matter before the Court. The factors to be taken into account under the relevant statute, the *National Parks and Wildlife Act 1974*, included any matter considered to be relevant. In addition, s 39(4) of the *Land and Environment Court Act 1979* required the Court in a merits appeal "*to have regard to... the public interest"*. Stein J held that while there was no express provision requiring consideration of the precautionary principle, consideration of the state of knowledge or uncertainty regarding a species, the potential for serious or irreversible harm to endangered fauna and the adoption of a cautious approach in protection of endangered fauna was consistent with the subject matter, scope and purpose of the *National Parks and Wildlife Act 1974*. His Honour held at 282: In my opinion the precautionary principle is a statement of commonsense and has already been applied by decision-makers in appropriate circumstances prior to the principle being spelt out. It is directed towards the prevention of serious or irreversible harm to the environment in situations of scientific uncertainty. Its premise is that where uncertainty or ignorance exists concerning the nature or scope of environmental harm (whether this follows from policies, decisions or activities), decision-makers should be cautious. 87 Stein J held that the Director-General must have regard to the distribution, habitat, depletion and ultimate security of the species and to this end the "*commonsense*" principle is not an "*extraneous consideration*". His Honour said, "*Application of the precautionary principle appears to me to be most apt in a situation of a scarcity of scientific knowledge of species population, habitat and impacts*". He noted the dearth of knowledge about the

population, habitat and behavioural patterns of the Giant Burrowing Frog and refused the licence because of inadequate scientific understanding of the possible impacts of road building on the species. Thus, the precautionary principle operated as a determining factor in the decision. 88 In ***Nicholls v Director-General of National Parks and Wildlife*** (1994) 84 LGERA 397 there was an objector merits appeal to this Court. Talbot J appeared to dismiss the precautionary principle as a political aspiration that might prove to be unworkable: at 419. On the other hand, his Honour said that an approach which incorporated "*careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and ..as [sic] assessment of the risk-weighted consequences of various options*" was axiomatic when dealing with environmental assessment: at 419. He accepted the approach of Stein J in ***Leatch*** that although there were then no express statutory provisions making consideration of the precautionary principle mandatory, the application of a cautious approach was consistent with the subject matter, scope and purpose of the *National Parks and Wildlife Act 1974*: at 418. 89 In ***Greenpeace Australia Ltd v Redbank Power Company Pty Ltd and Singleton Council*** (1994) 86 LGERA 143, there was an objector merits appeal to this Court by Greenpeace Australia against the decision of a council to grant development consent to the construction of a coal fired power station. The objector's concern was that, when fully operational, the project would increase the total amount of carbon dioxide emitted from State power stations, consequently contributing to the greenhouse effect. The Court was invited to apply the precautionary principle and refuse development consent because of the greenhouse gas emissions. Pearlman J found that the project's carbon dioxide emissions would contribute to the greenhouse effect but that there was uncertainty about the effect the emissions would have on global warming. Taking into account other beneficial environmental effects of the project, Pearlman J decided that the development application should be approved. Reference was made to the formulation of the precautionary principle in the *Australian Intergovernmental Agreement on the Environment* of 1992. Her Honour referred to the approach adopted in ***Leatch*** and concluded at 154: The application of the precautionary principle dictates that a cautious approach should be adopted in evaluating the various relevant factors in determining whether or not to grant consent; it does not require that the greenhouse issue should outweigh all other issues. 90 The next case was a decision of

the Federal Court of Australia in ***Friends of Hinchinbrook Society Inc v Minister for Environment (No 2)*** (1997) 93 LGERA 249. This was an unsuccessful challenge to the validity of a decision of the Minister to grant consents under the *World Heritage Properties Conservation Act 1983* (Cth). The consents related to the development of a proposed tourist resort for the dredging of a marina access channel in an area that formed part of the Great Barrier Reef World Heritage Area proclaimed under the Act. One of the grounds of challenge was failure to have regard to the precautionary principle. The legislation did not expressly refer to the principle. There were submissions based upon principles of international law and the principles in the Australian *Intergovernmental Agreement on the Environment* of May 1992. Sackville J held at 296 - 297: I do not think that the precautionary principle in the form adopted by the 1992 Intergovernmental Agreement (nine years after the enactment of the World Heritage Act), is a relevant consideration that the Minister is bound to take into account in exercising the powers conferred by the World Heritage Act. There is nothing to suggest that in 1983 any particular formulation of the precautionary principle commanded international approval, let alone endorsement by the Parliament. It may be that the *commonsense principle* identified by Stein J [in Leatch] is one to which the Minister must have regard. But this would flow from the proper construction of the relevant legislation and of its scope and purpose, rather than the adoption by representatives of Australian governments of policies and objectives relevant to a national strategy on the environment... It would be difficult, for example, for the Minister to have regard only to the protection, conservation and presentation of particular property, as required by s 13(1) of the World Heritage Act, unless he or she takes account of the prospect of serious and irreversible harm to the property in circumstances where scientific opinion is uncertain or in conflict. To the extent that the Minister was required to take account of the need to exercise caution on the fact of scientific uncertainty, in my opinion he did so...It is true that the Minister did not expressly refer to the precautionary principle or some variation of it, in his reasons. But it is equally clear that before making a final decision, he took steps to put in place arrangements designed to address the matters of concern identified in the scientific reports and other materials available to him. His Honour concluded at 297 that the Minister had taken into account "*the commonsense principle that caution should be exercised where scientific opinion is divided or scientific information is incomplete*".

91 In ***Tuna Boat Owners Association of SA Inc v Development Assessment Commission*** ***[2000] SASC 238;*** (2000) 110 LGERA 1 the applicant sought and obtained development consent for the establishment of tuna farms. There was a successful appeal by the Conservation Council of SA Inc to the Environment, Resources and Development Court of South Australia. Under the relevant legislation, the development had to be assessed against the provisions of a prescribed development plan which contained as an objective that development of the marine environment should be in an ecologically sustainable way. The Environment, Resources and Development Court of South Australia said: "*We accept that an adaptive management approach, implemented by way of licence conditions to achieve ecologically sustainable development, which could be varied in response to new knowledge is one means by which the development could proceed in an ecological (sic) sustainable manner*". It also held that the onus lay on the proponent to show that the development would meet the policies set out in the development plan. A further appeal to the Full Court of the Supreme Court of South Australia was successful , Doyle CJ, delivering the judgment of the Full Court, held at 6 - 7: ...It is true that generally there is no onus on an applicant for development consent to establish that the development consent should be granted. The relevant authority must simply assess the proposed development against the relevant Development Plan. But in this case, the DP [Development Plan] contains an objective and principle that invokes the concept of ESD. That in turn, in a case like the present, invites the use of the precautionary principle, simply because all of the consequences of the proposed development are not known and fully understood. In such a case, assessing the proposal against the DP requires a consideration of whether it is a development which is ecologically sustainable. As the longer term consequences of the proposed development are not known, it is appropriate to require measures that will avert adverse environmental impacts that might emerge. That was the ERD Court's approach. It was open to it to so proceed. The Court did not wrongly impose an onus on the Association in relation to the assessment of the proposal against the DP. The approach of the Court simply reflected what was inherent in one of the matters that the Court had to consider, the issue of ESD. There can be no hard and fast rules about what is required in a case such as this. Everything will depend upon the circumstances of the particular case, especially the level of knowledge about the environmental impacts of the particular

proposal. I agree broadly with what the Court said: The proponent would have to satisfy the burden of proof by evidence as to the likely consequences of the proposal, including scientific evidence (with its limitations), evidence as to the proposed management regime and measures, and evidence to assist the Court in the assessment of the risk-weighted consequences of the proposal. This should not be taken as a proposition of law, but simply as an expression in the particular case of what, in general terms, was required before the ERD Court could properly find for the Association when considering whether the development would be managed so as to be ecologically sustainable. 92 As regards the "*adaptive management approach*" accepted by the Environment, Resources and Development Court, Doyle CJ held at 8: That seems to me to be an appropriate approach in the light of the relevant objectives and principles in the DP, and in the light of the nature of the proposed development and, in particular, bearing in mind that the medium and longer term impacts of the fish farming are unknown. The DP requires the relevant authority to consider the proposed management of marine aquaculture, and the impact of any such proposed development on the environment. Pursuit of ESD requires careful consideration of the longer term consequences of such development. In such cases, the concept underlying the precautionary principle is obviously appropriate. To say that is not to say that the precautionary principle is elevated to a principle of law. Simply that it is sound commonsense in relation to provisions of the DP such as those in question, and a proposal such as that under consideration here. Thus, as in ***Leatch***, the precautionary principle was categorised as a matter of "*commonsense*". ***A case under the Water Management Act 2000 (NSW)***93 The precautionary principle was held to be a mandatory consideration under the *Water Management Act 2000* (NSW) and any other Act which adopts the principles of ESD in ***Murrumbidgee Ground-Water Preservation Association v Minister for Natural Resources*** [2004] NSWLEC 122 at [178] per McClellan CJ. That was an unsuccessful judicial review application to this Court for a declaration that a water-sharing management plan made by the Minister under the said Act was invalid. There was no express provision in that Act that the principles of ESD were a mandatory consideration for the Minister when making such a plan. Section 3 provided that: "*The objects of this Act are to provide for the sustainable and integrated management of the water sources of the State for the benefit of both present and future generations*

and, in particular: (a) to apply the principles of ecologically sustainable development..." There follow seven further particulars. The Dictionary to the Act defined ESD by reference to s 6(2) of the *Protection of the Environment Administration Act 1991* (NSW): set out above at [72]. Section 24(g) stated that a management plan may deal with "*measures to give effect to...the objects of the Act*". Thus, by force of s 24(g), the principles of ESD (and the other objects of the Act) were at least relevant and permissible to be considered by a Minister when considering the contents of a plan. However, McClellan CJ went further and held that the principles of ESD were a mandatory consideration. McClellan CJ noted that the *Water Management Act 2000* imposed obligations on the Minister when making a Plan to take all reasonable steps to promote the Water Management principles of the Act. His Honour held:[174] Beyond those matters, the Minister is required to act in a manner consistent with and so as to further the objects of the Act...[175] By providing that one of the objects of the Act is the application of the principles of ecologically sustainable development, the...Act takes an approach which is now common in environmental legislation. The Dictionary of the Act adopts the principles of ESD as defined in s 6(2) of the *Protection of the Environment Administration Act 1991* (NSW)....[178] ...as I have indicated the precautionary principle is now given statutory recognition not only in the Water Management Act but in numerous NSW Statutes...It is a central element in the decision making process and cannot be confined. It is not merely a political aspiration but must be applied when decisions are being made under the Water Management Act and any other Act which adopts the principles.(emphasis added)94 It is apparent that the fact that ESD was an object of the statute was a significant factor when reaching the conclusion that ESD principles were obligatory considerations. Nevertheless, McClellan CJ concluded that the applicants were not entitled to relief:[184] Notwithstanding these matters and accepting the identified anomalies I am not persuaded that bearing in mind the confined role for a court in judicial review proceedings the applicants are entitled to relief. It was for the Minister, and not the Court to balance the desired environmental outcome, and the chosen method of achieving it, with the beneficial and adverse social and economic consequences. [185] As Mason J said in *Peko* (at 42) when the decision-maker is required to balance disparate matters when making a decision, a court should be cautious when asked to intervene for otherwise it may inadvertently be

engaging in merit review. Perhaps, in the present case, if the Minister had not addressed the potential anomalies by providing a regime for supplementary water, a case for intervention could be made out. However, by providing for supplementary water the Minister has acknowledged the harm which may be occasioned to some irrigators and provided a regime designed to ameliorate it. It is not for the court to determine whether the regime adopted is the best which could have been provided. It is plain that the difficulties were considered and that the Minister, balancing the competing interests, is of the opinion that he has appropriately provided for the social, economic and environmental benefits from the available groundwater. The Minister's decision to provide a management regime which imposed hardship on some in the interests of achieving a satisfactory future regime for the management of the whole of the aquifers cannot be described as irrational. [186] When deciding to make the Plan the Minister had the ultimate objective of providing for the long term sustainability of the underground water. His decision was required to be informed by, inter alia, the precautionary principle which required a regime to be put in place which was likely to sustain the water source even if, as is the case, full scientific knowledge of the structure and behaviour of the aquifer is not available. [187] By ensuring the long-term health of the aquifer, the Minister has ensured both an appropriate environmental outcome and sustainable agriculture with the associated social and economic benefits. The mechanism adopted is faithful to the principle in s 5(3)(a) of the Act *that sharing of water from a water source must protect the water source and its dependent ecosystems* which must not be prejudiced by extraction of water (s 5(3)(c)). By providing supplementary water, the Minister has allowed for a lengthy period of adjustment during which those who can sustain an agricultural enterprise may, although at a cost, acquire water rights. [188] Others who lose part of their present rights to water and who could not justify, for economic or environmental reasons, the acquisition of additional entitlement may receive some moneys from the sale of entitlement, which they will presumably invest in some manner. To the extent that the Plan impacts adversely on those persons, the sale of the entitlement will ameliorate their position. [189] Having regard to all of these matters, I am not satisfied that the approach which has been taken is so lacking in logical structure or so fails to have regard to the parameters which the Act imposes on the Minister that it could be said that it was not open to the Minister and that the Minister's

discretion in making the Plan has miscarried.95 An appeal from that decision was dismissed, but ESD was not an issue in the appeal: ***Murrumbidgee Groundwater Preservation Association Inc v Minister of Natural Resources [2005] NSWCA 10;*** (2005) 138 LGERA 11 at 47 [143]. Spigelman CJ (Beazley and Tobias JJA agreeing) said that by force of s 21(e) (which was in the same terms as s 24(g) discussed above), the objects of the *Water Management Act 2000* were permissible to be considered by the Minister when determining the content of a management plan. Although there is no provision equivalent to ss 21(e) or 24(g) in Part 3A of the *EPA Act*, in my view the objects of the *EPA Act*, including the encouragement of ESD, are permissible considerations under s 750. However, in my view, the fact that encouragement of ESD is an object of the *EPA Act* does not, per se, elevate it to a mandatory consideration under s 750 ***A criminal case***96 ESD was considered in a criminal case in this Court in ***Bentley v BGP Properties Pty Ltd*** (2006) 145 LGERA 234. Section 118A(2) of the *National Parks and Wildlife Act 1974* provided that "*A person must not pick any threatened species, population or ecological community, being a plant*". By contravening that provision the defendant committed an offence. A plea of guilty was entered. Section 2A(2) of the *National Parks and Wildlife Act 1974* provided that "*The objects of this Act are to be achieved by applying the principles of ecologically sustainable development*". Preston CJ commented at [57]: Ecologically sustainable development is fundamental to meeting the needs of the present and future generations. It is a touchstone, *a central element* in decision-making relating to planning for and development of the environment and the natural resources that are the bounty of the environment... 97 Preston CJ described the role of environmental impact assessment and approval as a key means of achieving ESD, as follows (omitting some citations): [67] Requiring prior environmental impact assessment and approval is a key means of achieving ecologically sustainable development. It facilitates achievement of the principle of integration (*ecologically sustainable development requires the effective integration of economic and environmental considerations in decision-making processes*: s 6(2) of *Protection of the Environment Administration Act* adopted by s 5(1) of NPW Act. See also Principle 4 of *Rio Declaration on Environment and Development 1992* (Int)). If environmental considerations are to be an integral part of decision-making processes, it is necessary to assess the environmental impacts and risks associated with

proposed activities. Environmental impact assessment is widely applied to predict the impacts of proposed activities on the environment.[68] Prior environmental impact assessment and approval are important components in a precautionary approach. The precautionary principle is intended to promote actions that avoid serious or irreversible damage in advance of scientific certainty of such damage. Environmental impact assessment can help implement the precautionary principle in a number of ways including:

(a) enabling an assessment of whether there are threats of damage to threatened species, populations or ecological communities;(b) enabling an evaluation of the conclusiveness or certainty of the scientific evidence in relation to the threatened species, populations or ecological communities or the effect of proposed development on them; (c) enabling informed decisions to be made to avoid or mitigate, wherever practicable, serious or irreversible damage to the threatened species, populations or ecological communities and their habitats; and(d) shifting the burden of proof (evidentiary presumption) to persons responsible for potentially harmful activity to demonstrate that their actions will not cause environmental harm: Conservation Council of SA Inc v Development Assessment Commission [1999] SAERDC 86 at [24] and [25] upheld in Tuna Boat Owners Assn of SA Inc v Development Assessment Commission [2000] SASC 238; (2000) 77 SASR 369, 110 LGERA 1 at [27]- [30]... [69] The requirement for prior environmental impact assessment and approval enables the present generation to meet its obligation of intergenerational equity by ensuring the health, diversity and productivity of the environment is maintained and enhanced for the benefit of future generations.[70] Finally, prior environmental impact and assessment and approval can facilitate the internalisation of external environmental costs by including environmental factors in the valuation and costs of assets and services (such as in the price of allotments created by subdivision and development), by implementing the user pays or polluter pays principle (those who cause harm to the environment should bear the cost of containment, avoidance or abatement) and by ensuring that users of goods and services should pay prices used on the full life cycle costs of providing goods and services including the use of natural resources and assets (such as the full life cycle costs of maintaining reserved, existing habitat and of establishing and maintaining compensatory habitat of threatened species, populations and ecological communities). 98 Focusing on the polluter pays

principle, Preston CJ quoted from ***Axer Pty Ltd v Environment Protection Authority*** (1993) 113 LGERA 357 at 359 where Mahoney JA in the NSW Court of Criminal Appeal said that: ...I believe legislation of this kind contemplates that, in general, the cost of preventing pollution will be absorbed into the costing of the relevant industries and in that way will be borne by the community or by that part of it which uses the product which the industry produces. In assessing the quantum of a fine considerations of this kind are to be taken into account. The fine should be such as will make it worthwhile that the cost of precautions be undertaken...I do not mean by this that the legislature saw the legislation as providing, by payment of a fine, a licence to pollute. In the end, the object of the legislation is to prevent pollution and to do this, inter alia, by the deterrent effect of a substantial fine and by, in consequence, persuading the industries concerned to adopt preventive measures... Preston CJ commented on this dictum at [157]: By a court taking such factors into account, it promotes the achievement of ecologically sustainable development. The fourth pillar of ecologically sustainable development is the internalisation of external environmental costs. Ecologically sustainable development requires accounting for the short term and long term, external environmental impacts of development. One way...of doing so is by adoption of the user pays or polluter pays principle... ***Cases under Part 4 Environmental Planning and Assessment Act***99 A merits appeal to this Court from refusal of a development consent is available under Part 4 of the *EPA Act*. Since the object of encouragement of ESD was inserted in the *EPA Act* in July 1998, a good number of cases in this Court have held that ESD is a mandatory consideration under Part 4. The gateway to this conclusion has been s 79C(1)(e) (within Part 4), which requires a consent authority to take into consideration, among other things, "*the public interest*". The first case was ***Carstens v Pittwater Council*** (1999) 111 LGERA 1. There Lloyd J dismissed an appeal against a merits appeal decision of a Commissioner of this Court that under the *EPA Act* the principles of ESD must be a factor in the assessment of the impact on the environment of a combined development application and construction certificate. His Honour held at [74]: I have previously discussed under ground (1) above the relationship between the objects of the EP&A Act described in s 5 and the matters to be taken into consideration in determining a development application set out in s 79C(1). In the light of that discussion and for the reasons which I have there stated, I concluded

that s 79C(1) sets out the matters that must be taken into consideration, but that subsection does not exclude from consideration matters not listed and which may be of relevance to the particular development application and which further the objects of the Act. That is to say, it is not an irrelevant consideration for the decision-maker to take into account a matter relating to the objects of the Act. One of those objects is to encourage ecologically sustainable development (s 5(a)(vii)). Moreover, one of the considerations expressly mentioned in s 79C(1) is (e) the public interest. In my opinion it is in the public interest, in determining a development application, to give effect to the objects of the Act. For these reasons I do not accept the submission that the Commissioner erred in holding that the principles of ESD must be a factor in the consideration of a combined development application and construction certificate. (emphasis added)100 In ***BGP Properties Pty Ltd v Lake Macquarie City Council*** [2004] NSWLEC 399; (2004) 138 LGERA 237 the applicant lodged an integrated development application with a local council seeking consent to subdivide land into 48 lots for industrial use and storage. The site was located in an area of environmental sensitivity and encroached on a wetland. It contained the threatened species known as *Crinia tinnula* (the Wallum Froglet) and the threatened population *Tetratheca juncea*. It also contained some threatened ecological communities. A species impact statement prepared in accordance with the *Threatened Species Conservation Act 1995* concluded that the proposed industrial subdivision would provide an opportunity to improve the environmental management of the land. There was a deemed refusal by the council of the application. The applicant appealed on the merits to this Court. The *EPA Act* applied and included within its objects the encouragement of ESD. Matters which a consent authority were required to take into consideration under s 79C(1) of the *EPA Act* included "*the public interest*". 101 McClellan CJ held, following ***Carstens***, that by requiring a consent authority to have regard to "*the public interest*", s 79C obliged the decision-maker to have regard to the principles of ESD in cases where issues relevant to those principles arose. This would have the consequence that, among other matters, consideration had to be given to matters of inter-generational equity, conservation of biological diversity and ecological integrity: at [113]. His Honour held that where there was a lack of scientific certainty, the precautionary principle must be utilised. This meant that the decision-maker must approach the matter with caution but also required the decision-maker to avoid, where practical, serious or

irreversible damage to the environment. Consideration of these principles would not preclude a decision to approve an application in cases where the overall benefit of the project outweighed the likely environmental harm. However, care needed to be taken to determine whether appropriate and adequate measures had been incorporated into such a project to confine any likely harm to the environment. The applicant's proposal would destroy a substantial area of the Sydney Freshwater Wetland and, in time, the indirect effects could remove it entirely and affect the resilience and the integrity of the wetland system, both on and off the site. Due to these known impacts, together with the possible future impacts, the development application was refused. 102 In 2005 – 2006, the precautionary principle was considered in four merits appeals to this Court: (i) In ***BT Goldsmith Planning Services Pty Ltd v Blacktown City Council*** [2005] NSWLEC 210 at [68] – [73] Pain J took a precautionary approach to consideration of factors relevant to determining the likelihood of significant impact on an endangered ecological community under the *Threatened Species Conservation Act 1995* (NSW). (ii) In ***Port Stephens Pearls Pty Ltd v Minister for Infrastructure and Planning*** [2005] NSWLEC 426 there was a merits appeal against the Minister's decision to refuse development consent for a pearl farm. The Minister was concerned about its likely impacts such as the risks and potential consequences for marine life. Talbot J had regard to the precautionary principle. His Honour acknowledged that as a result of the formal adoption of ESD by various statutes since his dismissive judgment in ***Nicholls*** (discussed above), it had become more than a "*political aspiration*" and there was a legal obligation to have regard to it in relation to the *EPA Act* that he was considering: at [54]. Although his Honour found that there was no real threat of irreversible environmental damage, he decided that consent should be granted on condition that there be a monitoring regime that would detect any emerging adverse impacts and thus enable the appropriate authority to require them to be addressed if required. (iii) In ***Providence Projects Pty Ltd v Gosford City Council*** (2006) 147 LGERA 274 there was a merits appeal against a council's refusal to approve a retirement village. There was scientific uncertainty as to the distribution of an endangered ecological community over the development site and, consequently, as to the threat of serious or irreversible damage that might be caused to that community. Bignold J considered that the precautionary principle justified an approach that avoided the risk of serious or irreversible environmental

damage by assuming the widespread distribution of the endangered community. (iv) In ***Gales Holdings Pty Ltd v Tweed Shire Council*** (2006) 146 LGERA 236 there was a merits appeal against a council's deemed refusal to approve a shopping and commercial development. One issue was whether the development application should be accompanied by a species impact statement, which was required by legislation if the proposed development significantly affected a threatened species. Present on the development site was a threatened species, Mitchell's Rainforest Snail (*Thersites mitchellae*). There was scientific uncertainty as to the extent and location of its most important habitat and the relationship of the habitat to the proposed drainage works. Talbot J, applying the precautionary principle, held that the proposed development was likely to significantly affect the threatened species and that a species impact statement was required before the development application could be determined. ***The Telstra case***103 There was a comprehensive consideration of ESD by Preston CJ in a merits appeal under Part 4 of the *EPA Act* in ***Telstra Corp Ltd v Hornsby Shire Council [2006] NSWLEC 133;*** (2006) 146 LGERA 10. The respondent council refused a development consent application by Telstra, Australia's largest telecommunications provider, relating to the installation of mobile phone towers disguised as chimneys on the roof of a recreational club in a Sydney suburb. The application was opposed by some members of the local community and councillors who were concerned that the proposed facility would emit radiofrequency electromagnetic energy (RF EME) that would harm the health and safety of residents. Telstra's appeal on the merits to this Court was allowed. The case provides guidance in relation to questions identified by Preston CJ at [9] as follows: The case raises questions about fear, rationality and the law. How should a responsible decision-maker respond to public fear? Responsiveness to public fear entails a commitment to rational deliberation, in the form of reflection and reason-giving. An approach with some currency at the moment is the precautionary principle. What is the precautionary principle and how is it to be applied when thinking about public health and safety and the environment? How can it be invoked to respond to public fear? 104 The precautionary principle was invoked on the basis of potential public health threats posed by exposure to RF EME emitted by mobile phone towers. A court appointed expert was engaged to provide advice on the health effects of RF EME exposure. He strongly supported the consensus scientific view

regarding RF EME risks that the proposed tower could not conceivably cause any adverse biological or health effect. Telstra also presented evidence from two experts who testified that the tower was designed to minimise RF EME exposure and who estimated that its emissions would be less than one fortieth of those permitted under the relevant Australian Standard. The evidence of these three experts was not challenged and there was no expert evidence to the contrary. Some local residents, however, expressed concern over uncertainty about long term health effects and argued the need for the application of the precautionary principle. 105 Following ***BGP*** and ***Carstens***, Preston CJ held that under the *EPA Act* s 79C(1), ESD was one of the matters which the council, and on the appeal the Court standing in the shoes of the council, had to take into account. Preston CJ noted that ESD involves a cluster of elements or principles, six of which he highlighted. First, from the name itself comes the principle of sustainable use. Secondly, ESD requires the effective integration of economic and environmental considerations in the decision-making process. Thirdly, the precautionary principle. Fourthly, the principles of equity: the need for inter-generational equity and the need for intra-generational equity. Fifthly, the principle that conservation of biological diversity and ecological integrity should be a fundamental consideration. Finally, the principle of internalisation of environmental costs. 106 Preston CJ identified two cumulative conditions precedent to the application of the statutory description of the precautionary principle. First, *"a threat of serious or irreversible environmental damage"*. Secondly, *"scientific uncertainty as to the environmental damage"*. His Honour held that once both conditions precedent are satisfied "*a precautionary measure may be taken to avert the anticipated threat of environmental damage, but it should be proportionate*": [128]. 107 As to the first condition precedent, his Honour pointed out two things: (a) it is not necessary that serious or irreversible environmental damage has actually occurred – it is the threat of such damage that is required; and (b) the environmental damage threatened must attain the threshold of being serious or irreversible. Although the assessment of whether the threat is serious or reversible will be enhanced by taking into account the views of relevant stakeholders, the threat "*must be adequately sustained by scientific evidence*": at [134] 108 The second condition precedent, that there be "*a lack of full scientific certainty*", was said to concern the nature and scope of the threat of environmental damage. Although, on a literal reading, this condition

precedent is satisfied whenever there is a lack of "*full*" scientific certainty, the literal interpretation would render the condition meaningless because it is impossible to be completely certain about threats of environmental damage. The question then is: how much scientific uncertainty need there be as to the threat of environmental damage before the second condition precedent is fulfilled? His Honour concluded that scientific uncertainty must be considerable. Where, in contrast, the threat of seriously irreversible environmental damage can be classified as relatively certain, measures will still need to be taken but these will be preventative measures to control or regulate the relatively certain threat, rather than precautionary measures which are appropriate in relation to uncertain threats: at [149].
109 The burden of proof shifts once the two condition precedents are fulfilled: at [150]. At this point the decision-maker must assume that the threat of serious or irreversible environmental damage is no longer uncertain but is a reality. The burden of showing that this threat does not in fact exist or is negligible shifts to the proponent of the project. A rationale for this shift in the evidentiary burden is that, to avoid environmental harm, it is better to err on the side of caution. The consequence of failure to discharge the burden is not necessarily fatal and the relevant legislation does not give the precautionary principle overriding weight (at [154]). ...If a proponent of a plan, programme or project fails to discharge the burden to prove that there is no threat of serious or irreversible environmental damage, this does not necessarily mean that the plan, programme or project must be refused. It simply means that, in making the final decision, the decision-maker must assume that there will be serious or irreversible environmental damage. This assumed factor must be taken into account in the calculus which decision-makers are instructed to apply under environmental legislation (such as s 79C(1) of the EPA Act). There is nothing in the formulation of the precautionary principle which requires decision-makers to give the assumed factor (the serious or irreversible environmental damage) overriding weight compared to the other factors required to be considered, such as social and economic factors, when deciding how to proceed.110 Prudence would suggest that some margin for error should be retained until all the consequences of the decision to proceed are known. The precautionary principle should not be used to try to avoid all risks; a zero risk precautionary standard is inappropriate. His Honour said at [159] (citations omitted): Rationality dictates that the precautionary principle and any preventative measure cannot be based on a

purely hypothetical approach to the risk, founded on mere conjecture which has not been scientifically verified...Rather, a preventative measure may be taken only if the risk, although the reality and extent of the risk have not been 'fully' demonstrated by conclusive scientific evidence, appears nevertheless to be adequately backed up by the scientific data available at the time when the measure was taken. 111 Where the precautionary principle applies, "*measures should be adopted that are proportionate to the potential threats. A reasonable balance must be struck between the stringency of the precautionary measures, which may have associated costs, such as financial, livelihood and opportunity costs, and the seriousness and irreversibility of the potential threat*": at [167] 112 On the facts of the case before him, Preston CJ decided that the first condition precedent for the application of the precautionary principle (that there be a threat of serious or irreversible environmental damage) was not satisfied: at [184]. The level of RF EME emitted from the proposed base station would easily comply with the relevant Australian Standard. Any harm to the health and safety of people or the environment caused by exposure to such extremely low levels was negligible. The same conclusion had been reached by other courts and tribunals dealing with other proposed mobile phone base stations and antennae which emitted RF EME that complied with the relevant regulatory standards. That conclusion did not mean that there had been an avoidance of a precautionary approach. On the contrary, the conclusion was a direct consequence of the fact that a precautionary approach had already been adopted in the standard setting process, the terms of the relevant Australian standard, the design and location of the proposed base station, the equipment to be provided, the operation of the equipment, the application of the Australian Standard to the RF EME generated from the base station, and the likelihood of actual RF EME being significantly less than predicted. The cumulative effect of those precautionary approaches was to prevent any threat of serious or irreversible environmental damage: at [186]. Hence, there was no basis to invoke the precautionary principle. **ESD Cases under Part 3A Environmental Planning and Assessment Act**113 I now come to two recent cases on ESD in this Court, which were judicial review challenges to the validity of different types of decision under Part 3A of the *EPA Act*, on grounds related to greenhouse gas emissions: ***Gray v The Minister for Planning*** [2006] NSWLEC 720; (2006) 152 LGERA 258 (Pain J); ***Drake-Brockman v Minister for***

Planning [2007] NSWLEC 490 (Jagot J). Part 3A has been reviewed above at [4] – [8].114 ***Gray*** concerned a development proposal for the construction of an open cut coal mine capable of producing up to 10.5 million tonnes of coal per annum over a lifespan of more than 21 years. The coal was destined for use in coal-fired power stations in New South Wales and overseas. The project required environmental assessment under Part 3A of the *EPA Act*. The applicant sought, and the Court made, a declaration that the view of the Director-General of the Department of Planning that the environmental assessment adequately addressed the Director-General's environmental assessment requirements was void. The reason was failure to take into account the indirect greenhouse gas emissions of the coalmine in assessing its environmental impact. 115 Pain J held that although the principles of ESD were not expressly referred to in Part 3A, the Minister as well as the Director-General, who is subject to the Minister's direction, were obliged to take into account the public interest, which includes ESD (eg see ***Telstra***), when operating under Part 3A. Three reasons were given for that public interest conclusion: at [42] – [44]. First, the second reading speech to the Bill that introduced Part 3A said that it "*provides better outcomes for the community and the environment without unreasonable cost to the proponent*". Secondly, Part 3A applies to projects the Minister determines are major infrastructure or projects of State or regional planning significance. Thirdly, the Minister is required to act "*for the good management of the public affairs of NSW*": s 35 CA of the *Constitution Act 1902* (NSW). I note that the provision of s 35CA to which her Honour referred is in the following oath of office of a member of the Executive Council: "*...I will perform the functions and duties of an Executive Councillor faithfully and to the best of my ability and, when required to do so, freely give my counsel and advice to the Governor or officer administering the Government of New South Wales for the time being for the good management of the public affairs of New South Wales...*" Her Honour did not give specific consideration to a concept plan approval under s 75O. 116 In ***Gray*** the applicant's case was not that there had been a complete failure to address the principles of ESD, but a failure to make inquiry about facts relevant to those principles. The Director-General had required, as part of the coalmine's environmental assessment to be submitted to the decision maker (the Minister for Planning), a "*detailed greenhouse gas assessment*": at [16]. The applicant's submission was that consideration of ESD principles obliged the decision-maker to

inquire and consider the greenhouse gas emissions not only from sources owned or controlled by the coal mine (scope 1: direct greenhouse gas emissions) and from the generation of purchased electricity consumed by the coal mine (scope 2: electricity indirect greenhouse gas emissions) but also from sources not owned or controlled by the coal mine as a consequence of the activities of the coal mine (scope 3: other indirect greenhouse gas emissions). Scope 3 emissions could include potential greenhouse gas emissions from the burning of coal originating from the coal mine by third parties (mostly overseas) outside the control of the coal mine. The coal mine's environmental assessment report included a study of scope 1 and scope 2, but not scope 3 greenhouse gas emissions. Pain J held that two of the principles of ESD, intergenerational equity and the precautionary principle, in their application to the facts of the case at hand, required assessment of scope 3 emissions: at [126] – [135]. It appears to have been critical to the decision that there was a disjunction between the Director-General's specific requirement for a detailed greenhouse gas emission assessment and what the Director-General had accepted as adequate:[126]...it is apparent that there is a failure to take the principle of intergenerational equity into account by a requirement for a detailed GHG [Greenhouse Gas] assessment in the EAR [Environmental Assessment Requirements] if the major component of GHG which results from the use of the coal, namely scope 3 emissions, is not required to be assessed. That is a failure of a legal requirement to take into account the principle of intergenerational equity. It is clear from the evidence that this failure occurred on the Director-General's part and that the applicant is able to discharge its onus in that regard... ...[133] As this case focuses on the environmental assessment stage not the final decision whether the project should be approved, the extent to which the precautionary principle applies is as yet undetermined. What is required is that the Director-General ensure that there is sufficient information before the Minister to enable his consideration of all relevant matters so that if there is serious or irreversible environmental damage from climate change/global warming and there is scientific uncertainty about the impact he can determine if there are measures he should consider to prevent environmental degradation in relation to this project....[135] I also conclude that the Director-General failed to take into account the precautionary principle when he decided that the environmental assessment of Centennial was adequate, as already found in relation to intergenerational equity at [126]

of these reasons. This was a failure to comply with a legal requirement.117 Pain J therefore held that the Director-General's decision to accept the coal mine's environmental assessment as adequately addressing the environmental assessment requirements of the Director-General was vitiated by reason of a failure to take into account the precautionary principle and intergenerational equity.118 The decision in ***Gray*** was unsuccessfully relied on by the applicant in ***Drake-Brockman v Minister for Planning*** [2007] NSWLEC 490. Like the present case, in ***Drake-Brockman*** one of the judicial review challenges was to the validity of the Minister for Planning's approval of a concept plan under s 75O of the *EPA Act*. The concept plan was for a large redevelopment of the former Carlton United Breweries site at Chippendale. One of the grounds of that challenge was that the Minister had failed to consider the principles of ESD, including the precautionary principle and inter-generational equity, when granting the approval: at [7]. The challenge was not that there had been a total failure to consider ESD and greenhouse gas emissions (for the Minister had specifically considered them). Rather, the particular challenge was that there had been a failure to address one aspect of that subject matter, namely, a quantitative analysis of the greenhouse gas emissions of the redevelopment project: at [7], [126]. Jagot J distinguished ***Gray*** as turning on the terms of the Director-General's specific requirement in that case for a detailed greenhouse gas assessment as part of the proponent's environmental assessment under s 75F: at [130]. The grounds of challenge in ***Drake-Brockman*** did not include, as appears to have been critical in ***Gray***, any alleged disjunction between what the Director-General had required and what the Director-General had accepted as adequate: at [131]. Instead, the applicant had to establish – but failed to establish - that the *EPA Act*, by necessary implication, bound the Minister to consider one aspect of the complex of matters that might inform the concept of ESD in the particular manner and to the particular extent alleged by the applicant (a quantitative analysis of greenhouse gas emissions of the project): at [126].119 Jagot J assumed (without deciding) that Part 3A obliged the Minister to consider the principles of ESD, but concluded that the Minister had not failed to do so: at [132] – [133]. Her Honour reasoned that Parliament, in enacting the *EPA Act*, did not subordinate all other considerations to ESD; the breadth of the unifying theme of ESD explains the ubiquity of the concept in development decisions and discloses the level of generality at which it is capable of

operating; and the statutory scheme does not support the idea that the Minister can only consider ESD by considering a quantitative analysis of greenhouse gas emissions: at [132]. **ESD: Climate change**120 The applicant pleads that the Minister 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 connection with the proposed development in circumstances where flooding was identified as a major constraint on development of the site. It is convenient to refer to this consideration as the "climate change flood risk".121 "*Global warming*" refers to a rise in global temperatures that has coincided with human induced (anthropogenic) increases in concentrations of greenhouse gases in the atmosphere. The "greenhouse effect" is the name given to the natural build up of greenhouse gases in the lower atmosphere that prevent heat from the sun's rays from escaping back into space. When the balance of greenhouse gases is disrupted, more heat is trapped and the earth gradually heats up. Carbon dioxide (CO2) through the burning of fossil fuels and land clearing is the most important anthropogenic greenhouse gas. Other important anthropogenic greenhouse gases include methane (CH4), nitrous oxide (N2O) and various forms of fluorocarbons. 122 The well known and important United Nations Intergovernmental Panel on Climate Change (**IPCC**) considers that the two trends, increases in global temperatures and in anthropogenic greenhouse gas concentrations, are related and that global warming presents climate change risks, including sea level rises, increases in the severity and frequency of storms and coastal flooding. The IPCC has produced four climate change Assessment Reports: in 1990, 1995, 2001 and 2007. The IPCC *Fourth Assessment Report* was launched over some months in 2007 in four volumes entitled: (i) *Physical Science Basis Report*; (ii) *Impacts, Adaptation and Vulnerability Report*; (iii) *Mitigation of Climate Change Report* and (iv) *Synthesis Report*. 123 The IPCC's *First Assessment Report* influenced the *United Nations Framework Convention on Climate Change* in 1992, a non-binding agreement among 191 countries, which Australia has ratified, to reduce atmospheric concentrations of greenhouse gases for the purpose of preventing dangerous anthropogenic interference with the earth's climate system. Article 2 states that its ultimate objective is to achieve "*stabilization of greenhouse gas concentrations in the atmosphere at a level that would*

prevent dangerous anthropogenic interference with the climate system". Article 4 section 1(f) contains a commitment to take "*Take climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions"*.124 The May 1992 *Intergovernmental Agreement on the Environment* (referred to above at [62] – [65]) in Schedule 5 addressed the need for Australia to be part of an international response to the problem of greenhouse-enhanced climate change. It adopted an interim planning target to stabilise greenhouse gas emissions, based on 1988 levels, by the year 2000, and to reduce these emissions by twenty percent by the year 2005. However, this was expressed to be "*subject to Australia not implementing response measures that would have net adverse economic impacts nationally or on Australia's trade competitiveness, in the absence of similar action by major greenhouse gas emitting countries*".125 The potential vulnerability of Australia and New Zealand to climate change caused by global warming, including increasing coastal vulnerability to storm surges and sea level rises, was addressed in the IPCC *Third Assessment Report* in 2001, which was summarised in the IPCC *Fourth Assessment Report*, Volume 2 (Working Group II) in 2007. The latter included the following:**Executive SummaryRegional climate change has occurred (very high confidence).**Since 1950, there has been 0.4 to 0.7C warming, with more heatwaves, fewer frosts, more rain in north-west Australia and south-west New Zealand, less rain in southern and eastern Australia and north-eastern New Zealand, an increase in the intensity of Australian droughts, and a rise in sea level of about 70mm [11.2.1]....Potential impacts of climate change are likely to be substantial without further adaptation.**11.1.1 Summary of knowledge from theThird Assessment Report (TAR)**In the IPCC Third Assessment Report (TAR; Pittock and Wratt, 2001), the following impacts were assessed as important for Australia and New Zealand.· Water resources are likely to become increasingly stressed in some areas of both countries, with rising competition for water supply.· Warming is likely to threaten the survival of species in some natural ecosystems, notably in alpine regions, south-western Australia, coral reefs and freshwater wetlands.· Regional reductions in rainfall in south-west and inland Australia and eastern New Zealand are likely to make agricultural activities particularly vulnerable.· **Increasing coastal vulnerability to tropical cyclones, storm surges and sea-level rise.**· Increased frequency of high-intensity rainfall, which is likely to increase flood damage.· The

spread of some disease vectors is very likely thereby increasing the potential for disease outbreaks, despite existing biosecurity and health services.The overall conclusions of the TAR were that (i) climate change is likely to add to existing stresses to the conservation of terrestrial and aquatic biodiversity and to achieving sustainable land use, and (ii) Australia has significant vulnerability to climate change expected over the next 100 years, whereas New Zealand appears more resilient, except in a few eastern areas.**11.1.2 New findings of this Fourth Assessment Report (AR4)**The scientific literature published since 2001 supports the TAR findings. Key differences from the TAR include (i) more extensive documentation of observed changes in natural systems consistent with global warming, (ii) significant advances in understanding potential future impacts on water, natural ecosystems, agriculture, coasts, Indigenous people and health, (iii) more attention to the role of adaptation, and (iv) identification of the most vulnerable sectors and hotspots. Vulnerability is given more attention – it is dependent on the exposure to climate change, the sensitivity of sectors to this exposure, and their capacity to adapt....**11.4.5 Coasts**Over 80% of the Australian population lives in the coastal zone, with significant recent non-metropolitan population growth (Harvey and Caton, 2003). About 711,000 addresses (from the National Geo-coded Address File) are within 3 km of the coast and less than 6 m above sea level, with more than 60% located in Queensland and NSW (Chen and McAneney, 2006). **These are potentially at risk from long-term sea-level rise and large storm surges.**Rises in sea level, together with changes to weather patterns, ocean currents, ocean temperature and storm surges are very likely to create differences in regional exposure.....Sea-level rise is virtually certain to cause greater coastal inundation, erosion, loss of wetlands and salt-water intrusion into freshwater sources (MfE, 2004a), with impacts on infrastructure, coastal resources and existing coastal management programmes...At Collaroy/Narrabeen beach (NSW), a sea-level rise of 0.2 m by 2050 combined with a 50-year storm event leads to coastal recession exceeding 110 m and causing losses of US$184 million (Hennecke et al., 2004)... Uncertainties in projected impacts can be managed through a risk-based approach involving stochastic simulation (Cowell et al., 2006).....**Box 11.4 Climate change adaptation in coastal areas**Australia and New Zealand have very long coastlines with ongoing development and large and rapidly growing populations in the coastal zone. This situation is placing intense

pressure on land and water resources and is increasing vulnerability to climatic variations, including storm surges, droughts and floods. A major challenge facing both countries is how to adapt to changes in climate, reduce vulnerability, and yet achieve sustainable development... (emphasis added)126 Scientific support for a link between a rise in global temperatures and an increase in the atmosphere in the concentration of greenhouse gasses resulting from human activities, has been recognised by the Supreme Court of the United States: ***Massachusetts v Environmental Protection Agency*** (2007) 127 S.Ct. 1438; and by courts in the United Kingdom: ***Dimmock v Secretary of State for Education and Skills*** [2007] EWHC 2288 (Admin) (Burton J), and Australia: ***Greenpeace Australia Ltd v Redbank Power Company Pty Ltd and Singleton Council*** (1995) 86 LGERA 143 (Pearlman J); ***Gray v Minister of Planning*** [2006] NSWLEC 720; (2006) 152 LGERA 258 (Pain J); ***Taralga Landscape Guardians Inc v Minister for Planning*** [2007] NSWLEC 59 (Preston CJ); ***Thornton v Adelaide Hills Council*** (2006) 151 LGERA 1; ***Australian Conservation Foundation v Latrobe City Council [2004] VCAT 2029;*** (2004) 140 LGERA 100 (Morris J). It was dismissed by a tribunal in Queensland in ***Re Xstrata Coal Queensland Pty Ltd and Ors*** [2007] QLRT 33; however, that decision was overturned on appeal: ***Queensland Conservation Council Inc v Xstrata Coal Queensland Pty Ltd*** [2007] QCA 338.127 The momentum in climate change litigation and legislation has been analysed in a number of legal articles : eg Jacqueline Peel, 'The Role of Climate Change Litigation in Australia's Response to Global Warming' (2007) 24 *EPLJ* 90; Jan McDonald, ' A Risky Climate for Decision-Making: The Liability of Development Authorities for Climate Change Impacts' (2007) 24 *EPLJ* 405; Kate McCrossin, 'A Critical Analysis of the Extent to which International Environmental Law has Influenced Commonwealth Legislation and Policies and New South Wales Legislation with Respect to Climate Change' (2007) 12 *LGLJ* 230; Gary Bryner, 'The Rapid Evolution of Climate Change Law', April 30 2007, *Utah Bar Journal*.128 IPCC reports and global developments concerning climate change were addressed by the Supreme Court of the United States in ***Massachusetts v Environmental Protection Agency*** (above) as follows at 1448 - 1449:Meanwhile, the scientific understanding of climate change progressed. In 1990, the Intergovernmental Panel on Climate Change (IPCC), a multinational scientific body organized under the auspices of the United Nations, published its first comprehensive report on the topic.

Drawing on expert opinions from across the globe, the IPCC concluded that *emissions resulting from human activities are substantially increasing the atmospheric concentrations of...greenhouse gases [which] will enhance the greenhouse effect, resulting on average in an additional warming of the Earth's surface*: IPCC, Climate Change: The IPCC Scientific Assessment, p. xi (J Houghton, G. Jenkins, & J. Ephraums eds. 1991).Responding to the IPCC report, the United Nations convened the *Earth Summit* in 1992 in Rio de Janeiro. The first President Bush attended and signed the United Nations Framework Convention on Climate Change (UNFCCC), a nonbinding agreement among 154 nations to reduce atmospheric concentrations of carbon dioxide and other greenhouse gases for the purpose of *prevent[ing] dangerous anthropogenic* [ie., human-induced] interference with the [Earth's] climate system. (The industrialized countries listed in Annex I to the UNFCCC undertook to reduce their emissions of greenhouses gases to 1990 levels by the year 2000. No immediate restrictions were imposed on developing countries, including China and India. They could choose to become Annex I countries when sufficiently developed.) S Treaty Doc. No. 102-38 Art. 2, p.5 (1992). The Senate unanimously ratified the treaty.Some five years later—after the IPCC issued a second comprehensive report in 1995 concluding that *[t]he balance of evidence suggests there is a discernible human influence on global climate* (IPCC, Climate Change 1995, The Science of Climate Change, p 4)—the UNFCCC signatories met in Kyoto, Japan, and adopted a protocol that assigned mandatory targets for industrialized nations to reduce greenhouse gas emissions. Because those targets did not apply to developing and heavily polluting nations such as China and India, the Senate unanimously passed a resolution expressing its sense that the United States should not enter into the Kyoto Protocol. See S. Res. 98, 105th Cong., 1st Sess. (July 25, 1997) (as passed). President Clinton did not submit the protocol to the Senate for ratification.Australia will ratify the Kyoto Protocol shortly, according to the recently elected federal government. 129 In the ***Massachusetts*** case a group of private environmental organisations filed a petition requesting the Environmental Protection Agency (EPA) to regulate the emission of greenhouse gases, including carbon dioxide, from new motor vehicles under the *Clean Air Act:* at 1449. The EPA denied the petition, explaining that it lacked statutory authority to regulate such emissions and that, even if it had such authority, it would decline to exercise it: at 1450. A group of states, local

governments and private organisations sought judicial review of the EPA's denial: at 1451. They were successful in the Supreme Court which held (reversing a circuit court decision) that the EPA possessed authority to regulate such emissions and had failed to provide a "*reasoned explanation*" for its conclusion that it would not regulate such emissions even if it possessed the authority to do so: at 1459-1462. The majority commenced their judgment by stating at 1446:A well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related. For when carbon dioxide is released into the atmosphere, it acts like the ceiling of the greenhouse, trapping solar energy and retarding the escape of reflected heat. It is therefore a species – the most important species – of a *greenhouse gas*.The majority held at 1456:The harms associated with climate change are serious and well recognized. Indeed, the NRC [National Research Council] Report itself—which EPA regards as an *objective and independent assessment of the relevant science,* 68 Fed. Reg. 52930—identifies a number of environmental changes that have already inflicted significant harms, including *the global retreat of mountain glaciers, reduction in snow-cover extent, the earlier spring melting of rivers and lakes, [and] the accelerated rate of rise of sea levels during the 20th century relative to the past few thousand years*... NRC Report 16.The majority concluded at 1462:Nor can EPA avoid its statutory obligation by noting the uncertainty surrounding various features of climate change and concluding that it would therefore be better not to regulate at this time. See 68 Fed. Reg. 52930-52931. If the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming, EPA must say so. That EPA would prefer not to regulate greenhouse gases because of some residual uncertainty—which, contrary to Justice Scalia's apparent belief, *post*, at 1466—1468, is in fact all that it said, see 68 Fed. Reg. 52929 (*We do not believe...that it would be either effective or appropriate for EPA to* establish [greenhouse gas] standards for motor vehicles *at this time* (emphasis added))—is irrelevant. The statutory question is whether sufficient information exists to make an endangerment finding.In short, EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change. Its action was therefore *arbitrary, capricious, ...or otherwise not in accordance with law*. 42 USC §7607(d)(9)(A).Even the

dissentients acknowledged at 1463:Global warming may be a *crisis* even *the most pressing environmental problem of our time*...Indeed it may ultimately affect nearly everyone on the planet in some potentially adverse way, and it may be that governments have done too little to address it.130 Subsequently, in ***People of the State of California v General Motors Corporation and Ors*** (2007) WL 2726871 (N D Cal) the State of California sought damages against various automakers for creating and contributing to an alleged public nuisance – global warming. Jenkins J granted the defendant's motion to dismiss the proceedings, holding that it presented a non-justiciable question.131 In ***Dimmock v Secretary of State for Education and Skills*** [2007] EWHC 2288 (Admin) there was an application to declare unlawful a decision by the Secretary of State for Education and Skills to distribute to every state secondary school in the United Kingdom a copy of former US Vice President Al Gore's film, *An Inconvenient Truth*. Burton J decided that the film could be shown but on the condition that it was accompanied by a guidance note for teachers to balance Mr Gore's "*one-sided*" views: at [45] – [46]. Burton J accepted that the four main scientific hypotheses in the film are supported by a vast quantity of research in peer-reviewed journals worldwide and by the great majority of the world's climate scientists: at [17]. First, global average temperatures have been rising significantly over the past half century and are likely to continue to rise ("*climate change*"). Secondly, climate change is mainly attributable to man-made emissions of carbon dioxide, methane and nitrous oxide ("*greenhouse gases*"). Thirdly, climate change will, if unchecked, have significant adverse effects on the world and its population. Fourthly, there are measures which individuals and governments can take which will help to reduce climate change or mitigate its effects. 132 However, Burton J held that there are errors and omissions in the film and respects in which it departs from the mainstream view in the sense of the consensus expressed in *The Physical Science Basis,* IPCC Fourth Assessment Report (Working Group I). For the purposes of the hearing, the defendant was prepared to accept that this report represented the present scientific consensus. Burton J held that the erroneous claims had arisen in "*the context of alarmism and exaggeration*": at [19]. His Honour identified nine significant errors within the film. One was a claim that sea levels could rise by 20 feet "*in the near future*", which was dismissed as "*distinctly alarmist*": at [25]. If such a rise occurred it would be only after, and over, millennia so that the Armageddon scenario Mr

Gore predicts, insofar as it suggests that sea level rises of seven metres might occur in the immediate future, is not in line with the scientific consensus: at [25]. 133 The first Australian case to consider climate change was ***Greenpeace Australia Ltd v Redbank Power Company Pty Ltd and Singleton Council*** (1994) 86 LGERA 143, discussed above at [89]. Pearlman J acknowledged the greenhouse effect and analysed the governmental response (at 146-147):Earth's atmosphere, while composed mainly of nitrogen and oxygen, also contains a number of trace gases such as CO2, methane (CH4) and ozone. Over the past 200 years the global concentrations of a number of these gases have increased due to human activities such as the burning of fossil fuels, deforestation and large scale farming. These naturally occurring gases, together with synthetic chemicals such as chlorofluorocarbons (CFCs), have the capacity to absorb radiation and there is concern that their increased concentrations in the atmosphere is resulting in a change in global temperatures. The Environment Protection Authority in its report entitled *New South Wales State of the Environment 1993* (exhibit 9) discussed global warming. It stated at p 5 of that report that CO2 *has been estimated to account for over half of the global warming phenomenon* ... . The report continued as follows: ... Australia's CO2 emissions represent approximately 1.4 per cent of the world total. However on a per capita basis, it is estimated that Australia is the world's fourth-largest contributor. The report went on to discuss other major greenhouse gases -- CH4, nitrous oxide and CFCs -- as well as the question of CO2 sinks (that is, absorbers of CO2), the two major natural ones of which are the ocean and forests. Due to the intrinsically global nature of the problems associated with the human enhanced greenhouse effect, an international instrument was created in an attempt to co-ordinate a response. The United Nations Framework Convention on Climate Change (exhibit 10, the Framework Convention) was opened for signature in May 1992. Australia ratified the Framework Convention and it entered into force on 21 March 1994. Article 2 of the Framework Convention states as its objective the following: The ultimate objective of this Convention ... is to achieve ... stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system ... To that end, the parties to the Framework Convention made certain commitments in Art 4A. These commitments include, among others: 1(f) [To t]ake climate change considerations into account, to the extent feasible, in their

relevant social, economic and environmental policies and actions ... 2(a) [To] adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs ... While the Australian Government is now bound to act generally in accordance with its international obligations under the Framework Convention, there is no national legislation yet in place aimed at specifically implementing any of its obligations. What there is, however, is *the Intergovernmental Agreement on the Environment* (exhibit 11, the Intergovernmental Agreement). This document (entered into by the Federal Government, all State and Territory Governments, and the Australian Local Government Association) is designed to enable a *cooperative national approach to the environment*. The Intergovernmental Agreement contains general provisions related to its operation and principles to be applied by the parties. In a number of schedules, it deals with specific areas of environmental policy and management. Schedule 5 is entitled *Climate Change*. This schedule discusses the need for Australia to be part of an international response to the problem of greenhouse-enhanced climate change and details the creation of a *National Greenhouse Response Strategy*. It also adopts an interim planning target in the following terms: to stabilise greenhouse gas emissions ... based on 1988 levels, by the year 2000, and reducing these emissions by 20% by the year 2005 ... subject to Australia not implementing response measures that would have net adverse economic impacts nationally or on Australia's trade competitiveness, in the absence of similar action by major greenhouse gas producing countries. In accordance with Sch 5 of the *Intergovernmental Agreement*, the National Greenhouse Response Strategy... was produced and endorsed by the Council of Australian Governments in December 1992. The key elements of the *National Greenhouse Response Strategy* are stated to include, amongst other things: * a set of general principles underlying all response measures; * a set of sectoral objectives and sectoral strategies; * a phased plan of action.134 IPCC reports were considered in ***Taralga Landscape Guardians Inc v Minister for Planning*** [2007] NSWLEC 59. That was an objector appeal to this Court against a wind farm development, which was successful in that a number of strict conditions were put in place to limit the environmental impacts of the development. Preston CJ said:[68] The Intergovernmental Panel on Climate Change (IPCC) has catalogued the

increasing levels of atmospheric greenhouse gases and the processes affecting climate change in recent years. Its 2001 report compiles the research of hundreds of scientists around the world and is approved by the IPCC member countries, including Australia: Intergovernmental Panel on Climate Change, *Climate Change 2001 – IPCC Third Assessment Report*. It estimates that the rate of global warming over the 20th century is much greater than in the previous nine centuries and it is considered likely that the 1990s was the warmest decade of the millennium. Over the twentieth century the global average surface temperature (the average of near surface air temperature over land, and sea surface temperature) has increased by 0.6 degrees Celsius (+ or - 0.2 degrees Celsius): Intergovernmental Panel on Climate Change, 'Summary for Policymakers', *Climate Change 2001: The Scientific Basis*, IPCC Third Assessment Report at 1. [69] The most recent IPCC Report, released earlier this month, makes it clear that the effects of human behaviour on climate change are impossible to ignore: Intergovernmental Panel on Climate Change, IPCC WGI [Working Group I] Fourth Assessment Report, *Climate Change 2007: The Physical Science Basis*, 'Summary for Policymakers' (as at 8 February 2006). This IPCC report concludes that global atmospheric concentrations of carbon dioxide, methane and nitrous oxide have increased markedly as a result of human activities since 1750 and now far exceed pre-industrial values. It attributes these changes primarily to *fossil fuel use and land-use change, while those of methane and nitrous oxide are primarily due to agriculture*: at 2. [70] Although natural and human ecosystems are adaptive in nature, the rate at which the global climate is changing outweighs the rate at which these systems can adjust. Available data indicates that regional climate changes have already affected a wide range of physical and biological systems across the world. Examples given by the IPCC of the effects of climate change include the shrinkage of glaciers, thawing of permafrost, later freezing and earlier break-up of ice on rivers and lakes, lengthening of mid- to high-latitude growing seasons, poleward and altitudinal shifts of plant and animal ranges, declines of some plant and animal populations, and earlier flowering of trees, emergence of insects, and egg-laying in birds, as well as the death of coral reefs, atolls and mangroves. Although some species may thrive under the new conditions, many of these systems will be irreversibly damaged: Intergovernmental Panel on Climate Change, 'Summary for Policymakers', *Climate Change 2001:Impacts, Adaptation and Vulnerability*, IPCC Third Assessment Report, at 2.1-2.3. The most

recent IPCC Report states that average Arctic temperatures have increased at almost twice the global average rate in the past 100 years: Intergovernmental Panel on Climate Change, IPCC WGI Fourth Assessment Report, *Climate Change 2007: The Physical Science Basis*, 'Summary for Policymakers', at 8. In Australia, the effects of global warming are likely to have serious effects on Australia's natural environment, such as on the Great Barrier Reef. [71] Human systems are also vulnerable to the effects of climate change, especially in relation to water resources and agriculture: Intergovernmental Panel on Climate Change, 'Summary for Policymakers', *Climate Change 2001: Impacts, Adaptation and Vulnerability*, IPCC Third Assessment Report, at 2.4. Many of these effects will be manifested in natural disasters including droughts, floods and avalanches. They will also have a disproportionate impact on impoverished people as those with the least resources have the least capacity to adapt: Intergovernmental Panel on Climate Change, 'Summary for Policymakers', *Climate Change 2001: Impacts, Adaptation and Vulnerability*, IPCC Third Assessment Report, at 2.8. In Australia, climate change seriously threatens to compound the desperate situation in Australia's rural and drought-affected areas. ...[74] The attainment of intergenerational equity in the production of energy involves meeting at least two requirements. The first requirement is that the mining of and the subsequent use in the production of energy of finite, fossil fuel resources need to be sustainable. Sustainability refers not only to the exploitation and use of the resource (including rational and prudent use and the elimination of waste) but also to the environment in which the exploitation and use takes place and which may be affected. The objective is not only to extend the life of the finite resources and the benefits yielded by exploitation and use of the resources to future generations, but also to maintain the environment, including the ecological processes on which life depends, for the benefit of future generations. The second requirement is, as far as is practicable, to increasingly substitute energy sources that result in less greenhouse gas emissions for energy sources that result in more greenhouse gas emissions, thereby reducing the cumulative and long-term effects caused by anthropogenic climate change. In this way, the present generation reduces the adverse consequences for future generations. 135 The link between coal mining and climate change/global warming was recognised in ***Gray v Minister for Planning*** [2006] NSWLEC 720; (2006) 152 LGERA 258, discussed above at [113] – [117], which was concerned

with approval to build a large coal mine known as the Anvil Hill Project in the Hunter Valley in NSW. Pain J held at [100]: "*I consider there is a sufficiently proximate link between the mining of a very substantial reserve of thermal coal in NSW, the only purpose of which is for use as fuel in power stations, and the emission of GHG which contribute to climate change/global warming, which is impacting now and likely to continue to do so on the Australian and consequently NSW environment, to require assessment of that GHG contribution of the coal when burnt in an environmental assessment under Pt 3A*". 136 Following that decision, an assessment of the environmental impacts was made and the NSW Minister for Planning approved the project. By then opponents of the project had turned their attention to a challenge to the Commonwealth Minister's determination that the project did not require approval under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). The proposed coal mine was referred to the Minister under the Act and the Minister's delegate held that it was not a "*controlled action"* as defined and hence did not require approval of the Minister under the Act. There was an unsuccessful judicial review challenge to the validity of that decision based on a jurisdictional fact argument: ***Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources*** [2007] FCA 1480. Stone J noted that the delegate "*accepted that greenhouse gases in the Earth's atmosphere are causing changes to that atmosphere and to weather patterns and that these changes might affect matters protected [by legislation] such as the Hunter Estuary Wetlands Ramsar site*": at [25]. However, Stone J said that the question "*is not whether there is an impact [from greenhouse gas emissions] but whether that impact is, will be or is likely to be significant*": at [39]. The delegate had decided that a significant impact on matters of national environmental significance was not likely in that regard, the evidence suggested that the mine might contribute per annum the equivalent of 0.04% of the world's greenhouse gas emissions. The applicant submitted that it all added up. However, Stone J held that the Act does not require the Minister or a delegate to look at potential impacts in the context of other hypothetical or potential actions. They only had to look at the proposed action and determine whether its impact is likely to be significant. 137 In ***Drake-Brockman v Minister for Planning*** [2007] NSWLEC 490 (Jagot J), reviewed above at [118] – [119], the applicant failed to establish that the Minister was bound to consider ESD at the level of particularity of a

quantitative assessment of greenhouse gas emissions.138 In ***Australian Conservation Foundation v Latrobe City Council*** ***[2004] VCAT 2029;*** (2004) 140 LGERA 100 brown coal resources which resourced the Hazelwood power station in Victoria were due to run out in 2009. The power station's owner applied to develop another coal field that would extend the power station's operation until 2031. A panel was set up to consider the proposal under the *Planning and Environment Act 1987* (Vic). The Minister instructed the panel not to consider matters related to greenhouse gas emissions from the Hazelwood power station. Consequently, the panel excluded from its consideration submissions by environmental groups concerning the environmental impact of greenhouse gases generated by the power station continuing to burn brown coal beyond 2009. Environmental groups brought proceedings in the Victorian Civil and Administrative Tribunal alleging that the panel's exclusion of submissions from its consideration breached s 24 of the Act, which provided that such a panel must consider all submissions referred to it. An environmental effects statement was required under the Act because of the nature of the project and the nature and number of permissions required. Morris J, the President of the Tribunal, construed s 24 to mean that a panel is obliged to consider submissions that are relevant to planning issues and to the particular amendment (at 106). His Honour held that the environmental impacts of greenhouse gas emissions were relevant and therefore the panel should have considered the submissions. Objectives of the Act relating to "*maintaining ecological processes*" and balancing "*the present and future interests of all Victorians*" were taken to indicate the importance of inter-generational effects, such as the consequences of burning brown coal over the long term (at 109).139 In ***Thornton v Adelaide Hills Council*** (2006) 151 LGERA 1 residents of the township of Forreston in South Australia appealed against a decision of the Adelaide Hills Council to issue a development consent for the construction of a shed which would house a 4 megawatt capacity coal-fired boiler and associated bunded concrete pad or "*bunker*" for coal storage subject to conditions. The appellants owned land within Forreston and were concerned about the operation of the coal-fired boiler and its adverse environmental impacts, in particular the pollution of water catchment areas, emissions from the stack and the release of greenhouse gases into the atmosphere. The Environment, Resources and Development Court of SA held that the principles of ESD should be taken into account by a relevant authority

when assessing a proposed development and that councils are under an obligation to facilitate development that is sustainable: at [40], [42]. The court noted that the combustion of fossil fuels is the greatest source of greenhouse gases in the world, particularly carbon dioxide, and that the consequences of global warming have already been, and continues to be, observed. The court referred to the Third Assessment Report of the IPCC (2001) and the CSIRO report *Climate Change in South Australia* (March 2003). In the court's opinion, increasing the emission of greenhouse gases is not consistent with the principles of ESD. However, as the appellants had made no real attempt to provide the court with evidence of the likely increase in greenhouse gas emissions caused by the proposed development compared with the existing operation, the court declined to reject the proposal on this ground. The court acknowledged the effect of greenhouse gases as follows at [43]:It is well recognised that the combustion of fossil fuels (including coal) is the greatest source of greenhouse gases in the world, particularly carbon dioxide. Greenhouse gases concentrate in the atmosphere, enhancing the natural greenhouse effect and contributing to global warming. The consequences of global warming have already been and are continuing to be observed. They include major impacts on physical and biological systems worldwide, with consequential impacts on human systems. While there will be some seemingly beneficial impacts, generally the impacts will depend on the adaptive capacity of systems to adjust, with some inevitable negative consequences for human life and health and social and economic well-being. So much was reported in the Third Assessment Report of the International [sic] Panel on Climate Change (2001). In 2002, Australia's national greenhouse gas emissions per capita were the highest of all industrial nations...140 In ***Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage [2006] FCA 736;*** (2006) 232 ALR 510 there were proposals to open two new Queensland coal mines. Environmental groups bringing the case alleged that burning the coal would produce significant greenhouse gas emissions contributing to global warming. The legal challenge was to the validity of a decision by the delegate of the federal Minister that the referred proposals were not *"controlled actions"* under the *Environment Protection Biodiversity and Conservation Act 1999*. The argument was that the climate change impacts of the proposed mines should have been taken into consideration in deciding whether that Act was applicable. Dowsett J found that the

Minister's delegate had in fact taken the greenhouse gas issue into consideration. His Honour also said at [72]: *"I have proceeded upon the basis that greenhouse gas emissions consequent upon the burning of coal mined in one of these projects might arguably cause an impact upon a protected matter, which impact could be said to be an impact of the proposed action...However, I am far from satisfied that the burning of coal at some unidentified place in the world, the production of greenhouse gases from such combustion, its contribution towards global warming and the impact of global warming upon a protected matter, can be so described."*141 Against the general trend of cases reviewed above, a Queensland tribunal was dismissive of the IPCC *Fourth Assessment Report* and the *Stern Review on the Economics of Climate Change* in ***Re Xstrata Coal Queensland Pty Ltd and Ors*** [2007] QLRT 33. The *Stern Review* (HM Treasury 2006), was commissioned by the UK government as an independent expert review (Sir Nicholas Stern is the former chief economist of the World Bank). The Stern Review's summary of conclusions included that there was still time to avoid the worst impacts of climate change if strong action was taken now; climate change could have very serious impacts on growth and development; the costs of stabilising the climate are significant but manageable whereas delay would be dangerous and much more costly; and that action on climate change is required across all countries and need not cap the aspirations for growth of rich or poor countries. In ***Xstrata*** there was an application to the Queensland Land and Resources Tribunal by a mining company, Xstrata, for a statutory licence to extend an open cut coal mine and for a related statutory environmental authority. The function of the tribunal was to make a recommendation to the Minister that the application be granted, with or without conditions, or rejected. There were objections by (inter alia) the Queensland Conservation Council that the increased mining activity would result in an increase in greenhouse gas emissions and would contravene principles of ESD and give rise to an adverse environmental impact unless conditions were imposed to avoid, reduce or offset such emissions resulting from the mining, transport and use of the coal. The presiding member of the tribunal made orders recommending to the Minister that Xstrata's applications be granted without any of the conditions sought by the objectors.142 An appeal was allowed by the Queensland Court of Appeal and the matter was remitted for determination according to law, on the ground of denial of natural justice by the tribunal:

Queensland Conservation Council Inc v Xstrata Coal Queensland Pty Ltd and Ors [2007] QCA 338. It was not a function of the Court of Appeal to express a conclusion whether or not the methodology and analysis relied on by the tribunal was valid or not: at [63]. The Court of Appeal held that "*[t]he fact that climate change is occurring and that anthropogenic greenhouse gas emissions have contributed to it, was undoubtedly common ground between the parties at the hearing…What was in issue was the extent to which the proposed mine would contribute to global warming and whether, in the applicable factual and statutory matrix the Tribunal should impose conditions on the recommended granting of Xstrata's applications in response to the mine's potential contribution to global warming*": at [41]. 143 In the present case there is no submission that climate change is not occurring nor that anthropogenic greenhouse gas emissions have not contributed to it. **ESD: the present case**144 The applicant pleads in her Points of Claim that ESD and the impacts of the proposal on the environment were mandatory relevant considerations which the Minister failed to take into account, as follows: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.35. The Minister failed to consider ESD by failing to consider the impact of the proposal on Endangered Ecological Communities (*EEC's*) listed under the *Threatened Species Conservation Act 1995*.**Particulars**a. The assessment of flora and fauna impact in the EA was based on vegetation mapping carried out in around 2001, which identified the presence on Sandon Pt of an EEC known as Sydney Coastal Estuary Swamp Forest Complex (*SCESFC*).b. In 2004 SCESFC was omitted as a listed EEC and replaced with a number of EECs which were similar but

not identical in composition to SCESFC.c. As the consequence of the above, DEC recommended that the proponent should undertake further mapping to verify the extent and nature of the newly-defined EECs occurring at Sandon Point.d. The proponents failed to undertake any further vegetation mapping.e. Without up-to-date information about the location and extent of EECs, the Minister was unable to consider the likely impacts of the proposal on EECs.f. Failure to consider the impact of the proposal on EECs shows a failure to consider the principles of ESD, in particular the principle of the conservation of biological diversity.36. When making decision under Part 3A of the Act, the Minister was obliged to consider the impacts of the proposal on the environment.**Particulars**a. The objects and structure of the Act show that it was the intention of the legislature to ensure that the environmental impacts of the proposals were considered.37. The matters set out in paragraphs 30 – 40 above demonstrate that the Minister has failed to consider the impacts of the proposal on the environment.38. In light of the matters set out at paragraphs 31-37 above, the Minister's decision to grant the Concept Plan Approval is invalid on the grounds that in making that decision he failed to take into consideration a mandatory relevant consideration.145 The issues are whether the Minister had an implied obligation to consider the principles of ESD in the following respects and, if so, whether he failed to do so:(a) whether the impacts of the proposed development would be compounded by climate change. In particular, 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 development on the site (**Climate Change Flood Risk**); and(b) the impact of the proposal on Endangered Ecological Communities (**EECs**) listed under the *Threatened Species Conservation Act 1995* because there was no up-to-date mapping to verify the extent and nature of the EECs.146 Although the pleading refers to an obligation to consider the principles of ESD as well as to an obligation to consider the impacts of the development proposal on the environment, the applicant's submissions focused on the former. For present purposes, the latter is subsumed within the former, given that the principles of ESD are vitally concerned with the impact of development on the environment. 147 The applicant submits as follows that the Minister had an implied obligation under s 750 to consider ESD:(a) a conclusion as to whether a particular matter is a mandatory relevant consideration may

be drawn by implication from the subject matter, scope and purpose of the statute: ***Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40;*** (1986) 162 CLR 24 at 40;(b) s 75O of the *EPA Act* expressly provides only a list of documents which the Minister is required to consider rather than a list of substantive matters. It would be absurd if there were no mandatory substantive matters which the Minister is obliged to consider. As a minimum, those implied matters must include the principles of ESD and the impacts of the proposal on the environment;(c) one of the objects of the *EPA Act* is to encourage ESD: s 5(a)(vii). Section 4 defines ESD by reference to the definition in s 6(2) of the *Protection of the Environment (Administration) Act 1991*, which includes descriptions of the precautionary principle, inter-generational equity and conservation of biological diversity and ecological integrity;*(d) "The Minister is required to act in manner consistent with and so as to further the objects of the Act"*: ***Murrumbidgee Ground-Water Preservation Association v Minister for Natural Resources*** [2004] NSWLEC 122 at [174] and [178] per McClellan CJ in relation to the *Water Management Act 2000* (NSW);(e) all decisions under the *EPA Act*, including decisions made under Part 3A, require that ESD principles be considered: ***Gray v Minister for Planning*** [2006] NSWLEC 720; (2006) 152 LGERA 258 at 291 [114] – [115];(f) the objects and structure of the Act show that it was the intention of the legislature to ensure that the environmental impacts of the proposal were considered.148 A matter may be a mandatory relevant consideration by implication from the subject matter, scope and purpose of the statute. That is one of the propositions in Mason J's classic exposition in ***Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40;*** (1986) 162 CLR 24 at 39 – 41 (omitting citations):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)149 One of the cases

relied on by the applicant is ***Murrumbidgee Ground-Water Preservation Association v Minister for Natural Resources***, discussed above at [93] – [95]. The case supports the applicant in the present case to the extent that his Honour's general approach is that for which the applicant contends.150 The applicant also relies on ***Gray v The Minister for Planning***, discussed above at [113] – [117]. There Pain J held that under Part 3A of the *EPA Act* the Director-General of the Department of Planning was obliged to take ESD principles into consideration when forming a view as to whether an environmental assessment prepared by a concept plan proponent adequately addressed the Director-General's environmental assessment requirements. The case supports the applicant because, as discussed earlier, her Honour held that the Minister was obliged to take into account the public interest, including ESD. Strictly, that was obiter since it was not an issue for decision in the case. 151 Authorities reviewed above (most recently, ***Telstra***) establish that under Part 4 of the *EPA Act* a consent authority must consider ESD when granting a development consent. That obligation arises under a different statutory scheme in s 79C(1), which requires a consent authority "*to take into consideration such of the following matters as are of relevance to the development the subject of the development application*". One of those matters is "*the public interest*", which has been held to include ESD. In addition, in merits appeals the Court is bound to have regard to the public interest: *Land and Environment Court Act 1979* s 39(4).152 There is no equivalent public interest consideration provision in s 75O or any other provision of Part 3A of the *EPA Act*. However, one of the documents which s 75O mandates that the Minister must consider when approving a concept plan is the Director-General's report on the project and the reports and recommendations contained in the report. Clause 8B of the *Environmental Planning and Assessment Regulation 2000*, promulgated pursuant to s 75Z, (set out above at [10]) requires the Director-General to include in the report "*any aspect of the public interest that the Director-General considers relevant to the project*".153 In my opinion, the issue under s 75O falls to be determined having regard to cl 8B which, together with Part 3A, forms part of the legislative scheme. In ***Brayson Motors Pty Ltd (in liq) v Federal Commissioner of Taxation*** [1985] HCA 20; (1985) 156 CLR 651 at 652 Mason J observed: "*One looks at regulations, not to construe an overall scheme or to throw light on ambiguity in a statutory provision, but to ascertain what the scheme is*". That is what Dixon J did

in ***Deputy Federal Commissioner of Taxation (SA) v Ellis & Clark Ltd*** ***[1934] HCA 54;*** (1934) 52 CLR 85 at 89- 95. Mason J's dictum was applied by the Full Federal Court in ***Flanagan v Commissioner of Australian Federal Police*** (1996) 60 FCR 149 at 196 – 197. Similarly, in ***Minister for Immigration and Multicultural Affairs v A*** [1999] FCA 1679; (1999) 91 FCR 435 at 445 [47] the court referred to the Act and regulations there under consideration as constituting a "*single legislative scheme*", citing ***Brayson***.154 In my opinion, the reference to "*public interest*" in cl 8B includes the principles of ESD. That is consistent with the ESD cases decided under s 79C of the *EPA Act* to which I have referred. Clause 8B requires the Director-General to form an opinion as to what aspects of ESD (if any) are relevant to the project and, therefore, to be included in the report. The Minister is not obliged to initiate an independent inquiry to verify the Director-General's opinion.155 The question is whether, in the circumstances, the Minister had an implied obligation to consider ESD at the level of particularity alleged by the applicant. It was on the high level of particularity that the applicant's case foundered in ***Drake-Brockman*** (above). There Jagot J considered ***Foster v Minister for Customs and Justice*** ***[2000] HCA 38;*** (2000) 200 CLR 442 at [23] where Gleeson CJ and McHugh J referred to Brennan J's statement of principle in ***Peko-Wallsend*** at 55 that "*The Court has no jurisdiction to visit the exercise of a statutory power with invalidity for failure to have regard to a particular matter unless some statute expressly or by implication requires the repository of the power to have regard to that matter or to matters of that kind as a condition of exercising the power...*" Gleeson CJ and McHugh J then observed at [24] that "*The level of particularity with which a matter is identified for the purpose of applying this principle may be significant. A related question arises where the failure complained of is not a complete failure to address a certain subject, but a failure to make some inquiry about facts said to be relevant to that subject*". ***Climate change: flood risk***156 I turn to the first specific ESD complaint, that the Minister failed to consider whether the impacts of the proposed project would be compounded by climate change, in particular, 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").157 I accept that flooding was identified as a major constraint on development of the site. There was no submission to the contrary. 158 The

Director-General's Environmental Assessment Report did not refer to climate change or ESD other than in Appendix E thereto which contained the proponents' reports including an Environmental Assessment Report by Don Fox Planning in response to the Director-General's requirements. Section 10.2 of the Environmental Assessment Report of Don Fox Planning is headed "*Ecologically Sustainable Development*" and over some four pages assesses the project by reference to the ESD principles in s 6(2) of the *Protection of the Environment (Administration) Act 1991*: namely, the precautionary principle, intergenerational equity, biological diversity and ecological integrity, and the valuation and pricing of environmental resources. Section 10.3 referred to "*Climate Change and Greenhouse Effect*" in a limited way as follows:The various forms of residential development proposed in this Concept Plan can already take place under the current Residential 2(b) zoning applying to the land under Wollongong LEP 1990.The submission to the Minister for inclusion of the site as a State Significant Site within Schedule 3 of the SEPP (Major Projects) increases the extent open space land uses in the form of the Environmental Protection 7(a) zone thereby reducing the opportunities for development of the Sandon Point locality.The reduction in development potential of the land from the current zoning regime is a positive contribution in terms of ESD principles and climate change and greenhouse effects.The Concept Plan also provides opportunities to reduce car usage by locating higher densities in the northern part of the site close to Thirroul Railway station and the incorporation of a bus route along the north-south link.Sustainable building design practices particularly governed by SEPP 65 and SEPP (BASIX) will apply to all forms of future housing on the site to ensure that water management, energy efficiency, thermal comfort are integral to the design of future buildings. These details will be provided at the Project Plan stage or the DAs for individual houses.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] HCA 30;*** (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.***Endangered Ecological Communities***168 The applicant's second specific ESD complaint is that the Minister failed to consider the principles of ESD in relation to the impact of the proposal on Endangered Ecological Communities (EECs) listed under the *Threatened Species Conservation Act 1995* because (it is said) there was no up-to-date mapping to verify their extent and nature.169 In my view, there was no obligation on the Director-General, let alone the Minister, to consider ESD at such a high level of particularity (***Foster, Drake-Brockman***, above). I am not satisfied that the Minister and the Director-General did not sufficiently consider ESD in relation to this aspect. My reasons are as follows. 170 Cumberland Ecology's updated Flora and Fauna Assessment Report of 30 May 2006, which was before the Minister and the Director-General, stated:The Endangered Ecological Community (EEC) which was identified by Connell Wagner as occurring on the site was at the time listed as Sydney Coastal Estuary Swamp Complex (NSW Scientific Committee 2004d). This EEC was omitted from the NSW Scientific Committee list of final determinations. This community type has now been incorporated within the recently-named Swamp Sclerophyll Forest on Coastal Floodplains of the NSW North Coast, Sydney Basin and South East Corner Bioregions (NSW Scientific Committee 2004c) EEC, referred to as Swamp Sclerophyll Forest, gazetted in 2004. An assessment of significance, shown in Appendix C to this letter, has been prepared for this newly listed EEC, which predicts no significant impacts as a result of the proposal.Also before the Minister and the Director-General was another report by Cumberland Ecology dated 26 September 2006 which was in response to issues raised regarding the Concept Plan.171 The Director-General's report at paragraph 6.2.5, headed "*Flora and Fauna*" summarised the public submissions received in relation to flora and fauna and continued: In addition to these issues, DEC [Department of Environment and Conservation now known as the Department of Environment and Climate Change] asked the Proponents to provide more recent vegetation mapping of Sandon Point. This request was made as the vegetation mapping used by the Proponents dated from 2001 and referred to an EEC (the Sydney Coastal Estuary Swamp Forest Complex) that has been replaced by new EEC's listings in the *Threatened Species Conservation Act 1995*.The Proponents dealt with the issues summarised above and the matter of

vegetation mapping in their Response to Submissions. In regards to the vegetation mapping, the Proponent advised that they had not undertaken recent mapping. For the purposes of clarity, consideration of the Proponents' response is detailed below in relation to each creek and the Turpentine Forest. The location of these creeks and the Turpentine Forest are shown at Figure 2.172 The Director-General's report continued at 27:The Department recommends that the Concept Plan be modified to ensure that:· the extent of developable land and the riparian corridor widths of Woodlands Creek is consistent with the Charles Hill Report recommendations,· APZs [asset protection zones] are not located within any riparian corridor and within land proposed to be zoned for environmental protection; and· WSUD [water sensitive urban design] outside of any environmental protection zone can form part of APZs.The Department recommends that any rezoning of Sandon Point:· is consistent with the Concept Plan as modified;· place environmental protection zoning over EECs, the Turpentine forest and Class 1 Bird Habitats (where they overlap with either the riparian corridors and Turpentine Forest)...173 Thus, as the respondents submit, the updated mapping was not about a failure to have regard to a new EEC. It was about an absence of remapping to address the same plants which had been subjected to new classification. It appears that the EECs had changed in their nomination under the *Threatened Species Conservation Act 1995* and that more recent vegetation mapping was not considered necessary because the recommendation was to place environmental protection zoning over EECs. In my opinion, the Director-General and the Minister, thereby did sufficiently consider the principles of ESD in relation to the impact of the proposal on EECs. Consequently, I do not accept the applicant's contention in relation to EECs.**Conclusion as to the second ground of challenge** 174 For the reasons given earlier, I uphold the second ground of challenge insofar as it is based on the climate change consideration. **Third ground of challenge: lack of finality/deferral of questions**175 The third ground of challenge is that the Minister's concept plan approval was invalid because the concept plan approval lacked finality or deferred questions for later consideration. It is convenient to refer to the principle thereby invoked as the "finality principle". This ground of challenge is pleaded in paragraphs 39 to 41 of the Points of Claim as follows:39. The Minister deferred for later consideration the question of the flooding and flora and fauna impacts which may be caused by the proposed

development due to the narrowing of the Woodlands Creek Corridor.

Particularsa. Modification A1(3) provides that certain development may occur on the area hatched pink on the map following that paragraph where the proponent has addressed the matters in Modification A2 to the satisfaction of the consent authority.b. Modification A2 provides that the final design for Woodlands Creek must meet certain performance criteria.

40. The Concept Plan Approval lacked finality because it did not resolve the question of the creek design and creek corridor width for Woodlands Creek, leaving open the possibility that the final form of development may be significantly different from that which had been approved.

41. The Minister deferred for later consideration the question of possible impacts of the proposal Aboriginal cultural site identified in the report of Stuart Huys dated June 2006.176 The applicant submits that:(a) a concept plan approval cannot lack finality nor defer essential matters because that would be against the purpose of the process;(b) there are several indications in Part 3A that concept plan approvals are intended to be final:(i) the concept plan assessment process is identical to the project assessment process. Therefore, the same degree of certainty is required in each case;(ii) any project approval subsequently given in connection with an approved concept plan must be generally consistent with the approved concept plan: s 75P(2). Where this subsection applies, there will not be any significant changes to the project between the concept plan approval and the project approval;(iii) the Minister when giving an approval for a concept plan may decide that no further environmental assessment is required, in which case the Minister may give project approval without further application, environmental assessment or report: s 75P(1)(c);(iv) the terms of s 75O(1), that the Minister may either "*give or refuse to give approval for the concept plan for the project*" are similar to the old s 91(1) (the antecedent of the current s 80(1)) in Part 4 where the finality principle is established;(c) the fact that a concept plan does not need to contain a detailed description of the proposal does not detract from the requirement for finality and certainty. One can have certainty without having detail;(d) s 75O does not allow the Minister to condition concept plan approvals, which only makes it clearer that the exercise of the power must be final and certain;(e) Reference was made to ***Mison v Randwick Municipal Council*** (1991) 23 NSWLR 734; ***City of Unley v Claude Neon Ltd*** (1983)

49 LGRA 65 at 68; ***Weal v Bathurst City Council [2000] NSWCA 88;*** (2001) 111 LGERA 181; ***Farah v Warringah Council*** [2006] NSWLEC 191; ***Mid Western Community Action Group Inc v Mid-Western Regional Council & Stockland Development Pty Ltd*** [2007] NSWLEC 411 at [21] – [24] (Jagot J).177 The respondents submit that:(a) all this ignores that s 75O is only concerned with approval of a plan of a "*concept*" and that the legislative intent is to permit a project to be formulated initially as a concept and thereafter defined by later approvals (if appropriate); (b) the legislation envisages that a concept approval may dictate future actions which are required (particularly environmental assessment); (c) the principle of finality is inappropriate in this context. It applies to a development consent under Part 4 by virtue of the construction of s 80 of the *EPA Act*;(d) a concept plan has to outline the scope of the project and any development options and a detailed description of the project is not required at the time of lodgement and determination: s 75M(2). This contrasts with the requirement for approval of the project where the application is to "*describe the project*": s 75E. For a concept plan, the scope or extent of the project is to be outlined, not even "*described*"; and(e) when giving approval for a concept plan, the Minister may determine the further environmental requirements for approval to carry out the project for any particular stage of the project: s 75P(1).178 The threshold issue is whether the finality principle applies to a concept plan approval under s 75O(4). The question is one of statutory construction. The finality principle is an aspect of the "*Mison*" principle, as it is sometimes euphemistically called, which has gained currency under Part 4 of the *EPA Act: **Mison v Randwick Municipal Council*** (1991) 23 NSWLR 734; ***Transport Action Group Against Motorways Inc v Roads and Traffic Authority [1999] NSWCA 196;*** (1999) 46 NSWLR 598 at 629 [117] per Mason P; ***Kindimindi Investments Pty Ltd v Lane Cove Council [2006] NSWCA 23;*** (2006) 143 LGERA 277. However, the principle "*must be approached with care. The issue always turns on the construction of the particular statute*": ***Winn v Director-General National Parks and Wildlife*** [2001] NSWCA 17; (2001) 130 LGERA 508 at 514 [15] per Spigelman CJ.179 In ***Mison***, the Court of Appeal held invalid a consent to a development application because it included the following condition: "*Overall height of the dwelling-house being reduced to the satisfaction of Council's chief town planner*". Thus, the approved height remained to be determined and might fall at any point within an undefined

range. The relevant power was found in s 91(1) of the *EPA Act* - the predecessor to the current s 80(1) - which provided that "*A development application shall be determined by (a) the granting of consent to that application, either unconditionally or subject to conditions*". The decision in ***Mison*** was summarised and explained by Spigelman CJ in ***Winn v Director-General of National Parks and Wildlife*** [2001] NSWCA 17; (2001) 130 LGERA 508 (NSWCA) at 514 – 515:[16] In *Mison*, this Court held that the condition there under consideration was such that: (i) The consent was not a *consent* by reason of the significance of the issue left for further determination (at 738-739; 352-353 per Priestley JA and at 739G-740B; 353-354 per Clarke JA); and (ii) The consent was not a *consent to the application* because it left open the possibility that the further determination would significantly alter the development for which the application was made (at 737A-D; 351 per Priestley JA and 740E-F; 354 per Clarke JA). [17] However, as Mason P, with whom Sheller JA agreed, said in *Transport Action Group against Motorways Inc v Roads and Traffic Authority (NSW) [1999] NSWCA 196; (1999) 46 NSWLR 598* at 629 [117]; [1999] NSWCA 196; 104 LGERA 133 at 161 [117]: Mison does not stand for the proposition that any retention of flexibility or any delegation to a third party of the function of supervising a later stage of the development is prohibited. [18] Indeed, as Samuels JA said in *Scott v Wollongong City Council* (1992) 75 LGRA 112 (at 118): ... it is common to find that development consent is subject to conditions which provide for some aspects of the matter stipulated to be left for later and final decision by the consent authority or by some delegate or offences to whose satisfaction, for example, specified work is to be performed. Such provisions are inevitable since it cannot be supposed that a development application can contain ultimate detail or that a consent can finally resolve all aspects of a proposal with absolute precision. [19] As Mason P pointed out in *Transport Action Group v Road and Traffic Authority (NSW)* (at 629 [117]; 161 [117]) *Mison* itself *recognised that questions of degree are involved*. The determination of whether a condition deprives a purported consent of the character of a *consent* or of a *consent to that application* will often be difficult.180 More recently, ***Mison*** was explained in ***Kindimindi Investments Pty Ltd v Lane Cove Council [2006] NSWCA 23;*** (2006) 143 LGERA 277 (NSWCA) at 285 - 286 by Basten JA (Handley JA and Hunt AJA agreeing) as follows:[24] In accordance with principles explained by this Court in *Mison v Randwick Municipal Council*

(1991) 23 NSWLR 734, 73 LGRA 349, there may be no lawful consent to a development application where the consent falls within one of two categories of overlapping circumstances. The first category is where a condition has the effect of *significantly altering the development in respect of which the application is made*: at 737B; 351 (Priestley JA). The second category is where a council has purportedly granted consent, but in terms which lack either finality or certainty, so that there is, in substance, no effective consent to the application.[25] These two categories may overlap in circumstances where consent is granted subject to a condition which allows for significant variation of the development proposed. ...[28] Although different language is used in relation to the separate categories of invalidity, it would seem that the test of uncertainty or lack of finality, being determined by reference to an important aspect of the development, requires that what is left uncertain must be the possibility that the development as approved may be significantly different from the development the subject of the application. Thus, the result should not be different depending upon which approach is adopted: a consent will only fail for uncertainty where it leaves open the possibility of a significantly different development. On other hand, a consent may fail, within the first category, where a condition of great precision and certainty of operation results in a significantly different development. Whichever category is preferred in the case of a consent which lacks certainty or finality, it is helpful to bear in mind the relationship between the two tests.His Honour elaborated at 292:[54] According to the first category identified in *Mison*, the imposition of a condition which has the effect of significantly altering the development, will invalidate the consent because the development consented to is not that for which approval was sought. That test requires, of course, an evaluative judgment. *Mison* itself involved the construction of a single house. The principle it established would not necessarily operate in the same way in relation to a complex and extensive development with a number of severable elements. In the present case, accepting that a certain lack of precision in the two conditions 1(a) and (b) may make an evaluative judgment difficult, treating the development as a whole, neither the proposed change to the roof line of the residential component, nor the closing in of two sides of the carpark component, could be seen as significantly affecting the development. On the other hand, it would be possible, in some circumstances, to treat a change in the roofline of the residential part of the development as a significant

alteration, if viewed in isolation as a separate part of the development. Whether that is the appropriate question to ask is an issue which can be put to one side, however, as no challenge was mounted on that basis.[55] A challenge based on the second category identified in *Mison*, which was relied upon, involves two elements which may need to be separated. Thus, a condition may be uncertain but final, in the sense that it does not foreshadow a further judgment, either by the consent authority, or by a delegate or a third party. However, as noted by Mason P in *Transport Action Group Against Motorways Inc v Roads and Traffic Authority (NSW)* *[1999] NSWCA 196*; (1999) 46 NSWLR 598, 104 LGERA 133 at [112] mere uncertainty may not give rise to invalidity. Whether or not it does is likely to depend upon a different question, namely whether the condition complies with the statutory limits imposed upon the power of the authority. To the extent that the cases accept that a degree of *practical flexibility* (as in *Scott v Wollongong City Council* (1992) 75 LGRA 112 at 118 per Samuels AP) or imprecision (as in *Genkem Pty Ltd v Environment Protection Authority* (1994) 35 NSWLR 33, 85 LGERA 197, per Gleeson CJ) may not result in invalidity, the reason is that the relevant degree of flexibility or imprecision does not contravene any statutory limit on the power being exercised.181 After ***Mison***, in 1997 Part 4 of the *EPA Act* was amended to include a new s 80A which modifies the finality principle. It provides in part:**80A(1) Conditions—generally**A condition of development consent may be imposed if:

(a) it relates to any matter referred to in section 79C (1) of relevance to the development the subject of the consent, or

(b) it requires the modification or surrender of a consent granted under this Act or a right conferred by Division 10 in relation to the land to which the development application relates, or

(c) it requires the modification or cessation of development (including the removal of buildings and works used in connection with that development) carried out on land (whether or not being land to which the development application relates), or

(d) it limits the period during which development may be carried out in accordance with the consent so granted, or

(e) it requires the removal of buildings and works (or any part of them) at the expiration of the period referred to in paragraph (d), or

(f) it requires the carrying out of works (whether or not being works on land to which the application relates) relating to any matter referred to in section 79C (1) applicable to the development the subject of the consent, or

(g) it modifies details of the development the subject of the development application, or

(h) it is authorised to be imposed under section 80 (3) or (5), subsections (5)–(9) of this section or section 94, 94A, 94EF or 94F.

(2) Ancillary aspects of developmentA consent may be granted subject to a condition that a specified aspect of the development that is ancillary to the core purpose of the development is to be carried out to the satisfaction, determined in accordance with the regulations, of the consent authority or a person specified by the consent authority....**(4) Conditions expressed in terms of outcomes or objectives**A consent may be granted subject to a condition expressed in a manner that identifies both of the following:

(a) one or more express outcomes or objectives that the development or a specified part or aspect of the development must achieve,

(b) clear criteria against which achievement of the outcome or objective must be assessed. 182 A condition of a development consent will only be invalid if it falls outside the class of conditions permitted by Part 4, which now falls to be determined primarily by reference to the terms of s 80A. The intention of s 80A(4) is to allow an initial level of uncertainty and lack of finality. It allows a condition to require a variation of a proposal where the intended result is sufficiently identified, but the means of achieving it are left to the proponent: ***Kindimindi*** at [57], [59]. It has been said that s 80A(1)(a) and (g) (read with ss 79C, 80(4)), "*mean that, in the particular circumstances dealt with by those provisions, conditions may be imposed that have the effect that the development approved is substantially different from that applied for. In my opinion, the statement in* Mison *is still correct...but in order for that principle to apply in those circumstances, the alteration must go beyond alterations of the kind*

contemplated by those sections": ***Warehouse Group (Australia) Pty Ltd v Woolworths Ltd*** [2005] NSWCA 269; (2005) 141 LGERA 376 (NSWCA) at [89] per Hodgson JA.183 ***Kindimindi*** was analysed by Jagot J in ***Mid Western Community Action Group Inc v Mid-Western Regional Council & Stockland Development Pty Ltd*** [2007] NSWLEC 411 at [21] as follows:In *Kindimindi* No 1, Basten JA (with whom Handley JA and Hunt AJA agreed) identified three (potentially overlapping) circumstances said to constitute a lack of finality in the grant of consent. First, imposing a condition that has the effect of significantly altering the development in respect of which the application was made. Secondly, imposing a condition leaving open the possibility that the development as approved may be significantly different from the development in respect of which the application was made. Thirdly, imposing a condition which is final in that it does not foreshadow any further judgment, but in terms that are imprecise and uncertain (at [24], [27], [54] and [57. 184 The applicant submits that the finality argument is supported by the following extract from the Second Reading Speech for the Bill that introduced Part 3A of the *Environmental Planning and Assessment Amendment (Infrastructure and other Planning Reform) Bill 2005* (Hansard 27 May 2005 p 16332): "*Concept approvals will have statutory force and are designed to provide up-front certainty for those projects or programs which are either long term or complex, or where overarching strategies require statutory endorsement so their component parts can proceed with bankable security...Concept approvals will increase certainty up front and reduce environmental and investment risks and costs*". Consideration of such extrinsic material is permissible for limited purposes under s 34 of the *Interpretation Act 1987* (NSW). I do not think that it is dispositive in the present case. No doubt concept approval increases certainty up-front to a degree (although the description "*bankable security*" may be a flourish) but that cannot mean that it should be equated with a project approval. Notwithstanding a concept plan approval, a subsequent project approval may be refused or granted conditionally: s 75J(4). 185 In my opinion, as a matter of construction, the finality principle does not apply to a concept plan approval under s 75O in Part 3A of the *EPA Act* for the following reasons. 186 First, a "*concept*" is a "*general notion*": *Australian Oxford English Dictionary* (1999). Under Part 3A of the *EPA Act a* concept plan only has to "*outline the scope of the project*" and any "*development options*" and a "*detailed description of the project is not required*": s

75M(2). The legislation does not contemplate that a concept plan has to have the finality of a development the subject of a subsequent project approval. Lack of finality is inherent in the notion of a concept plan.187 Secondly, the finality principle, as developed, is concerned with conditions of development consents under Part 4. It was developed as a matter of statutory construction of a provision antecedent to s 80 in Part 4, and has been substantially modified by the later enactment of s 80A. In Part 3A there is no provision for conditions of a concept plan approval. Rather, there is a power under Part 3A for "*modifications of the project"* : s 75O(4). No such power appears in Part 4. The nearest provision in Part 4 is s 80A(1)(g) (introduced after ***Mison***), which permits a condition which modifies *"details"* of a development the subject of a development application, as distinct from a condition which modifies the development as a whole. 188 Thirdly, if there is scope for the application of the finality principle in Part 3A, it more naturally belongs to the next phase of project approval, which unlike a concept plan approval, may be granted on conditions. In that regard s 75J(4) acknowledges the distinction between modifications of the project and conditions of approval: *"A project may be approved under this part with such modifications of the project or on such conditions as the Minister may determine"*. 189 Fourthly, in my opinion, the modifications in issue were permitted under the provisions of Part 3A, particularly under s 75O(4) or 75P(1)(a), for the following reasons.
Woodlands Creek190 Woodlands Creek is one of the creeks that drain the catchments to the west of the railway line and that drain through the proposed project site to the sea. The western portion of Woodlands Creek on the proposed project site is currently piped underground. The proponents agreed that it was desirable to restore surface flows in this location and proposed a creek corridor designed to convey 100 year recurrence floodwaters without causing flooding of adjoining land. An issue arose as to the extent of the corridor. The Department of Planning obtained advice from an independent expert whose primary concern was whether the proposed corridors for Woodlands Creek and other creeks were of sufficient width to safely convey floodwaters in 100 year recurrence flood events without leading to inundation of adjoining lands and other adverse impacts. The following advice by the independent expert was reproduced in the Director-General's Environmental Assessment Report:As I have indicated, it is possible to engineer a solution that will ensure stream stability. However, it would appear to me that for this to be

achieved, there is a need to increase the sinuosity of the stream in order to reduce the energy gradient of flood waters and thereby reduce flow velocities and shear stresses to acceptable levels. This is likely to require widening of the stream corridor. There is also a need to ensure that the impacts of the works on flows downstream of the site can either be minimised or mitigated.In this context, it is recommended that a precautionary approach be adopted in defining the minimum creek corridor width. This precautionary approach should seek to allow for a *natural* channel to be created where possible, while at the same time allowing engineered systems to be implemented where required to minimise the potential for bed scour and bank erosion. On this basis, the creek corridor should be retained as per the *minimum* corridor width specified in the Hill Report, and with provision made for this to be re-assessed through the detail design process.191 Accordingly, the Director-General's Environmental Assessment Report recommended modifications to the project, in Modifications A1 and A2.192 Modification A1(3) provided in relation to the area shaded pink on a map (bordering the western portion of Woodlands Creek) that "*Development described in (1) may occur on the area hatched pink where the Proponent has addressed the matters in Modification A2, Schedule 2 to the satisfaction of the consent authority*". Thus, Modification A1(3) increased the width of the riparian corridor proposed by the proponents by the area hatched pink in the plan which appears in Modification A1, while stipulating that if the proponent satisfied the performance criteria in Modification A2 to the satisfaction of the consent authority, that pink area could be developed. Modification A2 (2) sets performance criteria for Woodlands Creek, as follows:(a) The low flow channel shall contain a 20 year recurrence flood;(b) The flood waters up to the 20 year recurrence flood will ensure that:(i) creek banks are not significantly scoured or eroded, or(ii) the creek bed is not significantly scoured or eroded, or(iii) there is minimal dislodgement of vegetation located within the creek corridors;(c) Major erosion or channel metamorphosis (that is, no catastrophic failure) does not occur in events rarer than the 20 year recurrence flood;(d) Flow velocities and shear stresses are managed to ensure that there are no increased risks to either the downstream street corridor or downstream properties from:(i) erosion,(ii) channel metamorphosis, or(iii) flooding.193 The applicant submits that (a) Modifications A1 and A2 unlawfully allows the question of the final environmental impact of the design of Woodlands

Creek to be unknown and deferred for later consideration because the creek's design itself was unknown; (b) the Minister failed to finally determine the question of the extent of buffers which should be allowed around the creeks and instead set up a process whereby the applicant could apply for an extension of the developable area by submitting documentation to the Minister at a later date; and (c) there should have been an approved engineering plan or the like which achieved certainty. 194 In my opinion these modifications were permitted under s 75O(4). Moreover, in my opinion (as the respondents submit) even if the finality principle applies to concept plan approvals, there was sufficient finality: performance criteria, design criteria, location and width were all known and all that was missing was a detailed engineering plan which conformed with the modification. **Women's Area**195 The applicant pleads that the Minister deferred for later consideration the question of possible impacts of the proposal on an Aboriginal cultural site identified in the report of Stuart Huys dated June 2006. That site is the "Women's Area" referred to in the evidence. The deferral for later consideration is a reference to Modification B1 of the Minister's approval.196 The report of Stuart Huys was an Aboriginal Cultural Heritage Assessment Report to the Department. Mr Huys noted that Aboriginal representatives involved in the project had identified a number of specific areas that they believe are of high cultural significance, including the "'*Women's Area' which incorporates the Turpentine Forest, and extends down to the McCauley's beach dune system*". The Turpentine Forest is adjacent to, but is not part of, the proposed development area. However, Mr Huys also said that certain Aboriginals believed the Women's Area was not defined by the present day extent of the Turpentine Forest. He said that the views and information by the Aboriginal representatives cannot feasibly be assessed or tested against the available archaeological evidence and that it was very unlikely that any further archaeological investigation could contribute any new and meaningful information to that assessment. He added that it was certainly possible that an anthropological study may help to further clarify the nature and extent of the Women's Area and that consideration should be given to commissioning an independent anthropological study.197 The Director-General was authorised by s 75F(6) (applied by s 75N) of the EPA Act to require the proponents to include in an environmental assessment a statement of the commitments the proponents were prepared to make for environmental management and mitigation measures on the

site. The Director-General's environmental assessment requirements of 24 April 2006 required the proponents to include in their environmental assessment *" a draft Statement of Commitments, outlining environmental management, mitigation and monitoring measures"*. 198 The proponents provided such a draft statement of commitments including, relevantly, commitment (12) in relation to cultural heritage, as follows:(12) Consultation with appropriate Aboriginal community members to determine the location and significance of the *Women's Area* which may be located over the subject site will be undertaken as identified in the Aboriginal Archaeological Report prepared by Mary Dallas (at Appendix H). This consultation is to take place prior to sub-surface archaeological investigations which may be commissioned with respect to proposed future development. This will determine the appropriateness and possible extent of these works.199 The report by Mary Dallas referred to in that commitment addressed the Women's Area (in section 2.4). She referred to conflicting evidence as to its location and concluded that there was a need for further consultation to determine its exact location.200 The Director-General's Environmental Assessment Report in Section 6.2.4 dealt with Aboriginal cultural heritage including a possible Women's Area cultural site identified in the Huys Report. It concluded:In regards to further investigations, the Department also notes that the Proponents have included a Statement of Commitments to undertake an investigation of the Aboriginal Cultural Heritage value to address this issue. The Department considers that this commitment should be further clarified to ensure that these investigations include an anthropological investigation to verity the existence of the *Women's Area*. A modification is included in the attached schedule.201 This was a reference to Modification B1 which strengthened the proponents' draft commitments by introducing a requirement for an anthropological report, as follows:**B1 Aboriginal cultural heritage**(1) The ARV Statement of Commitments concerning cultural heritage are to be modified to include measures outlined below.

(2) The Proponent shall:

(a) include an appropriately qualified and practising anthropologist as part of any investigations into the potential Aboriginal cultural heritage values of a *Women's Area*, and

(b) submit the report by the appropriately qualified and practising

anthropologist as part of any future application proposing to develop the ARV lands.202 Thus, the provisions of Part 3A contemplated that a proponent of a concept plan may be required to make such a commitment. Further, in my opinion, the modification was permitted by ss 75O(4) or 75P(1)(A).203 For these reasons, I reject the third ground of challenge. **Orders**204 The applicant has succeeded on the ESD ground of challenge insofar as it concerns the climate change flood risk consideration. All other grounds of challenge have been rejected. No discretionary considerations against the granting of relief were raised by the respondents, nor can I see any. 205 I propose the following relief:(1) Declaration that the first respondent's approval on 21 December 2006, under s 75O(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) Declaration that 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. 206 The parties are to bring in short minutes of proposed final orders if they differ from those proposed above, to give effect to this judgment. I will hear the parties as to costs, if not agreed. The exhibits may be returned. **Appendix to judgmentNEW SOUTH WALES AND COMMONWEALTH LEGISLATION THAT REFERS TO ECOLOGICALLY SUSTAINABLE DEVELOPMENT(see judgment at [69])New South Wales Acts and Regulations** Agricultural Tenancies Act 1990 Agricultural and Veterinary Chemicals (New South Wales) Act 1994 Central Coast Water Corporation Act 2006Coastal Protection Act 1979Contaminated Land Management Act 1997 Energy Services Corporations Act 1995 Environmental Planning and Assessment Act 1979 Environmental Planning and Assessment Regulation 2000 Fire Brigades Act 1989Fisheries Management (Abalone Share Management Plan) Regulation 2000 Fisheries Management Act 1994 Fisheries Management (Estuary General Share Management Plan) Regulation 2006 Fisheries Management (Estuary Prawn Trawl Share Management Plan) Regulation 2006 Fisheries Management (Lobster Share Management Plan) Regulation 2000 Fisheries Management (Ocean Hauling Share Management Plan)

Regulation 2006 Fisheries Management (Ocean Trap and Line Share Management Plan) Regulation 2006 Fisheries Management (Ocean Trawl Share Management Plan) Regulation 2006 Fisheries Management (Supporting Plan) Regulation 2006 Gas Supply Act 1996 Independent Pricing and Regulatory Tribunal Act 1992 No 39Landcom Corporation Act 2001 Local Government Act 1993 Local Government (General) Regulation 2005 Local Government (Manufactured Home Estates, Caravan Parks, Camping Grounds and Moveable Dwellings) Regulation 2005 Lord Howe Island Act 1953Marine Parks Act 1997 National Environment Protection Council (New South Wales) Act 1995 National Parks and Wildlife Act 1974 Native Vegetation Act 2003 Native Vegetation Regulation 2005 Natural Resources Commission Act 2003 Passenger Transport Act 1990 Pesticides Act 1999 Plantations and Reafforestation Act 1999 Protection of the Environment Administration Act 1991 Protection of the Environment Operations Act 1997 Protection of the Environment Operations (Clean Air) Regulation 2002 Rural Assistance Act 1989 Rural Fires Act 1997 Sporting Venues Management Act 2002 State Owned Corporations Act 1989 State Property Authority Act 2006 State Water Corporation Act 2004 State Water Management Outcomes Plan Order 2002 Sydney Harbour Foreshore Authority Act 1998 Sydney Olympic Park Authority Act 2001 Sydney Water Act 1994 Sydney Water Catchment Management Act 1998 Threatened Species Conservation Act 1995 Transport Administration Act 1988 Waste Avoidance and Resource Recovery Act 2001 Waste Recycling and Processing Corporation Act 2001 Water Management Act 2000 Western Lands Act 1901 Western Sydney Parklands Act 2006 **Commonwealth Acts and Regulations** Agricultural and Veterinary Chemicals (Administration) Act 1992 Environment and Heritage Legislation Amendment Act (No. 1) 2006 Environment Protection and Biodiversity Conservation Act 1999 Fisheries Administration Act 1991 Fisheries Management Act 1991 Lake Eyre Basin Intergovernmental Agreement Act 2001 National Environment Protection Council Act 1994 National Environment Protection Measures (Implementation) Act 1998 Natural Heritage Trust of Australia Act 1997 Natural Resources Management (Financial Assistance) Act 1992 Petroleum (Submerged Lands) (Management of Environment) Regulations 1999Primary Industries and Energy Research and Development Act 1989 Productivity Commission Act 1998 Renewable Energy (Electricity) Act 2000 Renewable Energy (Electricity) Amendment Regulations 2007 (No.

3) Renewable Energy (Electricity) Regulations 2001 Sydney Harbour Federation Trust Act 2001 Trade Practices Regulations 1974Water Act 2007AMENDMENTS: 03/12/2007 - Typographical correction. - Paragraph(s) 166